Privy Council Appeal No. 32 of 1993

Red Sea Insurance Company Limited *Appellant*

v.

Bouygues S.A. and 22 Others *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY 1994

Present at the hearing:-

LORD KEITH OF KINKEL
LORD SLYNN OF HADLEY
LORD WOOLF
LORD LLOYD OF BERWICK
LORD NOLAN

*[Delivered by **Lord Slynn of Hadley**]*

The appellant in this case is an insurance company incorporated in Hong Kong but having its head office in Jeddah, Saudi Arabia. The 1st to 3rd respondents, as parties to a joint venture, were employed by the Government of Saudi Arabia to carry out as main contractors construction work at the University of Riyadh. The 4th to 13th respondents, a consortium known as "PCG" supplied precast concrete prime building units required for the project. The 14th to 17th respondents together with a firm comprising the 18th to 23rd respondents formed a consortium known as the "HOK + 4 Consortium" which acted as architectural and engineering design consultants.

The respondents began proceedings against the appellant claiming, under the terms of an insurance policy issued by the appellant, to be indemnified for loss and expense incurred in repairing or replacing structural damage which occurred in the buildings constructed. The appellant denies that PCG is covered by the contract of insurance and it contends, amongst other defences, that the costs incurred by the respondents were not for the purpose of rectifying structural damage but were for work not covered by the policy such as the improvement or alteration of poor design, materials or workmanship shown up by the cracks which had appeared in parts of the

building. The appellant counterclaimed against PCG on the basis that PCG had supplied faulty pre-cast units in breach of its duty of reasonable care to the other respondents, and that if the appellant was liable under the policy for the loss suffered by the other respondents the appellant could recover the amount of such loss by way of subrogation to the other respondents' rights.

PCG applied to strike out the counterclaim as disclosing no reasonable cause of action on the basis that under Hong Kong law the appellant could not claim to be subrogated unless it had paid the respondents other than PCG, which it had not done; the appellant's riposte was to apply for leave to amend in order to claim that the law governing the relations between PCG and the other respondents and the appellant's claim against PCG was that of Saudi Arabia under which the appellant was entitled to sue PCG directly for the damage caused to the other respondents.

On 21st November 1991 Jones J. held (a) that under Hong Kong law no right of subrogation could arise until payment had been made by the insurer and moreover that proceedings had to be brought in the name of the insured; and (b) that the law of Saudi Arabia alone could not be relied on to determine the issue of liability in tort in the courts of Hong Kong. Accordingly he ordered that the counterclaim be struck out and that the appellant be refused leave to amend.

The Court of Appeal on 24th July 1992 allowed the appeal to the extent that it set aside the order striking out the counterclaim. The appellant should have the right, it was held, to seek to establish that under Saudi Arabian law it could pursue the claim by way of subrogation and the judge hearing the application for leave to amend should consider the adequacy of the amendments. The Court of Appeal held, however, that the appellant could not sue PCG in its own right ("directly") for negligence relying solely on the law of Saudi Arabia as the *lex loci delicti* by reason of its previous decision in *The Adhiguna Meranti* [1988] 1 Lloyd's Rep. 384. The Court of Appeal rejected PCG's respondent's notice that any amendment should not be allowed and the counterclaim should be struck out on the basis that an amendment would introduce a new claim after the expiry of the relevant limitation period contrary to section 35(3) of the Limitation Ordinance Cap. 347.

The Court of Appeal granted the appellant leave to appeal in respect of its ruling that the appellant could not rely solely on Saudi Arabian law to establish the direct claim but refused PCG leave to appeal in respect of the limitation argument.

The respondents take a preliminary procedural point on this appeal that there is no adverse order of the Court of Appeal against which the appellant can appeal. The latter it is said succeeded in obtaining leave to plead the indirect cause of action based on subrogation; it did not apply for

leave to amend to plead the direct cause of action (a right in negligence under Saudi Arabian law vested in the insurer) and there is no order refusing it leave, but merely a decision that the proposed "direct" cause of action is not sustainable. On the basis of *Lake v. Lake* [1955] P. 336 they contend that the appeal is misconceived.

Their Lordships do not accept this argument. The trial judge refused leave to amend on the basis that the law of Saudi Arabia alone could not be relied on to establish liability in tort. The Court of Appeal upheld this decision by allowing the appeal only to the extent that the counterclaim should not have been struck out and the appellant should have been allowed to amend to plead the indirect claim based on subrogation. The Court of Appeal specifically gave leave to appeal on the question "whether sub-rule (2) of Rule 205, to be found in the 9th edition of Dicey and Morris on Conflict of Laws, correctly expresses the law of Hong Kong". They described this question as "of great general and public importance and for that reason we give leave to appeal". In their Lordships' view it is open to the appellant to pursue the appeal on that issue subsequent to the leave given since the Court of Appeal plainly decided against the appellant.

The respondents contend further that even if it is otherwise open to the courts of Hong Kong to give leave to the appellant to plead and to rely on Saudi Arabian law, it should not be allowed to do so because the claim in this case is out of time. They say that more than six years have passed since the last manifestation of damage and section 4 of the Limitation Ordinance (which applies to counterclaims by virtue of section 35(1) and (2) of the Ordinance) bars a claim after six years. The cause of action now relied on was not pleaded originally.

The Court of Appeal ruled that an amendment may be made where the effect is to add a new cause of action and where the new cause of action arises out of the same or substantially the same facts. They held that:-

> "the claim in the original counterclaim was clearly made on the basis that the defendants were entitled to enforce for themselves whatever rights the Contractors and the HOK + 4 Consortium might have by reason of what is said to be the negligence of the Precast Construction Group. That is the same claim as is made, so we are told, in the proposed amendment. The only difference is that the amendment will contain an express, and we assume properly pleaded, reference to Saudi Arabian law. ... This difference is insufficient, in our view, to cast the mantle of 'newness' upon what is substantially the same claim as originally made. The defendants are therefore in a position to take advantage of Order 20 rule 5(5)."

They refused leave to appeal on the ground that the issue sought to be raised was not one which raised a question or questions of great general and public importance or which otherwise ought to be submitted to Her Majesty in Council for decision. Their Lordships see no reason to disagree with that decision and leave to the respondents to raise this point is refused.

The central issue arising on the appeal, thus, is whether the appellant can rely purely on Saudi Arabian law, the *lex loci delicti*, to establish direct liability in tort when Hong Kong law (the *lex fori*) does not recognise such liability. In *The Adhiguna Meranti (supra)* which arose out of the grounding of an Indonesian vessel in Taiwan and concerned an application to stay proceedings in Hong Kong in favour of Jakarta, the Court of Appeal of Hong Kong refused to accept that it was open to the plaintiffs suing in tort to rely solely on a law other than that of the forum. The claim had to be one which would have been actionable in Hong Kong had the facts occurred there. In the present case the Court of Appeal regarded itself as being bound by that decision.

The question which arises has a long history and has led to considerable discussion in the decisions of common law courts and in academic writings. The history can be taken from the decision in *The Halley* (1868) L.R. 2 P.C. 193 where the Judicial Committee of the Privy Council on appeal from the High Court of Admiralty refused to accept that a plaintiff could rely on Belgian law to establish the liability of shipowners for the negligence of a pilot whom the shipowners were bound to employ (and for whose negligence they would have been liable in Belgian law) when by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) section 388 the shipowners would have been exempted from liability in England. The Judicial Committee concluded at page 204 that it was:-

> "alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

In *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1 the Court of Exchequer Chamber in a judgment delivered by Willes J. held at pages 28-29 that:-

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; ... Secondly, the act must not have been justifiable by the law of the place where it was done."

For the first condition *The Halley* was relied on, for the second a number of earlier cases to which it is not necessary to refer. The court accepted, at page 31, that an Act of

Indemnity passed subsequently to the actions relied on as constituting assault and false imprisonment, "even upon the assumption that the acts complained of were originally actionable, furnishes an answer to the action".

The distinction if any between "actionable" and "not justifiable" is not adverted to in that judgment but in *Machado v. Fontes* [1897] 2 Q.B. 231 the Court of Appeal in England held that an act done abroad was not justifiable if it led to criminal liability in the foreign state.

In the 8th edition of Dicey and Morris, Conflict of Laws (1967) at page 919 the rule (rule 158) was stated to be:-

> "An act done in a foreign country is a tort and actionable as such in England, only if it is both
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> (1) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and
>
> (2) not justifiable, according to the law of the foreign country where it was done."

In 1969 in *Boys v. Chaplin* [1971] A.C. 356 the issue was examined by the House of Lords. As a result of the speeches in that case the rule in Dicey and Morris in subsequent editions is stated differently. In the 12th edition (1993) it is as follows:-

> "Rule 203 -
>
> (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both
>
> (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
>
> (b) actionable according to the law of the foreign country where it was done.
>
> (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."

If the law of England is as now stated in rule 203 then the appellant wins, since that law applies in Hong Kong by virtue of section 3 of the Application of English Law Ordinance (Cap. 88). If it is not, then it is necessary to consider what is the present position.

In *Boys v. Chaplin* their Lordships were agreed that the plaintiff, a British soldier who was injured by a car driven by another British soldier in Malta, was entitled

to damages in an English court on the basis recognised by English law, even though such damages were not available under the law of Malta, the *lex loci delicti*. Their reasons for reaching this conclusion, however, varied to such an extent that both academic writers and judges in other cases have expressed doubt as to whether there can be extracted from the speeches one binding *ratio decidendi*.

It seems to their Lordships that there is no doubt that, despite criticisms made elsewhere of the decision in *The Halley*, all the members of the House of Lords in *Boys v. Chaplin* accepted that decision, and therefore endorsed sub-rule (1) of rule 158 of Dicey and Morris (8th edition) as a starting point in the exercise, not of deciding whether English courts should have jurisdiction, but of deciding which law should be chosen to determine the relevant issue or issues. As to sub-rule (2) there was not the same degree of agreement. Lord Donovan, at page 383, clearly preferred to retain the words "not justifiable" which are found in *Phillips v. Eyre* and to regard the decision in *Machado v. Fontes* as being within the rule even if there was an abuse of it as a blatant example of forum shopping. Lord Pearson, at page 400 et seq., was not persuaded that the rule stated by Willes J. in *Phillips v. Eyre* should be changed either because it was wrong from the beginning or because it had become out of date, though he would have recognised that to discourage forum shopping an English court might as a matter of public policy "apply the law of the natural forum".

On the other hand Lord Hodson held, at page 377, that "not justifiable" referred only to civil liability and that *Machado v. Fontes* was wrongly decided and should be overruled. Lord Guest, at page 381, explicitly accepted that "to justify an action in England for a tort committed abroad the conduct must be actionable (emphasis added) by English law and by the laws of the country in which the conduct occurred, the *lex loci delicti*". Lord Wilberforce also regarded *Machado v. Fontes* as having been wrongly decided:-

> "The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed." (page 389D).

He continued at F:-

> "I would, therefore, restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done."

Their Lordships in the present case thus consider that it is clear that there was a majority in favour of reading "not justifiable" as meaning actionable in civil proceedings even if it was not necessary for the act to be characterised as a "tort" under the foreign law. Their Lordships agree with that decision and, subject to the effect of sub-rule (2), consider that rule 203(1)(b) in Dicey and Morris (12th edition) is a correct statement of the law.

It follows from their acceptance of rule 158 sub-rule (1) (unanimously) and sub-rule (2) by a majority, that the House of Lords in *Boys v. Chaplin* did not accept, and their Lordships made it clear that they did not accept, a number of alternative solutions which have been proposed from time to time to govern the choice of law. Thus the exclusive adoption of the *lex loci delicti*, at one time extensively adopted by courts of the States of the United States of America, was ruled out as being often inappropriate in modern conditions of travel, and as creating difficulties of its own, such as doubts as to what is the *locus*, and a rigidity causing injustice, however beneficial it might be considered in other respects as giving a clear and certain rule. The concept of the law of obligation or of a vested right, by which the tortious liability is regarded as travelling from state to state - again at one stage widely accepted in American courts - was equally rejected as not recognising sufficiently that the court trying the case is essentially applying its own law. There was no support in the House of Lords for the suggestion that English law should adopt a general rule that there is a proper law for each tort which the court must ascertain in order to apply the appropriate law. Whilst as a matter of legal theory there may be much to recommend this, the resulting complexities and uncertainty were considered to militate against the adoption of such a rule.

There remains the question as to whether rule 203(2) in Dicey and Morris (12th edition) is correctly stated, recognising as it does an element of flexibility in the application of sub-rule (1). It is clearly contrary to Lord Donovan's view and receives no support from Lord Guest. Lord Hodson, however, took a different view. He said:-

> "It is necessary to permit some flexibility in applying the language of Willes J. in *Phillips v. Eyre* L.R. 6 Q.B. 1, which is to be applied as 'a general rule' and not invariably. I reach this conclusion not without reluctance since rules of law should be defined and adhered to as closely as possible lest they lose themselves in a field of judicial discretion where no secure foothold is to be found by litigants or their advisers. The search for justice in the individual case must often clash with fixed legal principles especially perhaps when choice of law is concerned." (page 378 D)

Lord Pearson also recognised that some flexibility might be necessary:-

> "If the general rule is that the substantive law is the law of the forum, an exception will be required in order to discourage 'forum-shopping'. On the other hand, if the general rule is that the alleged wrongful act must be actionable by the law of the place where it was committed or that it must be actionable both by that law and by the law of the forum, an exception will be required to enable the plaintiff in a case such as the present case to succeed in his claim for adequate damages." (page 406 E-F)

Lord Wilberforce analysed the question in depth. Though rejecting the notion of a rule based on "contacts" or "centre of gravity" he found attractive the principles stated in the American Law Institute Restatement of the Law (Second): Conflict of Laws. His conclusion at pages 391-392, after referring to the general rule set out in sub-rule (1) of rule 158 in Dicey and Morris (8th edition) "as one which will normally apply to foreign torts" was that:-

> "I think that the necessary flexibility can be obtained from that principle which represents at least a common denominator of the United States decisions, namely, through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy or as Westlake said of science, to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet. This technique appears well adapted to meet cases where the lex delicti either limits or excludes damages for personal injury: it appears even necessary and inevitable. No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems. It will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred. If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice. Even within these limits this procedure may in some instances require a more searching analysis than is needed under the general rule. But unless this is done, or at least possible, we must come back to a system which is purely and simply mechanical."

Rule 203(2), as set out above, is thus clearly in accordance with Lord Wilberforce's views. The question is whether it is the view of the majority and in any event

whether their Lordships should apply it in this case where different considerations arise.

In *The Adhiguna Meranti* Hunter J.A. took a firm stand at page 914:-

> "The defendant's alternative formulation is based upon the new sub-rule (2) to Dicey's rule 172. Dicey's hopes here have not yet been fulfilled. The formulation still has the support only of Lord Wilberforce and has not been adopted since in England. In Australia it was rejected in *Kolksy v. Mayne Nickless* for reasons which carry conviction with us. We do not think that it can yet be regarded as part of the law of Hong Kong."

In the present case the Court of Appeal said:-

> "Whether today, being addressed with different arguments, we would come to the same conclusion is a question not open for consideration."

In writings on the subject it has been broadly accepted that an exception does exist to sub-rules 1(a) and 1(b) of rule 203 even if doubts as to the ambit of the exception exist (see e.g. Cheshire and North: Private International Law (12th edition) at pages 546-547; Collier: Conflict of Laws (pages 191-2); Kaye: Private International Law of Tort and Product Liability (pages 59-60); Morris: The Conflict of Laws (4th edition McLean) (at pages 288-9 and 291)).

In a number of cases in the English courts the existence of an exception to the general rule as stated by Willes J. has also been accepted. Thus in *Church of Scientology of California v. Commissioner for the Metropolis* (1976) 120 S.J. 690 (C.A.), Bridge L.J. clearly accepted that the majority of their Lordships in *Boys v. Chaplin* had recognised an exception to the general rule of double actionability whose "true limits will no doubt become clearer as more cases are decided in the courts". Talbot J. and Cairns L.J. were of the same view. The existence of an exception to the rule in *Phillips v. Eyre* was also recognised in *Coupland v. Arabian Gulf Oil Co.* [1983] 1 W.L.R. 1136 and 1151 and in *Johnson v. Coventry Churchill International Limited* [1992] 3 All E.R. 14.

In view of the Court of Appeal of Hong Kong's reliance upon *Kolksy v. Mayne Nickless Limited* (1970) 72 S.R. (N.S.W.) 437 it is of relevance to consider other Australian cases where the issue can arise there not merely in an international context but in the context of litigation in one state arising out of acts done in another state.

In *Warren v. Warren* [1972] Qd.R. 386 the plaintiff wife and defendant husband were ordinarily resident and domiciled in Queensland. During a temporary visit to New South Wales the plaintiff was injured in a car

accident. In New South Wales she had no right of action in tort against her husband. She began her proceedings in Queensland and an application was made to set aside service of the writ since the action complained of would not have been actionable in New South Wales. Matthews J. in the Supreme Court accepted that there was a degree of flexibility attaching to the general rule in *Phillips v. Eyre* which admitted of exception where clear and satisfactory grounds were shown why it should be departed from. The application was therefore dismissed, the judge ruling that on the facts and the relevant legislation it was right to apply the law of the forum (even if not of domicile) even if the acts were not actionable by the law of the *locus delicti*.

In *Corcoran v. Corcoran* [1974] V.R. 164 in the Supreme Court of Victoria Adam J. followed *Boys v. Chaplin* and *Koop v. Bebb* (1951) 84 C.L.R. 629 in holding that the *Phillips v. Eyre* rule required it to be shown that civil liability had to exist between the actual parties under the law of the foreign place where the act was done, but he disapproved of the decision in *Kolksy v. Mayne Nickless* and held that in the special circumstances of the case before him, where the parties, husband and wife, were resident and domiciled in Victoria and where the wife was injured in an accident in New South Wales, where she could not sue her husband in tort, the interests of justice warranted that the rule in *Phillips v. Eyre* should be modified or departed from. He held that the action was maintainable in Victoria on the basis of the law of that state. Having at pages 169-170 quoted Lord Wilberforce in *Boys v. Chaplin* he said at page 170:-

> "I feel persuaded by the force of what Lord Wilberforce has said in the passage cited above and I propose in this last portion of this judgment to indicate why, in my opinion, this is clearly a case where the rules in *Phillips v. Eyre* are flexible enough to admit of an action in the circumstances of this case although if rigidly applied they would defeat the wife's action."

These two courts thus adopted Lord Wilberforce's reasoning.

In *Breavington v. Godleman* (1988) 62 A.L.J.R. 447 in the High Court of Australia there was less agreement as to the principle to be followed. Mason C.J., having considered the various possible tests for choice of law and having cited Lord Wilberforce, added at page 453:-

> "No doubt a court, in deciding whether the powerful primary claim of the law of the place of the wrong should be discarded, may find it necessary to take account of the policy which underlies law of a relevant jurisdiction. However, for my part the interests of the parties themselves are likely to be more material in ascertaining whether another law has a closer connection with the parties and the occurrence with respect to the issue to be litigated. The justice of the case turns very largely on the need to give effect to

the legitimate or reasonable expectations of the parties. They may have acted in reliance upon an assumption that the courts would apply a certain rule or they may have expected that their rights would be determined by the law of a particular place."

Wilson and Gaudron JJ. referred to *Boys v. Chaplin*. At page 460 they considered its application, however, in the context of a federal state where:-

"the flexible exception to the *lex loci delicti*, as enunciated in the speech of Lord Wilberforce, allows the continued possibility that the one set of facts occurring in Australia may give rise to different legal consequences depending upon the location or venue of the court in which the action is brought. That question is, we think, one which must be resolved by reference to the federal compact embodied in the Constitution ...."

Brennan J. was critical of Lord Wilberforce's approach in that it introduced "uncertainty in the application of ordinary common law principles'. Lord Wilberforce's proposal was:-

"to extend the operation of the *lex fori* and to grant relief though the second of the *Phillips v. Eyre* conditions was not satisfied. In other words, a tortious liability would sometimes be created by the *lex fori* though no civil liability of the relevant kind arose under the law of the place where the material circumstances occurred. Such a development would not be conducive to uniform enforceability of liability for torts occurring within Australia. And in principle, it is difficult to accept that mere judicial declaration can create a common law liability in tort arising from extra-territorial events where none has hitherto existed." (pages 468-469)

Deane J. at page 475 considered that in England the most favoured view was that of Lord Wilberforce:-

"that the first part of the above test ... is a rule of choice of law (ie of the *lex fori*) and, subject to a largely instinctive flexible exception, the second part of the test is a requirement, under the chosen law of the forum, of civil liability under the *lex loci* in respect of the relevant claim as between the actual parties."

Dawson J. at page 484 thought that:-

"The flexible application of the rule, which did not receive unanimous support in *Chaplin v. Boys*, involves a limited application of the proper law of the tort, favoured in most American States, the more certain result of the rule in *Phillips v. Eyre* being preferred in all but special circumstances."

However, he added:-

> "The rule in *Phillips v. Eyre* has never been thought by this Court to have a flexible application within Australia and, for my part, I do not think that any benefit is to be gained from so regarding it." (emphasis added)

Finally Toohey J. at page 490-1 thought it appropriate for the High Court to accept that:-

> "the flexible approach enunciated by Lord Wilberforce is less parochial and can be applied to give appropriate significance to the *lex loci delicti* and the *lex fori* in all the circumstances. To recognise the existence of this flexible exception is not to introduce means by which the general rule can be subsumed, as counsel for the appellant suggested. The flexible exception does not confer an unfettered judicial discretion enabling the general rule to be ignored in arbitrary fashion. ... It is only in special circumstances where, after examination of the policy underlying the law which may be applied and the interests of the parties to be affected, it is clear that the *lex loci delicti* has no real connection with the proceedings, that the exception can be invoked, enabling a plaintiff to recover damages available in the *lex fori* but not available in the *lex loci delicti*. Such a requirement should do much to alleviate any fears that unacceptable uncertainty will be introduced into this area of the law."

In these different expressions of view the High Court was particularly concerned with relaxation of the rules of *Phillips v. Eyre* in a federal context.

There are many other cases in different jurisdictions where *Phillips v. Eyre* has been considered and where other approaches to the choice of law rule are applied. Their Lordships do not think it helpful to examine them further in the light of the speeches in *Boys v. Chaplin*. However in considering whether as a matter of principle some flexibility is justified, their Lordships find it helpful to consider what has been said by the Law Commission in England and by the American Law Institute.

In the Law Commission's Working Paper No. 87, Consultative Memorandum No. 62, Private International Law: Choice of Law in Tort and Delict (1984), alternative proposals were put forward for a choice of law rule, the basis of which was that some flexibility was desirable. Thus it was said that if the *lex loci delicti* were adopted it might be appropriate to dispose of that law in favour of the law of the country with which the occurrence and the parties had at the time of the occurrence the closest and most real connection, but perhaps only if the parties' connection with the *lex loci delicti* was not substantial. The alternative proposal was to adopt a modified form of the proper law of the tort test and to take the law of the

country with which the parties and their clients had the closest connection but subject to certain presumptions to be applied by the courts. There was thus in both cases a recognition of the need for some flexibility.

In its Report (Law Com. No. 193) of 1990, Private International Law: Choice of Law in Tort and Delict, the Law Commission concluded at paragraph 2.7:-

> "The exceptional role given to the substantive domestic law of the forum in the law of tort, apart from being almost unknown in the private international law of any other country, is parochial in appearance and 'also begs the question as it presupposes that it is inherently just for the rules of the English domestic law of tort to be indiscriminately applied regardless of the foreign character of the circumstances and the parties' (Carter, 'Torts in English Private International Law', (1981) 52 B.Y.B.I.L. 9, 24). We think that it is correct in principle that the introduction of a foreign element may make it just to apply a foreign law to determine a dispute, even though the substantive provisions of that foreign law might be different from our own. There is no reason why this general principle of the conflict of laws should not apply in cases involving torts and delicts. Apart from matters of procedure, and subject to overriding public policy considerations, there is no reason why the *lex fori* should be applied in all cases involving a tort or delict regardless of the foreign complexion of the factual situation."

The Second Restatement of the Law: Conflict of Laws was adopted by the American Law Institute on 23rd May 1969. It rejected the vested rights approach adopted in the original restatement (which required that rights lawfully created under the local law of a State in which the last act ascertained to bring a legal obligation into existence should be enforced everywhere). The reason for rejecting this test *inter alia* was that the State of the last event often had only a slight relationship to the occurrence and the parties with respect to the particular issues. The general principle is now stated (see Volume 1, section 145, pages 414-5) to be:-

> "(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
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> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue."

The Restatement underlines that the courts have long recognised that they are not bound to decide all issues under the local law of a single state (p. 417) and that in the case of injuries to tangible things, the place where the injury occurred is a contact that, as to most issues, plays an important rôle in the selection of the state of applicable law. It also considers (page 421) that:-

"When there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship, the place where the relationship is centered is another contact to be considered."

Their Lordships, having considered all of these opinions, recognise the conflict which exists between, on the one hand the desirability of a rule which is certain and clear on the basis of which people can act and lawyers advise, and on the other the desirability of the courts having the power to avoid injustice by introducing an element of flexibility into the rule. They do not consider that the rejection of the doctrine of the proper law of the tort as part of English law is inconsistent with a measure of flexibility being introduced into the rules. They consider that the majority in *Boys v. Chaplin* recognised the need for such flexibility. They accept that the law of England recognises that a particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties. They agree with the statement of Lord Wilberforce which has been set out above as to the extent and application of the exception. They accept, as he did, that the exception will not be successfully invoked in every case or even, probably, in many cases and that "The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred" (page 391H).

The books to which reference has been made indicate that many questions may need to be resolved in regard to the application of the exception to the double actionability rule. Only two of those questions need to be answered in the present case. The first is this. In *Boys v. Chaplin* the

application of the exception enabled the plaintiff to rely on the *lex fori* and to exclude the limited measure of damages imposed by the *lex loci delicti*. Can the exception be relied on to enable a plaintiff to rely on the *lex loci delicti* if his claim would not be actionable under the *lex fori*? There is obviously a difference between a court being able to apply its own law exclusively and it being required to apply exclusively another legal system. This, however, is not necessarily fatal to the contention that only the *lex loci delicti* be applied since the foreign law can be proved and it is clear that in appropriate cases the *lex loci delicti* can be applied to give a just result when the *lex fori* might not do so. In *Boys v. Chaplin* it is not suggested that the exception can be relied on only to exclude the *lex loci delicti* in favour of the *lex fori*. Their Lordships do not consider that the element of flexibility which exists is so limited. Whilst recognising that to do so is a departure from the strict rule in *The Halley* they consider that in principle the exception can be applied in an appropriate case to enable a plaintiff to rely exclusively on the *lex loci delicti*. To limit the rule so as to enable an English court only to apply English law would be in conflict with the degree of flexibility envisaged by Lord Wilberforce, though the fact that the forum is being required to apply a foreign law in a situation where its own law would give no remedy will be a factor to be taken into account when the court decides whether to apply the exception.

The second question is this. The present appeal is not based on an isolated issue (as was the case in *Boys v. Chaplin*). The contention put forward is that the whole case be decided according to the *lex loci delicti*. Although the cases may be rare where the exception should be applied to the whole case, their Lordships do not consider that to apply the exception to the whole case is in principle necessarily excluded. In their Lordships' view the exception is not limited to specific isolated issues but may apply to the whole claim, for example where all or virtually all of the significant factors are in favour of the *lex loci delicti*.

It follows that the Court of Appeal were wrong to rule that the "direct" cause of action was unsustainable on the basis of *The Adhiguna Meranti* (which their Lordships regard as having been wrongly decided) and to uphold the judge's refusal to give leave to amend. It remains to be considered, since sub-rule (2) of the rule is to be applied only in exceptional cases, whether this is a case which satisfies the test, so that the *lex loci delicti* alone can be relied on and the first limb of the rule be dispensed with.

The appeal in this case is based on a number of factors relied on by the appellant, which need to be considered in the light of what has been said. Thus the policy of insurance was subject to Saudi Arabian law, the project was to be carried out in Saudi Arabia and the property

was owned by the Government. The main contract, the supply contract and HOK + 4 Consortium's service contract are all subject to the law of Saudi Arabia and were to be performed there. The breaches and the alleged damage occurred in Saudi Arabia. The expense of repairing alleged damage occurred in Saudi Arabia. The appellant, though incorporated in Hong Kong, had its head office in Saudi Arabia.

In their Lordships' view these are all factors which should have been taken into account by the trial judge in deciding whether leave should have been given for the counterclaim to be amended. It being established that an exception to the general rule of double actionability exists on the lines set out above, all the relevant factors point to the exception being applied in this case. The arguments in favour of the *lex loci delicti* are indeed overwhelming.

It would not, however, be appropriate for their Lordships to consider the question of leave at this stage since the appellant has not fully formulated its claim based on Saudi Arabian law. It will be for the judge dealing with the application to decide whether the particulars of Saudi Arabian law are sufficient to justify leave being given.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the appellant being at liberty to apply to amend and to rely on Saudi Arabian law in respect of the direct claim against the respondents and that the respondents should pay the appellant's costs in the courts below. The respondents must also pay the appellant's costs before their Lordships' Board.