Neutral Citation Number: [2007] EWCA Civ 1374

Case No: A2/2007/0902/QBENF,
A2/2007/0902(A)/FC3

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Honourable Mr Justice Gray
TLQ/06/0601

Royal Courts of Justice
Strand, London, WC2A 2LL
21/12/2007

B e f o r e :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RIGHT HONOURABLE LORD JUSTICE WALL
and
THE RIGHT HONOURABLE LORD JUSTICE LAWRENCE COLLINS

Between:

Government of the Islamic Republic of Iran	**Appellant**
- and -	
The Barakat Galleries Limited	**Respondent**

Sir Sydney Kentridge QC, Norman Palmer and David Scannell (instructed by Messrs Withers LLP) for the Appellant
Philip Shepherd QC and David Herbert (instructed by Messrs Lane & Partners LLP) for the Respondent
Hearing dates: 9th and 10th October 2007

HTML VERSION OF JUDGMENT

Lord Phillips of Worth Matravers CJ:

Introduction

1. This is the judgment of the court, to which all of its members have contributed, on an appeal from a judgment of Gray J dated 29 March 2007 on a trial of two preliminary issues in an action brought by the appellant ("Iran") to recover antiquities alleged to form part of Iran's national heritage. Gray J decided those issues in favour of the respondent ("Barakat"). His

findings are fatal to the claim. He gave permission to appeal because of the importance of the issues not only to Iran but to other countries seeking the return of valuable antiquities that form part of their national heritage.

2. The unlawful excavation and trafficking of antiquities has become very big business. In 1970 the signatories to the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (ratified by the United Kingdom in 2002) recognised not only that it was incumbent on every State to protect the cultural property within its borders against the dangers of theft, clandestine excavation and illicit export, but also that it was essential for every State to become alive to the moral obligations to respect the cultural heritage of all nations and that the protection of cultural heritage could only be effective if organised both nationally and internationally among States working in close co-operation (recitals 3, 4 and 7). In the Supreme Court of Ireland, Finlay CJ said that it was universally accepted that one of the most important national assets belonging to the people is their heritage and the objects which constituted keys to their ancient history; and that a necessary ingredient of sovereignty in a modern State was and should be an ownership by the State of objects which constitute antiquities of importance which were discovered and which had no known owner: *Webb v. Ireland* [1988] I.R. 353 at 383.

3. On this appeal Iran seeks to assert its ownership of antiquities which are almost 5,000 years old. The appeal raises questions which were left unsettled by *Att-Gen of New Zealand v Ortiz* [1984] AC 1 (CA and HL) on the recognition or enforcement of foreign national heritage laws. Since the decisions of the Court of Appeal in 1982 and of the House of Lords in 1983, the United Kingdom has ratified the UNESCO Convention of 1970.

4. The antiquities consist of eighteen carved jars, bowls and cups made from chlorite ("the Objects"). Iran alleges that they date from the period 3000 BC to 2000 BC and originate from recent excavations in the Jiroft region of Iran which were unlicensed and unlawful under the law of Iran. The origin of the antiquities is denied by Barakat, but Iran's allegations are assumed to be correct for the purpose of the preliminary issues.

5. Barakat has a gallery in London, from which it trades in ancient art and antiquities from around the world. It has the antiquities in its possession in London. It claims to have purchased them in France, Germany and Switzerland under laws which have given it good title to them. Iran does not accept this. For the purpose of the preliminary issues Iran can advance no title to the antiquities other than that of their possession.

6. The preliminary issues that were ordered to be tried were as follows:

   i) Whether under the provisions of Iranian law pleaded in the Amended Particulars of Claim, the claimant can show that it has obtained title to the Objects as a matter of Iranian law and if so by what means, and

   ii) If the claimant can show that it has obtained such title under Iranian law, whether this court should recognise and/or enforce that title.

7. The first question reflected the fact that it was common ground between the parties that the question of title to the antiquities fell to be determined according to Iranian law, as being the *lex situs* of the antiquities at the time of derivation of such title. Iran's primary case was that Iranian law vested in Iran a proprietary title to the antiquities that entitled Iran to recover them in proceedings in England. It developed, however, an alternative case that Iranian law gave Iran an "immediate right to possession" of the antiquities that founded a claim in England for conversion or wrongful interference with the goods. Barakat successfully challenged both

contentions. Accordingly the judge answered the first question in the negative "with some regret" (para 59).

8. The second question reflected Barakat's contention that, if Iranian law did confer any right upon Iran in relation to the antiquities, such law was a penal or public law and thus one that was not enforceable in this jurisdiction. As the judge had answered the first question in the negative, this question proved to be academic. The judge nonetheless gave it brief consideration. He concluded that the relevant Iranian law relied upon by Iran was both penal and public in character and that, accordingly, it could not be enforced in this country or relied upon to found Iran's claim to relief. This also was a conclusion which the judge described (para 100) as "a regrettable one", and added (presumably not having been informed that the United Kingdom had ratified the UNESCO Convention) that the answer might be the one given by Lord Denning MR in the *Ortiz* case, namely an international convention on the subject.

9. The judge heard evidence from two experts on Iranian law. Professor Muhammad Taleghany gave evidence for Iran and Mr Hamid Sabi for Barakat. They were agreed as to the relevant statutory provisions of Iranian law but differed as to their effect. Professor Taleghany stated that they reflected the fact that the antiquities were owned by Iran. Mr Sabi stated that they did not. The judge concluded that Mr Sabi's opinion was to be preferred to that of Professor Taleghany. He concluded, accordingly, that Iran had no proprietary title to the antiquities. The judge went on to hold that Iranian law gave Iran an immediate right to possession of the antiquities, but that as this was not a proprietary right it could not found a claim for conversion or wrongful interference with the goods.

10. By this appeal Iran contends that the judge wrongly failed to hold that Iran has a proprietary title to the antiquities that entitles Iran to recover them. Alternatively, Iran contends that its immediate right to possession of the antiquities can properly found a claim for conversion or wrongful interference with goods. Barakat seeks to uphold the judge's decision for the reasons that he gave save that, by a Respondent's, notice it challenges the judge's finding that Iranian law gives Iran an *immediate* right to possession of the antiquities.

11. We propose to approach the issues raised by this appeal in the following order:

    i) What is the interest in moveable property that a claimant must show in order to found a claim in conversion in this jurisdiction?

    ii) What, if any, interest in the antiquities does Iran enjoy?

    iii) Does that right found a cause of action in conversion under English law?

    What interest in moveable property founds a cause of action in conversion under English law?

12. Iran's claim is brought in conversion, as preserved by the Torts (Interference with Goods) Act 1977. Section 1 of that Act provides:

    "Definition of 'wrongful interference with goods'

    In this Act 'wrongful interference' or 'wrongful interference with goods', means-

    (a) conversion of goods (also called trover),

(b) trespass to goods,

(c) negligence so far as it results in damage to goods or to an interest in goods;

(d) subject to section 2, any other tort so far as it results in damage to goods or to an interest in goods."

13. Section 2 of the Act provides:

"Abolition of detinue

(1) Detinue is abolished.

(2) An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been detinue before detinue was abolished)."

14. The Act recognises that it is possible to enjoy different interests in goods. Thus section 7 provides:

"Double liability

(1) In this section 'double liability' means the double liability of the wrongdoer which can arise-

(a) where one or two or more rights of action for wrongful interference is founded on a possessory title, or

(b) where the measure of damages in an action for wrongful interference founded on a proprietary title is or includes the entire value of the goods, although the interest is one of two or more interests in the goods.

(2) In proceedings to which any two or more claimants are parties, the relief shall be such as to avoid double liability of the wrongdoer as between those claimants."

15. The Act does not define "possessory title" or "proprietary title" and difficulty in this area of the law arises because of an overlap between the two. Originally the common law did not differentiate between possessory title and proprietary title. Possession of a chattel gave title to it. Where there was an involuntary transfer of possession, as a result for instance of loss or theft of the chattel, the person who had first possessed the chattel would have a superior title to the subsequent possessor. The subsequent possessor would have good title against all the world, save the earlier possessor. Each possessor could assert against a third party who interfered with the chattel that he enjoyed an immediate right to possession.

16. Interests in a chattel can be shared and it is this fact that has given rise to the distinction between proprietary and possessory title. Thus where an earlier possessor (the bailor) grants possession to a subsequent possessor (the bailee) on terms that reserve to the bailor a reversionary interest in the chattel, the bailor can be said to enjoy a "proprietary title" and the bailee a "possessory" title in the chattel. Wrongful interference with the chattel can then be detrimental to the interests of both.

17. Wrongful interference with a chattel used to give rise to two different causes of action, which were largely concurrent. Detinue, which was an interference with the proprietary right of the

claimant and conversion, which was an interference with the possessory right of the claimant. Where goods in possession of a bailee were lost or destroyed as a result of breach of his duty to the bailor, the appropriate claim, before the 1977 Act, lay in detinue rather than conversion. Where, however, the claim was brought by the possessor against a third party wrongdoer a claim would lie either in detinue or in conversion.

18. A person in possession of a chattel can bring an action in conversion against a person who wrongfully deprives him of that possession.

19. Controversy exists as to the position where "A" who is in possession of a chattel, or who is entitled to immediate possession of the chattel, agrees that another ("B") may enter into possession of the chattel. Can B rely upon his contractual right to immediate possession to found an action in conversion against C who wrongly interferes with the chattel? If by the agreement A has transferred to B not merely the right to enter into possession, but the ownership that A enjoyed, so that B enjoys both proprietary title and an immediate right to possession, he will be entitled to sue in conversion. If, however, A has retained his proprietary title, it is not clear that B can rely on his contractual right to enter into immediate possession to found a claim in conversion. It is Iran's case that he can; it is Barakat's case that he cannot.

20. The reissue of the 4th edition of Halsbury's Laws of England, volume 45 (2) states:

"**559. Right of possession and property**. To sue in conversion a claimant must show that he had either possession, or an immediate right to possession, of the chattel at the time of the act in question. Either relationship with the chattel affords the necessary possessory title to sustain a claim for conversion. If either is shown, the claimant need not be the owner of the chattel in order to succeed in conversion; indeed an owner can be liable in conversion to a person who had either possession or the immediate right of possession at the time of the owner's act.

…

560. Contractual right of possession. It appears that a mere contractual right to possess will suffice to sue in conversion, and that the claimant's right of possession need not derive from a proprietary interest in the chattel."

21. These propositions receive support from the following statements in textbooks covering the subject:

(1) Salmond, *Law of Torts*, 21st ed. 1996, p. 108: "Whenever goods have been converted, an action will lie at the suit of any person in actual possession or entitled at the time of conversion to the immediate possession of them."

(2) Winfield and Jolowicz, *Tort*, 17th ed. 2006, at p. 762 states that a claimant can maintain conversion if at the time of the defendant's act he had an immediate right to possess the goods "without either ownership or actual possession".

(3) Markesinis and Deakin, *Tort Law*, 5th ed. 2003, at p.436: "[i]n order to be able to sue [in conversion] the plaintiff must have the right to any one of ownership, possession, or the immediate right to possess".

(4) F. H. Lawson, *Remedies of English Law*, 2nd ed. 1980, at p. 122: "In ejectment and conversion [the claimant] must prove his title, that is to say that he has a right to the immediate possession of the land or chattel."

22. These unqualified statements that an immediate right to possession will suffice to found a cause of action in conversion are to be contrasted with the view of the editors of the 19th edition of Clerk & Lindsell, *Torts* (para 17-59:

"**Claimant's right must be proprietary.** For these purposes, it seems that the immediate right to possession on which the owner relies must be a proprietary right; a mere contractual right will not do."

Two authorities are cited in support of this proposition, *Jarvis v Williams* [1955] 1 WLR 71; *International Factors v Rodriguez* [1979] 1 QB 351. The judge considered these authorities and held that they supported the passage in Clerk and Lindsell. He concluded (at para 71):

"For these reasons I am satisfied that Iran is required in the present case to establish the proprietary nature of its right to possession of the antiquities which is required in order for an action in conversion or for wrongful interference with goods to succeed. For the reasons which I have already given, this is something which Iran is unable to do."

23. *Jarvis v Williams* [1955] 1 WLR 71 involved a claim in detinue. Paterson ordered some bathroom fittings from the plaintiff, Jarvis. At his request Jarvis delivered them to the premises of the defendant Williams. Paterson did not pay for the goods and agreed that Jarvis could take them back. Williams refused to permit Jarvis to collect the fittings and Jarvis brought an action against him. The judge held that he had a good claim. The Court of Appeal reversed this finding.

24. After reference to the relevant part of the judgment at first instance, Lord Evershed MR held (at 74):

"I take that to mean that the contractual right which the plaintiff had vis-à-vis Paterson to go and collect these goods from Paterson's agent was a right of a sufficient character to enable the plaintiff to bring an action in detinue against the agent of the owner of the property in these goods. But, with all respect to the county court judge, I am unable to accept that as a good proposition of law. Certain classes of persons, as for example bailees, have, no doubt, a special right to sustain actions in trover and detinue, but the general rule is, I think, correctly stated in the text of Halsbury's Laws of England, 2nd ed., vol.33 at p. 62, para. 98. 'In order to maintain an action of trover or detinue a person must have the right of possession and a right of property in the goods at the time of the conversion or detention; and he cannot sue if he has parted with the property in the goods at the time of the alleged conversion, or if at the time of the alleged conversion his title to the goods has been divested by a disposition which is valid under the Factors Act, 1889.' "

25. After reference to authority, Lord Evershed continued (at 75):

"Although it is, no doubt, true in a sense, and certainly in its original medieval conception, that when speaking of property in chattels there is in mind the right to their immediate possession, nevertheless the sense of property in chattels is now well understood. It is involved in the Sale of Goods Act, 1893, itself. Even though, by contract between himself and Paterson, the plaintiff may have had a right which, if infringed, could form the subject-matter of an action for breach of contract, and though he had a right to go and possess himself of these goods, nevertheless, until he has done so, there was in him according to my construction of the arrangement, no proprietary interest in the goods, in the sense in which that term is now, as I think, commonly understood. It seems to me therefore, that he had not, on the authorities which I have mentioned, the necessary foundation on which to sustain an action for detinue against the defendant. He, no doubt, could sue Paterson either for the price of goods or for damages for breach of this arrangement for the return of the goods when the

defendant refused to deliver them over. But I think that the rights of the plaintiff as regards these goods were not such as entitled him to bring an action in detinue against the defendant, in whose possession they were, as agent, at the time, of the person in whom the property in the goods was then vested."

26. In their skeleton argument, counsel for Iran sought to distinguish this case on the basis that it referred to a claim in detinue, not a claim in conversion. Lord Evershed's citation from Halsbury suggests that he was drawing no such distinction. *Jarvis v Williams* is a difficult case to analyse. Both the County Court Judge and the Court of Appeal were prepared to proceed on the basis that the plaintiff had a contractual right to collect the goods from the defendant, but the precise nature of the contract is not spelt out. If a contractual analysis is appropriate, we think that the contract was a conditional contract under which it was agreed that, if the plaintiff recovered possession of the goods, he would receive them in discharge of Paterson's obligation to pay for them. It was not a contract under which Paterson purported to transfer to the plaintiff his immediate right to the possession of the goods. While the passage that we have quoted from the judgment of Lord Evershed certainly supports Barakat's case, we do not consider that, when the facts of the case are considered, it can safely be treated as binding precedent for the proposition that a contractual right to immediate possession can never found a claim in conversion.

27. Iran's skeleton argues that, in so far as Lord Evershed's reasoning extended to the tort of conversion, it should not be followed because it is in conflict with more recent authorities. We turn to consider some of these.

28. Sir David Cairns purported to follow *Jarvis v Williams* when giving the leading judgment in *International Factors v Rodriguez* [1979] 1 QB 351. That case involved a factoring agreement under which the plaintiffs had purchased the book debts of a company of which the defendant was a director. The agreement provided that if any cheque was paid to the company rather than to the plaintiffs, it should be held in trust for the plaintiffs and transferred to them. In breach of this agreement the defendant caused four such cheques to be paid into the company's bank account. The plaintiffs' action in conversion succeeded. Sir David held that *Jarvis v Williams* established that a claimant in conversion had to show not merely an immediate right to possession but a proprietary interest in the subject matter of the claim. This requirement was, however, satisfied by the plaintiffs' equitable interest in the cheques. Bridge LJ stated that he agreed. Buckley LJ held, however, that the contractual right of the plaintiffs to demand immediate delivery of the cheques sufficed to found a claim in conversion, whether or not an immediate trust attached to the cheques.

29. *International Factors v Rodriguez* received consideration by all three members of the Court of Appeal in *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675. The relevant issue was whether an equitable title in share certificates could found a claim in conversion. The court held that it could not, and disapproved the significance that Sir David Cairns appeared to have attached to the plaintiffs' equitable interest in the cheques in that case. Mummery LJ expressed the view that this was not necessary to the decision. Pill and Hobhouse LJJ agreed. The latter observed (at 700 and 701):

"Buckley LJ decided the case on the basis of a common law possessory title as bailee giving the immediate right to possession…For a plaintiff to succeed in an action in conversion he must show that in law he had the requisite possessory title, either actual possession or the right to immediate possession. Where a plaintiff is the legal owner of the relevant chattel he will normally be entitled to sue in conversion even if he was not at the relevant time in possession of the chattel. But where there is a person who has a subsisting right to the immediate possession of the chattel, he may sue even the owner of the chattel for wrongfully interfering with his right."

30. There is thus a conflict between *Jarvis v Williams* and *International Factors v Rodriguez,* as explained in *MCC Proceeds v Lehman Brothers.* Where the owner of goods who has an immediate right to possession of them, albeit that they are in the possession of a third party, by agreement transfers his title to a new owner, the new owner can bring a claim in conversion against the person in whose possession they are. Where the owner of goods with an immediate right to possession of them by contract transfers the latter right to another, so that he no longer has an immediate right to possession, but retains ownership, it would seem right in principle that the transferee should be entitled to sue in conversion. *A fortiori* if the contract provides that when the transferee enters into possession, ownership will be transferred to him. We consider that this accords with the weight of academic opinion and can be reconciled with the facts of *Jarvis v Williams.*

31. Contractual transfer of rights is far removed from the facts of this case. The judge concluded, on the strength of *Jarvis v Williams,* that a claimant in conversion must demonstrate some proprietary right in the goods and that Iran could not do so. We now turn to consider whether Iran has any interest in the antiquities and, if so, the nature of such interest.

Iran's interest in the antiquities under Iranian law

32. It was common ground that the relevant law is to be found in provisions of Iranian statute law. The judge set these out at length and we shall incorporate, in his own words, the passages of his judgment in which he did so.

33. The appropriate starting point appears to date back to what is called the Constitutional Movement which developed in Iran. At paragraph 8 of his expert report Professor Taleghany says: "Since time immemorial Iran was ruled by absolute monarchs. The kingdom of Iran was the king's domain, i.e. his estate. It was as such that the kings acquired further territories, ceded territories and exchanged part of their kingdom with the neighbouring kings. The last evidence of the exercise of such power was exhibited in 1893. However, a short while after this date there was a Constitutional Movement in Iran and the king's domain became the Crown's, or government property. When the Iranian main laws were codified in the Civil Code of Iran (section 1 of which was approved in 1928) the internal 'government properties' legally replaced the king's domain".

34. By a Royal Proclamation dated 5 August 1906 the so-called "Bases of the Persian Constitution" were promulgated. They include what are described as "The Fundamental Laws of December 30 1906", which include Articles dealing with the duties, limitations and the rights of the National Consultative Assembly.

35. Despite the fact that there would have been at some stage and by some means a transfer to the state or government of Iran of property rights previously owned by the king, these constitutional provisions form no part of Iran's case in these proceedings.

The Civil Code

36. In chronological order, the first statutory provision which is relied on by Iran is the Civil Code by which in and after 1928 the main civil laws of Iran were codified. The Civil Code is divided into sections. The provisions which are said to touch upon the issue of ownership of the antiquities are the following:

Section 3

On Properties Which Have No Private Owner

…….

Article 26 – (As amended on 21-8-1370 A.H, equivalent to 12-11-1991) Government properties which are capable of public service or utilisation, such as fortifications, fortresses, moats, military earthworks, arsenals, weapons stored, warships and also government furniture, mansions and buildings, government telegraph wires, public museums and libraries, historical monuments and similar properties and, in brief, any movable and immovable properties which may be in the possession of the government for public expediency and national interest, may not privately be owned. The same applies to properties that have, in the public interest, been allocated to a province, county, region or town.

Chapter 2

On Various Rights that

People May Have in Properties.

……

Section 1

On Ownership

Article 30 - Every owner has the right to all kind of disposal and exploitation of his property, except where the law expressly provides otherwise.

Article 31 – No property may be taken out of its owner's possession except by the order of law.

……

Article 35 – Possession indicating ownership is proof of ownership unless the contrary is proved.

Article 36 - Possession which is proved not to have derived from a valid title or lawful transfer shall not be valid.

Chapter 4

On Found Articles and Lost Animals

Section 1

On Found Articles

Article 165 – Anyone who finds an article in the desert or in a ruined place which is not inhabited and which is not privately owned, may take ownership of it and there is no need to declare it; unless it is evident that the article belongs to modern times, in which case it is subject to the rules applicable to articles found in an inhabited locality.

Chapter 5

On Treasure Trove

Article 173 - Treasure trove means valuables buried in the ground or in a building and found by chance or accidentally.

Article 174 – Treasure trove whose owner is not known is the property of the finder.

Article 175 – If a person finds treasure trove in the property of another person, he must inform the owner of the property. If the owner of the property claims ownership of the treasure trove and proves it, the treasure trove belongs to the person claiming ownership.

Article 176 – Treasure trove found in ownerless land belongs to the person who finds it.

Section 2

On Tortious Liability

Subsection 1

On Usurpation

Article 308 - Usurpation is the assumption of another's right by force. Laying hands on another person's property is also considered usurpation.

Article 309 – If a person prevents an owner from possessory treatment of his property without himself assuming control of it, he is not considered a usurper, but if he destroys the said property or causes its destruction, he shall be liable.

….

Article 317 – The owner can claim the usurped property or, if it is lost, its equivalent or the value of the whole or part of the usurped property from either from the original or successive usurpers at his option.

The National Heritage Protection Act 1930

37. Shortly after the enactment of the Civil Code, a specific Act was passed on 3 November 1930 entitled National Heritage Protection Act. This Act provides for an inventory to be built up by the State including all the known and distinguished items of national heritage of Iran which possess historical, scientific or artistic respect and prestige. Provision is also made for the registration of both immovable and movable properties. Article 3 expressly recognises that some property registered on the inventory will be privately owned. Articles 4 to 6 inclusive deal with immovable property. Article 7 and following deal with movable property. Article 9 obliges the owner of a movable property registered in the List for National Heritage to inform the pertinent governmental organisation before selling any such property to another person. According to that Article the state possesses what is described as "the pre-emption right". A person who sells a property registered in the List without notifying the Ministry is liable to a fine for as much as the selling price of the property. The government is entitled to withdraw the property from the new owner on refunding the paid price to the new owner.

38. Amongst the potentially material provisions to be found in the 1930 Act are the following:

Article 1 Observing the Article 3 of this Law, all artifacts, Buildings and places having been established before the end of Zandieh Dynasty in Iran [late 19th Century], either movable or

immovable, may be considered as national heritage of Iran and shall be protected under the State control.

…

Article 9 – The owner of a movable property – registered in the List for National Heritage – Shall be obliged to inform the pertinent governmental organization in writing before selling the property to another person. In case the State intends to put the property among its collections of national heritage, it possesses the pre-emption right. ...

Article 10 – Anyone who accidentally or by chance finds a movable property which according to this Law may be considered as an item of national heritage, though it has been discovered in his/her own property shall be obliged to inform the Ministry of Education or its representatives as soon as possible; in case the pertinent State authorities recognize the property worthy to be registered in the List for National Heritage, half of the property or an equitable price as considered by qualified experts shall be transferred to the finder, and the State shall have the authority, at its discretion, to appropriate or transfer the other half to the finder without recompense.

Article 11 – The State has the exclusive right for land digging or excavation in sites to explore national relics. ……

…

Article 13 – Excavations in private lands shall require the owner's consent as well as the permission of the State. ...

Article 14 – During scientific and commercial excavations in one location and one season, if the State discovers the objects directly, it may appropriate them all, and if the discovery is performed by others, the State may choose and possess up to ten items out of the objects of historical artistic value; half of the rest of the objects shall be transferred freely to the discoverer, and the other half shall be appropriated by the State. In case all the discovered objects do not exceed ten items and the state appropriate them all, the expenses of the excavation shall be refunded to the discoverer. ...

Article 15 – The share of the state out of the objects discovered during a scientific excavation shall be kept in State collections and museums, and not be sold; and the discoverer's share shall be his/her own property. Among the share of the State out of the objects discovered during a commercial excavation, what is liable to be kept in museums shall be appropriated, and the rest shall be transacted, by any means the state deems proper; the State shall put these properties to auction to be sold. ...

Article 16 – The violators of Article 10, those who perform excavation operations without the State permission and information, though in their own lands, as well as those who illegally take items of national heritage out of the country shall be fined as much as twenty to two thousand Tomans, and the discovered objects shall be confiscated [in Farsi, "z*abt"*] in the interest of the State. ...

Article 17 – Those who intend to adopt dealing in antiquities as occupation should obtain permission from the State. Furthermore taking the antiquities out of the country shall require permission from the State. The registered objects in the list for National Heritage if attempted to be taken out of the country without the permission of the State, shall be confiscated in the interest of the State……

The Executive Regulations

39. On 19th November 1932 the Executive (or Administrative) Regulations of the National Heritage Protection Act of 1930 were approved by the Council of Ministers. In effect these Regulations were designed to implement the provisions of the 1930 Act. Movable property is dealt with in Chapter 2 (Articles 12 to 17). These include :

    Article 17 – Anyone who accidentally finds a movable property, even though it has been discovered in his/her own property, shall be obliged to immediately inform the Ministry of Education through the nearest representative of the Department for Education or through the Finance officers if there is no Department for Education. After the objects have been examined by the Department for Antiquities, half of the items or half of the commercial price thereof as evaluated by qualified experts shall be transferred to the finder, and the State shall have the authority to possess or transfer the other half to the finder.

40. Chapter 3 of the Regulations deals with Excavation. The provisions of this chapter include:

    Article 18 – The State possesses the exclusive rights to land excavation for the purpose of obtaining antiquities.

    ……

    Article 25 – Excavation in private lands shall require the owner's consent as well as the permission of the State…..

    ……..

    Article 31 – The manner of sharing the antiquities discovered in a place during a season of commercial or scientific excavation, between the excavator and the State shall be as follows: The first choice of the objects discovered, up to ten items, shall be that of the State, and then the State shall equally share the remainder with the licence holder. Immovable antiquities shall pertain to the State and not be divided. In case the discovered objects shall not exceed ten items the State, by virtue of the authority invested in it, shall possess them all and refund expenses that the excavator sustained. The holder of the excavator licence may possess his/her share of the antiquities recovered, provided that he/she had been refunded the rental value due to the owner……

    …

    Article 36 – Any person who takes measures violating the provisions of Article 10 from the law or Article 17 herein, or embark on excavation without securing proper permission at (sic) export antiquities illegally, shall be liable to a fine 20 to 2,000 Tomans, and the discovered objects shall be confiscated by the State.

    …

    Article 41 – [Provides that certain classes of antiquities are authorised to be traded, i.e. that they can be bought and sold.]

    …

Article 48 - In case the examination by Department for Antiquities proved that some of the objects had been illegally obtained, those objects shall be seized and confiscated by the State. The owners and exporters may be prosecuted according to the Antiquities Act……

…

Article 50 – In case the State recognises that the registered objects in the List for National Heritage, for which export permission has been requested, are beneficial for developing national collections, it shall have the authority to purchase the objects in question at the price declared by the owner. Should the owner refrain from selling the objects; export permits shall not be granted.

Article 51 – The Antiquities intended to be taken out of the country without obtaining proper permission shall be confiscated.

The Legal Bill of 1979

41. On 17 May 1979 a Legal Bill (which is accepted to have the force of law) was approved. The title of the Bill is:

Legal Bill Regarding Prevention of Unauthorised Excavations and Diggings intended to obtain antiquities and historical relics which, according to international criteria, have been made or have come into being one hundred or more years ago.

The Bill provides:

Considering the necessity of protection of relics belonging to Islamic and cultural heritage, and the need for protection and guarding these heritages from the point of view of sociology and scientific, cultural and historical research and considering the need for prevention of plundering these relics and their export abroad, which are prohibited by national and international rules, the following Single Article is approved.

1 - Undertaking any excavation and digging intended to obtain antiquities and historical relics is absolutely forbidden and the offender shall be sentenced to six months to three years correctional imprisonment and seizure [in Farsi "*zabt*"] of the discovered items and excavation equipment in favour of the public treasury. If the excavation takes place in historical places that have been registered in the National Heritage List, the offender shall be sentenced to the maximum punishment provided (in this Section).

2 - Where the objects named in this Act have been discovered accidentally, the discoverer is duty bound to submit them to the nearest office of Culture and Higher Education as soon as possible. In this case, a committee consisting of the Religious Judge, local Public-Prosecutor and the director of the office of Culture and Higher Education, or their representatives, will be formed with a specialised expert attending and who will examine the case and decide as follows:

A – Where the items are discovered in a private property, in the case of precious metals and jewels, they will be weighed and a sum equal to twice the market value of the raw material thereof will be paid to the discoverer. In the case of other objects, half of the estimated price will be paid to him.

B –Where the items are discovered in non-private property, a sum equal to half of the discovery reward, provided for in Section A, will be paid to the discoverer

...

3 – Antiquities means objects that according to international criteria have been made or produced one hundred, or more, years ago. In the case of objects whose antiquity is less than a hundred years, the discovered objects will belong to the discoverer after he has paid a fifth of their evaluated price to the public treasury.

4 - Persons who offer the discovered objects for sale or purchase in violation of the provisions of this Act will be sentenced to the penalty provided for in Section 1'.

The New Constitution

42. In the same year that the Legal Bill was approved, Iran on 24th October 1979 adopted a new Constitution. Its many provisions include the following:

Article 45 [Public Wealth]

Public wealth and property, such as uncultivated or abandoned land, mineral deposits, seas, lakes, rivers and other public waterways, mountains, valleys, forests, marshlands, natural forests, unenclosed pastureland, legacies without heirs, property of undetermined ownership and public property recovered from usurpers shall be at the disposal of the Islamic government for it to utilise in accordance with the public interest. Law will specify detailed procedures for the utilisation of each of the foregoing items'. ….

…

Article 47 [Private Property]

Private ownership, legitimately acquired, is to be respected. The relevant criteria are determined by law.

…

Article 83 [Property of National Heritage]

Government buildings and properties forming part of the national heritage cannot be transferred except with the approval of the Islamic Consultative Assembly; that, too, is not applicable in the case of irreplaceable treasures.

43. The Revolutionary Council of the Islamic Republic of Iran issued a decree on 29th February 1980 which prohibited export of any kind of antiquities or artistic objects from the country.

44. The 5th book of Islamic Punishment Law dated May 23 1996 deals at chapter 9 with the destruction of historical/cultural properties. This provides, inter alia:

Article 559 – Any person found guilty of stealing equipments and objects, as well as the materials and pieces of cultural- historical monuments from museums, exhibits, historical and religious places or any other places which are under the protection and control of the state; or trades in such objects or conceals them – knowing that they are stolen - shall be obliged to return them and condemned to confinement of one to five years, if not subject to punishment for theft (as ordained by Islamic religion).

….

Article 561 – Any attempt to take historical-cultural items out of the country, even if it would not be actually exported, shall be considered as illegal export. The violator shall be condemned to restitute the items, imprisoned from one to three years, and fined as twice as the value of the items exported. ….

Article 562 – Any digging or excavation intended to obtain historical-cultural properties is forbidden. The violator shall be condemned to undergo a confinement of six months to three years; the discovered objects shall be confiscated in the interests of The Iranian Cultural Heritage Organisation and the equipments of the excavation shall be confiscated by the state....

Note 1.Whoever obtains the historical/cultural properties, that are the subject of this Article, by chance and does not take (the necessary) steps to deliver the same, according to the regulations of the State Cultural Heritage Organisation, will be sentenced to the seizure of the discovered (found) properties.

…

The judge's findings on title to the antiquities

45. After considering the various statutory provisions relied on by Iran, of which the Legal Bill of 1979 was particularly relied upon, the judge concluded, as he put it, "with some regret" that Iran had not discharged the burden of establishing the ownership of the antiquities under the law of Iran. He said (at para 59)

"I readily accept that Iran has gone to some lengths to list and secure protection for its natural heritage and to penalise unlawful excavators and exporters. But the enactments relied on by Iran fell short in my judgment of establishing its legal ownership of the antiquities. I am not persuaded that those enactments are in certain respects consistent with State ownership but, even if all of them were, that would still in my opinion not be enough to have the effect of vesting ownership in the State, as it were, by default of as a matter of inference."

The judge's finding in respect of Iran's claim based on immediate right to possession

46. Barakat accepted that a person with an immediate right to possession could bring a claim in conversion or for the tort of wrongful interference with goods subject only to the requirement that the right to possession should be a proprietary right. The judge, after consideration of authority, upheld Barakat's submission that the right to possession must be proprietary. He held that Iran had failed to establish the necessary proprietary interest, albeit that Iran did have an immediate right to possession of the antiquities which was an immediate right.

Ownership of the antiquities

47. The judge started from the uncontroversial position that determination of Iranian law was a question of fact; and that when faced with conflicting evidence of foreign law, he had to look at the effect of the foreign sources on which the experts rely as part of their evidence in order to evaluate and interpret that evidence and decide between the conflicting testimony: *Bumper Development Corp Ltd v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362, at 1368-1369. As we have said, the judge was assisted by expert evidence from Professor Muhammad Taleghany on behalf of Iran and from Mr Hamid Sabi on behalf of Barakat. Professor Taleghany was a Professor of Law at Teheran University until 1984, when he moved to London. In London he was the legal adviser of the Iranian Bureau for International Legal Services until 1994, since when he has been a consultant on Iranian law. Mr Hamid Sabi was a member of the Iranian Bar. He practised law in Iran until 1979, when he moved to

London, since when he has practised as a consultant on Iranian law. Both experts have considerable experience of giving evidence on Iranian law in English courts.

48. There was no judicial or academic authority on the central question, namely whether the effect of the Iranian legislation, and in particular the 1979 Legal Bill, was to vest ownership of antiquities in the Iranian State. In choosing between the experts on this question, and preferring the conclusions of Mr Sabi, the judge was not making a judgment on credibility, or expertise, or any of the other matters which are normally taken into account when choosing between expert evidence. He expressly recorded that he was satisfied that both experts did their best to assist him.

49. In deciding whether the Republic has ownership under Iranian law, it is important to bear in mind that it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant. If the rights given by Iranian law are equivalent to ownership in English law, then English law would treat that as ownership for the purposes of the conflict of laws. The issue with which we are concerned is whether the rights enjoyed by Iran in relation to the antiquities equate to those that give standing to sue in conversion under English law.

50. What the judge did was to look at the legislation, and decide what its effect was by testing the expert evidence against its language and context. We propose to adopt the same course.

51. It was Professor Taleghany's opinion that the antiquities formed part of the national heritage which was originally owned by the King or Shah and which subsequently became owned by the Republic of Iran. He asserted that this accorded with all the relevant statutory provisions. It was Mr Sabi's opinion that ownership of the antiquities was governed by express provisions of the Iranian Civil Code. These vested ownership of the antiquities in the finders. These provisions remained binding unless expressly altered by subsequent statutory provisions. There were no such provisions.

52. The debate before the judge focussed on the effect of the statutory provisions. The judge found that some of these were incompatible with Professor Taleghany's opinion although he rejected the suggestion that this opinion had not been objectively formed. He held that Iran had failed to discharge the burden of proving that, under Iranian law, the antiquities were property of the Republic. Mr Philip Shepherd QC for Iran supports the judge's conclusions.

53. For Iran Sir Sydney Kentridge QC submits that the cumulative effect of the relevant Iranian statutory provisions is to vest ownership of the antiquities, as this concept is understood by the law of England, in Iran. Iranian law prohibits anyone other than the Government of Iran from seeking to excavate antiquities. Iranian law prohibits anyone who unlawfully excavated antiquities from acquiring any title to them. Antiquities excavated by the Government are owned by the Government as are antiquities that are excavated by anyone else. Those who find antiquities by chance have to hand them over to the Government. The effect of all these laws is that the government owns the antiquities.

54. These submissions require a detailed analysis of the relevant provisions of Iranian statutes. We approach these having regard to two principles that are common ground. The statutes should be given a purposive interpretation and special provisions dealing with antiquities take precedence over general provisions.

The Civil Code

55. Among the provisions relied upon by Professor Taleghany was Article 26 of the Civil Code. The judge, preferring the evidence of Mr Sabi, held that movable antiquities did not fall within the description "historical monuments and similar property", nor within the description

"in use by the Government for the service of the public". In any event, Article 26 deals only with properties in the possession of the government. We endorse these conclusions.

56. The judge observed that it was clear from provisions of Chapter 2 that Iranian law both recognised and respected private ownership. That proposition has not been in issue. He commented that Article 35 created a presumption in favour of the possessor as to the ownership of property. He did not comment on Article 36. It does not seem to us that that Article bears directly on whether the antiquities are vested in Iran, although it is not readily reconciled with the proposition, advanced by Mr Sabi, that someone who finds antiquities in the course of unlawful excavation obtains title to them.

57. It is common ground that the antiquities do not constitute treasure trove. The judge nonetheless remarked that both Article 165 and Articles 174-176 lent some support to Barakat's assertion that the Civil Code provided for the finder of an article to become its owner. We agree with that general proposition.

The National Heritage Protection Act 1930.

58. The judge observed that the provisions of this Act were incompatible with Professor Taleghany's broad proposition that all antiquities were owned by the State. We agree. Article 9 expressly deals with movable property that is registered as part of the National Heritage but which is privately owned. Articles 10, 14 and 15 make provision for the State to share with the finder antiquities that are found by chance or discovered during lawful excavations.

59. The judge remarked that these provisions could not be construed as conferring title to movable assets on the government and that they were inconsistent with the government having ownership of movables. These general observations call for some qualification.

60. Article 10 sets out circumstances in which the State has or acquires title to movable property. It provides that "half of the property or an equitable price as considered by qualified experts shall be transferred to the finder". It is implicit that if the latter option is adopted the State becomes (or remains) the owner of the property in question. The section further gives the State the option "to appropriate or transfer the other half to the finder without recompense". This gives the State the option of becoming (or remaining) the owner of the other half. The words that we have placed in brackets reflect the fact that it is perhaps arguable that the language is sufficiently imprecise to accommodate the possibility that antiquities vest in the State when they are found – see Article 17 of the 1932 Regulations where the language, or perhaps the translation, of the relevant provisions is a little different.

61. Article 14, as explained by Article 31 of the Regulations, appears to us to vest the State's share in the State as owner, rather than mere possessor. This is also to be inferred from the reference in Article 15 to the discoverer's share being "his/her own property". Article 14 gives the State the right to "appropriate" all the objects that it discovers directly. This might suggest that until appropriation the State does not own them.

62. In summary there is a lack of clarity in these provisions about precisely how and when the State becomes the owner of its share of antiquities that are discovered in lawful excavations. Overall we think the provisions more consistent with Mr Sabi's evidence that the finder is the owner unless and until antiquities are transferred to the State. We do not consider that these difficult provisions are directly relevant. We have some sympathy with Sir Sydney's submission to us that "the State was coming pretty near to ownership but it is rather difficult to work out just what rights it has and what rights it does not have". The significance of the provisions is that they qualify the effect of Article 165 where antiquities are concerned. They

vest some of these in the State in accordance with their terms. They provide background to the all important provisions of the Legal Bill of 1979.

The Legal Bill of 1979

63. The judge observed that it was Mr Malek's case for Iran that the Legal Bill of 1979 was the "clinching statutory provision" and Sir Sydney adopted the same stance. Early in his submissions (Day 1, p 17) he set out very clearly the way that he put Iran's case:

"The question of whether someone is owner is decided by looking at what rights that person has, for example the right of exclusive enjoyment, the right of alienation, the right of recovering possession. ... Those are the elements of ownership and it is our submission that whatever language is used in the Iranian statute – and certainly in the Iranian statute there is no clause which uses the term that the antiquities vest in the Government – nonetheless if one examines what rights the Government had and that no one else had, what the Government had amounted to what we would regard as ownership"

64. Applying this approach to the 1979 Legal Bill, he submitted that this replaced the provisions of the 1930 Act and the 1932 Regulations. The discoverer of antiquities no longer had any claim to ownership of them. The most that he could receive was a discoverer's reward. It was impossible for anyone other than Iran to become the owner of antiquities to which the Legal Bill applied.

65. The judge's findings in relation to the 1979 Legal Bill, accepting Mr Sabi's evidence and the submissions made on behalf of Barakat, were as follows:

"53. ... I have been unable to find any provision prior to the 1979 Bill which confers ownership of antiquities on the state. To the extent that Professor Taleghany is asserting that the 1979 Legal Bill does so, I cannot agree with him. As Mr Sabi points out, the Bill has on its face the limited objective of preventing the plundering of relics. It is, as Mr Sabi says, principally at least, a criminal statute. There is no express vesting of title to antiquities in Iran nor any declaration that all antiquities are vested in the state. I find it difficult to see how the provisions 'reflect the fact' of state ownership. As Mr Sabi rightly says, the draftsman could so easily have provided for state ownership of all antiquities if such had been his intention. It seems to me that, given the historical background to the Bill's enactment, its purpose was to criminalise the widespread pillaging of antiquities which was then taking place and not to make provision for state ownership of antiquities.

54. Under the 1979 Bill ownership is only affected when, by virtue of paragraph 1, seizure in favour of the public treasury takes place upon conviction of an offender in a criminal court for undertaking unlawful excavation or digging or where, by virtue of paragraph 4, discovered objects are offered for sale or purchase. Paragraphs 1 and 4, like the comparable provisions of the 1930 Act, only come into play when the criminal court imposes penalties following conviction. Paragraph 2 imposes an *in personam* obligation on the discoverer to submit discovered items to the nearest office of Culture and Higher Education. Paragraph 3 also affects ownership but only in relation to objects less than 100 years old.

55. I accept the evidence of Mr Sabi and the Bill does not address wider questions of ownership of undiscovered antiquities. If that had been the intention, it would have been clearly spelt out in the legislation."

66. In considering these findings we propose to start by considering whether, under the 1979 Legal Bill, it is possible to identify anyone other than Iran as the owner of antiquities that are discovered. This is a question that the judge did not expressly address, although his

concluding observation in the passage that we have just quoted suggests that he accepted the correctness of Mr Sabi's analysis.

67. It was Mr Sabi's evidence that the 1979 Legal Bill did not affect the application of Article 165 of the Civil Code. Ownership of antiquities, whether illegally excavated or found by accident, vested in the finder. The illegal excavator was liable to have them seized in criminal proceedings, but until that happened he remained the owner. The accidental finder was under an *in personam* obligation to hand them over to the Office of Culture and Higher Education, but unless and until he did so he remained the owner. We do not think that it was open to the judge to accept this analysis of the 1979 Legal Bill.

68. It is helpful to start with Article 3. The judge remarked, somewhat cryptically, that this "also affects ownership but only in relation to objects less than 100 years old". It is hard to reconcile the wording of Article 3 with the proposition that the finder of objects whose antiquity is less than one hundred years old becomes the owner of them before he has paid to the treasury one fifth of their worth, although the Article does not state who is the owner until this payment is made.

69. Article 2 deals with the person who accidentally finds antiquities. There is no way in which the Legal Bill permits him to benefit from his discovery other than by obtaining the statutory reward. In the first place he is under a positive obligation to hand them in to the nearest office of Culture and Higher Education 'as soon as possible'. He is not entitled to offer them for sale. If he purports to sell them, no title will be transferred to the buyer by reason of Article 36 of the Civil Code. Furthermore he will be guilty of a criminal offence under Article 559 of the Punishment Law of 1996. The antiquities will be subject to seizure.

70. Article 1 deals with the position of the person who finds antiquities as a result of illegal excavation. The judge found that he could be in no better position than the accidental finder under Article 2 and this finding has not been challenged. Furthermore he will have been guilty of a criminal offence by virtue of the excavation itself.

71. Having regard to the obligations and restrictions that are placed upon the finder of antiquities we do not consider that he can properly be described as the "owner" of them. The provisions of the 1979 Legal Bill are inconsistent with both Articles 165 and Articles 173-6 of the Civil Code. They also supersede Article 10 of the National Heritage Protection Act of 1930. The finder of antiquities is not entitled to keep possession of them nor to transfer title to anyone else. His only right is to receive a reward on handing them over to the State. The finder has no ownership rights in the antiquities that he finds.

72. In concluding that under the 1979 Legal Bill the finder of antiquities cannot be described as the "owner" we have been considering the concept of ownership through English eyes for the reasons given above.

73. Halsbury's Laws of England, vol 35, para 1227, sets out the following meaning of "ownership":

    "Ownership consists of innumerable rights over property, for example rights of exclusive enjoyment, of destruction, alteration and alienation, and of maintaining and recovering possession of the property from all other persons. Those rights are conceived not as separately existing, but as merged in one general right of ownership."

    Under the Legal Bill of 1979 the finder of antiquities enjoys none of these attributes of ownership.

74. We turn to the position of Iran. Iran is entitled to immediate possession of any antiquities found, for the finder is required to hand them over "as soon as possible". There has been no dispute that once the antiquities are handed over, they become the property of Iran. If they are not handed over, but are transferred by the finder to a third party, the third party will get no title and the antiquities will be subject to "seizure".

75. Where the antiquities are discovered in the course of illegal excavation, they will be subject to "seizure" by Iran, whether they remain in the possession of the finder or are transferred to a third party. It follows that, apart from the right of the accidental finder to a reward, no one enjoys any rights in relation to antiquities found accidentally or as a result of illegal excavation except Iran and the rights that Iran enjoys are essentially the rights of ownership.

76. There are four matters that Barakat relied on, successfully, before the Judge in contending that the Legal Bill of 1979 did not confer ownership on Iran:

    i) The provision for "seizure" in Article 1.

    ii) The 1979 Legal Bill acts "in personam".

    iii) The legislators could easily have made clear provision for title in antiquities to pass to Iran had that been their intention.

    iv) There has been no recorded case of Iran asserting a right to antiquities in civil proceedings.

    We shall deal with each in turn.

77. The word which we have referred to as "seizure", *zabt* in the original Farsi, can mean both "seizure" and "confiscation". In Article 1 it is used in relation to both the antiquities found and the excavation equipment. So far as the latter are concerned, the Article plainly provides for confiscation, for the equipment will be owned by the illegal excavators. Barakat argued that, by parity of reasoning the same had to be true of the antiquities. *Zabt* could not mean two different things, depending upon whether it applied to excavating equipment or to antiquities. It followed that Article 1 provided for confiscation of antiquities, which carried the necessary implication that they were owned by the person from whom they were confiscated.

78. We do not accept this argument. We can see no reason why, in its context, *zabt* could not be used to describe an act that constituted confiscation of equipment owned by the excavator and taking possession of antiquities in respect of which Iran had the rights of the owner.

79. The express obligations imposed by the 1979 Legal Bill not to conduct excavations and to hand over any antiquities found are indeed personal obligations. The right to seize antiquities that are not handed over is also a personal right. But these rights nonetheless inferentially affect title. Barakat did not challenge the proposition that, where antiquities were handed in under Article 2 and a reward paid, the antiquities became the property of Iran. Antiquities seized plainly also vested in Iran. The only issue has been at what stage Iran acquired ownership. Barakat contended that it was only when the antiquities came within the possession of Iran and, in the case of antiquities that were "seized", only on completion of the criminal process that followed from the seizure.

80. We consider that this is an arid issue. Given our conclusion that the finder did not own the antiquities (and the fact, as was common ground, that the owner of the land from which they

came had no claim to them), there are only two possibilities. Either they were "bona vacantia" to which Iran had an immediate right of possession and which would become Iran's property once Iran obtained possession and which could not become the property of anyone else or they belonged to Iran from, at least, the moment that they were found. We consider that the former alternative is artificial. Iran's personal rights in relation to antiquities found were so extensive and exclusive that Iran was properly to be considered the owner of the properties found.

81. The judge observed (at para 53):

"…the draftsman could so easily have provided for state ownership of all antiquities if such had been his intention. It seems to me that, given the historical background to the Bill's enactment, its purpose was to criminalise the widespread pillaging of antiquities that was taking place and not to make provision for state ownership of antiquities."

82. The Legal Bill of 1979 was enacted as an urgent response to the pillaging of antiquities which took place immediately after the revolution. We have no knowledge of who, after that revolution, was available to draft legislation and there appears to be no basis for drawing inferences from what was not included in the Legal Bill rather than considering the effect of what it did provide. Having regard to the problems of interpreting the earlier legislation to which we have referred, it is possible that the draftsman started from the premise that antiquities were owned by Iran. At all events, for the reasons that we have given, the clear effect of the Legal Bill was to vest title to antiquities in Iran – the only question is when and in what circumstances the title vested.

83. We do not consider that any significance can be attached to the fact, if it be the case, that this action is the first occasion on which Iran has claimed to be the owner of antiquities in civil proceedings. In so far as State officials have discovered antiquities illegally held in Iran it may well be that no one has chosen to challenge the State's title to these.

84. For the reasons that we have given and on the facts that we have assumed, we have concluded that the judge was wrong to find that under Iranian law Iran had not shown that it was the owner of the antiquities which are the subject matter of this action. Had we not reached this conclusion we would have concluded that, under Iranian law, Iran had an immediate right to possession of the antiquities that would vest ownership on taking possession.

Does Iran's interest in the antiquities found a cause of action in conversion under English law?

85. This question sub-divides into two issues:

i) Is Iran's interest in the antiquities of such a kind as to found a claim in conversion? If so

ii) Is Iran's claim none the less not justiciable in England because it is founded on a penal or public law?

There is an overlap between these two issues.

86. Under English law the owner of a chattel who has an immediate right to possession of it has a right to sue in conversion. Iran contends that it obtained both ownership and an immediate right to possession of the antiquities when they were in Iran. It follows that, under our principles of conflict of laws, the question of whether Iran is the owner of the antiquities falls to be determined by the law of Iran as the *lex situs.* There was no discussion, either before the

judge or before us, as to whether the immediate right to possession also falls to be considered according to the law of Iran. On principle we think that the answer to this question must depend on the *situs* of the antiquities when the immediate right to possession arose. On the facts of this case this means that the immediate right to possession also falls to be determined by the law of Iran. For the reasons that we have given our primary view is that Iran enjoys both title and an immediate right to possession of the antiquities under the law of Iran. Had we not formed this view, we would have concluded that Iran enjoyed an immediate right to their possession under the law of Iran which of itself would suffice to found a claim in conversion in this jurisdiction. Thus we would answer the first question in the affirmative.

87. Had Iran asserted that it had acquired ownership and an immediate right to possession as a result of purchasing the antiquities in Iran we do not believe that Barakat would have challenged Iran's entitlement to bring a claim for conversion in England, notwithstanding that Iran never acquired actual possession of the antiquities. Barakat contends, however, that Iran cannot claim in conversion because Iran never perfected its title by obtaining possession of the antiquities. As we understand the position this argument is founded on the contention that the laws relied upon by Iran to found their claim are both penal and public laws. Barakat accepts that had Iran obtained possession of the antiquities it would have thereby acquired a title that it could enforce by advancing a "patrimonial" claim. As it is, however, Barakat contends that what Iran is attempting to do is to enforce a foreign penal and public law which is not justiciable in this country. This brings us to the second issue.

88. Iran's answer is twofold:

    i) Where a foreign law vests in the foreign State title in property that is within its own jurisdiction, that title will be recognised in England even if the law is penal or public;

    ii) The laws relied on by Iran are not penal and, in so far as they are public, there is no reason of public policy why they should not be enforced in this country.

89. Because the judge held that Iran had neither established ownership nor the proprietary immediate right to possession which he considered essential to found an action in conversion, he did not need to deal with the issue of justiciability.

90. He nonetheless addressed it on the premise that, under Iranian law, Iran had acquired a valid title to the antiquities whilst they were still in Iran. He proceeded on the basis that Iran was seeking to enforce in England the provisions of Iranian law under which Iran had acquired title and that, if the law in question was either penal law or public law, the claim was not justiciable. His judgment suggests that this approach was in accordance with concessions made by Iran. If such concessions were made, they are no longer.

91. The judge decided that the 1979 Legal Bill (a) was a penal law which had as its purpose the aim of protecting the national heritage; and (b) was a paradigm example of a public law which the state was not entitled to enforce. Accordingly, he answered the second preliminary question in the negative: even if Iran had title to the objects under Iranian law, the English court would not recognise or enforce it. The judge added (para 100) : "If the conclusion is a regrettable one, the answer may be the one given by Lord Denning in *Ortiz*, namely an international convention where individual countries can agree and pass the necessary legislation."

92. Iran's appeal is based on the following propositions: (a) the relevant provisions of the 1979 Legal Bill are not penal; (b) the proper approach to a foreign public law is to consider in each case whether there is any special ground of public policy which requires the law in question not to be enforced in England; (c) laws for the preservation of the historic cultural heritage

should not be regarded as public laws for that purpose; (d) in any event, where a foreign state owns or has the right to immediate possession under the *lex situs*, and the property is not susceptible of ownership by a private individual, its title should be recognised and enforced irrespective of whether it has reduced the property into its possession.

93. Barakat does not suggest that the Iranian laws relied on by Iran offend against public policy to the extent that this country should not recognise them. Barakat contends, however, that, when the substance and not the form of these proceedings is considered, what Iran is seeking to do is to enforce in this country Iranian laws that are both penal and public. Barakat contends that this is not, in reality, a patrimonial claim. What Iran is seeking to do is to exercise its own sovereignty within this jurisdiction. This is something that the English courts will not countenance.

94. The preliminary issue was tried on the basis that the antiquities originated from Iran in the circumstances alleged in the particulars of claim. For the purposes of the preliminary issue, and therefore for the purposes of this appeal, it must be assumed that (a) the antiquities derived from the Jiroft region of Iran; (b) they were excavated recently; and (c) they were removed from Iran illegally. There is, and can be, no suggestion that Barakat acquired title from any person who has, or claims, title under Iranian law.

Penal, revenue and other public laws

95. We turn to consider the second main aspect of the appeal. As we have said, the judge reached what he described as the regrettable conclusion that, even if Iran had established title, the English court would not, in the terms of the preliminary issue, recognise or enforce that title, because the Iranian law was both a "penal" law and a "public" law which was not justiciable in the English court. It is therefore necessary to consider the nature and scope of the principles on which he relied.

96. According to Rule 3(1) in Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed. 2006 ("*Dicey*"), para 5R-019: "English courts have no jurisdiction to entertain an action: … for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State ..."

97. The 11th edition of *Dicey* in 1987 (p.220) suggested that the lack of jurisdiction was not that of the courts of the forum but of the foreign State, which has no international jurisdiction to enforce its law outside its own territory, and that the basis of the Rule is that the courts of the forum will not exercise their own jurisdiction in aid of an attempt by the foreign State to act in excess of its own jurisdiction. This view was substantially adopted by the House of Lords in *Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 AC 723, at 808, but the Rule is retained in its traditional form because of its wide acceptance in judicial decisions.

98. The starting point of any consideration of the justiciability issue raised in this appeal must be *Att-Gen of New Zealand v Ortiz* [1984] AC 1 (CA and HL). New Zealand was seeking to recover a Maori carving, which had been unlawfully exported to this country contrary to the Historic Articles Act 1962 of New Zealand. It had been lawfully purchased within New Zealand by the exporter, and ultimately sold to George Ortiz, a well-known collector who put it up for sale at Sotheby's in order to pay a ransom to the kidnappers of his daughter. The reason why the action failed, as ultimately held by the House of Lords, was that the forfeiture provisions of the 1962 Act did not, as New Zealand alleged, effect a transfer of property in the carving from the exporter to New Zealand upon the exporter attempting to export it unlawfully, but only if and when the carving was actually seized by the New Zealand authorities, which it never was.

99. All three members of the Court of Appeal (Lord Denning MR, Ackner and O'Connor LJJ) considered what the position would have been had the 1962 Act in fact transferred title from the exporter to New Zealand before the carving had left New Zealand territory. Lord Denning remarked ([1984] AC at 20) that the point was of vast importance, and continued:

"Most countries have legislation to prevent the export of their historic articles unless permitted by licence. This legislation may provide for automatic forfeiture on export or attempted export. It might be very desirable that every country should enforce every other country's legislation on the point – by enabling such articles to be recovered and taken back to their original home. But does the law permit of this? "

100. He reached the following conclusion (at 24):

"… if any country should have legislation prohibiting the export of works of art, and providing for the automatic forfeiture of them to the state should they be exported, then that falls into the category of 'public laws' which will not be enforced by the courts of the country to which it is exported, or any other country, because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory."

101. Ackner LJ's view (at 34) was that New Zealand was seeking to enforce a penal statute, and he would have dismissed the claim on what he described as "this point of public international law." The claim was to enforce a foreign penal law because the New Zealand Government was seeking to vindicate its right to preserve historic articles in New Zealand by confiscating them if they were illegally exported. Without reaching any firm conclusion, he said that he was impressed by the reasoning of Staughton J at first instance that there was no such vague general residual category of "public law". O'Connor LJ (at 35) concurred in holding that the law could not be enforced in England because it was a penal law.

102. In the House of Lords Lord Brightman gave the only speech, with which the other members of the House agreed. He upheld the decision of the Court of Appeal on the ground that New Zealand acquired no title to the carving. He added (at 46) that, so far as the views to which we have referred above were concerned, these were *obiter* and "I venture to think that, in any event, your Lordships would not wish to be taken as expressing any conclusion on the correctness or otherwise of the opinions so expressed."

103. He went on, however, at 49, to make an observation, to which we will revert:

"Counsel submitted, and I am disposed to agree, that the recovery of unlawfully exported historic articles would be best ensured if title thereto were to vest in the Crown independently of seizure."

Penal laws

104. Lord Denning MR said in *Att-Gen of New Zealand v Ortiz* (at 20): "No one has ever doubted that our courts will not entertain a suit brought by a foreign sovereign, directly or indirectly, to enforce the penal or revenue laws of that foreign state. We do not sit to collect taxes for another country or to inflict punishments for it."

105. The rule against the enforcement of penal laws was said to have its foundation in the principle that crimes are only cognisable and punishable in the country where they were committed, and accordingly no proceeding, even in the shape of a civil suit, which had as its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches, ought to be admitted in the courts of any other country: *Huntington v Attrill* [1893] AC 150, at 156.

106. Whether a foreign law, or a claim based on foreign law, is to be characterised as penal depends on English law. It does not depend on the label given to the law by the foreign system of law, nor on whether the claim is in form a private law claim. The English court has to determine the substance of the right sought to be enforced, and whether its enforcement would, directly or indirectly, involve the execution of the penal law of another state: *Huntington v Attrill* [1893] AC 150, at 155; *Att-Gen of New Zealand v Ortiz* [1984] AC 1, at 32, per Ackner LJ.

107. An example of the court looking to the substance of the claim is *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140. The ex- King of Spain claimed securities held by Westminster Bank Limited in London. The securities had originally been held to the order of its Madrid branch as the agents of the King, but when the Madrid branch was closed, the King gave instructions that the London branch of the Westminster Bank should hold the securities to the order of the Banco de Vizcaya. In 1931 the private property of the ex-King was seized, he was declared guilty of high treason and an outlaw. The Banco de Vizcaya brought an action against the Westminster Bank in London for the delivery up of the securities. It was held that enforcement of the Banco de Vizcaya's right to the securities would directly or indirectly involve the execution of penal laws of the Spanish Republic. It was not in substance asserting its own rights at all, but the rights of the Spanish Republic. So also in *United States v Inkley* [1989] QB 255 (CA) the substance of the claim which was the subject of a foreign judgment for a money judgment in civil proceedings was to enforce an appearance bond in criminal proceedings. Judgment in default of defence on the foreign judgment was therefore set aside.

108. It follows that a law may be characterised as penal even if it does not form part of the criminal code of a foreign country: *Att-Gen of New Zealand v Ortiz* [1984] AC 1, at 33, per Ackner LJ. The particular provision relied on should be categorised, rather than the law as a whole: ibid.

109. It follows also that the fact that a provision is found within a law which contains criminal sanctions, such as penalties or forfeiture, does not mean that the provision itself is penal in nature. This point seems to have been overlooked in *Schemmer v Property Resources Ltd* [1975] Ch 273, in which Goulding J held (as an alternative ground of the decision) that the English court would not recognise the title of a receiver appointed by the United States court to get in the assets of a group of companies (based in the Bahamas) which had been used as the vehicle for the IOS frauds in the 1970s. The basis of that part of the decision was that the receiver had been appointed pursuant to the US Securities Exchange Act 1934, and that Act was a penal law. But the receiver had not been appointed to enforce the penal provisions of the Act, but to preserve and recover the property of the company.

110. In the present case, the judge held that the fact that the mechanism for protecting its heritage was by virtue of the state acquiring ownership rather than by a provision for forfeiture was a distinction without a difference. The effect was the same: the state acquired title by compulsory process of law which overrode the right of any individual who might otherwise have become or remained owner (para. 90). The sanctions included imprisonment, and confiscation not only of the cultural property but the excavation equipment, and those penal aspects supported the conclusion that the legislation was properly characterised as penal (para 91).

111. In our judgment, on this aspect the judge has fallen into error. The 1979 Legal Bill was in large part penal in that it created criminal offences with criminal penalties for unlawfully excavating or dealing with antiquities. But the fact that some of the provisions of the 1979 Legal Bill impose penalties does not render penal all the other provisions of the Bill. The changes that it made in relation to ownership of antiquities were not penal or confiscatory.

They did not take effect retroactively. They did not deprive anyone who already owned antiquities of their title to them. They altered the law as to the ownership of antiquities that had not yet been found, with the effect that these would all be owned by the State, subject to the entitlement of the chance finder to a reward. These were not penal provisions, and the claim in this case does not fail on that ground.

Public law

112. That part of Rule 3(1) of *Dicey* referring to "other public law" has its origin in the 4th edition (1927, by Berriedale Keith, Rule 54, p 224) when it appeared as "political law," citing *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217 and distinguishing proprietary rights from claims to enforce political laws.

113. The expression "political law" was replaced by "other public law" in the 7th edition (1958, *Dicey and Morris*, ed. Dr J.H.C. Morris et al, Rule 21, p 159*)*. This was in response (it seems) to criticism of the expression "political law" by Dr F.A. Mann in *Prerogative Rights of Foreign States and the Conflict of Laws* (1955) 40 Tr.Gro.Soc. 25, reprinted in F.A. Mann, *Studies in International Law* (1973) p. 492 (see at p 500), and by Parker LJ in *Regazzoni v K.C. Sethia (1944) Ltd* [1956] 2 QB 490, at 524. The new expression, "public law", was intended to be equivalent to "prerogative right", the term used by Dr Mann: see *Dicey*, 7th ed. p. 162, n. 60.

114. As we have already said, in *Att-Gen of New Zealand v Ortiz* only Lord Denning MR accepted that there was a residual category of foreign public laws which the English court would not enforce. After concluding that there was such a rule, he continued (at 20-21):

"But what are 'other public laws'? I think they are laws which are eiusdem generis with 'penal' or 'revenue' laws.

Then what is the genus? Or, in English, what is the general concept which embraces 'penal' and 'revenue' laws and others like them? It is to be found, I think, by going back to the classification of acts taken in international law. One class comprises those acts which are done by a sovereign 'jure imperii', that is, by virtue of his sovereign authority. The others are those which are done by him 'jure gestionis', that is, which obtain their validity by virtue of his performance of them. The application of this distinction to our present problem was well drawn by Dr. F. A. Mann 28 years ago in an article 'Prerogative Rights of Foreign States and the Conflict of Laws' …

Applied to our present problem the class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its own territory … But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority."

115. His conclusion was that legislation forbidding export of works of art and providing for automatic forfeiture to the state should they be exported fell into the category of "public laws" which would not be enforced by the courts of a country to which they were exported because it was an act done in the exercise of sovereign authority which would not be enforced outside its own territory.

116. The question of principle was considered again by the High Court of Australia in the *Spycatcher* case, *Att-Gen (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30. In that case the British government sought to enforce against Australian publishers the

duty of confidentiality owed by Mr Peter Wright, a former intelligence officer. In form the action was a private law action based on allegations of breach of fiduciary duty, and breach of equitable and contractual obligations of confidence. It was held that the action was not maintainable.

117. The majority (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ) held that the claim was not enforceable on the broad ground that it was a claim to vindicate the governmental interests of a foreign state. The rule applied "to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government" (at 42) and the principle of law rendered unenforceable "actions to enforce the governmental interests of a foreign State" (at 47). The action was to be characterised by reference to the substance of the interest sought to be enforced, rather than the form of the action (at 46).

118. In *President of the State of Equatorial Guinea v Royal Bank of Scotland* [2006] UKPC 7, the Privy Council (speaking thorough Lords Bingham and Hoffmann) expressed views, obiter, on the justiciability of claims by foreign states in the exercise of sovereign authority, and seems to have approved, at least tentatively, the approach of the High Court of Australia in the *Spycatcher* case, that the application of the rule depends on whether "the central interest" of the state in bringing the action is governmental in nature: paras 24 and 25:

"24. It appears to their Lordships well arguable that the claims which the appellants say they wish to make in the English proceedings represent an exercise of sovereign authority, namely the preservation of the security of the state and its ruler. The apprehension and trial of suspects, the imposition of security measures, obtaining diplomatic assistance: these heads of damage alleged by the appellants in the English proceedings can all be regarded as aspects of sovereign authority … As the High Court of Australia said in *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 46, the application of the rule depends upon whether the 'central interest' of the state bringing the action is governmental in nature…

25. … It may therefore be that the question is not whether the claim is framed by reference to personal injury or damage to property but whether, as the Australian High Court said, the 'central interest' of the state in bringing the action is governmental in nature."

119. After a full review of the authorities, this court in *Mbasogo v Logo Ltd* [2007] 2 WLR 1062 decided that Rule 3(1) of *Dicey* accurately reflected the law. The court said:

"50 …The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim. On the other hand, if in bringing the claim the claimant is not doing an act which is of a sovereign character or by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does to seek to vindicate a sovereign act or acts, then the court will both determine and enforce it. As we see it, that was the broad distinction of principle which the court was seeking to draw in the *Emperor of Austria* case 3 De GF & J 217. In deciding how to characterise a claim, the court must of course examine its substance, and not be misled by appearances: see, for example, *Huntington v Attrill* [1893] AC 150.

51. We put the distinction in that broad way because it seems to us to express the rationale behind rule 3(1) in *Dicey, Morris & Collins, The Conflict of Laws*. We have reached the conclusion that rule 3(1) does accurately reflect the law in stating that the English courts have no jurisdiction to entertain an action for the enforcement of 'a penal, revenue or other public law of a foreign state'… "

120. But the Court of Appeal indicated (para 52) that it was not necessary to express a view whether the test in English law was the same as that suggested by the High Court of Australia in the *Spycatcher* case.

121. The actual decision in the *Equatorial Guinea* case in the Court of Appeal was that the claims by the Government of Equatorial Guinea were not founded on its property interests but were for losses suffered by virtue of an exercise of sovereign authority, which arose as a result of decisions taken by the State to protect the state and its citizens. The defence of a state and its subjects was a paradigm function of government, and the court would not enforce claims which involve the exercise of sovereign authority: paras 57, 61, 67.

122. The court recognised (at para 60) that the case was not one involving the enforcement of public law, but to restrict in that way would be to interpret the principle too narrowly.

123. Consequently, the *Equatorial Guinea* case in the Court of Appeal is not in fact a case involving the attempted enforcement of foreign public law. Although the court approved the residual category of "other public law" the ratio is that a claim involving the exercise or assertion of a sovereign right is not justiciable. This is not far removed from the test adopted by the High Court of Australia, and the Court of Appeal accepted (at para 50) the correctness of the expression of opinion by the Privy Council, which itself appears to give some approval to the test suggested by the High Court of Australia. Nor is it far removed from the approach in civil law countries: thus the French Cour de Cassation decided that the claims by the Republic of Haiti against Baby Doc Duvalier for looting of the Haitian treasury were inadmissible because they related to relations between a state and its officers, and to the exercise of public power: *Etat d'Haiti v. Duvalier*, Cass. civ. I, May 29, 1990, 1991 Clunet 137, 1991 Rev. Crit. 386.

124. The application of the approach of the High Court of Australia is illustrated by *Robb Evans of Robb Evans & Associates v. European Bank Ltd* [2004] NSWCA 82, (2004) 61 NSWLR 75, in which it was held (distinguishing *Schemmer v Property Resources Ltd* [1975] Ch 273, above, para 110) that a receiver appointed by the United States Federal Trade Commission could sue in New South Wales to recover the proceeds of a credit card fraud: in the sphere of consumer protection, regulatory regimes may serve a public interest and be classified as public laws, without constituting a governmental interest of the relevant kind; and as a matter of substance, it was a proceeding designed to compensate persons who had been defrauded.

125. On the authorities as they now stand the only category outside penal and revenue laws which is the subject of an actual decision, as opposed to dicta, is a claim which involves the exercise or assertion of a sovereign right. There is no decision which binds this court to find that there is a rule which prevents the enforcement of all foreign public laws. The test laid down by the High Court of Australia is not only consistent with the English authorities, including the *Equatorial Guinea* case in the Court of Appeal, but is a helpful and practical test.

126. What laws fall within the category of laws which will not be enforced because they involve the exercise or assertion of a sovereign right, or seek to enforce governmental interests? As we have said, Lord Denning MR in *Ortiz* suggested that the public laws envisaged by Rule 3(1) are laws which are *eiusdem generis* with penal or revenue laws, and that the relevant *genus* is to be found in acts *jure imperii*, acts done by virtue of sovereign authority, rather than acts *jure gestionis*. This is a distinction deriving from the law of state immunity: see e.g. *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 WLR 1147, 1156, per Lord Goff of Chieveley and material in *Dicey*, paras 10-004, 10-033. It bears some relationship to the distinction which has been applied by the European Court of Justice to

determine whether a claim is a "civil and commercial matter" for the purposes of the Brussels Convention and the Brussels I Regulation, where the question is whether or not the state is acting in the exercise of its powers: cases cited in *Dicey*, para 11-025.

127. No doubt one example of laws within this category would be exchange control legislation: see *Re Lord Cable, deceased* [1977] 1 WLR 7; and *Camdex International Ltd. v Bank of Zambia (No. 2)* [1997] CLC 714, at 724 (Simon Brown LJ) and 734 (Phillips LJ).

128. It is possible, but by no means certain, that export restrictions may also be within this category. In *King of Italy v de Medici* (1918) 34 TLR 623 an interlocutory injunction was sought against a member of the de Medici family and against Christie's to restrain them from disposing of the Medici Archives. The injunction was granted in relation to those of the papers which belonged to the Italian state, but refused in relation to other papers which had been illegally exported from Italy. It was said that Italian law prohibited their export "but it was manifest that this only applied so long as they remained in Italy" (at 624, per Peterson J). In *Att-Gen of New Zealand v Ortiz* Lord Denning MR suggested (at 23) that on this aspect the *King of Italy* case was a case where the prohibition of export of the family papers was an exercise of sovereign authority by the King of Italy, and it would not be enforced in England. The case is not fully reported and is of little assistance.

129. In *Kingdom of Spain v Christie, Manson & Woods Ltd* [1986] 1 WLR 1120 Sir Nicolas Browne- Wilkinson V-C refused to strike out a claim for a declaration against Christie's and the owners of a Goya that export documents obtained for the removal of the painting from Spain had been forged. The decision goes no further than to hold that it was arguable that a claim that the use of forged documents could debase the credibility of genuine export documents issued by Spain was supportable by reference to the decision in *Emperor of Austria v Day and Kossuth* that the Emperor of Austria could sue Louis Kossuth and the printers to prevent them from debasing the currency of Hungary by printing false new currency.

130. These cases would probably now come within the Return of Cultural Objects Regulations 1994, SI 1994/501 (discussed below, para 161), since the papers in the Italian case and the Goya in the Spanish case would be relevant cultural objects (as defined by Article 1 of Council Directive 93/7) and subject to proceedings under reg 6 as amended by SI 1997/1997 and SI 2001/3972.

Patrimonial claims and reduction into possession

131. The claim in this case is not an attempt to enforce export restrictions, but to assert rights of ownership. We now turn to the question of whether the claim by Iran is maintainable even it has not taken possession of the objects.

132. The starting point is the almost universal rule that title to movables depends on the *lex situs*, and accordingly: "The validity of a transfer of a tangible movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country where the movable is at the time of the transfer (*lex situs*). … A transfer of a tangible movable which is valid and effective by the law of the country where the movable is at the time of the transfer is valid and effective in England…" (*Dicey*, Rule 124, para 24R-001).

133. Where the foreign state has acquired title under its law to property within its jurisdiction in cases not involving compulsory acquisition of title from private parties, there is no reason in principle why the English court should not recognise its title in accordance with the general principle.

134. In *Government of India v Taylor* [1955] AC 491, 511, Lord Keith of Avonholm said that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, was (treaty or convention apart) contrary to all concepts of independent sovereignties.

135. Thus in *City of Gotha v Sotheby's*, unreported, September 9, 1998 (Moses J) it was held that the Federal Republic of Germany was entitled to recover a Wtewael painting originally owned and possessed by the Duke of Saxe-Coburg-Gotha Foundation for Art and Science, and which had been looted. The Federal Republic's title derived from the dissolution of the Foundation, and its claim was not an assertion of sovereign authority. Cf. *Kunstsammlungen Zu Weimar v Elicofon*, 678 F 2d 1150 (2d Cir. 1982).

136. Consequently, when a state owns property in the same way as a private citizen there is no impediment to recovery. This is the basis of that part of the decision in *King of Italy v de Medici* (1918) 34 TLR 623, in which it was decided that there was a prima facie case that part of the Medici Archive belonged to the Italian state and that it was entitled to prevent the disposition of its property by someone who was not entitled to it, and that an injunction would therefore be granted.

137. Is the position different where there has been compulsory acquisition? In *Kuwait Airways Corporation* v. *Iraq Airways Co* [2002] 2 AC 883, 1077 Lord Nicholls of Birkenhead said:

> "Under English conflict of laws principles the transfer of title to tangible movable property normally depends on the lex situs: the law of the country where the movable was situated at the time of the transfer. Likewise, governmental acts affecting proprietary rights will be recognised by an English court as valid if they would be recognised as valid by the law of the country where the property was situated when the law takes effect."

138. So also Lord Brightman in *Att-Gen of New Zealand v Ortiz* observed, obiter ([1984] AC at 49): "Counsel submitted, and I am disposed to agree, that the recovery of unlawfully exported historic articles would be best ensured if title thereto were to vest in the Crown independently of seizure." That dictum supports Iran's contention that (a) if the foreign law transfers ownership, then the penal law/public law principle is inapplicable; and (b) it is not a necessary pre-condition that the foreign State should have reduced the property into its possession.

139. According to *Dicey*, Rule 128 (para 25R-001):

> "A governmental act affecting any private proprietary right in any movable or immovable thing will be recognised as valid and effective in England if the act was valid and effective by the law of the country where the thing was situated (*lex situs)* at the moment when the act takes effect, and not otherwise."

140. But, as *Dicey* says (para 25-012):

> "The effect of Rule 128 is that the transfer of the title will be recognised, so that where the foreign State disposes of the property the title of the new owner will be recognised in England as against the original owner. But where the original owner retains possession and brings the property to England, the position is more difficult. In such a case the issue will not be one of recognition, but of enforcement. If the decree is penal, neither the foreign government nor its nominee can enforce a title founded upon the decree, because there is an 'international rule whereby one State will not enforce the…penal laws of another State.' But more controversial questions arise where the decree is neither penal nor otherwise contrary to English public policy. … If the foreign State has reduced the property into its possession, there is no

objection to protecting its actual possession of property to which it has acquired a recognisable title."

141. So also at para 5-026 it is suggested that where the foreign government has a patrimonial claim "e.g. to the property of unsuccessful revolutionaries or former governments, or *where it claims or reclaims property which it has reduced into its possession*" (emphasis added), the case is not one of enforcement of title, but of recognition and the claim will be enforced. The cases cited as authority for the words in quotation marks are authority for the first part of the quotation, namely that the court will recognise the title of the state to property in England held by revolutionaries or former governments, but they do not touch on the question whether the property must have been reduced into possession by the foreign state. In the revolution/governmental succession cases the point will not normally arise.

142. Thus in *King of the Two Sicilies v Willcox* (1850-51) 1 Sim NS 301 during a revolution in Sicily, the revolutionary government sent money to its envoys in England. It was held that the King could recover a ship purchased with the money. Shadwell V-C said at (332): "It seems, to my mind, to be laid down as clear as any proposition can be, that the independent sovereign of a state is competent, in this country, to sue for his personal rights." In two cases following the American Civil War, the United States was able to recover property held in England on behalf of the Confederate States: *United States of America v Prioleau* (1865) 35 L.J. Ch. 7; *United States of America v Wagner* (1867) L.R. 2 Ch. App. 582; (1869) L.R. 8 Eq. 69. In each of these decisions it was held that the government which displaces a de facto government succeeds to its property, and is treated as the owner. So also in *USSR v Belaiew* (1975) 42 TLR 21, it was accepted that documents originally held in London on behalf of the Imperial Russian government, and later on behalf of the Russian provisional government, became the property of the Soviet government, and it was entitled to recover them from the defendant, a member of the Russian Government Committee which had been set up in 1916 by the Imperial Russian government to obtain supplies abroad.

143. There is little doubt, however, that where the foreign State has sought to confiscate or attach private property, the State's title will only be recognised in England if it has reduced the property to possession.

144. In *Luther v Sagor* [1921] 3 KB 532 the Soviet authorities had taken the timber into their possession, and in *Princess Paley Olga v Weisz* [1929] 1 KB 718 they had taken the works of art into their possession. It is those authorities to which Lord Templeman was referring in *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, 431, when he said: "These authorities illustrate the principle that an English court will recognise the compulsory acquisition law of a foreign state and will recognise the change of title to property which has come under the control of the foreign state and will recognise the consequences of that change of title."

145. In *Prerogative Rights of Foreign States and the Conflict of Laws*, in *Studies in International Law* (1973), 492 at 503-504 Dr Mann said:

"Soviet Russia has confiscated the jewels of Princess Paley Olga. They are situate in Russia and by Russian law title has passed. However, let it be assumed that they remain in the possession of the Princess who succeeds in bringing them to England. If the Russian State brought here an action for conversion, it ought to be dismissed, because its true purpose is to enforce the plaintiff State's prerogative rights. On the other hand, if the Russian State had obtained possession of the jewels in Russia and they had been stolen from it, then an action against the thief ought to succeed even if the thief was the original owner; the reason is that the Russian State's right had already been completed when it obtained possession, and the

action is brought, not in order to implement the confiscation, but to enforce a cause of action arising later than and irrespective of the confiscation."

146. Lord Denning MR adopted this analysis in *Att-Gen of New Zealand v Ortiz* , at 23. But see Wolff, *Private International Law*, 2nd ed 1950, at 526-527, for a contrary view.

147. The need for the foreign State to have taken possession before it can maintain a claim in cases involving the exercise of sovereign rights is illustrated by *Brokaw v Seatrain UK Ltd* [1971] 2 QB 476, in which it was held that the United States could not claim goods pursuant to a notice of levy by which it claimed title to goods being shipped on a US registered ship by persons alleged to owe tax. The notice of levy took effect forthwith so that persons in possession of such goods were legally obliged to surrender the goods. The claim could not be pursued because it was an attempt at the indirect enforcement of a revenue claim. But Lord Denning MR said (at 483):

"If the United States Government had taken these goods into their actual possession, say in a warehouse in Baltimore, or may be by attornment of the master to an officer of the United States Government, that might have been sufficient to enable them to claim the goods. But there is nothing of that kind here. The United States Government simply rely on this notice of levy given to the shipowners, and that is not, in my view, sufficient to reduce the goods into their possession."

148. Consequently, the distinction between the two categories of cases, those where the foreign State will be able to claim its property in England even if it has not reduced it into its possession, and those where it may not claim unless it has reduced the property into its possession, depends on the way in which it has acquired ownership. If it has acquired title under public law by confiscation or compulsory process from the former owner then it will not be able to claim the property in England from the former owner or his successors in title unless it has had possession. If it has taken the property into its possession then its claim will be treated as depending on recognition; if it has not had possession it will be seeking to exercise its sovereign authority.

149. But in these proceedings Iran does not assert a claim based on its compulsory acquisition from private owners. It asserts a claim based upon title to antiquities which form part of Iran's national heritage, title conferred by legislation that is nearly 30 years old. This is a patrimonial claim, not a claim to enforce a public law or to assert sovereign rights. We do not consider that this is within the category of case where recognition of title or the right to possess under the foreign law depends on the State having taken possession.

150. In the United States the patrimonial rights of the foreign State have been recognised in the context of criminal proceedings, even where the State never had possession. In *United States v Schultz*, 333 F 3d 393 (2d Cir. 2003) Schultz, a successful art dealer in New York City, was convicted of conspiracy to receive stolen property, Egyptian antiquities, which had been transported in interstate and foreign commerce. The underlying substantive offence was violation of the National Stolen Property Act. The Court of Appeals for the Second Circuit decided that an Egyptian patrimony law, declaring all antiquities found in Egypt after 1983 to be the property of the Egyptian government, had the effect of making the Egyptian government the owner of the antiquities, and that "ownership" was recognised by the United States for the purposes of prosecution under the Act. *Cf R v Tokeley-Parry* [1999] Crim LR 578 (also a case of handling stolen Egyptian antiquities: conviction under Theft Act 1968 in relation to door taken from the Tomb of Hetepka).

Public policy

151. If we are wrong in the view that this is not a claim to enforce foreign public law, then we do not consider that it should be precluded by any general principle that this country will not entertain an action whose object is to enforce the public law of another State.

152. Staughton J (as he then was) said at first instance in *Att-Gen of New Zealand v Ortiz* ([1982] QB 349, 371-372):

"If the test is one of public policy, applied to the foreign law in question in this particular case, there is in my judgment every reason why the English courts should enforce section 12 of the Historic Articles Act 1962 of New Zealand. Comity requires that we should respect the national heritage of other countries, by according both recognition and enforcement to their laws which affect the title to property while it is within their territory. The hope of reciprocity is an additional ground of public policy leading to the same conclusion."

153. Ackner LJ accepted that if the test were one of public policy, there was no reason why the English courts should not enforce the New Zealand law: [1984] AC at 34.

154. In our judgment, there are positive reasons of policy why a claim by a State to recover antiquities which form part of its national heritage and which otherwise complies with the requirements of private international law should not be shut out by the general principle invoked by Barakat. Conversely, in our judgment it is certainly contrary to public policy for such claims to be shut out. A degree of flexibility in dealing with claims to enforce public law has been recommended by the Institut de droit international (in particular where it is justified by reason of the subject-matter of the claim and the needs of international co-operation or the interests of the States concerned: *Ann.*, 1977, vol. 57-II, p. 328) and the International Law Association: *Dicey*, para 5-040, n. 80.

155. There is international recognition that States should assist one another to prevent the unlawful removal of cultural objects including antiquities. There are a number of international instruments which have, in part, the purpose of preventing unlawful dealing in property which is part of the cultural heritage of States, although there still remains a question about their effectiveness. The United Kingdom is party to some of them.

156. On August 1, 2002 the United Kingdom ratified, with effect from November 1, 2002, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. More than 100 States have ratified the Convention, including Iran, which ratified it in 1975. The Convention was implemented in the United States through the Cultural Property Implementation Act of 1983.

157. By Article 2 the parties recognise that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin, and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property, and the parties undertake to oppose such practices with the means at their disposal. In Article 3 the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under the Convention by the parties, is to be illicit.

158. By Article 13:

"The States Parties to this Convention also undertake, consistent with the laws of each State:

(a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;

(b) To ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;

….

(d) To recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported."

159. The obligations imposed by the Convention are very general in character, and the obligation in Article 13(d) is watered down by the phrase "consistent with the laws of each State." Although the Convention has been ratified by the United Kingdom Government, no legislation has been introduced to implement it, apparently because the Government is of the view that existing legislation is sufficient to enable the United Kingdom to comply with its obligations under the Convention. The Dealing in Cultural Objects (Offences) Act 2003 gave legislative effect to a recommendation contained in the report produced by the Ministerial Advisory Panel on Illicit Trade (ITAP) published in December 2000. The effect of the Act is to provide for criminal offences in the case of dealing with cultural objects which have been illegally removed (after the Act came into force in December 2003) from an archaeological site: sections 1(1), 2(1), (2), (4), (5). It is immaterial whether the excavation was done in the United Kingdom or elsewhere, or whether the offence is committed under the law of a part of the United Kingdom or under the law of any other country: section 2(3).

160. Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State was incorporated into English law with effect from March 2, 1994 by the Return of Cultural Objects Regulations 1994, SI 1994/501, as amended by SI 1997/1719 and SI 2001/3972. A Member State has the right to take proceedings against the possessor, or failing him the holder, for the return of a cultural object which has been unlawfully removed from its territory: Regulation 3(1). The court may order the requesting member State to pay compensation: Regulation 7(1).

161. The Unidroit Convention on Stolen or Illegally Exported Cultural Objects was signed in June 1995. It came into force in 1998 when the necessary five ratifications had been effected. Under the Unidroit Convention, a cultural object which has been unlawfully excavated, or lawfully excavated but unlawfully retained, shall be considered stolen: Article 3(2). A contracting state may request the court of another contracting state to order the return of a cultural object illegally exported from the territory of the requesting state: Article 5(1). Provision is made for compensation to be paid to innocent purchasers: Articles 4 and 6(1). The Convention has been ratified by Iran and entered into force for it in December 2005. But it has not been ratified by many potentially importing countries, and the ITAP Report referred to above recommended against ratification by the United Kingdom.

162. There is also a Commonwealth scheme for the protection of the material cultural heritage, adopted in Mauritius in November 1993, following proposals made by the New Zealand Government after the failure of its action in the *Ortiz* case. It is based on mutual recognition of export prohibitions, but it has not resulted in concrete action: see O'Keefe (1995) 44 ICLQ 147.

163. None of these instruments directly affects the outcome of this appeal, but they do illustrate the international acceptance of the desirability of protection of the national heritage. A refusal to recognise the title of a foreign State, conferred by its law, to antiquities unless they had come into the possession of such State, would in most cases render it impossible for

this country to recognise any claim by such a State to recover antiquities unlawfully exported to this country.

Conclusion

164. For those reasons we reject Barakat's submissions that Iran's claim should be dismissed because Iran has never possessed the antiquities or on the ground that Iran's claim is in reality an attempt to enforce Iran's penal or public law.

165. This appeal is allowed. The first preliminary issue should be answered: "yes, by virtue of the provisions of Iranian law and, in particular, the Legal Bill of 1979" and the second preliminary issue should be answered "yes".