NEUTRAL CITATION NO. [2004] EWHC 49 (Comm) Case No: 2001/856

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd January 2004

Before :

THE HONOURABLE MR JUSTICE COOKE

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Between :

(1) BERRY TRADE LIMITED	**Claimant**
(a Company formed in Bermuda)	
(2) VITOL ENERGY (BERMUDA) LIMITED	
- and -	
(1) KAVEH MOUSSAVI	**Defendant**
(2) KHADEJEH SAEBI	
(3) FARZANEH PIROUZ-MOUSSAVI	
(4) BERRY TRADE LIMITED	
(a company formed in the Isle of Man)	
(5) EASTWAY PETROLEUM LIMITED	
(6) SILVERSTREAM LIMITED	
(7) MOHAMMED GHADIMI GHESHLAGHI	

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Philip Marshall, Q.C. (instructed by **Ince & Co**) for the Claimant
Anthony Zacaroli (instructed by **Watson Farley Williams**) for the 7th Defendant, Mohammad Ghadimi Gheshlaghi

Hearing dates : 12th, 13th, 14th and 19th January 2004

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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The Honourable Mr Justice Cooke

Mr Justice Cooke:

Introduction

1. The background to this matter is set out in my previous Judgment of 7th May 2003, in which I gave Summary Judgment against the first defendant, Mr Moussavi, but refused it in respect of the seventh defendant, Mr Ghadimi. On 26th September 2003, Cresswell J ordered a trial of preliminary issues of Iranian law as set out in paragraph 133A of the amended Defence and paragraph 22 of the Reply as amplified in further information given by the claimants (BTLB and Vitol) in response to a request from Mr Ghadimi. The plea of Iranian law was advanced by Mr Ghadimi following the late production of evidence of that law as set out in paragraphs 39 – 41 of my earlier Judgment.

2. Cresswell J directed the hearing of the preliminary issues of Iranian law and a concurrent hearing of the claimants' application for Summary Judgment. Directions were given for exchange of expert reports, a meeting of experts, a joint experts' report and for each party to identify the evidence upon which they wished to rely for the purpose of the Summary Judgment hearing. No further evidence was to be adduced at the hearing without the permission of the Court. The purpose was to identify the preliminary issues with clarity and to avoid introduction of late evidence and new issues. The Order did not achieve the desired result since the experts' reports resulted in a multiplication of the issues which has resulted in amendments by both parties to the pleadings and supplementary reports in addition to the joint experts' report. The latter consists of four paragraphs on two pages whereas the experts' bundle of reports runs to 123 pages, excluding exhibits.

3. Nonetheless the critical issues of Iranian law, upon which the application for Summary Judgment depends are ultimately in relatively small compass although a number of subsidiary issues of Iranian law arise which fall to be considered in the context of these primary contentions. The claimant's application proceeds on the basis that Mr Ghadimi is liable in usurpation, which is broadly analogous to the English tort of conversion or unlawful interference with goods. It is Mr Ghadimi's case that he at all times acted as an agent for others and, as such an agent, has no personal liability towards third parties for actions undertaken within the scope of his agency, unless he acted with specific knowledge of the wrongdoing of his principals. For liability in usurpation, it is said that the agent would have to know, at the time he committed the act said to constitute usurpation, that the goods were the property of the true owner and that his own actions were not authorised by that true owner. By contrast, BTLB and Vitol say that usurpation under Article 308 of the Iranian Civil Code gives rise to strict liability without the need for any such knowledge or any intention to misappropriate another's goods. The existence of the alleged agency makes no difference, since the agent is personally liable for usurpation regardless of any instructions given by an alleged principal and no alleged principal can give valid instructions to do an act which amounts to usurpation in any event.

4. I heard evidence of Iranian law from Mr Sabi and Dr Bagheri who were instructed by the claimants and Mr Ghadimi respectively.

   i) Mr Sabi had been a member of the Iranian Bar Association since 1974 and had practised law in Iran between 1974 and 1979, when he left that country at or about the time of the revolution. Since then he has practised as a consultant in Iranian law in London advising on litigation in Iran and preparing cases for presentation by local lawyers there.

   ii) Dr Bagheri graduated in law from Tehran University in 1988 and worked as an in-house lawyer for companies in Iran whilst pursuing an LLM course at the University which he completed in 1990. He was not a member of the Iranian Bar but taught Commercial and Company law at Tehran University until 1993. He then left Iran for the UK to complete a doctoral programme at the University of London on International Commercial Arbitration. Since 2000 he has been engaged in research and teaching in International Commercial Law at City University, Brunel University, The Open University and the University of London and since 1993 he has not been actively involved in research, study or the practice of the law of Iran.

   iii) Mr Sabi gave his evidence with clarity and consistency and in a manner which showed a clear understanding of the various elements of Iranian law. Dr Bagheri lacked the practical experience of Mr Sabi in the operation of the Iranian Courts and did not always exhibit, in his evidence, the same analytical coherence that Mr Sabi demonstrated. There were some fundamental differences between them and on those points I preferred the evidence of Mr Sabi, backed up, as it was, by much greater practical experience of the Courts of Iran and their decision making and because, under cross examination, Dr Bagheri made significant concessions.

Sources of Iranian Law

5. The major sources of relevant law in Iran are the Civil and Commercial Codes. The decisions of the Courts, save for pronouncements from the General Council of the Supreme Court in Iran are persuasive only. The experts in Iranian law agree that the Civil Code of Iran conforms to Islamic law and that the Civil Code, where clear, prevails over any Islamic law principles enshrined in earlier law or elsewhere. Reference can however be made to Islamic writings if the Code is not clear. In interpreting the law of Iran reference is made to commentators on the Civil law (in particular Professors Emami and Katouzian) although these have no binding authority. The experts differed as to the extent to which these were used in Court and the extent to which any reference was made to Islamic jurists. In this respect I find that, in accordance with Mr Sabi's greater experience, these two Professors' works are highly regarded and are used by the Courts whereas little reference is made to Islamic jurists generally, whether those belonging to the Shia persuasion or other branches of Islam. There was some difference between the experts also in relation to the applicability of the principle of non-liability and the principle of fault as allegedly enshrined in Islamic law. In the end not much turned on this since Dr Bagheri

accepted that strict liability was not inconsistent with Islamic law and that property rights and the tort of usurpation did involve elements of strict liability which were in accordance with Islamic principles. He regarded those as exceptions to the more general rule however.

Usurpation under the Civil Code

6. The starting point for determination of the issues is the Civil Code of Iran and in particular Chapter 2 of it which deals with extra-contractual obligations. Section 1 of that Chapter sets out general principles (Articles 301 – 306) whilst Section 2 covers tortious liability which (subject to the Civil Liability Act of 1960) arises in four ways as set out in the four succeeding sub-sections between Articles 308 and 337. Those four sub-sections cover usurpation and constructive usurpation in sub-section 1 and direct damage, indirect damage and unjust enrichment in the following sub-sections. (Throughout this Judgment I will refer to English translations of the Farsi Code, drawing attention to any differences in the various translations where they appear significant).

7. In Section 1 which sets out the general principles, the following are to be found:

> "Article 301 – any person who intentionally or by mistake receives something to which he is not entitled is bound to deliver it to the owner"
>
> "Article 303 – anyone who receives property without any entitlement to it is liable for it and its profits whether he was aware that he was not entitled to it or not. "

It can be seen that these two Articles make the specified liability independent of any intention or knowledge on the part of the recipient of lack of entitlement to the property. These general principles I find, in accordance with the evidence of Mr Sabi, underlie all extra-contractual obligations set out in Section 2 of the chapter, including usurpation and constructive usurpation.

8. The key provision upon which BTLB and Vitol placed reliance was Article 308 which was part of sub-section 1 on usurpation, which ran from Article 308 through to Article 327.

> "Article 308 – usurpation is the assumption of another's right by force. Laying hands on another person's property without authority is also considered usurpation."

Having heard the evidence and been referred to the foremost textbook writers, it is clear that the two sentences of Article 308 cover different matters. The first sentence deals with usurpation, properly so called, whilst the second sentence deals with "constructive usurpation" or "deemed usurpation". The first sentence refers to circumstances where the perpetrator possesses the property with the knowledge that

his possession is illegal. The ambit of the sentence extends beyond taking someone else's property by force to any situation where the possessor is aware that the property belongs to someone else and that he has no authority to possess it. Both experts on Iranian law agreed that the term translated as "by force" meant "with hostility" so that it covered any deliberate taking, or assumption of others' rights of property. The first sentence therefore involves fault and an act known to be illegal. As stated by Professor Emami, where the possessor obtains possession without knowledge that the property belongs to somebody else or that the owner has not authorised such possession, this does not constitute usurpation within the first sentence of Article 308, but if possession is "without legal justification" (without authority) it is deemed to be usurpation or constructive usurpation under the second sentence of the Article. Professor Katouzian agreed with this proposition. Thus, for the second sentence of Article 308 to apply, there is no need for the alleged wrongdoer to appreciate that what he is doing is wrongful. Despite originally contending otherwise, ultimately Dr Bagheri appeared to have accepted this.

9. The expression "laying hands" as it appears in Article 308 refers to the taking of possession or the exercise of possession in the sense of the exercise of authority and dominion over property. This is expressed in a number of different ways including words such as "governance, dominance and control" but the essence of it, as set out by Professor Langroudi and by Branch 6 of the Supreme Court of Iran in its Judgment number 6/839 dated 16th March 1993, is that the alleged wrongdoer should be able to decide upon the disposition of the property. A number of phrases are used in this context such as "freedom to carry out acts which have a legal consequence in respect of the property" or such dominion "that the possessor can decide (on delivery) thereon legally or illegally". What it amounts to however is a requirement that the person concerned should have the power of disposal of the property with real and effective control exercised through physical possession or practical possession as defined by custom, convention or religion.

10. It is clear therefore that the first and second sentences of Article 308 are different in their requirements as a matter of construction of the Article and by reference to jurists and Court decisions. No commentator on the Code has suggested that the second sentence of Article 308 requires intention or knowledge on the part of the perpetrator for liability in usurpation to arise. Moreover the Iranian Courts have always applied the second sentence in this way.

11. It was suggested by Mr Bagheri that strict liability ran counter to the tenor of Iranian law, by reason both of the requirement of fault in Sharia or Islamic law on the one hand and by virtue of the Civil Liability Act on the other. The fact is however that Articles 316 and 323 clearly provide for the liability of a person usurping property from a usurper, even if he is unaware of the original usurpation and for the liability of a bona fide purchaser of usurped property from a usurper. Equally Article 327 refers to the transfer of usurped property from one person to another with the application of the same rules.

12. The parties' experts were agreed that the Civil Code of Iran codified Islamic principles and brought them into the law of Iran in the shape of the Code itself. It

would only be in cases where there was ambiguity in the Code that reference would be made to earlier law or Islamic principle to construe it. Dr Bagheri was referred, in cross-examination, to two decisions of the English Courts in relation to the law of Iraq and the law of the UAE which are each based largely upon Islamic law. He accepted that the definition of "Ghasb" (which is translated as "usurpation" in the translation of the Civil Code) as set out by Moore-Bick J at paragraph 121 in Glencore v MTI [2001] LLR at page 315, reflected the position in Shia Islamic law. The definition given was "any dealing with the goods of another in a way which involved a denial of title". He also accepted, with one qualification, the finding by Mance J in Kuwait Airways Corporation v Iraqi Airways Corporation 1999 CLC at page 44-45 that "all that is required for usurpation is a deliberate act affecting the property which objectively, whether or not this is intended or appreciated, manifests an attitude or claim inconsistent with its owner's title" as being equally consistent with Shia Islamic principle. The qualification he made related to Article 309 of the Civil Code which provides that where a person prevents an owner from using his possessory rights, without himself assuming control of the property, he is not a usurper as such. Thus, there is, in Islamic law which underlies the Civil Code, and which the latter is intended to enshrine and codify, no overriding principle that requires fault in the case of usurpation. Nor therefore does it matter whether the Civil Liability Act reflects a general principle requiring fault or whether the Civil Code's provisions relating to usurpation reflect an exception to that principle, since the latter is in accord with Islamic concepts.

13. The Civil Liability Act does not repeal any part of the Civil Code, despite some comments from a minority of commentators suggesting that it might impact upon those parts of the Code which dealt with destruction of property in sub-sections 2 and 3 of section 2 (different sub-sections from usurpation). At most this Act could affect the interpretation of the Code where there was no explicit provision in the Civil Code for strict liability and could give rise to the suggestion that fault or knowledge was required. This was as far as Dr Bagheri was, in the end, prepared to go, in arguing for its relevance to the issues before me. Since there is no ambiguity in the Code and the terms of Article 308 are clear, when properly understood, with a requirement for knowledge or intention in the first sentence and strict liability in the second sentence, there is no assistance to be gained from reference to the Civil Liability Act or to general principles of Islamic law.

14. I find therefore that the Code clearly provides for strict liability in the second sentence of Article 308, in accordance with the general principles relating to extra-contractual liability in relation to property as set out in Articles 301 and 303, as reinforced by the provisions of Articles 316, 323 and 327.

15. Article 310 of the Civil Code provides as follows:-

> "If a person to whom property has been lent or with whom the same is deposited or who holds a property under similar titles should deny the same, he is considered a usurper as from the date of denial."

16. It was accepted by Dr Bagheri that a person who held property "under similar titles" meant a person who held property in a manner less than ownership. "Holding property" was akin to that of "laying hands" or possession in the sense of the exercise of control over the property in question. It was common ground between the experts in Iranian law that denial of the title of the true owner could take the form of an express denial in words or writing or by any act which prejudiced the ownership of the oil in question. Thus the effecting of a sale of oil belonging to someone else would amount to such a denial as would participation in the creation of documents purporting wrongly to transfer title, informing the true owners that none of their property was held or asserting that the property belonged to somebody else. The terms of Article 310 are clear in as much as a denial of title is sufficient to give rise to liability as a usurper as from the date of denial. It would be impossible to read into this provision the need for knowledge of the true position, given the general principles expressed in Articles 301 and 303 and the other provisions relating to usurpation. Article 308 sets out the two distinct forms of usurpation and constructive usurpation. Article 310 by its terms gives rise to the latter by providing that a person is "considered a usurper" as from the date of denial of title of the true owner.

Agency

17. Mr Ghadimi's case under Iranian law therefore turns on the issue of agency. Section 13 of the Civil Code deals with agency in four subsections. Sub-section 1 sets out general rules whereas sub-section 2 deals with the undertakings of the agent, sub-section 3 with the undertakings of the principal and sub-section 4 with termination of the agency. An examination of these provisions shows that they are intended primarily to provide for the position as between the principal and the agent. Dr Bagheri said that this Section of the Code simply did not deal with the liability of an agent to third parties and maintained that this was because no such liability existed. I find however, in accordance with the evidence of Mr Sabi, that the essential principles of agency in Iranian law relate to engagements undertaken with authority by the agent. Where the agent acts within his mandate and enters into a contract or engagement for his principal, the principal and not the agent is liable on that undertaking. When there is no agency or the agent acts outside the scope of his instructions, however, the putative agent is personally liable and the principal is not.

18. The two Iranian lawyers were initially fundamentally at odds over the issue of tortious or delictual liability, Mr Sabi maintaining that, whatever instructions were given, there could be no agency for an unlawful act, whilst Dr Bagheri's view was that if the "agent" acted in accordance with his "principal's" instructions, the principal would be liable but the agent would not. Ultimately however the point he maintained was that the agent's possession of the property was not attributable to him personally but was to be treated as the possession of the principal or person giving the instructions.

19. It is true that the Civil Code has no express provision making an "agent" liable for usurpation when he commits acts constituting usurpation on the instructions of his "principal". This is not surprising however because of the limited ambit of agency law in Iran. It is only in a given class of acts that a person can truly be an agent and thus

escape personal liability for what he does. Thus contracts concluded without the authority of the principal create liability for the agent, not the principal whilst, as Dr Bagheri was ultimately disposed to accept, there cannot be any agency to commit usurpation.

20. Articles 662 to 665 and 680 of the Civil Code do contain provisions which bear upon third parties. Article 663 provides that an agent may not perform an act which is beyond the limits of the terms of the agency, whilst Article 667 repeats this and Article 674 states that the principal is not liable in respect of acts done by the agent outside the scope of the authority given to him. Article 680 (in the provisions relating to termination) provides that everything that an agent does within the limits of his authority before termination is binding upon the principal. It was agreed between the experts that there are no provisions of Iranian law equivalent to the principle of ostensible authority which applies to agents under English law. If an act falls outside the authority of the agent, it is not binding upon the principal at all, with the result that the agent is personally liable for whatever it is that he has undertaken. That which is done within his authority binds his principal but nothing else can do so, with the result that the agent alone can be liable for such acts. This is significant when the question of tort is considered.

21. Article 662 reads as follows:

> "Agency must operate in a matter that the principal himself would be able to perform and the agent also must be a person who enjoys legal capacity for performing it."
>
> Or as an alternative translation puts it-
>
> "An Agency must not be given except for a matter which the principal himself is entitled to act ……"

The effect of this is, as both experts agreed, to delimit the areas in which agency can operate. If the agent has no legal capacity to perform the functions authorised, the agency is ineffective. Equally, by the first half of Article 662, agency can only be created in respect of matters which the principal himself could legitimately perform.

22. It thus follows that:-

i) a person without rights to assets cannot give authority to his agent to deal with that asset. There simply is no valid agency because he can only authorise his agent to do what he is entitled to do himself.

ii) if a person without the authority of the true owner purports to give instructions to someone to act in a manner inconsistent with the true owners' rights, compliance with those instructions will constitute usurpation.

23. Mr Sabi maintained that the principle of agency was simply inapplicable to delictual/tortious acts since it was not possible for a principal to instruct his agent to commit a wrongdoing. This arose from the terms of Article 662 and also from Article 10 of the Civil Code which provides that private contracts are binding on the contracting parties if they are not contrary to the express provisions of the law. Mr Sabi stated that if a contract was contrary to law, then the contract was invalid since it was for an illegal purpose. Thus, if instructions are given which amount to usurpation on the part of the supposed agent, there can be no agency of any kind. Whichever way the matter is regarded, agency cannot apply to usurpation. If the acts do constitute usurpation within the meaning of Article 308, it matters not that the perpetrator does so on the instructions of someone else.

24. Dr Bagheri did not ultimately dissent from the proposition that an agent could not be appointed to effect usurpation. He did however maintain that there was a fundamental rule of Shia law which protected the putative agent who was instructed to commit a tort. The principle can be stated thus:-

> "If a valid contract imposes liability then a void version of the contract also imposes liability and vice versa."

The illustration given was of the transfer of property to a buyer under a void sale contract, following which the buyer is liable to the true owner, although the contract is void. Equally, it is said that if an agent performs acts under a void agency contract his liabilities are the same as if that agency contract were valid. The ambit of the proposition appears thus to prevent a party in possession of someone else's goods from escaping liability because he did not truly buy the goods. Dr Bagheri sought however to apply this principle to an entirely different situation. I find in accordance with Mr Sabi's evidence that there is no basis for this contention as a matter of Iranian law. The principle is not known to the law of Iran. Where there is no agency at all any protection which would otherwise be available to an agent simply cannot arise. Moreover, as Mr Sabi's evidence made clear, an agent has no relevant protection either for acts done by him which are unlawful or tortious.

25. The starting point for liability in tort necessarily is that a person is liable in respect of his own tortious activity. Despite all that Dr Bagheri said in his reports and evidence, there is simply no basis for asserting an exemption in respect of acts purportedly done as an agent or on the instructions of another. This is unaffected by the principle of non-liability (no liability unless imposed by the Code) as liability is imposed by Article 308 or 310. The question is then whether there is any relevant exemption for an agent acting on instructions. No such exemption appears in the Code or in the writings of any eminent Iranian jurist.

26. It is accepted by both experts and clear from the textbook writers that an agent acting within his authority is not liable in respect of the contracts and engagements which he undertakes on behalf of his principal because there is no privity between him and the third party since he creates a contract between his principal and the third party. There is however no question of a mandate covering a delictual or tortious activity. There can be no valid agency for the commission of a tort. If instructions are given to effect

an act which amounts to usurpation, this provides no excuse to the person carrying out the instructions since those instructions are unlawful in themselves and do not fall within any mandate which he could possess.

27. The point is exemplified by the provisions of Article 673. Article 672 provides that an agent may not delegate to a sub-agent unless he is expressly or implicitly authorised to do so. Article 673 then provides that if an agent who is not empowered to delegate his agency does delegate to a sub-agent, both he and the putative sub-agent are liable to the principal for losses which are caused by them. Although there was dispute as to the translation of this provision, the effect is clear inasmuch as no loss can be caused by the sub-delegation itself but only by that which happens under the sub-delegation and the acts of the putative sub-agent pursuant to that delegation. The effect, as Mr Sabi stated, by reference to Professor Katouzian, is that both the agent and putative sub-agent are liable for the loss caused, the first on the basis of his unauthorised delegation of powers and the second as a usurper. The unauthorised sub-agent is automatically a usurper in his dealings with the property, because the agent has no power to delegate any duties to him at all. There is no valid sub-agency.

28. By parity of reasoning, the position is identical for an invalid agency where someone purports to appoint an agent to deal with property but cannot do so because the property is not his. The principle is the same whether there is no power to appoint a sub-agent because it is not permitted or because the appointment of an agent is to do something that the principal himself cannot do. The same point arises in a commentary by Professor Langroudi where he says that authority for possession resulting from a mistake by the person giving authority is not treated as authority for possession so that usurpation is established.

29. The effect of this is that the existence of instructions to a person to carry out what is objectively an act of usurpation is irrelevant to the latter's liability for usurpation. It matters not that the individual concerned considers that the person giving instructions is entitled to do so. It matters not that he considers himself to be acting as an agent for that person. No agency can or does arise and there can be no protection in respect of a tortious act of this kind in any event. The liability of the person receiving the instructions remains with the individual as the perpetrator of the tort, as it would have done in the absence of any such instructions.

Laying Hands, Possession or holding as an Agent

30. The remaining issue maintained by Dr Bagheri in relation to any suggestion of agency was the question of "laying hands" or "possession". It was maintained by Dr Bagheri that where instructions were given and followed, possession or "laying hands" within the meaning of Article 308 was exercised by the person giving instructions and not by the person instructed and the goods were held by the former for the purposes of Article 310. Ultimately, in cross examination, the logic of Dr Bagheri's position virtually compelled him to say that, even if the "agent" had total discretion in what he did, or on receiving instructions knew that the act was one of usurpation, he could not be liable in usurpation, since only the "principal" held the property through his agent and the agent never held the property at all for the purposes of Articles 308 and 310.

On this basis an agent could escape liability under the first sentence of Article 308 with full knowledge of his wrongdoing. The extreme nature of this contention reveals its weakness.

31. The commentaries contain discussion of the liability of the person giving instructions and not the person instructed. That is the area of debate because there is no suggestion anywhere that the person instructed is not liable for the usurping acts he commits, notwithstanding Dr Bagheri's expressed view that he would not be liable. I find that none of the material relied on to support the argument advanced does so, neither the extracts from Professor Katouzian, nor Mohaghagh Heli nor the Ghanam rule which is not part of Iranian law, nor the judgment of the Supreme Court relating to tenancy.

32. The argument cannot succeed. First, if there is no valid agency, the "agent" cannot hold possession for his principal. Secondly, the question is always one of fact as to who has dominion and control and who can exercise an effective power of disposition so as to decide upon the delivery of the goods in question. This factual question depends on all the relevant circumstances. It does not follow from the fact that one person can or does give instructions to another, that the latter has no effective power of disposition. Indeed the person who has immediate or more immediate power over the goods is the primary person likely to have an effective power of disposition. The person in physical possession of the goods can decide on their disposal and whether or not to accept instructions from someone else, whether or not it is lawful for him to do so, unless he is subject to duress. Additionally the person giving instructions may have a power of disposition, if it is likely that the person in physical possession of the goods will comply with any instructions given. Indeed, it may very well be that both will have an effective power if the person instructed is likely to obey the instructions given by the former. It is possible to conceive of situations where several people have an effective power of disposition since each one in a chain where instructions are given can decide whether or not to accept the instructions given, whilst being likely to accept those instructions in such a way as to give the instructor such a power also.

33. Both Professor Emami and Professor Katouzian state that independent control is not required for usurpation as Dr Bagheri accepted, and Dr Bagheri's suggestion that "agency" was different foundered on Article 673 as explained by Professor Katouzian and Mr Sabi.

34. The concept of several people exercising rights of possession without the authority of the owner, whether contemporaneously or sequentially creates no difficulties as Dr Bagheri was ultimately disposed to accept. It is a question of fact as to whether or not any given individual can and does exercise dominion and control of someone else's property without authority and in such a way as to be inconsistent with the true owner's rights. Joint and several liability for usurpation in the sequential situation is provided for in Articles 316 and 323 and is envisaged in the contemporaneous situation by Article 673.

35. Dr Bagheri considered the position of agents to be analogous to that of "Trustees" under the Civil Code. In this connection the word "Trustee" means a depositee of property who does not charge the depositor – a form of gratuitous bailment (see

Article 607). The provisions of Articles 624 and 625 require the "Trustee" to return the deposited property to the person from whom he has received it unless it is established that the deposited property belongs to someone other than the depositor, in which case he must return it to the true owner. There is provision for handing over possession to the Court if the depositee has no access to the person entitled to receive the property. I gained little assistance from these provisions in determining the position of an agent although Article 631 suggests that an agent could find himself in a position akin to that of a "Trustee", whereupon his liability to the depositor or owner would be determined by the same principles as for a "Trustee". Where agents receive payment however the principles relating to "Trustees" cannot apply and no general principle can be extracted from the "Trustee" provisions.

36. Neither is there any help to be gained from references to the torts of direct or indirect damage in Articles 328 – 335 as modified or expanded by the Civil Liability Act, which has, in the view of all commentators, no application whatsoever to the tort of usurpation. Article 332 does not deal with the issue of the responsibility of principal and agent but deals with the question of division of responsibility between two independent tortfeasors, one of whom has indirectly caused damage to property and the other of whom has directly caused the damage. This, like the provisions for depositees (Trustees) has no bearing on the liability of an "agent" in usurpation where the second sentence of Article 308 requires that, providing the necessary degree of control is exercised, the "principal" and the "agent" can be liable.

37. Thus the notion that the "principal" possesses the property through his "agent" and that the "agent" cannot possess the property himself is unsustainable. The "agent" cannot possess property on behalf of his principal if the principal himself cannot legally possess and no agency arises. Equally, the idea that fault is required on the part of the "agent" for him to be liable to the true owner of the property cannot stand against the express provisions of Article 308 whilst the rules which apply to the liability of an agent to his principal are irrelevant in this context.

Proceeds of Sale

38. Moreover the terms of Article 301, 303 and 320 have the effect that any proceeds of sale received by a person who is not the owner or who carries out instructions to sell on behalf of someone who is not the owner give rise to liability on the part of the recipient to the true owner, it being common ground that receipt involved the same concept as effective control. Whilst in examination in chief Dr Bagheri suggested that Articles 301 and 303 did not apply to money, under cross-examination, he accepted that they did apply where the individual concerned had previously had control of the property sold.

The position of a Commercial Deputy

39. Dr Bagheri maintained that the provisions of Article 396 of the Commercial Code, which was adopted subsequent to the Civil Code presented a defence to someone in the position of Mr Ghadimi. Article 395 provides that a Commercial Deputy can be

appointed by the head of a business firm to transact all business on behalf of the firm or one of its branches – in other words, to run its business. Article 396 then goes on to provide that "any limitation of the powers of the Commercial Deputy is null and void as regards third parties who were unaware of it". Dr Bagheri maintained that Mr Moussavi was the Commercial Deputy of BTLB and BTL (IOM) so that Mr Ghadimi, who was unaware of any limitations on Mr Moussavi's authority, was entitled to rely upon Mr Moussavi's instructions as binding those entities.

40. Mr Sabi had a number of answers to this. He said that the provisions relating to Commercial Deputies are inapplicable to incorporated bodies which are covered by a different part of the Commercial Code. In Part 3 and Article 20 of the Commercial Code, seven different types of trading entities are spelt out including joint stock companies and limited liability companies. The provisions of the Commercial Code, as amended, regulate the manner in which these entities conduct their business. The provisions of Part 9 of the Commercial Code which deals with Commercial Deputies are referable only to trading houses which are not incorporated bodies.

41. In 1967 there was an Amendment Act to the Commercial Code in relation to joint stock companies in which the duties and responsibilities of the directors and managing director were set out in detail. Under Iranian law all the seven forms of trading companies have to be registered and details of the directors and managing director, as well as those who have authority to bind the corporation have also to be registered with the Registrar of Companies and advertised in the official gazette and newspapers in the locality in which the company operates. If there are any limits on the authority of these directors or authorised signatories, those limitations have also to be registered and advertised. In Mr Sabi's view, the detailed rules of the Commercial Code and the Amendment Act, when combined with the Registration Act of 1931, exclude the possibility of applying the general rules for Commercial Deputies to cases where an agent claims to have authority on behalf of an incorporated body. He knew of no case where Article 396 had been invoked where the principal was incorporated.

42. Article 395 of the Commercial Code reads as follows:-

> "A Commercial Deputy is a person appointed by the head of a business firm as his deputy to transact all business on behalf of the firm or one of its branches and whose signature binds the firm. The appointment may be made in writing or implied."

It is apparent from the terms of this Article that the Commercial Deputy is someone who is appointed to run all the business of the entity. Other translations refer to him as a Commercial Substitute which gives something of the flavour of the Article. If he was to be appointed by an independent body, since registration is not required for Commercial Deputies, the terms of Articles 124, 125, 128 and 129 of the Commercial Code could thus be circumvented and the regulations applicable to such companies rendered futile.

43. When Part 9 of the Commercial Code is read in conjunction with the previous provisions of the Amended Code, and regard is had to both the purpose of those

provisions and the wording of Articles 395 – 401, it can be seen that the appointment of a Commercial Deputy or "substitute" by the "head of a business firm as his substitute to transact all business on behalf of the firm or one of its branches" does not fit happily with an appointment on behalf of an incorporated company. Who is the "head" of the company to make the appointment which by Article 400 survives his death and how does an individual run all the business of the company, when the legislation governing companies requires some matters to be dealt with by the Board of Directors?

44. Furthermore, in Mr Sabi's view, these provisions could not apply to a foreign limited company, which ought, if it carried out business in Iran, to register its branch in Iran. Article 396 could only apply in circumstances where the trading house in question was an Iranian trader or carried out activities in Iran. Thus, Mr Ghadimi, who was managing director of STC, a joint stock company in Iran, could not rely upon Article 396, whether Mr Moussavi purported to act for BTLB or BTL (IOM).

45. To these points Dr Bagheri had no sufficient answer and I therefore accept Mr Sabi's evidence on this point. The provisions of Article 401 therefore apply inasmuch as the ordinary provisions of agency govern the position for those who act on behalf of an incorporated entity, foreign or Iranian.

The position of a Managing Director

46. It was Dr Bagheri's contention that a managing director could not be personally liable in tort when acting in his capacity as managing director of a company, such as STC. Mr Sabi maintained that an individual who committed a tort was, in accordance with the principles for torts set out in Chapter 2 of the Civil Code, liable for such torts, regardless of the fact that he was managing director of a company, just as he would be if acting on the instructions of a "principal". No Article in the Code provides for, and no evidence was put before me of, any relevant exemption for acts done as a managing director of a corporate body. Mr Sabi's evidence was that the Iranian Courts were unimpressed by any suggestion that personal liability was to be rejected in favour of liability of a corporate body and that directors were ultimately held liable by the Iranian Courts for the wrongful acts of their companies.

47. In addition Mr Sabi relied on Article 142 of the Commercial Code which reads as follows:

> "The directors and the managing director of a company are responsible either individually or jointly, as the case may be, vis-à-vis the company and third parties in respect of any infringement of legal regulations or the provisions stipulated in the Articles of Association or the Minutes of General Meetings. The Court shall determine the scope of responsibility of each individual for indemnity purposes."

48. Mr Sabi said that the "infringement of legal regulations" meant any unlawful act whereas Dr Bagheri maintained that the legal regulations referred to were those which operated as between the directors and the company and did not refer to the general body of law. He accepted however that since the latter part of the Article referred to provisions in the Articles of Association or the Minute of General Meetings, "legal regulations" also included matters of employment and other law in so far as they affected the position as between the directors and the company itself.

49. Both experts relied on a text by Dr Eskini who, in commenting on this Article, referred to regulations regarding the manner in which the Board of Directors should be formed and should operate, to regulations regarding the way in which General Meetings were called and to acts which the law considered a crime, such as fraud, breach of fiduciary duty, forgery and use of forged documents and tax fraud. In commenting on an aphorism which summarised matters, namely "bad management of the company causes the directors or the managing director to be liable", she asked the rhetorical question as to whether bad management of the company was limited to specific cases to which she had made reference. She then illustrated the point by asking whether a managing director who employed incompetent staff which resulted in loss to third parties would be liable as a result of such poor recruitment. She answered the question in the affirmative on the basis that this would be covered by the general laws of civil liability and not Article 142 of the Commerical Code.

50. I found the extract from Dr Kiaie's work of no help, because that discussion was all in the context of the liability of directors to their company. Dr Bagheri's explanation of Dr Eskini's work, by reference to criminal liability for acts done vis-à-vis the company which resulted in loss to third parties if the company became insolvent conflated Article 142 with Article 143 which expressly deals with insolvency and cannot be accepted.

51. The comments of Dr Eskini support Mr Sabi's basic principle of personal liability for unlawful acts, though not his interpretation of Article 142. She states that a director will be responsible for criminal acts and tortious acts, whether or not committed in the capacity of a director or managing director. The extract from Dr Eskini's work shows that she accepts, as does Mr Sabi, that ordinary tortious principles apply to a director of a company so that, if the necessary conditions for the tortious act are met, the director is liable, even if the company is also liable.

Conclusions on Iranian Law

52. I thus find that, if Mr Ghadimi had the necessary degree of control over the claimant's property and "laid hands" on it without authority, he would be liable in constructive usurpation under the second sentence of Article 308 whilst if he denied the title of the true owners by words or actions, he would equally be liable as a constructive usurper under Article 310 of the Civil Code. No exemption applies to him by virtue of any suggestion that he carried out such acts on the instructions of a supposed principal who did not have authority to deal with the oil. Equally no exemption applies to him as a result of the terms of Article 396 of the Commercial Code, since the provisions relating to Commercial Deputies or substitutes have no application to those acting for

foreign incorporated bodies; nor is there any exemption in respect of tortious acts committed as a director. If the necessary prerequisites are met for liability for usurpation by Mr Ghadimi, he does not therefore escape liability by virtue of any argument that he acted as an agent for someone not entitled to give instructions in relation to the oil, nor by virtue of his acting in the capacity of managing director for STC.

53. Since I have found that the question of knowledge of the true ownership of the oil and the intention to interfere with the title of the true owner is unnecessary for the purposes of Articles 308 and 310, the only remaining questions relate to the acts of Mr Ghadimi and whether, on the facts, he did lay hands on the claimant's oil without their authorisation for the purposes of Article 308, whether he denied their title when holding the oil within the meaning of Article 310 and whether he was in receipt of the oil and the proceeds of sale for the purposes of Articles 301, 303 and 320 of the Civil Code.

Application of the law of Iran to the relevant facts

54. In my Judgment of 7th May 2003, I made a number of detailed findings of fact to which my findings on the law of Iran now fall to be applied. There is one area of fact to which limited attention was paid in that Judgment but which now assumes critical importance, namely the degree of control which Mr Ghadimi exercised over BTLB's oil.

55. In this respect Mr Ghadimi's two roles are to be noted.

i) First, in his own pleadings he accepts that he was responsible for the supervision of the whole project for transporting BTLB's oil from the ships in the northern Iranian ports to ships in the ports of south Iran. Vitol brought into the joint venture its expertise in the buying and selling of oil whilst Mr Moussavi was to organise the entry of the oil into Iran, the transit of the oil in Iran and its shipment out of Iran, most or all of which functions he effectively delegated to Mr Ghadimi. Mr Moussavi himself had no power of sale and no power to delegate any power of sale to Mr Ghadimi. As part of his supervisory function, Mr Ghadimi liaised with his brother-in-law who ran IMICO which effected customs clearance in the north. Mr Ghadimi on his own evidence was responsible for all the logistics in getting the oil to the south of Iran and on to ships in the southern ports although in some passages in his evidence to the Court, he maintained that IMICO effected customs clearance in the south also.

ii) Secondly, it is clear that Mr Ghadimi also had another role as managing director of STC. He was not only managing director but the largest single shareholder with a 40% holding, whilst the other two 30% shareholders left the running of the company and all its management to him. Mr Ghadimi therefore controlled STC and STC did nothing which Mr Ghadimi did not instruct it to do.

56. In my previous Judgment I summarised the facts relating to the three sales to Fairdeal and the seven sales to IMS at paragraphs 13 – 29, 43 and 45. Now that attention is focused on the issue of control, it is necessary for me to examine that aspect more closely. It is, on the facts, clear that Mr Ghadimi had dominion and control over all the oil in STC's tanks both for the purposes of sales to Fairdeal and sales to IMS. Because of his supervisory powers, as appears from his defence at paragraphs 14(i), 16(iii), 26 and 29, he dealt with the receipt, interim storage and the discharge of oil at STC for loading on to ships. As the managing director of STC, he gave all necessary directions in connection with the storage and delivery of oil for the Fairdeal and IMS sales. He himself asserts at paragraphs 53 to 56 of his third witness statement that he was in control of the delivery of the oil from STC's tanks and could prevent such delivery in order to ensure that the fees which he said were due to him personally (the $9 per MT) were paid ("my consent was needed to release oil from STC's tanks in circumstances where I was owed money"). Mr Ghadimi cannot shield behind the corporate personality of STC, since on his own evidence, he personally decided whether or not oil was to be delivered out of STC's tanks and in practice STC did what he decided. What I described as "inherently highly likely" in paragraph 43(iii) of my earlier Judgment is, when the evidence is examined on this particular issue, clearly the case and the pleading point to which I then referred has been met by an amendment.

57. Moreover, contemporaneous documents in the shape of Mr Moussavi's diaries evidence the fact of Mr Ghadimi's control in relation to vessels leaving with the oil on board and paragraph 106 of the Points of Defence admits an involvement in the customs clearance operation in the south of Iran in the form of "logistical support". A contemporaneous letter from Mr Ghadimi indicates that STC in fact did everything to get the customs clearance in the south of Iran, although, as I have already mentioned, evidence in his Affidavits and witness statements is to a different effect. What "logistical support" in effecting customs clearance means, in his Points of Defence, is hard to define but the contemporaneous letter shows an extensive involvement, if not total responsibility for the customs operation at the south Iranian ports.

58. When these matters are seen in the light of my findings at paragraphs 13, 27 and 43, it is clear that, with express knowledge that Mr Moussavi was selling the oil to Fairdeal and that he was delivering oil for sales to Fairdeal, Mr Ghadimi procured the discharge of the oil from STC's tanks on to tankers for shipment for that very purpose. Whether or not such delivery was technically made to IMICO as shippers under the Bills of Lading is irrelevant. It was delivery for the purpose of fulfilling Mr Moussavi's sales to Fairdeal and was unauthorised dealing with BTLB's oil and a denial of its title. Furthermore, IMICO did not act for itself or deposit the oil in its own right, but always did so on behalf of a BTL company, so that it was never per se entitled to redelivery. Such activity, on the evidence of Iranian law which I have accepted, amounts to acts inconsistent with the title of the true owners BTLB by someone who had sufficient physical control over the oil for the purposes of rendering him liable in usurpation. I find therefore that, on the basis of the evidence before me, Mr Ghadimi has no realistic prospect of succeeding in a defence that he is not liable in usurpation in respect of the Fairdeal transactions.

59. With regard to the sales to IMS, the position is even more clear. As set out in paragraphs 28 and 45 of my previous Judgment, Mr Ghadimi negotiated the sales of cargoes to IMS/Glencore on Mr Moussavi's instructions. He considered that he was acting for BTL(IOM) and, not only did he negotiate these sales and produce invoices but, once again, the oil was discharged from STC's tanks on his instructions for shipment to the buyers. He signed the Bills of Lading. These acts are unequivocally acts of usurpation within the meaning of the Iranian Civil Code and Mr Ghadimi has no realistic prospect of showing otherwise.

60. It matters not whether the liability arises under Article 308 or Article 310. Once it is established that Mr Ghadimi had the necessary freedom of disposition and control over the oil, not only did he lay hands upon BTLB's oil without authority but he also denied BTLB's title to it in such a way as to give rise to liability under both Articles.

61. Further, on 3rd October 1996, Mr Ghadimi informed the claimants in writing that there was no BTLB oil in STC's tanks which was untrue. In a Defence served in the Iranian proceedings on 9th November 1999, in paragraphs 3, 5 and 8 to 10, he maintained that ownership of BTLB's cargoes was vested in BTL (IOM) and that BTLB had no rights to the oil or to compensation because it had transferred its rights. These acts also amount to a denial of BTLB's title which is effective usurpation under both Articles 308 and 310.

62. If, there was any possibility of a protection being afforded to Mr Ghadimi by virtue of his dealings with Mr Moussavi under Article 396 of the Commercial Code, such protection cannot arise on the facts. In my previous Judgment I made reference to the shareholder agreement between Mr Moussavi and Vitol. This agreement set out the objectives of the joint venture to be effected through BTLB in wide terms. Articles 1.1, 2.1 and 2.2 cover the purchase and sale of crude oil and refined products and other commodities, the processing of such oil, the chartering of ships, the operation of refineries and terminals and penetration of the markets in Iran and Central Asia. Whether or not BTLB ever carried out all these activities, at no time did BTLB appoint Mr Moussavi to run all of its business so as to constitute him, as a matter of fact, a person who could be called a commercial deputy or commercial substitute. The consultancy agreement made between BTLB and Silverstream Limited provided for the latter to make available the exclusive full-time services of Mr Moussavi and, by clause 5.3, restricted Mr Moussavi's authority, preventing him from holding himself out as an employee, officer or agent of BTLB and from concluding contracts on behalf of BTLB. At no time was he authorised to enter into contracts of sale and purchase and at no time did he do so, save that in limited circumstances he effected swap transactions with a view to the recovery of prior lost oil with the express authority of Vitol/BTLB. If an inquiry is made as to whether and when Mr Moussavi was appointed by the head of BTLB as his deputy to transact all business on behalf of BTLB, no such appointment can be found. Thus even if Dr Bagheri is right about Article 395 and 396, it cannot avail Mr Ghadimi in the present case, particularly as there is no question of ostensible authority in Iranian law and no holding out by BTLB of Mr Moussavi in any event.

63. Because I find that Mr Ghadimi is liable under Articles 308 and 310, he must also be liable for any profits made under the terms of Article 320.

64. I do not however determine any question of liability on the basis of Articles 301 and 303 which would give rise to liability in respect of the proceeds of sale, even if there had been no prior usurpation. It was argued on Mr Ghadimi's behalf that, if reliance was placed upon these provisions as giving rise to free-standing liability, this amounted to a claim in restitution and not a tortious claim. In such circumstances, the governing law would not be that of Iran. The governing law would be the place of receipt of the proceeds by Mr Ghadimi, namely Canada and England. It was moreover pointed out that the claim had previously been made in restitution on the basis of breach of fiduciary duty and tracing remedies in accordance with English law. It seems to me that Mr Ghadimi is likely to be right in this respect, the argument being supported by reference to Dicey & Morris, Rule 200(2)(c). If there has been a tort, then the proceeds will be recoverable under Article 320 but if there has not been a tort, then it would not appear that the law of Iran has any relevance in the context of a pure restitutionary claim.

The 6th and 7th IMS Shipments

65. Mr Ghadimi sought to argue that the oil being sold and being transported by these shipments was not that of BTLB. This point has however already been the subject of findings by me in paragraphs 7 and 14(2) of my previous Judgment. Counsel for Mr Ghadimi wished to re-open the point but accepted that, if all that STC did was to be attributed to Mr Ghadimi because he had to give instructions for STC to release oil, the point led nowhere. As I have found this to be the case, there is no benefit to Mr Ghadimi in pursuing this line of argument. The basis of my earlier decision is essentially that set out in paragraph 51 of the claimant's final submissions in writing, in accordance with Mr Wagner's evidence and the submissions made to me last year.

Conclusion

66. In these circumstances, the claimants are entitled to Summary Judgment against Mr Ghadimi in respect of usurpation of all 10 cargoes and, subject to any peculiarities of which I am not aware and upon which I can be addressed, must also recover their costs. I will hear submissions as to the quantum to be claimed and the Order to be made, including provision for amendment of the pleadings for which I gave permission at the outset of the hearing. If the parties can agree on the quantum and interest, I should be grateful to receive a form of Order which is agreed between the parties on the basis of the conclusions which I have reached.