Government of the Islamic Republic of Iran v Barakat Galleries Ltd
Queen's Bench Division
Urteil vom 29. März 2007 – [2007] EWHC 705 (QB)

Queen's Bench Division /Gray J / 29 March 2007
Conflict of laws - Movables - Title to goods - Antiquities - Antiquities from site in Iran - Antiquities in possession of defendant - Antiquities in England - Iran seeking to recover antiquities - Whether Iran able to show title as a matter of Iranian law - Whether Iran having right to possession.

The claimant foreign state brought an action to recover antiquities which it considered formed part of its national heritage. The defendant gallery admitted being in possession of the antiquities, which were present in England, but disputed the entitlement of the claimant to their return. It contended that it had acquired good title to the antiquities under the laws of certain countries where it acquired them.

The trial of a preliminary issue was ordered as to whether under the provisions of Iranian law, the claimant could show that it had obtained title to the antiquities as a matter of Iranian law and, if so, by what means.

The claimant submitted, that if its claim to ownership of the antiquities failed, that its claim for delivery up of them should succeed since, at all material times, it had an immediate right to possession of them. Accordingly, the gallery by retaining possession of the antiquities for the purpose of their sale, notwithstanding the claimant's request for their return, had wrongfully interfered with the claimant's goods or converted them. The gallery contended that for the claim to succeed the right to possession of the claimant had to be a proprietary right and the claimant had no such right in the antiquities.

The court ruled:

It was settled law that the determination of the applicable foreign law was a question of fact for the court to decide and that the ultimate question which had to be decided was whether under Iranian law the claimant obtained title to the antiquities. The court also had to ask itself whether it was satisfied on a balance of probabilities that an Iranian court, confronted with the facts of the instant case and the submissions of law on each side, would decide the issue of ownership in favour of Iran.

Having considered the historical background and detailed provisions of the various enactments, Iran had not discharged the burden of establishing its ownership of the antiquities under the laws of Iran. The claimant was also unable to establish the proprietary nature of its right to possession of the antiquities which it was necessary for a claimant suing in conversion or for wrongful interference with his goods to do.

Jarvis v Williams [1955] 1 All ER 108, *International Factors Ltd v Rodriguez* [1979] 1 All ER 17 and *City of Gotha v Sotheby's* (unreported, 9 September 1998) applied

Hodge Malek QC and Tony Oakley (instructed by Withers LLP) for the claimant.

Philip Shepherd QC and David Herbert (instructed by Lane & Partners) for the defendant.

Dilys Tausz Barrister.
Judgment

[2007] EWHC 705 (QB)

QUEEN'S BENCH DIVISION

29 MARCH 2007

MR JUSTICE GRAY

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.

MR JUSTICE GRAY:

The Claim

1. This is an action brought by a foreign sovereign state to recover articles which it considers form part of its national heritage. The claimant, The Government of the Islamic Republic of Iran ("Iran"), seeks an order for the delivery up of a number of carved jars, bowls and cups made out of chlorite ("the antiquities"). It is Iran's case that the antiquities derive from the Jiroft region of Iran.

Jiroft is a city in the Halil river valley in South East Iran. It is thought to have been the home of the one of the earliest literate societies in the world, dating back to the third millennium BC. Jiroft was discovered in the last few years, so it is only recently that excavation began there. As is accepted, no consent was given by or on behalf of Iran to the removal of the antiquities from Iran.

2. The defendant, The Barakat Gallery Ltd ("Barakat") has a gallery in London, from which it trades in ancient art and antiquities from around the world. Barakat admits being in possession of the antiquities but disputes the entitlement of Iran to their return. Barakat does not accept that the antiquities came from the Jiroft region. In any event Barakat contends that it has acquired good title to the antiquities under the laws of certain countries where it acquired the antiquities, namely France, Germany and Switzerland. In the alternative Barakat maintains that, even if (contrary to Barakat's primary case) Iran has title to the antiquities by virtue of the laws of Iran, the present claim cannot succeed because Iran is seeking by this action to enforce, directly or indirectly, Iranian penal or public laws.

The Preliminary Issues

3. It is common ground that, if Iran does not have either title to or a right to immediate possession of the antiquities under the laws of Iran, the action cannot succeed. It is also common ground between the parties that, even if Iran has a valid title to the antiquities by virtue of Iranian law, the action will still fail if it be the case that the Iranian law or laws by virtue of which Iran acquired title is properly to be characterised as "penal". Barakat's case is that, even if the relevant Iranian laws do not qualify as penal laws, they are nevertheless "public" laws and as such also unenforceable in the courts of this country. Iran's answer to these contentions is that the laws by virtue of which it acquired title to the antiquities are neither penal nor public laws. Iran accepts that penal laws are unenforceable in the courts of this country and that there is Court of Appeal authority (which is binding on me) that public laws of a foreign sovereign state are not enforceable either. Iran reserves the right to argue hereafter, if necessary, that public laws of a foreign state are or should be enforceable here.

4. In these circumstances the parties obtained an order on 13th' December 2006 for the trial of the following preliminary issues:

> "(1) Whether under the provisions of Iranian law pleaded in the Amended Particulars of Claim, [Iran] can show that it has obtained title to [the antiquities] as a matter of Iranian law and, if so, by what means;
>
> (2) If [Iran] can show that it has obtained such title under Iranian law whether this court should recognise and/or enforce that title"

5. The Order further provides that, for the purpose of the trial of these preliminary issues, it is to be assumed that "Iranian law is the applicable law for the acquisition/transfer of title to the antiquities and that the antiquities do originate from The Islamic Republic of Iran in the circumstances alleged in the Amended Particulars of Claim". It is further to be assumed to be true that the antiquities were excavated from the Jiroft area. It is agreed that such excavation was unlicensed and therefore unlawful.

The parties' cases in summary

6. The contention advanced by Iran is in summary that under Iranian law it is the lawful owner of all antiquities excavated from the Jiroft area, including those which are the subject of this action. Iran relies in paragraph 6 of the Amended Particulars of Claim on the following provisions of Iranian law:

> i. a Legal Bill regarding clandestine diggings and illegal excavations intended to obtain antiquities and historical relics which are according to international regulations made or produced one hundred or more years ago ("the 1979 Legal Bill");
>
> ii. 1930 National Heritage Protection Act;
>
> iii. Executive Regulations of the "National Heritage Protection" dated 3 November 3, 1930;
>
> iii. Article 26, Civil Code.

7. In support of its contention that the removal of such antiquities from the Jiroft area without consent is a crime under Iranian law, Iran relies in paragraph 7 of the Amended Particulars of Claim

upon the following additional provisions of Iranian law:

i. Islamic Punishment Law, chapter 9;

ii. Decree issued by the Revolution Council in 1980 (Decree Concerning Export Prohibition of Antiquities, Works of Art and Gold and Silver Wares, decree no. 64434, 12 January 1980);

iii. Constitution of Iran, Article 83.

8. The antiquities are now in the possession of Barakat in England. Iran's case is that under Iranian law, in the absence of consent from Iran permitting the antiquities to be present in the United Kingdom, they are held here by Barakat contrary to Iranian law. Accordingly Iran contends that the antiquities are lawfully their property and should be delivered up accordingly.

9. Iran advances an alternative contention that, even if under Iranian law it is not the owner of the antiquities, at all material times it had under Iranian law an immediate right to possession of the antiquities. By refusing the request made to it for the return of the antiquities, Iran contends that Barakat has wrongfully interfered with or converted the antiquities.

10. The response of Barakat to these contentions is, firstly, to deny that Iranian law has conferred any possessory title on Iran so as to be able to dispossess Barakat of the antiquities. Barakat's case is that it purchased the antiquities at auction or from other dealers in England, France, Switzerland and Germany. Barakat maintains that, even if, according to Iranian law, Iran did acquire a right to possession of the antiquities at a time when they were within its territory, the fact that (as is conceded) Iran did not obtain actual possession of them prevents Iran from obtaining an order from the English courts which would give it possession of the antiquities for the first time. Barakat further denies Iran's claim that it is or was at any material time entitled to immediate possession of them.

11. Barakat maintains that, even if, contrary to its primary contention, Iran did become the owners of the antiquities under Iranian law, the claim must still fail on grounds of non-justiciablity. Barakat submits that by this action Iran is seeking, directly or indirectly, to enforce in the domestic courts of this country an exercise of the sovereign power or authority of a foreign state. According to the argument on behalf of Barakat, the present claim falls squarely within the rule summarised in Article 3(1) of *Dicey Morris & Collins*:

"Rule 3 - English Courts have no jurisdiction to entertain an action:

(1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or

(2) founded upon an act of state".

The First issue: approach to Iranian law.

12. Resolution of the first preliminary issue depends entirely on Iranian laws and their interpretation. It is in some respects invidious for an English Judge to have to determine delicate questions of the construction of foreign law. That is particularly so in cases such as the present where there is no relevant decision of an Iranian court and where in any event there is no judicial precedent.

13. In the present case I have been 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. He is the author of a number of books and articles on law both in Persian and English. Somewhat unusually, he has translated for the purposes of the present proceedings a number of the provisions of Iranian law which are said to be material. Mr Sabi was a member of the Iranian Bar. He practised law in Iran between 1974 and 1979, when he moved to London. Since that time he has practised as a consultant advising amongst other clients governments and major multi-corporations. Although Mr Philip Shepherd QC for Barakat was critical of Professor Taleghany on the grounds that his approach to the present case lacked objectivity, I am satisfied that both experts did their best to assist me.

14. Determination of the applicable foreign law is a question of fact for me to decide. The approach which I should take is helpfully summarised in an unreported decision of Moses J (as he then was), *City of Gotha v Sotheby's and another* (QBD, 9 September 1998):

"In resolving the disputes as to foreign law, I must be guided by the following principles:

(1) when faced with conflicting evidence about foreign law, I must resolve differences in the same way as in the case of other conflicting evidence as to facts (*Bumper Development Corporation Ltd v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362 at 1368G);

(2) where the evidence conflicts I am bound 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 Corporation* at 1369H ;

(3) I should not consider passages contained within foreign sources of law produced by the experts to which those experts have not themselves referred (*Bumper Corporation* at 1369D to G);

(4) it is not permissible to reject uncontradicted expert evidence unless it is patently absurd (*Bumper Corporation* at 1371B);

(5) In considering foreign sources of law I should adopt those foreign rules of construction of which the experts have given evidence (this principle underlies the principle that an English court must not conduct its own researches into foreign law);

(6) whilst an expert witness may give evidence as to his interpretation as to the meaning of a statute, it is not for the expert to interpret the meaning of a foreign document. His evidence will be limited to giving evidence as to the proper approach, according to the relevant foreign rules of construction to that document".

I adopt that approach in this case.

15. The ultimate question which I have to decide is whether under Iranian law Iran obtained title to the antiquities. It is accepted by Mr Hodge Malek QC for Iran that he cannot point to any specific provision which in express terms vests title to the antiquities in Iran. As I have already indicated (see paragraphs 5 and 6 above), Iran's case is that it is apparent from a consideration of a series of statutory provisions, including provisions contained in the Civil and as well as the Criminal Codes, that Iranian law has treated the state as the owner of articles, such as the antiquities, which form part of Iran's national heritage.

16. The evidence of Professor Taleghany is that, if and to the extent that there is an inconsistency between the provisions of the specific laws and the more general provisions of the Civil Code, the provisions of the specific laws displace the general provisions of the Civil Code. The specific laws are considered lex specialis to the Civil Code. I did not understand Mr Sabi to dispute that evidence. In those circumstances the course which I propose to take is to set out in chronological order what appear to me to be the material provisions of Iranian law. Having done so, I will address the question whether and, if so, by virtue of which provisions of Iranian law, title to the antiquities is vested in Iran.

The Laws of Iran applicable to the determionation of the ownership of the antiquities.

17. Although Mr Malek placed no reliance on it, 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".

18. 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.

19. 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. Accordingly I will pay no regard to them.

20. 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. equals 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 telegraphs, public museums and libraries, historical monuments and similar properties, and in brief, any movable or immovable properties which may be in the possession of the government of 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 32 - All products and appurtenances of properties whether movable or immovable, produced naturally or as a result of an action, follow the property and belong to the owner of the property.

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 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 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 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.
> ....."

21. 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. 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.

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

> "**Article 1** Observing the Article 3 of this Law, all artefacts, Buildings and places having been established before the end of the 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 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, although 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 recognise the property worthy to be registered in the List of 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 16** - The violators of Article 10, those who perform excavations 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, "zabt"] in the interest of the State .....

Article 17 - Those who intend to adopt dealing in antiquities as an 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 ....."

23. 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 are 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 thought it has been discovered in his/her own property, shall be obliged to immediately inform the Ministry of Education through its nearest representative of the Department for Education or through the Finance Officers if there is no Department for Education. After the objects has (sic) 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".

24. 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 discovered, provided that he/she had been refunded the rental value due to the owner .....
...

Article 36 - Any person who takes measure 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 twenty to Two thousand Tomans, and the discovered objects shall be confiscated by the State .....
...

Article 41 - Provides that certain classes of antiquities are authorised to be traded, that ie can be bought and sold. (It is common ground that this Article is now entirely superseded).
...

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".

25. Next in time comes the first of three criminal provisions relied on by Iran namely the Islamic Penal Code which is said by Professor Taleghany to have been enacted in 1968. Chapter 9 is headed "Destruction of Historical/Cultural Properties". It provides, amongst other things, penalties for illegal excavation to acquire antiquities. It is common ground, however, that this code has been superseded by a Punishment Law to which I shall come in due course.

26. 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 consists of a single Article which, since it forms a vital part of Iran's case, I will quote almost in full:

> "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 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 articles that according to international criteria have been made or produced 100 , 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 provided for in Section 1".

27. 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 and abandoned land, mineral deposits, seas, lakes, rivers and other public waterways, mountains, valleys, forests, marshlands, natural forests, unenclosed pastures, 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".

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

29. The 5th book of Islamic Punishment Law dated May 23 1996 deals at chapter 9 with the destruction of historical/cultural properties. Three of its articles are relied on :

"**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 (sic) 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 Rival Contentions as to the Ownership of the Antiquities

30. As I have already indicated Iran claims to be entitled to the delivery up of the antiquities either on the basis that under Iranian law it is the owner of them or in the alternative upon the footing that it has an immediate right of possession of them. I shall deal with these two contentions in turn, starting with Iran's claim to ownership.

31. Mr Malek on behalf of Iran does not claim to be able to point to any specific provision of Iranian law which in terms vests in Iran ownership of the class of chattels to which the antiquities belong. Rather it is Iran's case that it is the manifest purpose of much of the legislation which I have endeavoured to summarise above to vest in Iran ownership in chattels which have been excavated, including the antiquities. As I have said one of the assumed facts is that the antiquities were unlawfully excavated from sites in Iran on dates unknown between 2000 and 2004.

32. In his closing speech Mr Malek articulated a number of propositions by reference to which he invited me to consider the issue of ownership. The propositions were these:

i) The clear purpose of the legislation is for property in antiquities which have been dug up to vest in the state and no one else. That purpose is clear in particular in the 1979 Legal Bill but also in Articles 569 and 562 of the Penal Code and/or the Punishment Law.

ii) The exclusive right to dig for antiquities is vested in the state and in no one else: see the 1930 Act; the Executive Regulations and the 1979 Legal Bill.

iii) It is not possible to obtain title by unlawful activity nor by unlawful possession: see para-

graph 35 of the expert report of Professor Taleghany and Article 36 of the Civil Code.

iv) When an antiquity is found and dug up, neither the finder nor the owner of the land acquires title to it. Nor does either have any right to keep such an antiquity. The obligation is to deliver the antiquity to the state: see the Legal Bill of 1979.

v) There is no principle of "finders keepers" with regard to antiquities; an excavator who takes possession of one of the antiquities cannot conceivably become its owner.

vi) The finder of an antiquity obtains no title to it. At best he may receive a reward when he delivers the antiquity to the relevant ministry: see again the 1979 Legal Bill at numbered sub-paragraph 2 and contrast sub-paragraph 3.

vii) The owner of the land where the antiquity is found has no right of ownership in it. The only person who receives payment is the founder or discoverer of the antiquity.

viii) Even in a case when the excavation is authorised or licensed, the owner of the land obtains no payment or monetary reward; still less does he acquire title. All the owner is entitled to is the rental value of the land: see articles 25 and 31 of the Executive Regulations.

ix) All trading in antiquities has been unlawful since 1979.

x) The only person to whom a finder of antiquity may transfer it is the state. The obligation on the finder is to deliver the antiquity to the state as soon as possible: 1979 legal bill sub-paragraph 2.

xi) Any finder of an antiquity who keeps it or transfers it to another is acting unlawfully and in breach of the ownership right vested in the state. In other words such a finder would in English terms have converted the antiquity and in Iranian terms would have usurped it: see Article 308 of the civil code.

xii) The transferee from the finder acquires no title in the antiquity. The principle nemo dat quod non habet is recognised by Iranian law: see Article 317 of the Civil Code.

xiii) The seizure provisions which are to be found in both Iran's criminal and civil laws are the mechanism by which the state obtains possession of antiquities and not, as Barakat contends, recognition that until the time of seizure the finder is the owner.

33. The case for Barakat advanced by Mr Shepherd QC is that there is no provision of Iranian law, as it applies to moveable property, which vests in or transfers to Iran title to the antiquities. The provisions of Iranian civil law relied on by Professor Taleghany operate, so it is submitted on behalf of Barakat, solely in personam. Obligations owed in personam cannot operate to transfer or otherwise affect rights which exist in rem. To the limited extent that the legislation relied on by Iran touches upon the ownership of antiquities, it is in the context of criminal seizure or confiscation and as such casts no light on the question of anterior property rights.

Analysis of the Provisions of Iranian Law as to the ownership of the antiquities

34. As has been seen (see paragraph 17 above), the entire kingdom of Iran was formerly the king's domain or estate. Everything belonged to the absolute monarch, who could acquire further territories, cede territories and exchange part of his domain with neighbouring kings.

35. Professor Taleghany further gave evidence that there came a time when the King "ceded" or gave up ownership of his entire domain or estate to the Government at the time of the Consititutional Movement in Iran. However, when asked by Mr Shepherd whether he could point to a single provision of Iranian law that clearly declared that all moveable antiquities belonged to the Islamic Republic of Iran, Professor Taleghany answered that there was no need for such a law because it is obvious to Iranian lawyers that the whole Kingdom, including whatever is on it and whatever is under it, belongs to the Government. In making that assertion Professor Taleghany did not rely on or point to any common or customary law reflecting the passing of title to the state of Iran.

36. Professor Taleghany's evidence being that there is no identifiable provision of Iranian law which transfers or vests moveable property, such as the antiquities, in Iran, there might have been

scope for an argument that ownership in the antiquities vests in Iran by default. But that is not how Mr Malek on behalf of Iran puts his client's case: Iran's case is that the various laws which he has cited clearly provide that neither the finder of an antiquity, nor the owner of the land on which the antiquity is found, acquires ownership rights in any antiquity or any right to transfer property in the antiquity to a third party. It follows, according to the argument of Mr Malek, that it is the Government of Iran which is the owner of any antiquity which may be found or dug up.

37. Mr Shepherd makes a number of cogent observations about this argument. Firstly, he says that what Iran is inviting the court to do is to infer title. I see the force of that but it does not appear to me to be fatal to the claim advanced by Iran. One can envisage a position where the inference, whilst falling short of a clear vesting provision, is so clear as to justify the conclusion that particular chattels are owned by the state. Whether such an inference can be drawn will depend in some measure upon the question whether it appears to have been the intent of the legislation that it should operate in rem. Mr Shepherd's second observation is that the inability on the part of Iran to pinpoint the precise point in time when ownership of movables becomes vested in the State is a strong indicator that no ownership rights have in fact been acquired by Iran.

38. By the time he came to make his closing submissions, it was Mr Malek's contention that the Legal Bill of 1979 was the clinching statutory provision. I will in due course have to consider whether that contention is well-founded. I should first, however, refer to the earlier laws which were pleaded and which have been canvassed in the course of argument. As I do so, I remind myself that the burden of proving that it acquired a valid title to the antiquities under the law of Iran, as the lex situs, rests on Iran: see *Dicey, Morris and Collins* Rules 124-5. I must ask myself whether I am satisfied, on the balance of probabilities that an Iranian Court confronted with the facts of this case and the submissions of law on each side, would decide the issue of ownership in favour of Iran: see *The Islamic Republic of Iran v Berend* [2007] EWHC132 QB.

39. The earliest instrument of Iranian law which is relied on is the Civil Code: see paragraph 20 above. Since this is (as far as I am aware) the first codification of Iranian civil law which took place in Iran, one would expect to find in it some provision to be made for the ownership of moveable property to be vested in the state or at least some reference to state ownership, if indeed that is the legal position. But, as Mr Malek expressly concedes, Article 26 does not of itself confer ownership of the antiquities on Iran, although he submits that it is consistent with Government ownership of all movable property.

40. I reject the contention of Professor Taleghany that the antiquities fall within the category of "historical monuments and similar properties" which, according to Article 26, may not be privately owned. The words "and similar properties" in Article 26 are not apt to extend the scope of that Article so as to embrace movable antiquities. I see no similarity between antiquities on the one hand and fortresses and the other specified properties on the other hand. Notwithstanding the evidence of Professor Taleghany to a contrary effect, I accept the evidence of Mr Sabi that movable antiquities are not "in use by the Government for the service of the public" within the meaning of Article 26. Government telephone wires may be but antiquities are not. Besides Article 26 does not purport to assign or convey title to the state in the properties to which it applies. I note that Article 26 refers to the properties in question being in the "possession" (in Farsi "tasarof") as opposed to ownership.

41. In the case of private property, dealt with in chapter 2, possession "indicating ownership" (which I take to mean possession qua owner) creates a presumption in favour of the possessor as to the ownership of that property (see Article 35). It is clear from the chapter 2 Articles quoted at paragraph 20 above that Iranian law both recognises and respects private ownership which, unless the law otherwise provides, carries with it a right to absolute control on the part of the owner over his property (see Articles 30 and 32 of the Civil Code).

42. Although it is unnecessary for me to come to any firm conclusion on the point, my impression is that the later chapters of the Civil Code, entitled respectively "on Found Articles and Lost Animals" and "on Treasure Trove", lend some support to Barakat's assertion that the Civil Code provides for the finder of an article to become the owner: see Articles 165 and 174-176. It is not possible for me to be categorical on this point because it is unclear on the admitted facts whether the land where the tombs containing the antiquities were found was or

was not privately owned; whether the antiquities had been buried deliberately or otherwise or whether the burial place was or was not unclaimed land.

43. The next statutory provision on which Iran places some reliance is the National Heritage Protection Act of 3 November 1930. Although Mr Malek founds his argument principally on Articles 10, 14 and 17 of the Act, I think the title and earlier Articles cast helpful light on the objectives underlying the Statute. Article 1 makes clear that the aim of the Act is to protect under State control, amongst other things, artefacts which may be considered to be part of the national heritage of Iran. In the context of this Act it seems to me that state control is distinguishable from state ownership. The control is by virtue of later provisions of the Act to be exercised through the operation of the Register.

44. Article 5 of the 1930 Act permits private individuals, who are the owners of property listed in the inventory of national antiquities, to retain ownership. The Act also provides that the government must be informed by the owner of a movable property before he sells it: see Article 9. The same duty is imposed on anyone who finds movable property. There is a reference in Article 9 to a governmental right of pre-emption and in Article 10 to payment by the government of an equitable price to a chance finder. Moreover the words in Article 14 ("...the State may choose and take ownership of up to ten items...") are inconsistent with the Professor's broad oconstruction of the Act, since they confer an option to assume ownership of no more than a proportion of the objects found and all of which would, on Professor Taleghany's approach have been in the ownership of the State in any event.

45. In my judgment these provisions of the 1930 Act not only cannot be construed as conferring title to movable assets on the Government, they are also inconsistent with the government having ownership of movables.

46. It is true that, as Professor Taleghany points out, Articles 13, 16 and 17 of the 1930 Act (see paragraph 22 above) provide (according to Professor Taleghany's translation) for the "seizure" of movable assets or (according to the other translation included in the papers) for their "confiscation". The word in Farsi is "zabt". The dictionary definition of "zabt" includes both "seize" and "confiscate". I do not find it necessary to decide which definition is preferable in the present context. It seems to me that the provision for seizure/confiscation is designed to spell out penal consequences of illegal excavation and attempted export respectively. According to Professor Taleghany's thesis, these provisions are otiose since the State is already the owner. Confiscation/seizure does not happen unless objects are discovered in the course of illegal excavation or an unlawful export of antiquity by a dealer is attempted. In that sense Articles 13, 16 and 17 are inconsistent with a pre-existing state ownership of antiquities. Of course, by virtue of those provisions of the 1930 Act, ownership of antiquities may be transferred to and become vested in the State but only in consequence of the sentence of a criminal court.

47. I accept the evidence of Mr Sabi that the 1930 Act primarily regulates the listing of the national heritage and makes provision for measures to be taken to protect and preserve items of the National Heritage, for example by restricting excavations and export. Mr Shepherd is in my view right to stress that the obligations created by the Act are in personam obligations, including the obligations on the accidental or chance finder to inform the Ministry, which will decide whether the particular item is worthy of being listed in the National Heritage List. I cannot accept that the 1930 Act is concerned with property rights.

48. The 1930 Executive Regulations (see paragraph 23 above) were (as I have already said) designed to implement or give effect to the 1930 Act. If the Act itself does not confer ownership, it would be surprising to find that the Regulations had any such effect. In my judgment they do not. Mr Malek placed reliance on Article 17 and in particular on the provision in its last sentence for the State having authority to possess or (according to one translation) transfer half of the found movables to the finder. The first sentence of Article 17 plainly creates no more than an in personam obligation, which is wholly in keeping with the purpose of the 1930 Act. Professor Taleghany's translation of the second sentence of Article 17 reads: "The Government is entitled to take possession of half of the items or 'return' them to the finder". Possession is not of course the same as ownership. If the Government is not bound to take possession of the items or of some of them, it is difficult to understand how it can be their owner. Moreover the pro-

vision for the "return" or "restitution" (in Farsi "mostarad") appears to recognise the finder as the owner.

49. Articles 18, 31 and 36 of the Executive Regulations broadly correspond to Articles 11, 14 and 16 of the 1930 Act. Mr Malek's third to sixth propositions (see paragraph 32 above) are to the effect that it is not possible to get title by unlawful activity or unlawful possession; that neither the finder of an excavated antiquity nor the owner of the land in question has a right to keep the antiquity; he must deliver it to the State. According to Mr Malek's argument, there is no such thing as "finders keepers"; all the discoverer gets is a reward. I accept these submissions as far as they go. But there is to my mind a considerable gulf between a regulation which confers on the State an exclusive right to dig and excavate on the one hand and a provision on the other hand that the State acquires immediate and automatic ownership of any antiquity dug up or excavated. The latter provision is conspicuous by its absence from the Regulations.

50. I have already found that Article 14 of the 1930 Act was not consistent with automatic deemed ownership on the part of the Government (see paragraph 44 above). So too is Article 31 of the Executive Regulations inconsistent with the government having automatic property rights in excavated antiquities, at least according to the translation by Mr Sabi at paragraph 46 of his report. Mr Sabi translates Article 31 as including the words "The State may initially select up to ten items which will thus become its property ..."(emphasis added). In other words, ownership will only vest in the state once it had made that selection and not at an earlier point. Ownership is dependent upon the statutory process being implemented. As regards Article 26 of the Regulations, the reasons why I have earlier given at paragraphs 44-46 for saying that Articles 10 and 17 of the 1930 Act are not of themselves apt to confer ownership on Iran apply with equal force to Article 26 of the Regulations .

51. I come next to the Legal Bill of 1979 (see paragraph 26 above). Mr Malek places this statute (for that is what it really is) at the forefront of his case. His submission is that it is consistent only with the state being the owner of antiquities ("relics") as they are called in the Bill.

52. Mr Sabi describes the historical context in which the Bill was introduced as follows:

> 'Following the Islamic Revolution and the collapse of law and order during the early days of the Islamic Republic, a large number of historical sites were looted and opportunist excavation of the national heritage sites became widespread. This was partially encouraged by the attitude of certain members of the ruling clergy who considered that certain items of historical value were un-Islamic and suggested that these should be destroyed.
>
> In order to combat this situation, the Government introduced the 1979 Act for amongst others "prevention of plundering of these relics'".

53. Professor Taleghany asserts that the manifest purpose of the Act is to render unauthorised digging and excavating of antiquities "absolutely prohibited" and to penalise those who offer antiquities for sale or purchase. He goes on to say at paragraph 44 of his report:

> 'The provisions reflect the fact that such antiquities belong to the state'.

For the reasons already explained, 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 that 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.

56. Professor Taleghany further refers to principles 45 and 83 of the Constitution which was adopted in 1979 (the text of which is set out at paragraph 27 above). In the present context of the issue as to ownership of the antiquities, I can deal quite briefly with the Constitution. Even if, (which I doubt) antiquities come within the generic reference to "public wealth" in Article 85, that cannot assist Iran on the issue of ownership because Article 45 refers only to possession by the Government. Principle 83 does not address ownership as such but merely requires the approval of the Islamic Consultative Assembly before government buildings or properties can be transferred, presumably by the Government, to a third party.

57. Finally Mr Malek prays in aid certain penal provisions of Iranian Criminal Law, namely the Punishments Act dated 23 May 1996 and a Decree of 28 February 1980 (referred to at paragraph 28 and 29 above and respectively). In paragraphs 45 and 46 of his report, Professor Taleghany refers to Articles 559 and 562. Article 559 is concerned with stealing objects from places such as museums. Professor Taleghany comments:

> "these objects are capable of being stolen because they belong to the state".

But objects can be stolen from persons other than their owner and objects can be and often are loaned to museums by their owners.

58. Articles 561 and 562 of the Constitution provide for seizure or confiscation (depending on which translation is preferred) in the event of illegal export or illegal digging or excavation. I agree with Mr Sabi that neither of those Articles addresses the issue of ownership otherwise than as a consequence of an offender being convicted. These Articles say nothing of the position in regard to ownership prior to the seizure or confiscation. Moreover, as Mr Sabi notes, Article 562 provides for the confiscation not only of the object excavated but also for the confiscation of the "equipments of the excavation". There is no suggestion that the latter were owned by Iran. That appears to me to lend some support to the contention that the objects were not previously owned by the state either.

Conclusion as to the ownership of the antiquities under Iranian Law

59. Having considered the historical background and the detailed provisions of the various enactments identified by Professor Taleghany and referred to by Mr Malek, I have come, with some regret, to the conclusion that Iran has not discharged the burden of establishing its ownership of the antiquities under the laws of Iran. 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 fall 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 or as a matter of inference.

Iran's alternative claim based upon its right to immediate possession

60. Iran has a fallback position in the event that, as I have decided, its claim to ownership of the antiquities fails. By an amendment to the Particulars of Claim made on 13 December 2006 Iran introduced an alternative basis for its claim for delivery up of the antiquities, namely that at all material times it had an immediate right to possession of them. Accordingly, Iran alleges that Barakat, by retaining possession of the antiquities for the purpose of their sale, not withstanding Iran's request for their return, has wrongfully interfered with Iran's goods or converted them.

61. Mr Oakley, who presented Iran's argument in support of its alternative case based on an immediate entitlement to possession, relies principally on paragraph 2 of the Legal Bill of 1979 (set out at paragraph 26 above) which obliges the discoverer of antiquities to submit them as soon as possible to the nearest office of Culture and Higher Education. Paragraph 2 applies in terms to accidental discoverers of antiquities only. But Iran submits that the position of illegal excavators (as the excavator who found the antiquities in the present case is to be assumed to be) cannot be in a better position than an accidental discoverer. Mr Oakley argues that the duty therefore applies equally to an illegal excavator. Iran rely also on Article 10 of the National Heritage Protection Act 1930 (see paragraph 21 above) to the extent that it has not been superseded by the 1979 Bill. Iran's case is that there is no other provision of Iranian law which is inconsistent with the existence of its immediate right to possession of the antiquities.

62. Barakat does not quarrel with the proposition that a person with an immediate right to possession of a chattel is entitled to bring proceedings in conversion or for the tort of wrongful interference with goods against anyone who threatens to sell the chattel or who deals with it ma manner inconsistent with the claimant's right to it. Barakat contends, however, that in order for such a claim to succeed the right to possession of the claimant must be a proprietary right. Barakat says that Iran had and has no such proprietary right in the antiquities. Barakat further denies that Iran had or has an immediate right to possession, such an immediate right being, according to Barakat's argument, a necessary condition of the successful claim in conversion or for wrongful interference.

The need to establish a proprietary right

63. I will take these two issues in turn, starting with the question whether Barakat is right in its contention that the right to possession has to be a proprietary right. I will summarise the argument advanced on behalf of Barakat and then turn to Iran's answer to it.

64. Mr Shepherd cites two authorities in support of Barakat's contention that there has to be a proprietary right to the goods. The first is *Jarvis v Williams* [1955] 1 WLR 71, where J, the owner of the goods, sued in detinue the defendant W to whom the goods had been delivered at the request of a third party, P, who had failed to pay for them. W refused to deliver up the goods. The Court of Appeal held that the claim was not maintainable. Lord Evershed MR said at 74:

> "I take [the judgment below] to mean that the contractual right which the plaintiff had vis-à-vis Patterson to go and collect these goods from Patterson'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 p62, 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 1989'.

65. In *Rosenthal v Alderton and Sons Limited* [1946] KB 374 the question was whether the value of goods, which had disappeared, ought to be ascertained, for the purpose of giving to the successful plaintiff damages for their wrongful detention, as at the date of the detention or as at the date of the judgment. No such question, of course, arises here. But in the course of the judgment of the court in that case, Lord Evershed MR said at p377:

> 'it is further to be noted that the action of detinue was essentially a proprietary action implying property in the plaintiff in the goods claimed', and then a reference is made to Viner's Abridgement vol 8 p23 and Holdsworth, History of English Law vol 7, pp 438 and 439. 'It was, and still is, of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods claimed....
>
> ... 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, as the time, of the person in whom the property in the goods was then vested'.

66. The cause of action in *Jarvis* and in *Rosenthal* was in detinue, which was abolished by the Torts (Interference) with Goods Act 1977. But it is not disputed that the propositions enunciated by Lord Evershed apply equally to claims brought under the 1977 Act.

67. The second authority cited by Mr Shepherd is *International Factors Limited v Rodriguez* [1979] 1 QB 351, where the claim was brought in conversion. The property said to have been converted consisted of cheques payable to a company which had entered into a factoring agreement with the plaintiffs. The cheques were sent to the company in settlement of debts owed to the company but which had been assigned to the plaintiffs. The defendant, a Director of the company, paid the cheques into the company's bank account. Sir David Cairns (which whom Bridge LJ agreed) upheld the plaintiffs claim. After referring to *Jarvis* Sir David Cairns said at 357e:

> "...so a contractual right is not sufficient.
>
> In my view, however, there was here something more than a contractual right. Clause 11(e) of the [Factoring] agreement provided both that the company was to hold any debt paid direct to the company in trust for the plaintiffs and immediately after receipt of a cheque, in the case of payment by cheque, to hand over that cheque to the plaintiffs. Taking together the trust which was thereby set up and the obligation immediately on receipt to hand over the cheque to the plaintiffs, I am satisfied that the plaintiffs had here a sufficient proprietary right to sue in conversion".

Bridge LJ agreed with Sir David Cairns. Buckley LJ agreed in the result but he said at 359g:

> "It is manifest on the terms of clause 11(e) of the agreement that the intention of the parties was that the cheque itself, if payment was by cheque, should be handed on, endorsed if necessary to the plaintiffs, and that confers upon the plaintiffs, as it seems to me an immediate right to possession if any such cheque quite sufficient to support a cause of action in conversion against anyone who wrongfully deals with the cheque in any other matter.
>
> ...I think that there is a contractual right here for the plaintiffs to demand immediate delivery of the cheque to them, and that that is a sufficient right to possession to give them a status to sue in conversion".

68. At paragraph 17-59 the editors of the current (19th) edition of Clerk and Lindsell on Torts say: "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". In support of that proposition *Jarvis* and *International Factors* are cited.

69. Mr Oakley points out that in *Jarvis*, the purchaser (P) acquired title to the goods on their delivery to the defendant W. It was by virtue of P's ownership of the goods, rather than their possession, that the plaintiff J became entitled to sue in conversion (or detinue). In support of that proposition Mr Oakley relied on an article by Mr Nicholas Curwen entitled "The role of possession" [2004] 68 Conv.308. Mr Oakley accepted that ownership is normally the basis of an action in conversion but he argued that a mere immediate right to possession without more can also ground an action in conversion. He founded that argument on the judgment of Buckley LJ in *International Factors.* Mr Oakley referred me also to *MCC Proceeds v Lehman Bros* [1998] 4 ALL ER 675.

70. In my judgment it is necessary for a claimant suing in conversion or for wrongful interference with his goods to establish the existence of a proprietary right in the goods. That is what was held in *Jarvis*, which was a claim in detinue but it is accepted the position is no different on that account. The proposition was not doubted by the majority in *International Factors*, which was a conversion case. I accept that *International Factors* was distinguished in *MCC Proceeds* but that was on other grounds and there was no criticism in that case of the earlier authority of *Jarvis*.

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 alread

y given, this is something which Iran is unable to do.

Is Iran's right to possession immediate?

72. My conclusion that Iran lacks the requisite proprietary interest in the antiquities means that its alternative claim in conversion or for unlawful interference with goods must fail. I should for completeness, however, deal with Barakat's argument that this alternative case founders for a further and separate reason, namely that Iran cannot establish a right to immediate possession of the antiquities.

73. I accept that a right to immediate possession is required. The editors of Clerk & Lindsell at paragraph 17.40 say: "claimant must have possession or immediate right to possession. A person has title to sue for conversion if and only if he had, at the time of the conversion either actual possession or the immediate right to possess the property concerned." Reference is made to *Surrey Asset Finance Limited v National Westminster Bank PLC* [The Times, November 30, 2000]. The proposition is reflected in the fact that the owner of goods cannot sue in conversion for so long as there is in existence a subsisting contract of bailment in respect of the goods.

74. The position in the present case is that, by virtue of the Bill of 1979 (and before that by virtue of the 1930 Act), the discoverer was duty bound to submit the goods to the nearest office of Culture and Education as soon as possible. It is true that this duty is imposed expressly on accidental discoverers only. However, I accept Iran's contention that it would be absurd for an illegal excavator to be in a better position than a change discoverer.

75. The duty imposed on the discoverer of antiquities was enforceable in law by Iran. Enforcement would have resulted in Iran obtaining possession of the goods. In those circumstances it seems to me that Iran did have a right to possession of antiquities which was an immediate right. However, for the reasons I have already given, the alternative claim in conversion and for wrongful interference with goods has to fail because Iran cannot establish the requisite proprietary interest.

76. My answer to the first preliminary issue is therefore in the negative.

The second preliminary issue: non-justiciability

77. Iran having failed on the first preliminary issue, there is, strictly speaking, no need for me to address the second issue, namely whether this court should recognise and/or enforce Iran's title to the antiquities. However, in case these proceedings go further and in deference to the respective arguments of the parties, I should express my conclusions on the second issue, albeit rather more briefly than I would have done if I had decided the first preliminary issue in favour of Iran.

78. For the purposes of the issue of justiciability, I shall assume (contrary to my findings) that under Iranian law as the lex situs Iran acquired a valid title to the antiquities whilst they were still in Iran.

79. The contention of Barakat, which is pleaded at paragraph 2A of the Amended Defence is that by this claim Iran, being a foreign Sovereign State, is seeking directly or indirectly to enforce penal or other public laws of a foreign State namely the public and/or penal laws of the Islamic Republic of Iran.

80. Iran accepts that, if the relevant law of Iran is properly characterised as "penal", then the English Courts will not enforce it. Iran's case is that the relevant Iranian law is not penal and so is enforceable here.

81. Iran denies that in these proceedings it is seeking to enforce laws which are properly characterised as "public" laws. Iran's case is that laws enacted for the purpose of preserving the architectural heritage of a foreign State are not public laws. Iran does, however, recognise that there is Court of Appeal authority, which is binding on me, to the effect that public laws, like penal laws, may not be enforced directly or indirectly in the English Court: see *Republic of Equatorial Guinea and others v Logo Limited and others* [2006] EWCA Civ 1370 at paras 50-52. (There is another decision of the Court of Appeal in which Lord Denning MR arrived at the same conclusion, namely *Attorney General of New Zealand v Ortiz* [1984] AC 1, but the other two members of the court took a different view and in any event, as is accepted, the finding in that case was obiter). Iran reserves the right to challenge the conclusion arrived at in the *Equatorial Guinea* case in a higher court.

Are the relevant Iranian laws penal?

82. Penal law was defined in the context of an issue of justiciability in *Huntington v Attrill* [1893] AC 150 at 156 as including:

> "all breaches of public law punishable by pecuniary mulct or otherwise at the instance of the state government or someone representing the public".

The court quoted with approval a passage from a decision of the United States Supreme Court in *Wisconsin v Pelican Insurance Co*, 127 US 265, 290 (1888):

> "The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanours but to all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws and all judgments for such penalties".

83. According to *Dicey, Morris and Collins* (14th Ed.) at paragraph 5-027;

> "...A penal law is a law which punishes or prevents an offence. To come within this principle the law does not have to be part of the criminal code of the foreign country. Thus a law intended to protect the historic heritage of New Zealand by forfeiting historic articles illegally exported was held to be penal ..."

That is a reference to a finding made by two members of the Court of Appeal in *Ortiz*. In that case Ackner LJ at 34a gave as his reason for finding that the New Zealand statute was penal the fact that:

> "It concerns a public right - the preservation of historic articles within New Zealand - which right the State seeks to vindicate. The vindication is not sought by the acquisition of the article in exchange for proper compensation. The vindication is sought through confiscation..."

O'Connor LJ agreed with Ackner LJ at 25e.

84. I have to decide whether, in the light of those amongst other authorities, the Iranian laws here relied on qualify as "penal". The contention advanced on behalf of Iran is that this is a patrimonial, rather than a penal, claim. The concept of a patrimonial claim is to be found in a speech of Lord Keith of Avonholme in *Government of India v Taylor* [1955] AC481. The issue in that case was whether the law sought to be enforced was a revenue law. Answering that question in the affirmative Lord Keith said at 511:

> "One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the Sovereign power which imposed the taxes and that an assertion of, Sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concept of independent sovereignty ".

85. I readily accept that a foreign state can bring proceedings which qualify as patrimonial claims in that sense. *Princess Olga v Weisz* [1929] 1KB718 and *Luther v Sagor* [1921] 3KB 532 are examples. The claim in the former case failed because the court recognised that the Soviet Republic had acquired good title to the movables in question (as well as possession of them), so as to be able to convey ownership of them to the defendants. *Luther* is to similar effect. Thus there would be no infringement of the principle governing justiciability if the English Court were to enforce a proprietary claim by a foreign sovereign state in relation to movables acquired by that State (whether by purchase, bequest, gift or as bona vacantia) at a time when the movables were within the territory of that state. This would be an instance of the state doing acts jure gestionis: see *Ortiz* per Lord Denning MR at 21b.

86. Iran does not claim to have purchased the antiquities or to have acquired title to them in any of the other ways in which an individual or a corporation might lawfully acquire title. As I have said, Iran's case is that at some stage it assumed ownership of articles belonging to the national heritage.

87. The statute principally relied on by Iran is the Legal Bill of 1979 (which largely superseded the earlier Act of 1930). As the prefatory words of the

1979 Bill make abundantly clear, the purpose of that enactment was to prevent relics being plundered and exported abroad. The purpose of the Historical Articles Act, 1962 of New Zealand was exactly the same. In *Ortiz* Ackner LJ pointed out in the passage quoted at paragraph 81 above that the claim was brought by the Attorney-General on behalf of the State; that it was not a claim by a private individual and that the cause of action did not concern a private right which demanded reparation or compensation. By parity of reasoning I conclude that the 1979 Legal Bill (as well for that matter as the 1930 Act) is also concerned with a public right. It is not a patrimonial claim.

88. Moreover the 1979 Legal Bill imposes penal sanctions for invasion of the public right. As in *Ortiz*, the vindication of the state's right is not sought by conferring on the State a right to purchase the article. Rather the Legal Bill empowers the criminal court (which would no doubt be the court with jurisdiction to enforce the sanctions) to sentence the offender to between 6 months and three years correctional imprisonment and to order seizure of the discovered items together with the equipment. Those provisions of the Bill plainly bear the hallmark of penal laws, just as the forfeiture provision of New Zealand law was held to be penal in *Ortiz*. It is worth bearing in mind that there are other Iranian laws which impose similar sanctions, namely the Punishments Act of 1996 and the decree of 28 February 1980 (referred to in paragraph 57 above).

89. It was submitted on behalf of Iran that the Legal Bill does not deprive the finder of cultural objects of any proprietary right in them because the finder never had any such right. That is the assumption on which I am proceeding. It was also submitted that the Iranian legislation in question is not "political" in nature; reference was made to the EC Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (93/7/EEC). These submissions would no doubt carry great weight if the English Court was being asked to recognise the Iranian law. However, this action is brought by a foreign State, which never had actual possession of the antiquities, to enforce their proprietary right to them.

90. In my judgment the 1979 Legal Bill is a penal law which has as its purpose the aim of protecting the national heritage on behalf of the people of Iran. The fact that the mechanism chosen by Iran for protecting its heritage was by virtue of the state acquiring ownership of the antiquities (as I am assuming it did) rather than by a provision for forfeiture (as in the case of *Ortiz*) seems to me to be a distinction without a difference. The effect in each case is the same: the state acquires title by compulsory process of law which overrides the right of any individual who might otherwise have become or remained owner.

91. The claim brought here is not, for the reasons already given, a patrimonial claim. It is an action to enforce a public right of state ownership. The antiquities are not purchased by the state in any meaningful sense of that term. The sanctions imposed by the legislation for the vindication of that public right include imprisonment and seizure not only of the discovered objects but also to the excavating or other equipment in which (as Mr Sabi pointed out) Iran would have had not proprietary right at all. These plainly penal aspects of the Legal Bill support the conclusion that the Iranian legislation is properly characterised as "penal".

Are the relevant Iranian laws public?

92. I do not think it is necessary to conduct an elaborate analysis of the provenance of rule 3 of *Dicey, Morris and Collins*, which I have quoted in paragraph 11 above. In view of the way Iran puts its case on this issue, however, it is pertinent to note that in earlier editions of *Dicey* (for example the 6th edition) the laws which the English Court was said to have no jurisdiction to enforce included "political" laws as opposed to "public" laws.

93. In order to decide whether the relevant Iranian laws qualify as public laws it is necessary to bear in mind the rationale for the principle of non-justiability which applies to certain categories of foreign law. Numerous cases were cited to me on that topic. It will, I think, suffice if I quote from the recent decision of the Court of Appeal in the *Equatorial Guinea* case:

> "41 The importance of the speech of Lord Keith in the *Government of India* and the judgment of Lord Denning in Ortiz case is that they both sought to explain the rationale for the well-established rule that the courts will not enforce the penal and revenue laws of another country. In short, it is that the courts will not enforce or otherwise lend their aid to

the assertion of sovereign authority by one State in the territory of another. The assertion of such authority may take different forms. Claims to enforce penal or revenue laws are good examples of acts done by a sovereign by virtue of his sovereign authority ("jure imperii"). In each case it is necessary to see whether the relevant Act is of a sovereign character. Penal and revenue laws are assumed to be of a sovereign character."

"42 As Lord Denning made clear in *Ortiz*, his judgment was influenced by the article by Dr Mann to which we have referred in paragraph 26 above. At page 34, Dr Mann said:

"Where the foreign State pursues a right that by its nature could equally well belong to an individual, no question of a prerogative claim arises and State's access to the courts is unrestricted. Thus a State whose property is in the defendant's possession can recover it by an action in detenue. A State which has a contractual claim against the defendant is at liberty to recover the money due to it. If a State's ship has been damaged in a collision, an action for damages undoubtedly lies. On the other hand, a foreign State cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle".

We agree.

50. Having heard detailed argument, we are unable to accept Sir Sydney's submission that the views expressed in the Privy Council in the paragraphs just quoted are wrong. 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 involved the exercise or assertion of a sovereign right and the claim does not 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. In deciding how to characterise a claim, the court must of course examine its substance, not be mislead by appearances: see, for example, *Huntington v Attrill*".

94. The submission for Iran is that the Iranian laws by virtue of which ownership of objects such as antiquities vest in the State (as I am assuming they do) are not to be classified as public laws. It is argued on behalf of Iran that the objects were physically present within the State's boundaries when ownership was assumed by Iran; that there is no question of anyone's private property being forfeited; no-one owned the antiquities before they were found and the State is not depriving the finder of anything which had ever belonged to him or to her.

95. In these circumstances Iran contends that the laws relied on do not qualify as "other public laws". If this category exists at all, it is submitted that its subject matter is limited to laws whose objectives are determined by the nature and policies of the government of the foreign State for the time being. The category does not extend to laws which are necessarily in the long term interests of the State and not exclusively or principally in the political interests of whatever government has enacted them.

96. The difficulty which I have about accepting these contentions is two-fold. The first difficulty is that, as it appears to me, Iran is seeking to narrow the ambit of the concept of a public law to what were called "political" laws in the 6th edition of *Dicey*, as mentioned earlier, which dates back to 1949. It is clear that succeeding editors have deliberately chosen to substitute "public" for "political".

97. The second, more fundamental difficulty with the proposition for which Iran contends is that it appears to me to mis-characterise the distinction between public laws (or "governmental interests" which was the term preferred in *HM's Attorney-General for the UK v Heinemann publishers Australia proprietary Limited and another* [1988] 165 CLR 30) on the one hand and private laws on the other hand. I have already accepted that the English courts will recognise and in certain conditions enforce a patrimonial claim by a foreign State, that is, a claim to ownership acquired by purchase, gift and the like. It seems to me, however, that the

claim based on the 1979 Legal Bill (or the 1930 Act) stands on an altogether different footing.

98. Even if one ignores the problem that all property (including undiscovered antiquities) was formerly owned by the King of Iran, it is not only legitimate but in my view essential to have in mind the circumstances under which Iran acquired title to the antiquities. Ownership of objects such as the antiquities became vested in the State of Iran because it was decided by the then government in 1979 (or perhaps at some earlier date) that it was in the public interest of Iranian people or in the Governmental interest of Iran that the national heritage of Iran should be protected in the manner which is to be found in the 1979 Legal Bill (and earlier legislation). No-one is suggesting that Iran is not entitled so to legislate. But it appears to me to be clear that it was an act of sovereign authority, that is, an act jure imperii.

99. The 1979 Legal Bill strikes me as a paradigm example of a public law. Iran is, as most people would see it, laudably, seeking to protect the interests of the State of Iran in recovering items of that country's natural heritage and seeking further to enforce the right to delivery up which has under Iranian law has become vested in the State. This is something which, for the reasons expounded in several of the authorities to which I have referred, a foreign state or government is unable to enlist the assistance of the English Courts to achieve.

100. I therefore answer the question posed in the second preliminary issue in the negative. If this 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.

The Islamic Republic of Iran vs. Denyse Berend
Urteil des High Court of Justice, Queen's Bench Division
01. Februar 2007

B e f o r e :
THE HON. MR JUSTICE EADY

Between:
The Islamic Republic of Iran
Claimant
- and -
Denyse Berend
Defendant

Michael Lazarus (instructed by Withers) for the Claimant
Paul Lowenstein (instructed by Barlow Lyde & Gilbert) for the Defendant
Hearing dates: 15th to 19th January 2007

The Hon. Mr Justice Eady:

The factual background

1.The chronology in this case begins, unusually, in 531 B.C. This is because it is thought to represent the beginning of the period during which Persepolis was constructed. It is believed that the process of building the city continued until approximately 359 B.C. (that is to say between the reigns of Darius I and Artaxerxes III). The subject-matter of these proceedings is a fragment of an Achaemenid limestone relief, believed to originate from the first half of the fifth century B.C. It is approximately 23.7cm high and 31.5cm wide, consisting of the head and shoulders of a Persian guardsman with a spear. It would appear to come from the northern façade of the eastern staircase of the Apadana (audience hall), which lay buried from the time the city was sacked by Alexander the Great in 331 B.C. until excavations in the early 1930s. It is thought by some scholars that these processional reliefs inspired those incorporated shortly afterwards in the Parthenon.

2.The Islamic Republic of Iran seeks to recover the fragment as part of a national monument to which it claims entitlement in accordance with certain legal provisions dating from the first half of the twentieth century. The Defendant, Mme Denyse Berend, resists the claim primarily on the basis that she had acquired title in the fragment after it was sold to her through an agent at a New York auction in October 1974. (It is perhaps worth not-

ing that the vendor had himself also acquired the piece at public auction in New York in May 1974.) It is submitted that, in accordance with French domestic law, the Defendant acquired title in good faith when it was delivered to her in Paris on 10 November of that year. Alternatively, it is submitted that she would have acquired title by prescription after 30 years' possession in November 2004.

3.The fragment is here in the safe keeping of Christie's to whom it was delivered in January 2005 (after an export licence was obtained from the French government). It was due to be sold by Christie's in London on 20 April of that year but, on the day before, an injunction was granted by Silber J in favour of Iran. That is where matters now stand and how it comes about that the claim is brought in this jurisdiction.

4.The Claimant's case was significantly amended at the end of September last year pursuant to an order of Irwin J, and it is now sought to be argued that an English court should apply Iranian law to the question of title by a process of reasoning based upon an expert report of 18 September 2006 from Maitre Dominique Foussard. It is said that as a matter of French law the question should be governed by the law of the state of origin of the fragment; that a French judge would apply an exception, for policy reasons, to the general rule of French law that the question of title to movables is determined according to the situs. The 12 points of agreement

5.The counsel in the case, Mr Lazarus representing the Claimant and Mr Lowenstein representing the Defendant, are to be commended for the way in which this litigation has been prepared and presented. The issues have been significantly narrowed. In particular, they have agreed 12 important propositions on the basis of which I should proceed to resolve the dispute:

(1) The fragment was the property of the Claimant immediately before it was exported from Iran.

(2) The Defendant does not rely on any fact or event as defeating the Claimant's title to the fragment prior to her alleged acquisition of possession in Paris in November 1974.

(3) As a matter of English law and of French law the fragment is to be characterised as movable property.

(4) If, as a matter of French law, Iranian law governs the question whether the Defendant's alleged acquisition of possession of the fragment in November 2004 (sic) and/or any subsequent events or lapse of time prior to April 2005 confer title on the Defendant, the Claimant retains title to the fragment.

(5) The general rule in French law is that title to a movable is governed by the lex situs, i.e. the law where the object is situated at the time of the event(s) said to confer title.

(6) The French lex situs rule is a rule of judge made law.

(7) There are no reported cases in the French courts addressing the following propositions advanced by the Claimant, namely:

(7.1) That a French court will decline the general lex situs rule in relation to a constituent part of a national treasure such as an ancient palace and would apply the law of the object's state of origin;

(7.2) That the treaties and resolution referred to at 8 below embody a policy to which French law would have regard, namely that in relation to illicitly exported artistic or cultural property, the most appropriate law to govern the question of title is the law of the state of origin;

(7.3) The further contentions and matters set out at paragraphs 2A.3.6 to 2A.3.9 of the Amended Reply. [These refer in particular to certain propositions said to be recognised by French law, namely:
(i) the competence of a foreign state to establish rules for its own functioning and to "determine the alienability of goods assigned to the state's activities as a public authority";
(ii) where an object has been separated from a larger item, which was itself a national treasure, there would be an especially powerful argument to apply the law of the place of origin;
(iii) a distinction is to be drawn between objects of ordinary commerce, where their origin is not an essential consideration for the acquirer, and cultural objects when it can be critical.]

(8) The following treaties and French legislation relied upon by the Claimant do not apply directly to the fragment, namely;

(8.1) the UNESCO Convention of 14 November 1970 (Amended Reply paragraph 2 A.3.3(a));

(8.2) the UNIDROIT Convention of 24 June 1995 (Amended Reply paragraph 2 A.3.3(b));

(8.3) Article L.112 of the Code du Patrimoine of 3 April 1995 (Amended Reply paragraph 2 A.3.3(c));

(8.4) Resolution IV Article 2 of the Institut de Droit International, Basle 1991 (Amended Reply paragraph 2A.3.4);

(9) As a matter of French domestic law there are two alternative bases for the Defendant's claim to title to the fragment, namely Articles 2279 and 2262 of the Civil Code.

(10) In relation to the claim under Article 2279 (acquisition of title by possession), it is necessary for the possessor to be in good faith.

(11) In relation to the claim under article 2262 (30 year prescription), it is necessary for the Defendant to show that her possession has been public and not clandestine.

(12) If the Defendant has title to the fragment, the Defendant is entitled to be compensated for any loss she has sustained by reason of the granting of the injunction on 19 April 2005 to restrain the sale of the fragment at Christie's on 20 April 2005.

The Defendant's case summarised

6.The Defendant's case was conveniently summarised by Mr Lowenstein in these terms:
i) The fragment is to be characterised as movable property. Accordingly, the English conflict of laws rules dictate that French law governs the question of title to the fragment, since the Defendant obtained her title to it at a time when the fragment was in France (i.e. on delivery in November 1974).

ii) The Defendant took possession of the fragment in good faith, on delivery, and at that moment obtained good title in accordance with Article 2279 of the civil code.

iii) Even if this proposition were wrong, the fragment was nonetheless in the Defendant's continuous and open possession for a period of more than 30 years. Accordingly, she would have obtained good title by prescription in accordance with Article 2262 of the code.

The Claimant's case summarised

7.Originally, it was the Claimant's contention that the French law rules governing movable property had no application because the fragment was properly to be characterised as immovable. As I have already made clear, it is now common ground that it should be regarded as movable.

8.It is now submitted that the English court should not simply apply French domestic law, but should apply also the French conflict of law rules. That is to say, I should apply the doctrine of renvoi. It is recognised that there is no English authority directly in point and that, if I were to do so, this would be the first application in this jurisdiction of the doctrine to movable property.

9.Assuming that I were prepared to bring into play the French rules of private international law, the Claimant submits that I should in doing so proceed on the premise that a French judge would introduce an exception to its traditional lex situs rule and apply the law of Iran (as the state of origin). This would be on the basis that the fragment should be regarded as artistic or cultural property. As both parties recognise, there is no reported French case law to support such an exception. I must now turn, therefore, to the Claimant's case on how this hiatus is to be filled.

10.The case is put in the Amended Reply of September 2006 as follows. The basic French rule, that title to movables is determined according to the lex situs, is not established by legislation but by jurisprudence. Accordingly, it is potentially subject to exceptions which may be developed by judges on a case by case basis.

11.Moreover, it is said, if a French judge were called upon to determine the matter, he or she would indeed introduce such an exception for reasons of policy which are to be found embodied in the international instruments and French statute to which I have referred:

a) the Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property adopted at the General Conference of UNESCO on 14 November 1970, which contains measures seeking to prevent the illicit import, export and transfer of such property and, in particular, Article 3 which provides:

"The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this convention by the States Parties thereto, shall be illicit".

b) the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome 24 June 1995) which provides at Article 5(i):

"A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting state".

c) Article L112 of the Code du Patrimoine of 3 April 1995, a French statute which provided for the return of cultural property from France to other members of the European Union where such property has been illicitly removed from the territory of another member of the European Union.

12.Reliance is also placed upon Resolution IV Article 2 of the Institut de Droit International at Basle in 1991, to the effect that the transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country.

13.As is already clear, it is accepted by both parties that none of the conventions or French legislation cited above applies directly to the fragment. What is said, however, is that a French judge would nevertheless "have regard" to, or be "inspired" by, the underlying policy that the most appropriate law to govern questions of title is the law of the state of origin.

14.My attention has also been drawn to academic writings by Bernard Audit, Louis d'Avout and Christian Armbrüster, in which support has been expressed for the proposition that title to a cultural object which has been illicitly removed from its state of origin should be governed by the law of that state. It is said that a French judge determining the question would "have regard to such writings".

15.An alternative argument is also to be found in the Amended Reply, namely that a French court would, or might, address the question of title by reference to a combination of Iranian and French law, and arrive at the conclusion that the Defendant would not be treated as having acquired title unless her acquisition would be "authorised by both systems of law".

16.If and in so far as is necessary for the Defendant to rely upon her alternative argument, by way of prescription in accordance with Article 2262, the submission is advanced on the Claimant's behalf that the nature of her possession between November 1974 and November 2004 was insufficiently "public" to satisfy the relevant French criteria.

17.A recent development, by way of letter on 5 January 2007, was that the Claimant's advisers were not requiring the attendance of any of the Defendant's lay witnesses (including herself) and that the content of their statements was admitted. These additional concessions include the important propositions that:

a) the Defendant took possession of the fragment in good faith; and

b) the fragment was continuously on display in the living room of the Defendant's Paris home at all material times.

18.This had the effect of reducing the live issues to questions of English and French law, and the only two witnesses to give evidence before me were the respective French law experts.
The first issue: Should renvoi be applied with regard to movable property?

19.The first issue for me to resolve has been defined as follows:

As a matter of the English conflict of laws rules, in determining the question of title to the fragment as movable property situated in France, will the English court (as the Defendant contends) apply only the relevant provisions of French domestic law, or (as the Claimant contends) apply the relevant French conflict of laws rules as well as any relevant substantive provisions of French domestic law (thereby giving effect to a renvoi)?

20.There is no binding authority to the effect that English private international law will apply the renvoi doctrine to such questions. Whether or not it should apply in any given circumstances is largely a question of policy. To take examples, it has been applied most frequently in the context of the law of succession; on the other hand, it is not applied in the fields of contractual relations or tort. It seems that the modern approach towards renvoi is that there is no over-arching doctrine to be applied, but it will be seen as a useful tool to be applied where appropriate (i.e. to achieving the policy objectives of the particular choice of law rule): see e.g. Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC [2001] QB 825, at [26]-[29], per Mance LJ; Neilson v Overseas Projects Corpora-

tion of Victoria Ltd [2005] HCA 54, High Court of Australia.

21.The nature of the policy considerations which come into play was addressed by Millett J (as he then was) in Macmillan v Bishopsgate Investment Trust plc (No3) [1995] 1 WLR 978, 1008. It was one of the cases dealing with the fallout from Robert Maxwell's fraudulent activities and concerned intangible property, in the context of share ownership. More generally, however, the learned Judge made the following observations:
"The determination of a question of priority between competing claims to property is based on considerations of domestic legal policy, since it involves striking a balance between two competing desiderata, the security of title and the security of a purchase. A decision by an English court, based on English principles of conflict of laws, that the question should be determined by the application of the rules of a foreign law is also based on considerations of legal policy, albeit at a higher level of abstraction. It involves a policy decision, at the higher level, that the policy which has been adopted, at the lower level, by English law should not be applied because the considerations which led to its adoption in the domestic law are not relevant in the particular circumstances of the case; and to a policy decision, at a higher level, that the policy which has been adopted, at the lower level, by the foreign law should be applied in its stead. In my judgment there is or ought to be no scope for the doctrine of renvoi in determining a question of priority between competing claims to shares, and in the absence of authority which compels me to do so – and there is none – I am not willing to extend it to such a question".

22.It was urged upon me on the Defendant's behalf that this reasoning is equally applicable here. It is undoubtedly compelling. On the other hand, my attention was drawn to a passage in the judgment of Moore-Bick J (as he then was) in Glencore International AG v Metro Trading International Inc [2001] 1 Lloyds Rep 284 at [41], where he made the following obiter comment upon the words of Millett J cited above, addressing a potentially material distinction between share ownership and the title to movables:
"However, if the lex situs rule in relation to movables rests, at least in part, on a recognition of the practical control exercised by the state in which they are situated, there is something to be said for applying whatever rules of law the courts of that state would actually apply in determining such questions [and a passing reference was made to Dicey & Morris, The Conflict of Laws (13th edn)]".

23.I have difficulty in formulating what the "something to be said" might be, on the facts of this present case, which would be sufficiently cogent to undermine the reasoning of Millett J in Macmillan. English law has held for many years, in order partly to achieve consistency and certainty, that where movable property is concerned title should be determined by the lex situs of the property at the time when the disputed title is said to have been acquired. Millett J saw no room for the doctrine of renvoi, in the share context, and I see no room either as a matter of policy for its introduction in the context of a tangible object such as that in contention here. In particular, I can detect no relevance to the present circumstances of any "practical control" which might at some point have been exercised by the state of France and which requires me to depart from the reasoning of Millett J.

24.It was argued by Mr Lazarus that the particular passage in the judgment simply begs the question as to whether the "foreign law" contemplated embraced choice of law rules or not, but it seems from the context to be clear that Millett J was endorsing an established policy in English law of choosing the lex situs in the sense of domestic law. Otherwise it would hardly make sense for the judgment to reject the doctrine of renvoi. I can find no reason to differ from Millett J and to hold, for the first time, that public policy requires English law to introduce the notion of renvoi into the determination of title to movables.

25.I was referred to textbooks which were said to lend support to the opposite view. There was a short passage on the applicability of renvoi to movable property in Dicey, Morris & Collins (14th edn) at 4-025. It follows a paragraph on "Title to land situated abroad" in which the view was expressed that there is a "relatively strong case" for the application of renvoi in that context, largely because an adjudication in England contrary to what the lex situs would actually hold "would be in most cases a brutum fulmen, since in the last resort the land can only be dealt with in a manner permitted by the lex situs". When the learned editors move to the subject of "movables situated abroad", they reach the conclusion:

"The argument is much weaker than in the case of land, because the movables may be taken out of the jurisdiction of the foreign court."

The support for the Claimant's case there would appear lukewarm, to say the least. It is curious that at this point in the book no reference at all is made to the judgment of Millett J (although it is certainly addressed in other contexts). It is too flimsy to warrant my rejecting his reasoning as being invalid for tangible movable property.

26.In any event, it is necessary to have in mind, on the other side of the argument, the general observations of the editors at 4-034 headed "Conclusions":

"As a purely practical matter it would seem that a court should not undertake the onerous task of trying to ascertain how a foreign court would decide the question, unless the advantages of doing so clearly outweigh the disadvantages. In most situations, the balance of convenience surely lies in interpreting the reference to foreign law to mean its domestic rules".

Similar sentiments were expressed in the Neilson case (cited above) at [92], per Gummow and Hayne JJ:

"But as Kahn-Freund pointed out, the intellectual challenge presented by questions of conflict of laws is its main curse. Whenever reasonably possible, certainty and simplicity are to be preferred to complexity and difficulty".

27.Reference was also made to Cheshire & North, Private International Law (13th edn. 1999). One passage (at p. 948) addresses the question "will the English court apply the law, not of the situs itself, but of whichever country is selected as applicable by the choice of law rules of the law of situs?" It is said that some "tentative support" is to be found in the judgment of Slade J (as he then was) in Winkworth v Christie, Manson & Woods Ltd [1980] Ch 496, 514, where the learned Judge observed obiter (and without the benefit of argument on the point) that it was "theoretically possible", depending on the evidence, that the plaintiff could argue that renvoi should be applied.
28.I do not find this passage a compelling basis, either, for distinguishing the rationale of Millett J's remarks (which, of course, were not obiter, but directly on a point which was raised before him, albeit abandoned by the Court of Appeal stage). In any event, I find this passage in Cheshire & North difficult to reconcile with an earlier paragraph (on p. 66):

"If the English choice of law rule refers a disputed title to movables to the law of their situs at the time when the alleged title was said to have been acquired, it is probable that the court will apply the internal system of law that a court of the situs would apply in the particular circumstances of the case".

29.This appears, if anything, to go against the Claimant's argument. It is somewhat ambivalent, I suppose, but on one view the "internal system of law" which a French court would apply would surely be its own domestic law (as the lex situs). Yet another curiosity is that the only authority cited for the point consists of the very same dicta in the judgment of Slade J (cited above) which were supposed (on p. 948) to lend tentative support for the opposite proposition. I therefore move on from Cheshire & North, unusually, without enlightenment.

30.I can think of a number of reasons why it might be desirable to apply generally, in dealing with national treasures or monuments, the law of the state of origin but that is a matter for governments to determine and implement if they see fit. As Millett J himself observed (also at p. 1008):
"[The doctrine of renvoi] owes its origin to a laudable endeavour to ensure that like cases should be decided alike wherever they are decided, but it should now be recognised that this cannot be achieved by judicial mental gymnastics but only by international conventions".

31.Accordingly, I determine the first question in favour of the Defendant. I hold that, as a matter of English law, there is no good reason to introduce the doctrine of renvoi and that title to the fragment should thus be determined in accordance with French domestic law.

The outcome according to French domestic law

32.As I have indicated above, it is common ground that the general rule in French law is that title in respect of movable property should be determined by the lex situs where the object was situated at the material time (here, the relevant date being 10 November 1974). One would thus ordinarily expect a French judge to apply the relevant provisions of French domestic law. In particular, the provisions of the following articles of the Civil Code need to be applied (as translated into English):

Article 2229

In order to be allowed to prescribe, one must have a continuous and uninterrupted, peaceful, public

and unequivocal possession, and in the capacity of an owner.

Article 2262

All claims, in rem as well as in personam, are prescribed by thirty years, without the person who alleges that prescription being obliged to adduce a title, or a plea resulting from bad faith being allowed to be set up against him.

Article 2279

In matters of movables, possession is equivalent to a title. Nevertheless, the person who has lost or from whom a thing has been stolen may claim it during three years, from the day of the loss or of the theft, against the one in whose hands he finds it, subject to the remedy of the latter against the one from whom he holds it.

33.Since it is now conceded that, at all material times, the Defendant acted in good faith, she would not appear to have any need to resort to any title by prescription. She would be held to have acquired title by possession at the moment of transfer in November 1974. For that reason, I consider that the Defendant is entitled to succeed. (Yet for the sake of completeness I shall need to return to matters of prescription in answering other questions before me.)

The second issue: Would a French court apply Iranian law?

34.I must, however, now turn to the second question remaining for determination. That has been formulated as follows:

In the event that it is held that the English court will apply the relevant substantive provisions of French domestic law as well as the relevant conflict of laws rules, would the French court determine the question of title to the fragment:

(1) (as the Defendant contends) by reference to French domestic law alone as the lex rei sitae (the law of the place in which the fragment as a movable was situated at the relevant time); or (2) (as the Claimant contends) by reference exclusively to the law of Iran, in that the question of title to the fragment is to be determined by reference to the law of its state of origin:

a) since the fragment is a constituent part of a national treasure; and/or

b) since French law would have regard to a policy that questions of title in relation to illicitly exported artistic or cultural property is most appropriately to be determined by reference to the law of the state of origin;

c) since French law would regard the state of origin (Iran) as exclusively competent to determine the status of goods assigned to its activities as a public authority;

d) since the origin of artistic or cultural goods is a key element in the decision made by a prospective buyer to purchase them.

(3) (as the Claimant contends in the alternative) by reference both to the law of France and to the law of Iran with the consequence that the Defendant will not have acquired title unless authorised by both systems of law?

35.It is right to record that I have received no evidence of the French or Iranian law as to renvoi. Mr Lowenstein submits that these are fundamental gaps in the reasoning advanced against him. I see the force of that, but will nonetheless proceed to address the merits of the argument on the basis of what has been deployed on either side through the experts.

36.The Claimant's case is supported by the report of Maître Foussard. Although variously expressed at different times, his proposition appears to be that a French judge would apply Iranian law to the question of title to a fragment of this kind. It is accepted that there is no precedent for this. But he prays in aid the conventions to which I have referred and also certain legal writings.

37.The suggestion is that a French court would give effect to the policy underlying the UNESCO and UNIDROIT conventions, to the effect that title to national treasures and works of art (such as would include the Persepolis fragment) should be determined in accordance with the law of the place of origin. Although the UNESCO convention has been ratified, neither of them is yet part of the law of France. I was shown a number of documents from which it may reasonably be inferred that this is not merely fortuitous, or a question of waiting until they come into force, but rather reflects serious concerns on the part of legislators. In particular, counsel drew my attention to the report by Monsieur Pierre Lequiller (who I am told is broadly equivalent to the President of the Law Commission in England) on the issue of whether to adopt the

UNIDROIT Convention and also to some remarks made by Mme Catherine Tasca in Parliament (as Minister of Culture).

38.What is beyond doubt is that the provisions of the conventions have still not been implemented in French law after a long period of time, and that there are a number of frequently canvassed arguments against doing so, for example as to the wide repercussions which would follow for public and private collections. These have been considered in Parliament and may at least have contributed to this course of sustained inaction.

39.Despite these and other concerns, the proposal advanced by the Claimant is that a French judge would, nevertheless, not only give effect to the conventions as part of private international law but, moreover, develop the policy underlying them a good deal further even than would be the case if the conventions were adopted. Maitre Foussard did not demur.

40.For example, neither of the conventions would be of retrospective effect and, therefore, even if implemented, would not adversely affect the Defendant's title in this case.

41.Moreover, the UNIDROIT Convention contains (in Article 3) limitation provisions, including a "backstop" of fifty years from the date on which the object in question was ex hypothesi wrongly expropriated. That would place formidable hurdles in front of the Claimant if operative in this case, which it would be most unlikely to overcome. I note also that the Basle proposals of the Institut de Droit International (1991) also contemplate (at Article 4) that any claim by the country of origin would have to be made "within a reasonable time". The submission I am now addressing would entail the application of Iranian law without any corresponding time bar.

42.Another term of the UNESCO and UNIDROIT Conventions would be that compensation would be payable to any innocent "owner" from whom the relevant object was to be repatriated. No such protection is contemplated in the rule proposed by Maître Foussard and it can thus be seen that it takes on a punitive or confiscatory character (which would in itself be likely to inhibit the courts in France and other jurisdictions from giving effect to it).

43.It is inherent in Maître Foussard's proposed rule that it could be given effect by a country in which the relevant convention was not in force. By contrast, Maître Berlioz stated that it would be unimaginable that a judge would go against the negative decision of the legislature and give effect to such controversial proposals. There would be none of the balancing protections which any international agreement would certainly embrace (reciprocity, limitation periods, compensation, non-retroactivity, good faith, etc.) Moreover, as is obvious, these conventions have been around a long time without being incorporated into the law of France, and Maître Berlioz asked rhetorically why as a matter of judicial policy the hypothetical French court should suppose that the time has become ripe for their implementation in 2007.

44.The scope of the change would be potentially very wide indeed, as I believe Maître Foussard recognised (and perhaps thought desirable). It would apparently mean that the transfer of virtually any "cultural object" or relevant work of art could be prevented in circumstances where the state occupying the territory of its origin had passed legislation to expropriate it – at least if the legislation had been passed before it was removed.

45.It is against this background that Mr Lowenstein described the proposal as "startling". Indeed at one stage, in a rhetorical flourish, he had suggested that the effect "would be to empty the art galleries and private collections of France". At least it can be said that, if a French judge were to adopt the reasoning proposed, it would represent a significant shift from the position as it has always been thought to be in French law. In particular, it is clear from the French cases cited to me that the basic lex situs rule has been applied hitherto in relation to works of art or antiquities without any such exception being proposed. It was argued that it would be all the more inappropriate for an English judge (or indeed any other foreign judge) to appear to be taking such a bold and innovative approach without any French judicial precedent or legislative warrant.

46.In this context, my attention was drawn to the words of Wynn-Parry J in Re Duke of Wellington [1947] Ch 506, 515:

"The task of an English judge, who is faced with the duty of finding as a fact what is the relevant foreign law, in a case involving the application of foreign law, as it would be expounded in the foreign court, for that purpose notionally sitting in that court, is frequently a hard one; but it would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either

in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of courts of inferior jurisdiction".
In this case, by contrast, there are no conflicting decisions. There simply have been none which directly support the Claimant's proposition.

47.It is necessary to have in mind the nature of the exercise I am required to carry out. It is elementary that any decision of this court as to the substance of French law is only a finding of fact within this jurisdiction. Although Maître Foussard, when asked the question by Mr Lowenstein, responded courteously and diplomatically that an English judgment on the subject would be read with interest, it is right to remember that an English judge would in no way be making a decision of French law or intruding upon the French jurisdiction. It would simply be a decision about French law. Like Wynn-Parry J before me, I am carrying out a task required of me by English law with a view to determining the outcome in English litigation. I am only "notionally" sitting in a French court.

48.Accordingly, if the evidence (including that of the experts) points clearly to a particular outcome according to French principles and methods of application, an English judge should not necessarily feel inhibited by the fact that no French judge happens to have reached such a conclusion in the past. The particular question, or the particular factual circumstances, may simply not have arisen hitherto. On the other hand, an English judge must tread with care when it appears that a particular result would not only be unprecedented but also involve the application of new principles, or a judicial development of French law, by the hypothetical French judge. A test I suggested in the course of argument was that I should do my best to assess the hypothetical French court's decision, in the light of established principles and methodology, but should draw back from determining the current state of French law by reference to policy changes which it would be open to a French court (at least a higher French court) to implement.
49.I should not anticipate any such changes, since not only would that be presumptuous, but I should be exceeding my function – which is to determine, on the evidence, the relevant law of France as it stands. Whether it is appropriate to introduce into French law an exception to its choice of law rules, in the context of cultural objects, is a matter of policy for French judges to decide. They would no doubt have well in mind such considerations as those addressed by Gummow and Hayne JJ in Neilson (cited above) at [93]:

"What have come to be known as 'flexible exceptions' to choice of law rules are necessarily uncertain. That is the inevitable consequence of their flexibility. Experience reveals that such rules generate a wilderness of single instances".

50.Since foreign law is approached in England as a matter of factual evidence, it would seem to accord with principle that I should ask myself whether I am satisfied, on a balance of probabilities, that a French court confronted with these facts and these submissions would be more likely than not to apply Iranian law in determining title. For the reasons identified above in [36]-[43] I am not so persuaded. I consider it highly unlikely. I hasten to add, it is not simply a question of impression. The evidence called for the Defendant was to the effect that no French judge, as the law now stands, would conceivably apply Iranian law.

51.Maître Berlioz expressed an unequivocal opinion and stated that the question posed admits of a categorical and definitive answer in the light of domestic law and, in particular, by reason of Articles 2279 and 2262 of the Civil Code. He asserts that title to the fragment could not be questioned under French law by the Iranian government.

52.He further states that Maître Foussard's contentions are entirely wrong and have no basis in French law; that he is putting forward a view as to what he feels French law or policy should be and not what the law actually is. He even went so far as to suggest that the principles of French law were being unethically misrepresented. Mr Lowenstein did not adopt or develop these observations. He did, however, suggest that Maître Foussard's analysis was "creative". I did not understand this to be an attack upon his integrity but rather a comment to the effect that he was advocating development in the law, by reference to various strands of academic argument, since there was no specifically judicial precedent (as Maître Foussard expressly accepted). I certainly found Maître Berlioz' assessment in this respect persuasive. I need go no further than to say that, in the light of the evidence before me, I am far from satisfied that a French judge would apply Iranian law. I resolve the second issue in favour of the Defendant also.

53.I should add that strong criticism was made of Maître Berlioz by Mr Lazarus on behalf of the Claimant, and I was asked not to find him credible. There is no doubt that he expressed himself trenchantly on a number of matters about which, as he readily accepted, he felt strongly. I am not prepared to disbelieve him, however, although I find his evidence more persuasive on some points than others. There is no doubt that he lacked the gift of brevity; nor that he was ready to attack the credentials and integrity of others. But I did not conclude that this rendered his evidence unreliable in general. Specifically, on this second issue, I can find no cogent reason to reject the thrust of his expert opinion.

54.Finally, on this issue, there was an argument canvassed on both sides as to the significance, or otherwise, of the well known principle of international law whereby states will not generally enforce foreign public law. I need not investigate this area of dispute since it is not necessary to do so in order to reach my conclusions. The argument ranged primarily over whether or not all of the relevant Iranian legal provisions would necessarily be characterised as "public law" and whether there would, in any event, be an exception recognised in French law in the context of "cultural objects" (to use loose and general terminology).

55.I was referred in particular to a case of 2 May 1990 in the Cour de Cassation: Republic of Guatemala v Société Internationale de Négoce de Café et de Cacao. There was a decision, expressed in very general terms, to the effect that French courts can set aside the principle that jurisdiction will not be accepted where a foreign state makes a claim based on provisions of public law in circumstances "where, from the point of view of the court, the requirements of international solidarity or a convergence of interests so justify". No other examples of the principle being "set aside" were cited and I certainly cannot say with confidence that a claim for the return of a "cultural object" would so qualify. This is another example of the uncertainty inevitably attaching to "flexible exceptions" (see [49] above).

56.I thus recognise that a French court might (a) classify this claim, if brought in France, as based on "public law", (b) decline to recognise any relevant exception, and (c) not accept jurisdiction to deal with it. My judgment proceeds, however, on a series of hypotheses – one of which is obviously that the French court has accepted jurisdiction. There is accordingly no need to pursue this interesting and theoretical debate to any kind of conclusion. For that I am especially grateful, since Maître Foussard recognised that this is an area of law which is in a state of flux.

The third issue: Is it a requirement of Article 2279 of the Civil Code that the Defendant's possession should have been "public"?

57.The third issue I am required to resolve is a matter of French domestic law. It relates to whether the Defendant did acquire title on 10 November 1974, when she took possession, in accordance with Article 2279 of the Code. I am asked to determine, in the light of Article 2229 (set out above), whether she is required to demonstrate that her possession was "public" or whether that requirement has no application to a situation where title is asserted by possession under Article 2279. If I answer that question in the affirmative, I should then need to address whether indeed it has been shown by the Claimant that her possession was not "public". (I can express the issue thus, because it was conceded by Maître Foussard that the burden would lie upon the Claimant.)

58.This seems to me a question of logic. The requirement that possession be shown to be "public" under Article 2229 corresponds closely to the notion of "nec vi, nec clam, nec precario" traditionally applied in the law of prescription under English law. It obviously relates, in this context also, to the acquisition of title by prescription and is thus directly relevant to Article 2262. In my judgment, however, both on the evidence and as a matter of logic, it can have no relevance or indeed any meaning in the context of Article 2279 ("En fait de meubles, la possession vaut titre"). That clearly specifically contemplates that possession, and thus also title, can be taken instantaneously. That is plainly what happened here. It makes no sense to apply criteria for the acquisition of a prescriptive title, over a period of time, to the quite different situation where title may be acquired instantaneously. In any event, the very words of Article 2229 make clear that its relevance is confined to the acquisition of title by prescription ("Pour pouvoir prescrire...). I have no doubt whatever that in accordance with Article 2279 the Defendant acquired title in the fragment by transfer of possession on 10 November 1974. Her good faith is conceded. (I have no doubt that, where good faith is in issue, it may sometimes be relevant in that context for a French court to enquire into such matters as "unequivocal possession" or furtive behaviour.)

The fourth issue: Would the Defendant's possession have been vitiated by clandestinity?
59.The Defendant's alternative case is that she did indeed acquire title by prescription overt the 30 year period from 10 November 1974. In view of my primary conclusion, she does not need to place reliance on that argument. Nevertheless, I was asked to resolve a fourth issue which in my judgment can only be relevant to the alternative argument. I am asked to consider (again as a matter of French domestic law) what is meant by "public" under Article 2229.

60. As I have made clear already, it is not my view that Article 2229 or its concept of "public" possession has any bearing upon the Defendant's primary (and successful) argument that title was obtained under Article 2279. That is why I say that this fourth issue is only relevant to her alternative case. Nonetheless, again for the sake of completeness, I will state my conclusions on it in the light of the evidence. The questions have been posed in these terms:

"4. Given that the fragment remained continually on open display in the living room of the Defendant's home in Paris at all times between November 1974 and January 2005, had the Defendant by 21 January 2005 acquired title to the fragment by the alternative route of prescription acquisition under the 30 year rule provided by Article 2262 of the Civil Code? The following issues arise:

4.1 Was the Defendant's possession of the fragment 'public' – i.e. open and not clandestine?

4.1.1 Is it necessary (as the Claimant contends) for the Defendant to show that she made her possession of the fragment reasonably apparent to the Claimant in order to demonstrate that her possession of the fragment was 'public' since:

(a) the vice of clandestinity is assessed through the eyes of the Claimant?

(b) a finding of clandestine behaviour is only avoided if the material acts of possession are carried out by the holder, openly, permitting a reaction from the true owner who brings the claim by action?
4.1.2 Or (as the Defendant contends) is it sufficient that the holder:

(a) does not dissimulate the acts of possession to the person against whom one intends to invoke the effects of the possession; and

(b) holds the property openly albeit in private premises?

4.2 Has the Defendant shown that her possession of the fragment was 'public' within the meaning of Article 2229 (or, if the burden is on the Claimant, has the Claimant shown that the Defendant's possession was not 'public')?"

61.As was accepted in the evidence, and in argument, different considerations must come into play according to whether one is positively asserting acquisition by prescription, in order to establish a title, or whether one is relying (as here) on the rules of prescription by way of a shield against another's claim.

62.Maître Foussard did not adequately reflect this distinction, and was thus drawn into imposing unrealistic criteria for resolving the clandestinity argument. The Defendant's possession of the fragment could not, he argued, be free of that "vice" (le vice de clandestinité) unless she had taken some positive steps in relation to it (subsequent to the public auction in October 1974). Pressed for examples, he suggested that she might have exhibited it, or published photographs or articles about it. I fail to see how that can possibly be a requirement of the law in circumstances such as these. 63.Naturally, if someone has obtained an artefact knowing it to have been stolen from a particular source, or suspecting it, there may well be policy reasons for placing obstacles in the way of his acquiring a good title by secret possession. Here, by contrast, the Defendant's good faith having been conceded, she had no reason to keep the fragment she had bought under wraps, nor yet even to suspect that the then government of Iran had a claim to repossess it. There was obviously no question of dissimulation on her part or of any intention to deceive. It makes no sense that innocent purchasers of such objects should be required to go on for up to 30 years advertising the fact of their possession – just in case a third party at some stage decides to assert a claim.

64.Accordingly, I find persuasive and readily accept the evidence of Maître Berlioz that there is no such requirement under French law. I hold that the Defendant's possession of the fragment was not vitiated by clandestinity, and thus I resolve the fourth issue also in her favour.

65.My attention was drawn in this context to certain French case law. Great importance was attached by Maître Foussard to a decision of the

Cour de Cassation on 9 February 1955, to which Maître Berlioz said he had given a wider significance than it could reasonably bear. It was, he suggested, of no special importance beyond the facts of the case itself. It was essentially concerned with applying Article 552 of the Civil Code, as the report makes clear. It addressed the occupation of a cellar which ran under another house. Article 552 embodies the principle of French law that the owners of a house are entitled to possession of what lies beneath it. It appears that the house owners (les consorts Dumets) had been unaware throughout the relevant prescription period of the adverse use of the cellar beneath (to which they had no direct access) by their neighbours (les époux Jacquemins). Thus it was held that the occupation of the cellar did not displace the primary rule.

66.Maître Foussard relied on the case as stating a rule of wider application which would embrace the present case. The facts are, however, quite different. One of the distinctions to which Mr Lowenstein attached significance is that there the court was concerned with title to real property (immovables), whereas in this instance I am dealing with a movable item. It is relevant to address another French decision of 18 June 1959 concerning bearer bonds (also movable property) where it was held that possession had not been vitiated by clandestinity. They had been kept in a bank safe between 1939 and 1950 which might, in one sense, be thought to represent the antithesis of "public" possession.

Yet it was nevertheless held that a good title had been acquired by prescription. There was a similar case decided on 8 March 2005.

67.It is Maître Foussard's contention that, in the half century since the cellar case, bearer bonds represent the sole exception to the "principle" for which it is supposed to stand. Save in the case of bearer bonds, he says, a title cannot be acquired by prescription without the possession being publicly visible or accessible. I much prefer the analysis offered by Maître Berlioz.

68.He suggests that there is nothing specific to bearer bonds. It is in the nature of some movable property that one may keep it and "use" it out of the public gaze. Bearer bonds are merely one example. Another might be a valuable necklace or a painting acquired for investment purposes. Possession over 30 years (especially possession in good faith) could lead to a good title by prescription without any public exposure of the item in question. Maître Foussard agreed that the court would need to be guided "above all" by the characteristics of the property and how it is normally used.

69.I do not believe it would be a worthwhile exercise for me to set out and consider each of the French cases to which reference was made. Suffice to say that none of it undermined the cogency of Maître Berlioz' analysis of the criteria applicable to Articles 2279 and 2262.

The final outcome

70.In the result, as I informed the parties at the conclusion of the case on 19 January, there will be judgment for the Defendant. I will hear argument as to any consequential matters and, in particular, whether it is necessary to order an enquiry as to damages flowing from the grant of the injunction by Silber J on 19 April 2005.