same emphasis also allowed their Lordships to overcome the constitutional objection that Security Council resolutions have no direct effect in English law. At the same time, the limitations placed by Lords Steyn and Nicholls on the court's "public international law" extension of the public policy exception obviously raise important questions. All in all, *Kuwait Airways (Nos. 4 & 5)* represents an intriguing development in the ever more nuanced relationship between public international law and English law.

ROGER O'KEEFE

***

Apart from the more high-profile questions of public and private international law noted above, *Kuwait Airways* also raised some nice issues about the often enigmatic English tort of conversion.

To recapitulate, ten aircraft were grabbed in Kuwait by invading Iraqi forces in August 1990, taken to Iraq, and then purportedly incorporated in IAC's fleet. Four of them were later moved to Mosul and destroyed by Allied bombs: with these we will not be concerned. The other six, which form the subject of this note, were sent to Iran for safe-keeping, survived and were eventually returned to KAC. Nevertheless KAC remained less than satisfied, since it had lost the use of them in the meantime—being constrained to charter substitutes—and had had in addition to pay Iran some $20 million for looking after them. These sums, *inter alia*, KAC sought to recover from IAC under the rubric of conversion.

The first query that arose was whether IAC had ever converted the aircraft at all. This may seem a disingenuous question: but one must remember that State immunity cloaked all events before RCC resolution 369 on 17 September, a period that included the aeroplanes' physical seizure and delivery to a doubtless grateful IAC. KAC therefore had to limit their claim to subsequent, less unequivocal, acts of IAC, notably their conduct in registering and insuring the aircraft, having them repainted, and even occasionally flying them. Were these acts sufficient to amount to conversion? IAC said not. They had not (they observed) taken, destroyed or disposed of the aircraft, or otherwise in any way interfered with KAC's possessory rights in them. All they had done was to make use of them and generally act as an owner might: but such activities were not, as such, conversion.

This pettifogger's point convinced neither the Court of Appeal nor the House of Lords. IAC had, it was said, gone further than mere use or minor interference: they had been "asserting rights inconsistent with KAC's rights as owner" (Lord Nicholls) or

https://doi.org/10.1017/S0008197302241707 Published online by Cambridge University Press

"manifest[ing] an assertion of rights or dominion over the goods which [was] inconsistent with the rights of the plaintiff" (Lord Steyn), and that was enough to make them liable.

On the facts this is intuitively—and indeed legally—correct. But (with respect) it could have been better expressed. Take a simple example. Suppose you borrow my BMW and tell everybody it is yours. Besides showing abominable manners, you undeniably assert a right to the car inconsistent with mine. But equally incontrovertibly—*pace* Lords Nicholls and Steyn—you do not convert it. As section 11(3) of the Torts (Interference with Goods) Act 1977 pithily puts it, denial of title is not of itself conversion. Indeed, imagine you go further and actually sell (or rather, affect to sell) the vehicle to a finance company. An unequivocal claim of a right entirely at odds with mine, certainly. But a conversion? Unless and until you physically deliver it, the answer is a clear "No": see, for example, *Lancashire Waggon* v. *Fitzhugh* (1861) 6 H. & N. 502, *Consolidated Co.* v. *Curtis* [1892] 1 Q.B. 495, 498.

However, if assertion of inconsistent rights is not the touchstone of conversion, what is? The answer, it is suggested, is: some indication that the defendant intends not only to promote his own spurious right, but to block or hinder the claimant in exercising his genuine one. So while you can say you own my BMW with impunity, you convert it as soon as you go further and tell me I can't have it back, or put a barbed wire entanglement round it (rather like the defendant in *Oakley* v. *Lyster* [1931] 1 K.B. 148, who barred the plaintiff from collecting his own building rubble). And, effectively, this is what IAC had done: what mattered was not so much their own claims with regard to KAC's aircraft but the clear indication that beyond any doubt they would resist any claim by KAC to exercise the rights they had.

Secondly, IAC raised a neat point about KAC's claim for damages for loss of use, including the expense of chartering replacements. IAC pointed out that, even if they had never touched the aircraft, KAC would still have been unable to use them—the Iraqi Government had, after all, abstracted them in the first place and would hardly have given them back to KAC without a fight. It followed, said IAC, that any loss of use was not the result of any conversion committed by them, but rather of the original seizure. Now, this kind of causation plea—"if I hadn't done it you would still have suffered the same loss from other events"—is always awkward. In some torts, such as negligence, it is on principle available; elsewhere, as in deceit, it is excluded (*e.g.*, *Slough Estates plc* v. *Welwyn Hatfield District Council* [1996] 2 E.G.L.R. 219). Lord Nicholls, faced with a straight choice, declined to admit it

https://doi.org/10.1017/S0008197302241707 Published online by Cambridge University Press

into the tort of conversion. A converter, his Lordship said, was liable for depriving the owner of possession: the very act of receiving another's chattel obliged him personally to let that other have his property back. For this reason, it was beside the point that some other factor might equally have deprived him of it anyway. Despite the apparent violence to generally accepted principles of causation, there is (it is suggested) much to be said for this view. It certainly makes for simplicity: furthermore, where serial conversions are in issue, there is something unattractive about the plea of subsequent converters that the entire loss of use claim should fall on the first converter and that they should escape scot-free.

The third question concerned consequential damages and the rule of remoteness. Was a converter liable expansively, for all direct consequences of his conversion, or only in a more limited way, for such results as were foreseeable? In the House of Lords the issue strictly did not arise; nevertheless, Lord Nicholls chose to discuss it. Once again, the message from other torts was mixed. In negligence foreseeability governs, as it does in nuisance and *Rylands* v. *Fletcher*; by contrast, in deceit direct causation is the test. The Court of Appeal in *Kuwait* (see [2001] 3 W.L.R. 1117) had inclined to the "foreseeability" view as regards conversion. Lord Nicholls was not so sure, however, and his reason was refreshingly original. Converters, he observed, were less homogeneous than defendants in deceit or negligence suits, ranging as they did from thieves to mere dupes. And if so, there was no reason why the rule of remoteness should not equally vary: direct consequences for bad faith defendants, but foreseeability for those who acted in good faith. This may be a novel approach: but it seems (if one may say so) eminently sound. Moreover, if his Lordship's suggestions are taken up, similar reasoning could equally well apply to other torts, such as assault or trespass to goods. We may have a law of torts rather than a law of tort: but there is no necessary reason why all instances of one tort should be subject to the same rules merely because they happen to share the same name.

ANDREW TETTENBORN

https://doi.org/10.1017/S0008197302241707 Published online by Cambridge University Press