HARLEY v SMITH

QUEEN'S BENCH DIVISION

Foskett J.: January 20, 2009

[2009] EWHC 56 (QB); [2009] P.I.Q.R. P11

Divers; Islamic law; Limitation periods; Personal injury claims; Saudi Arabia; Termination of employment

H1 *Personal injury abroad—foreign jurisdiction—Saudi law—Limitation—Foreign Limitation Periods Act 1984—"undue hardship"—whether claim statute barred*

H2 The claimants were all British professional divers, who were employed by the second defendant (ADAMS), which was a Saudi owned company. They were working offshore in Saudi Arabia (KSA) when they were injured in the course of their employment on May 7, 2003. The claimants, who were supervised by the first defendant, were working from a vessel offshore from KSA when they were exposed to toxic chemicals that caused long term injury and ultimately ended their careers as divers.

H3 The claimants commenced a tortious claim in negligence in the United Kingdom against the defendants within the UK limitation period. It was agreed that Saudi law would determine liability and the defendants contended that the claim was time barred under Saudi law. They submitted that the limitation period was one year from the date of injury. This limitation period arose pursuant to KSA Labour Law, namely a statute by Royal Decree. An additional issue was whether pursuant to s.2 of the Foreign Limitation Periods Act 1984 the limitation period should not apply as to permit it to do so "would cause undue hardship" to the claimants.

H4 The claimants had contracts with ADAMS and they were expressed to be "subject to the Laws of Saudi Arabia only". After the accident it was found as a fact, first that until the claimants left Saudi Arabia on June 17, 2003 they were hospitalised for a period or otherwise unwell. Secondly, that ADAMS did not provide positive assistance to the claimants particularly in relation to their legal position. In fact ADAMS asserted in correspondence that the incident was not directly attributable to any action of ADAMS.

H5 The claimants submitted on the limitation issue that as the claim was framed in tort then there was no limitation period under Shari'ah law and the claims were not time barred. Alternatively, if it applied, the one-year limitation period commenced only on termination of the work relationship, namely June 2006 and so the claim was issued in time.

H6 **Held** (finding for the claimants):

(1) The applicable law was KSA law. On the limitation issue, on a proper construction of the applicable the relevant limitation period was 12 months.
(2) Under the relevant principles of Saudi law the 12-month limitation period did not commence until the end of ''work relations'' between the employer and employee (art.222 of KSA law).
(3) As the claimants were paid by ADAMS until June 2006 and they were still undergoing periodical medical examinations then the employment relationship subsisted to that date.
(4) The claimants were not therefore defeated by limitation.

H7 If that conclusion on limitation was wrong then the limitation period should be disapplied under the Foreign Limitation Periods Act 1984 as not to do so would cause ''undue hardship'' to the claimants as they were impeded in obtaining legal advice and so prevented from protecting their position. In addition on their return to the United Kingdom they took legal advice within a reasonable time and they were generally deprived of the opportunity of seeking redress through no fault of their own (*Jones v Trollope Colls Cementation Overseas Ltd The Times*, January 26, 1990 CA and *Arab Monetary Fund v Hashim (No.9)* [1996] 1 Lloyd's Rep. 589 CA (Civ Div) considered and applied).

H8 **Cases judicially considered:**
(1) *Arab Monetary Fund v Hashim (No.9)* [1996] 1 Lloyd's Rep. 589
(2) *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 W.L.R. 1362; [1991] 4 All E.R. 638; (1991) 135 S.J. 382
(3) *Durham v T&N Plc* Unreported May 1, 1996 CA (Civ Div)
(4) *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409; [2002] 3 All E.R. 385
(5) *Gotha City v Sotheby's (No.2) The Times*, October 8, 1998 QBD
(6) *Iran v Barakat Galleries Ltd* [2007] EWHC 705 (QB)
(7) *Jones v Trollope Colls Cementation Overseas Ltd The Times*, January 26, 1990 CA
(8) *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 W.L.R. 387; [1996] 1 All E.R. 585; [1996] B.C.C. 453
(9) *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] EWCA Civ 68; [2001] Q.B. 825; [2001] 2 W.L.R. 1344

H9 **Legislation judicially considered:**
(1) The Foreign Limitation Periods Act 1984
(2) KSA 2005 Labour Law

H10 **Claim** by the claimants for damages for injuries suffered by reason of alleged negligence of the defendants arising out of their employment with the defendants.

H11 *Robert Weir*, instructed by *Bridge McFarland and Thompsons*, for the claimant.

Stephen Cogley, instructed by *Clark Ricketts*, for the defendant.

APPROVED JUDGMENT

FOSKETT J.:

Introduction

1 Until an incident that occurred on May 7, 2003 the three claimants were all professional divers. At the time of the incident they were employed by the Second defendant, a Saudi-based and Saudi-owned company whose business—as its name suggests—is the provision of diving and marine services. Its name is often abbreviated to ''ADAMS'' and I will use that expression throughout.

2 The incident occurred when the claimants were working from a vessel called the ''Aramco MV Rimthan 2'' in an oil field in the territorial waters of the Kingdom of Saudi Arabia (the KSA). The first defendant, who was employed by ADAMS, was the diving supervisor for the three claimants. The contract on which the Second defendant was engaged at the material time was a contract with Saudi Aramco (Aramco stands for ''Arabian American Oil Company''), the state-owned national oil company of Saudi Arabia, which owned the vessel on or from which the claimants were working.

3 The case they wish to advance is that on the day in question they, together with three other divers, were required to work in water into which toxic chemicals had been discharged from the Saudi Aramco vessel with the consequence that each suffered injury. They were all hospitalised for some period after the incident and each claims to have suffered long-term consequences, both physical and in some cases psychological. None has been able to return to diving as an occupation though two have found other occupations.

4 Each has launched a tortious claim in negligence in the UK against the First and Second defendants within the limitation period that would apply if UK law applied to their cases. I will say more about the manner in which the claim is framed below. It is, however, accepted that Saudi law is the law by which the issue of liability falls to be determined. It is alleged by the defendants that the claims are, as a matter of Saudi law, time-barred.

5 It is the issue of limitation that I must determine as a preliminary issue pursuant to an order of Master Rose of April 17, 2008 as amended by an order made by Blake J. on November 19, 2008.

6 There are two broad issues: first, are the claims time-barred by Saudi law and second, if so, should I hold, pursuant to s.2 of the Foreign Limitation Periods Act 1984, that the Saudi limitation period should not apply because to permit it to do so ''would cause undue hardship'' to the claimants?

7 That is the background in a nutshell. I need to trace the history in a little more detail before turning to the law and the competing arguments.

More detailed background

8 The basis upon which the claimants were engaged by ADAMS and the period of their respective contracts is of potential importance to one of the issues arising under the limitation question. However, in a broad sense Mr Hopley had worked for them since 1996 and Mr Iles since 2001. Only Mr Harley was, at the time of the incident, new to working for them and engaged by them for the first time.

9 Each claimant had written contracts of employment with ADAMS. The phraseology of Mr Hopley's contract was slightly different from that in those of Mr Harley and Mr Iles, but the general effect would seem to have been intended to be the same. Mr Hopley's contract at the time of the incident had as the ''Effective Date of Contract'' February 4, 2003 with the ''Last Day of Contract'' being March 1, 2004 (a period of 392 days). The ''Vacation Entitlement'' was 28 days for 70 days work. Mr Harley and Mr Iles had contracts drawn with an ''Effective Date of Contract'' of April 14, 2003 and April 22, 2003 respectively. In fact Mr Harley never signed his contract, though nothing turns on it because he accepts that he was to be employed initially for a 10-week (70 day) period. Each contract contained the following provision concerning the ''Period of Employment'':

> ''(a) The period of employment covered by this contract agreement will be at the sole discretion of ADAMS and may be terminated by ADAMS, for convenience, without notice.
>
> (b) Notwithstanding. . . (a) EMPLOYEE shall be entitled to a relief following a period of 70 days (the base period), from arrival within the Kingdom of Saudi Arabia. ADAMS shall use its best endeavours to supply such relief in a timely manner.
>
> (c) The period of engagement may be extended beyond the base period, subject to the mutual agreement of both parties.
>
> (d) Should EMPLOYEE terminate this contract for convenience, ADAMS, at its sole discretion, retains the right to seek compensation towards the cost of relieving EMPLOYEE. Such compensation, however, shall be limited to travel and associated visa costs, or a part thereof, incurred as a result of supplying the relief.''

10 Each of the contracts contains the express provision that it is ''subject to the Laws of Saudi Arabia only''.

11 It is worth recording at this stage that it is the law of the KSA that a foreign national may be employed only on the basis of a fixed term contract. Any such contract may be extended, but the contract may only stipulate for a fixed period.

12 I will return to the implications of the contractual position later, but the basis upon which each claimant was able to move (freely or otherwise) within the KSA should also be noted. They all lived and worked onboard ship, each possessing a ''Seaman's Book'' issued by the UK Department of Transport. Mr Harley and Mr Iles were not permitted to work onshore within Saudi Arabia nor were they allowed onshore for any purpose (except for entry and exit purposes to and from the KSA) without temporary shore access being arranged. Permission of

this nature had to be obtained from the Saudi Coast Guard. Mr Hopley was, however, entitled to go onshore without this kind of specific permission because he had a visa called an Iqama.

13 The restrictions affecting Mr Harley and Mr Iles meant that in order for them to obtain medical treatment onshore, the permission of the Coast Guards was necessary. Equally, if, for example, they wished to go onshore to consult a local lawyer, they would need permission from the Coast Guards to do so. Inevitably, arrangements such as these would have to be made through the intervention of ADAMS as their employer. I will return to the potential significance of this in due course.

14 The general geographical location of the material events was in the region of Dammam in (and the capital of) the Eastern Province of the KSA. Nearby cities are Al Khobar and Dhahran, the latter housing the headquarters for Saudi Aramco. Another location that figures in the story is Ras Tanura, a city further to the north close to which (or part of which) is Rahimah. Some way considerably further north is the Tanajib Camp, which I understand to be a residential complex for Saudi Aramco employees.

15 The precise location of the vessel where the incident occurred was not specified in the proceedings before me, but it is, I think, common ground that, after initial treatment on the vessel (or a nearby support vessel) by paramedics who were on hand, the claimants were taken to the nearest hospital which was the Al Mana General Hospital in Al Khobar. I infer, therefore, that the incident occurred in waters not far from there.

16 As I have indicated, the incident took place on May 7, 2003. The general account of the claimants is that it was not until the following day that arrangements were made for them to be seen at the hospital. The boat upon which they were working docked on that day in order for them to disembark. It appears that after about a day or two they were all discharged from hospital, but within a short while of that they were all readmitted for a further 10 days or so. Each says that he felt generally very unwell, experienced difficulties in breathing and was essentially lethargic. They each said, and I accept, that this was an extremely worrying time for them.

17 Their symptoms continued whilst they awaited repatriation which eventually occurred when they left the KSA on June 17, 2003. Following their eventual discharge from hospital on or around May 22, Mr Harley and Mr Iles were taken back to live on the boat where they had been accommodated previously. Mr Hopley had gone to a guest house in Rahimah provided by ADAMS and then, at some stage, he was taken to the Tanajib Camp which, as I have said, was some distance away. He told me that it was about two hours by car from the Dammam/Al Khobar region which, by reference to the map the parties provided to me at my request, would seem about right. At all events, for a period during which the further events I shall describe below leading up to his departure on June 17 took place, Mr Hopley was housed a good distance from where his colleagues were, from the hospital and from where ADAMS' offices were.

18 Each of the claimants said, and I have no reason to doubt it at all, that they were very concerned for their own health and well-being during this period. Equally,

they wanted to obtain some legal advice locally about what they should do to protect their interests in relation to a possible compensation claim. Mr Hopley, who had had the most experience of life in the KSA, telephoned the British Embassy in Riyadh from the hospital. As a result of that the Vice Consul visited the three claimants in hospital the following day. It should, perhaps, be noted that the Head of the British Trade Office in Al Khobar expressed surprise to ADAMS (in the person of Mr Stonebanks: see [20] below) that his office had not been told of the hospitalisation of the claimants for some 10 days. In an email of May 25 he indicated that Mr Hopley had complained about the way ADAMS "had handled the case". Mr Hopley told me that he telephoned the Embassy principally because he was scared for his health, but his email represents some contemporaneous confirmation of what each claimant said, namely, that they felt that ADAMS were not being helpful to them—indeed Mr Hopley said that he felt ADAMS were being obstructive, a general theme supported by the others.

19 That email was in response to a letter to the Head of the British Trade Office from Mr Stonebanks dated May 24, 2003, the material parts of which were in these terms:

> "We are at somewhat of a loss as to why these employees have felt it necessary to contact you regarding this matter and we would wish to place on record with you the actions which have been taken and are still being taken to ensure proper medical treatment and recovery.
>
> These personnel suffered various reactions to the escaped substance, including rashes, nausea and temporary respiratory difficulties. Their initial treatment was on board the ARAMCO support vessel by the ARAMCO paramedic and when they did not recover fully, it was determined that they should be transferred to the Al Mana Hospital in Al Khobar for observation and treatment. Following a period of days in the hospital they were duly discharged at various times since some required different treatment to others as the reactions to the substance likewise varied from person to person.
>
> Subject to medical clearance as to fitness to travel and Saudi coastguard permission, we are at present planning to arrange for the British divers to be repatriated so that their condition can be assessed by a specialist occupational health and offshore medical unit based in Aberdeen. We retain this unit on a long-term basis to provide advice and assistance in the event of an underwater injury or accident.
>
> Subject to the outcome of that re-assessment of their present condition and any further treatment as prescribed, they will then undergo a full Diver Medical Examination under UK HSE regulations to ensure they are fit to return to diving work.
>
> All costs (transport, medical etc) related to the foregoing will be borne by this Company and during this period these employees will receive their full salary as specified within their individual Contracts of Employment.
>
> Frankly, we do not see that there is anything further which we (or any other responsible employer) could or would have done.

> We now understand, however, that these employees are reluctant to leave the Kingdom for some reason, but if they refuse then we will read them as being in breach of their obligations on the grounds that they are unwilling to follow our instruction (based solely upon their welfare) to return for the medical assessment and appropriate follow up treatment (if any required) as described above. If there is a need for further medical treatment, then the sooner this is diagnosed by a specialist unit the better for the individual concerned as delay may prejudice a potential full recovery.
>
> It is our opinion that these employees are behaving irrationally and irresponsibly. We believe we have acted to the highest standards in our dealings with them and our care for their well-being.
>
> It should be noted that the escape of this pollutant into the sea where these divers were working was not caused by any act, omission or negligence of this Company or any of its employees.
>
> We regret that our employees found it necessary to trouble you with this matter but if you require any further information or feel that you have any comments on the way this matter has been handled by us, then please do not hesitate to contact the undersigned.''

20 Mr Stonebanks accepted (as the tone of his letter suggests) that he was somewhat irritated by the actions of the three claimants. Indeed in cross-examination he volunteered that his perception was that they were giving the staff of the hospital ''the run around''. Mr Stonebanks, from whom I heard, gave the impression of being a tough and uncompromising character (doubtless necessary in his role as Operations Manager for the large number of divers under his control). It was, however, unfortunate, in my view, that he should have been describing the three claimants as ''behaving irrationally and irresponsibly'' when they were plainly suffering a number of distressing symptoms (and shortness of breath will inevitably cause an individual to feel very vulnerable) away from their families and in circumstances where they might reasonably have felt that their concerns were not being fully recognised and their interests not being fully met.

21 At all events, that was how Mr Stonebanks expressed himself on May 24. A further period of a little over three weeks elapsed before the claimants were repatriated and I have already described how they were accommodated during that period. It is clear from the email from the Head of the British Trade Office to which I referred in [18] that the Vice Consul gave them a list of local lawyers. In other words, this confirms their account that they were, even by then, concerned to do something to protect their interests. The email also confirms that they wanted to speak to a member of the Gosaibi family which, I imagine, is the family behind ADAMS. That, according to the email from the Head of the British Trade Office, would be a matter for Mr Stonebanks to ''sort out'' with Mr Hopley, since it was his request.

22 It is plain from the contemporaneous evidence that concerns about their legal position, in addition to their health position, continued to exercise all three claimants throughout the period until they returned home. It is, perhaps, not surprising that they should be concerned about their legal position because

Mr Owens, the Financial Controller of ADAMS had written to each of them on May 21 sympathising with them, but asserting that the ''incident was not attributable to the direct actions of [ADAMS] or its employees.'' Since they considered that Mr Smith (the first defendant and an employee of ADAMS) bore some responsibility for what occurred, this would have been an assertion that would have caused them concern.

23 A meeting between the three claimants and Mr Owens and Mr Stonebanks was held in the ADAMS' office in Dammam on June 9. It appears from a letter written by Mr Owens and Mr Stonebanks on the following day that the claimants had asked for a meeting to be arranged between them and ''the Emir of the Eastern Provence''. ADAMS indicated that they could not arrange this, but would provide transport and coastguard clearances to enable such a meeting. In relation to the question of legal advice the following paragraph appears in the letter:

> ''With regard to your request that the Company assists in the appointment of a Saudi lawyer, we have carefully considered this and while we do not wish to hinder this process, it could be deemed inappropriate for the Company to be seen to have influenced your decision in any way and, as we are sure you will recall, we have repeatedly stated that you should act whatever way you believe to be in your best interests.''

24 That letter also contained the following paragraph confirming the arrangements proposed by ADAMS for a medical assessment:

> ''We can again confirm that the costs of this medical assessment and any further remedial treatment prescribed will be paid by the Company. Upon your full recovery, you will require to undergo a new Diver Medical Examination to ensure that you are fully fit to return to work. During this period of recuperation you will remain on full pay as per the terms of your Contract of employment.''

25 On June 14 ADAMS delivered by hand to each claimant a letter indicating that they (i.e. ADAMS) had:

> ''... been successful [in arranging for a full medical assessment at the Aramco General Hospital in Dhahran] and that [they] have today received confirmation from Saudi Aramco that they are prepared to offer the opportunity to have a complete medical evaluation and testing under the supervision of their Occupational Medicine Specialist''.

They were urged to let ADAMS know their decision ''at the earliest opportunity''.

26 It is plain that the claimants did not see the letters of June 10 and 14 as helping to solve their difficulties as they saw them. On June 15 (which was a Sunday) two communications concerning their position were sent. Mr Hopley sent a fax to Mr Stonebanks asking for arrangements to be made for ''the six divers'' to be taken off the boat to enable them to meet a Saudi lawyer on the Monday morning at the guest house in Ramihah. Mr Harley, acting on behalf of all them, sent a lengthy email from his mobile telephone to Mr Stonebanks, copying it to

Mr Owens and certain others. The specific requests being made were intended, the email said, to alleviate the ''anxiety and stress the divers are suffering'' because of concerns about how committed ADAMS was to supporting their recovery in their own countries. The email wanted a ''legally binding agreement'' (signed by representatives of ADAMS and a member of the Gosaibi family) to the effect that they would remain on full pay until medically and mentally fit to resume diving, with certain other specific commitments which were said to be designed to facilitate their attendance at the specialist medical unit in Aberdeen to which ADAMS had been wanting to send them for some time.

27 Whilst it might be said that Mr Hopley was, strictly speaking, physically free to make his own arrangements for obtaining legal advice, he was at least at some times during this period accommodated in the Tanajib Camp although it looks as if he was at the guest house or on the boat at the time he sent the fax. So far as Mr Harley and Mr Iles were concerned, they depended upon ADAMS to arrange coastguard clearance for this purpose. All this was during a period when, albeit not hospitalised, they were all experiencing symptoms and discomfort arising from the consequences of the incident. It is against that background that their communications of June 15 should be seen.

28 So far as Mr Harley's email was concerned, Mr Owens and Mr Stonebanks replied the following day expressing surprise as to some of its contents, reiterating that they would continue to be paid ''in accordance with your contract of employment'' whilst the medical investigations took place. It does not appear that there was any reply to Mr Hopley's fax. At or about this time, the claimants decided that they would be prepared to leave the KSA for the medical assessments. However, nothing had been resolved in relation to legal advice. According to Mr Harley, at about this time they were taken to be interviewed by the Saudi Coast Guard to explain why it was they were not prepared to leave the KSA. According to Mr Harley, the coastguard advised them not to leave until they had lodged the case and the coastguards helped them to draft a document indicating their position. The document was in these terms:

> ''We the below mentioned divers are refusing to leave the Kingdom of Saudi Arabia until [ADAMS] make arrangements for us all to lodge our case in the Saudi court so as it can follow the full legal procedures of Saudi Arabia. We also ask that the company write a letter covering all the points which were presented to them in an email on June 15, 2003 guaranteeing all the points fully and accurately as per the email.''

29 Mr Harley (with whom Mr Iles concurred) said this in his witness statement:

> ''The Coastguard took a statement from us (all of us) as to the facts of the accident and what happened afterwards. The Coastguard told us that in fact we were entitled to lodge particulars of the accident but then we were taken back to the ship by the [ADAMS] staff and we were simply prevented from leaving the ship and registering the claim. He told us that the claim had to be registered in person. There was no mention of any time period in which the claim had to be lodged—just that it had to be lodged personally and that

> it was not possible to lodge the claim by post or any other means. For about 14 days we asked everyday to be allowed to go on land to register the claim but each time we were refused. After about 14 days we gave up and thought it was clear that they were just not going to let us register the claim and they kept badgering us to ship us home, which we finally agreed to. Another very important reason for finally agreeing to come home was because we were all still concerned about our health and wanted to get checked out at an English hospital.''

30 Mr Hopley in his witness statement said this:

> ''Before I left for England, I was able, without the knowledge of the company, to go with the Saudi diver involved in the incident, Ahmed al Ahmadi to a firm of lawyers called Al Bassam Law Office. Mr Hardy and Mr Iles did not come as they were delayed. I think it was Mr Al Bassam who saw me. He spoke some English, but with some difficulty. During the very brief period of this meeting (about 15 minutes) I recall him saying this would be a big case. He spent time talking about the costs which he would need to recover though I do not recall the details. He did not mention time limits. He did not give me any advice about the case or enter into any form of future correspondence.''

31 When he gave his evidence, Mr Hopley indicated that he had signed something when he went to the lawyers' office on the way to the airport. However, he was uncertain as to what it was he signed and I am not prepared, on the evidence I have heard, to conclude that he did either formally lodge his case or, if he did attempt to do so, that he succeeded in a way which preserved his position within the KSA.

32 Mr Harley and Mr Hopley gave evidence in accordance with their statements. Mr Iles adopted the position taken by Mr Harley. The position they each took is consistent with the contemporaneous documentation to which I have referred.

33 Whilst it might be putting things too high to say that ADAMS actively prevented them from obtaining legal advice, what happened was tantamount to having done so. When Mr Stonebanks was asked in cross-examination whether he did not want them to see a lawyer, he said that he ''didn't mind'' and that it ''didn't matter'' to him. I have to observe that he did *not* say that he was *keen* for them to do so.

34 I am quite satisfied that ADAMS, for whatever reason it was, found the continued presence in the KSA of these three men, who wanted to seek compensation from them and/or from ARAMCO, an embarrassment. Whilst, as I have indicated, it would be impossible to conclude that ADAMS actively strove to prevent them seeing a lawyer, nothing was done to help them to do so in circumstances where, in my judgment, positive and active assistance should have been provided. The men were unwell in a way that must have been distressing physically and emotionally, they had no families to hand who could help and they were plainly unhappy that they were not getting the help and advice they wanted. Their employer was the only realistic source of practical assistance. As Mr Hopley put it, ''a little bit of help would have gone a long way''. It was

perfectly understandable that ADAMS would not have wished to become involved in the *choice* of a lawyer, but it is difficult to understand why they could not have taken the position of inviting the claimants to nominate a lawyer, make an appointment to see the lawyer and then for ADAMS to make all the necessary arrangements for them to attend the appointment. Although ADAMS told the Head of the British Trade Office in an email on the day the claimants left the KSA that such facilities would be offered, there is no evidence that a specific offer of help of that nature was made to the claimants at a time when it could have been taken up conveniently and readily and consequently none of the claimants received proper and fully informed legal advice about how to protect their interests before they left the KSA. On the evidence before me, none had actually taken the steps that would have been necessary to do so. (The email to which I have just referred, incidentally, shows that the claimants had again contacted the Head of the British Trade Office in his consular capacity and demonstrates also the frustrations of ADAMS that they should have done so.)

35 Since ADAMS were, in my view, instrumental in depriving the claimants of the opportunity to obtain proper legal advice that would (or ought to) have ensured that their interests were protected, it may seem surprising that they should now be taking the point that the proceedings that the claimants did, in due course, bring were out of time according to Saudi law. However, that is ADAMS' legal entitlement subject to the question, to which I will return if the issue arises, as to whether what ADAMS did (or, more accurately, failed to do) whilst the claimants were in Saudi Arabia is material to the issue of ''undue hardship''.

The limitation point

36 ADAMS assert that there is a requirement in Saudi Arabia that any claim of the nature sought to be advanced by the claimants must be lodged within *one year* from the date of the incident or, alternatively, from the termination of the work relationship which is either the date when they ceased working for ADAMS (which was effectively the same date as the incident) or no later than when their contracts ceased. If that is so, it is accepted that their claims would be out of time. However, it is argued on behalf of the claimants that since the claims are claims in tort and that there is no limitation period under *Shari'ah* law in respect of such claims, then (irrespective of the tribunal that adjudicates on the claim: see [66]–[78] below) the claims are not time-barred. The alternative argument on behalf of the claimants is that the one-year period ends only upon the termination of the work relationship and, in the events that happened in this case, that work relationship did not end until June 2006 and, accordingly, the claims are well in time.

37 The period of one year is said to arise under the KSA Labour Law, effectively a statute issued by Royal Decree.

38 I have had placed before me the relevant provisions of the Labour Law and have heard expert evidence about its implications in the context of the primary source of law in Saudi Arabia, namely, *Shari'ah* law.

39 I will refer to that evidence in due course, but there are two matters that need to be addressed before turning to that: first, the question of how the nature of the claims sought to be advanced by the claimants should be characterised or classified for the purposes of determining how they would be treated in Saudi Arabia; second, the question of how I should approach the question of determining what is the relevant law of Saudi Arabia for the purposes of this case.

The characterisation or classification of the claims

40 It is not disputed that the claims advanced can be brought in England. The English common law requires double actionability in tort claims which means that the wrong complained of must ordinarily be actionable both under the *lex loci delicti* and the *lex fori* (see, e.g. *Jones v Trollope Colls Cementation Overseas Ltd The Times*, January 26, 1990 CA, [57] below). Since there is no challenge to the jurisdiction of the English courts (save, of course, arising from the issue of limitation), the common assumption underlying the proceedings is that the tort relied upon would be recognized in Saudi Arabia.

41 Given that an English Court is the forum for the proceedings, the general rule is that English law (the *lex fori*) should be employed to characterise or classify the nature of the claim that, had it been advanced in Saudi Arabia, would have been before the courts or tribunals of that country: see, e.g. the first stage of the three-stage process described in *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] Q.B. 825, at [26]. In that case Mance L.J., as he then was, warned against too mechanistic an approach to this question (and related issues):

> ''While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived.''

He referred to what Auld L.J. had said in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 W.L.R. 387, 407:

> ''[C]haracterisation or classification is governed by the lex fori. But characterisation or classification of what? . . . the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which

> may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system . . .''

42 These authoritative formulations of the correct approach to the identification of the nature of the claim in issue in a case in which classification or characterisation of such a claim is important are those that I must endeavour to apply. Each bears a clear message that too limited and too parochial an answer to the relevant question is inappropriate.

43 The Particulars of Claim formulate a claim as a straightforward claim in negligence against the first defendant directly and against the second defendant as vicariously liable for the acts of the first defendant. There is also a direct claim in negligence against the second defendant. In English law, there is no contractual basis for the claims as advanced—and there would be no need for a contractual basis even though the claims against the second defendant could be formulated as a breach of an implied term of the contract of employment that the employer should take reasonable care for the safety of its employee. Whether one looks at the way the claim is formulated, or at the true issues thrown up by the claim and the defence (see *per* Auld L.J. in the *Macmillan* case), the claim would be classified or characterised as a tortious claim in negligence.

44 On the evidence I have heard about Saudi law, there is no doubt that a tortious claim in negligence is something recognised within that jurisdiction. If Mr Alissa, in the further written contribution he made after the conclusion of the hearing (see [60] below), was suggesting otherwise, I am unable to accept it. To that extent there would seem to be no difficulty about the classification or characterisation of the basis of the claims advanced in this case and no immediate conflict between the two systems from that point of view.

45 However, the difficulty that emerges from the expert evidence to which I will turn below, is whether such a claim, because it arises from what I will for this purpose call a ''workplace'' accident, has a relatively short limitation period (of 12 months) whereas a claim for negligence arising in other (non-workplace) settings is not similarly constrained. I will return to this issue below.

The approach to determining the applicable Saudi law

46 In *Iran v Barakat Galleries Ltd* [2007] EWHC 705 (QB), Gray J. said this:

> ''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, September 9, 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 Corp v Commissioner of Police of the Metropolis* [1991] 1 W.L.R. 1362);

(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 Corp* 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 Corp* at 1369D to G);
(4) it is not permissible to reject uncontradicted expert evidence unless it is patently absurd (*Bumper Corp* 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.'"

47 This guidance is, of course, extremely helpful and it has illuminated the path that I have had to follow. The guidance was based upon the *Bumper Development Corp* case and it is essentially to that case that one must look for the approach to be followed save, as always, that the context in which any guidance is offered always needs to be taken into account. I have to observe, with respect, that I find it difficult to draw proposition (4) in quite such strong terms as that in which it is formulated from the part of the judgment in the *Bumper Development Corp* case identified in the *Gotha City v Sotheby's (No.2) The Times*, October 8, 1998 QBD case. There are forensic circumstances which sometimes leave expert evidence "uncontradicted" in a material respect that should not, in my judgment, necessarily lead to the unqualified acceptance of that evidence. A jury in a criminal case is always told that it does not have to accept even the unchallenged evidence of an expert though, of course, it will be evidence it will wish to consider carefully in the context of all the evidence. I do not, for my part, think that a judge in a civil case is, or should, be any more constrained when endeavouring to make findings of fact about foreign law on the basis of expert evidence subject, of course, to what Lord Phillips of Worth Matravers M.R. said in *English v Emery Reimbold & Strick Ltd* [2002] 1 W.L.R. 2409 at [20]. At all events, I will return to the significance of this later, but it appears not to be a wholly unusual situation for a court of England and Wales to be confronted with expert evidence on foreign law that does not appear altogether satisfactory. Whilst I suspect that from time to time foreign courts face similar difficulties over evidence given by experts in English law, I fear that I have found myself in that position in this case.

The competing arguments on the limitation issue

The experts

48 I identified the competing assertions on the limitation issue in [36] above. I have been assisted on matters of Saudi law by Professor Adnan Amkhan for the claimants and Mr Wael Abdelrahman Alissa for ADAMS.

49 Professor Amkhan is an Honorary Fellow in Law at the University of Edinburgh and Fellow in Law at the University of Bedfordshire. He holds a degree of Bachelor of Legal Studies from the University of Al-Qaraweeyn, Fez, Morocco, a degree of Master of Laws from Queen's University Belfast and a PhD in law from the University of Cambridge. He is currently an External Examiner for the Master's degree programme of London University in International Economic Law. His primary expertise is in Islamic law and, as might be anticipated, he has given seminars in this and associated matters and has written extensively in these areas. He has given expert legal opinions to governments, companies and private parties on matters relating to modern Arab legal systems, Islamic law (including Saudi Arabian law) and international law. There is undoubtedly a significant international element in Professor Amkhan's work and he acknowledged openly that he has never practised law in Saudi Arabia. Professor Amkhan gave evidence without the need for an interpreter.

50 Mr Alissa is an attorney licensed to practise law in the KSA. He obtained a law degree from the King Saud University in Saudi Arabia and started in legal practice in 1991. He established his own firm in 2003 and continues to run his own practice as well as working in association with Denton Wilde Sapte in Riyadh, Saudi Arabia. He is, therefore, a practitioner in the KSA. His firm's areas of practice include international law, Labour Law, litigation, *Shar'iah* law, corporate and business law, commercial law, foreign investment law, real estate, insolvency law and intellectual property law. He said that he had personal experience of claims arising under the statutory labour laws and the application of the Shar'iah law to personal injury cases involving workers before the courts in the KSA and of limitation issues. Mr Alissa, though speaking some English, gave evidence with the assistance from time to time of an interpreter.

51 It will be apparent from the resumés of their respective experience that each approaches this case from a different perspective. There were, however, a number of areas of agreement that I should record before turning to the areas of disagreement. In the Joint Statement concluded between them in October 2008 the following areas of agreement were recorded:

- Islamic law (*Shari'ah*) is the primary source of law in the Kingdom of Saudi Arabia (hereinafter referred to as "KSA").
- Unlike modern Arab legal systems, *Shari'ah* does not recognise the concept of time limitation. Therefore, were the instant case tried under *Sharia'h* law the present claims of the claimants would not be time barred.
- In principle, *Shari'ah law* is the governing law for civil liability (tort) claims.
- The KSA's *Shari'ah* courts would enjoy a wide margin of discretion as to whether or not to hear the present claims of the claimants.

• However, if a *Shari'ah* court would decide to hear the claims of the claimants, the present claims would not be time barred.
• Article 222 of the KSA's Labour Law (promulgated by Royal Decree No. M/51, 23 Sha'ban, 1426 (September 27, 2005)) limits the time during which to bring a claim before ''The Commissions for Settlement of Labour Disputes''.
• For convenience and ease of reference, art.222 of the KSA's Labour Law is here reproduced in full. It reads as follows:

> ''(1) No case shall be accepted by the commission provided for in this law involving a claim of the rights provided for in this law or arising from a work contract after twelve months following termination of the work relation.
> (2) No case involving a claim of the rights provided for in the previous labour Law shall be accepted after twelve months following the effective date of this Law.
> (3) No complaint regarding violations of the provisions of this Law or the regulations and decisions issued hereunder shall be accepted after twelve months following the date of the occurrence of the violation.''

52 They disagreed on whether the claims would be time barred under art.222 of the KSA's Labour Law which, they indicated, was a ''critical issue'' and which gave rise to ''marked differences'' between them.

The Labour Law—Article 222(3)

53 Professor Amkhan had drawn attention in his initial report of June 24, 2007 to the fact that in a number of areas specific statutes had been enacted by the Saudi legislature expressly providing for limitation periods, one of which was in the field of ''labour disputes''. He did not express the view that this had any bearing on the circumstances prevailing in this case and concluded that ''the present claims are not barred under Saudi Arabian civil law''.

54 In his initial report of January 28, 2008 Mr Alissa asked and answered the question ''What is the applicable limitation period as a matter of Saudi Arabian Law for bringing claims of the type (namely personal injury) that are being pursued by the claimants?'' His answer was the cases were ''more than likely'' to be deemed disputes under the Labour Law and consequently the Labour Courts of the KSA would have jurisdiction. He mentioned the 2005 Labour Law referred to in the Joint Statement and said that arts 210–214 establish Preliminary and High Commissions to settle disputes under the Labour Law, depending on the amount of money involved. He drew attention to art.219 which states that these Commissions ''solely have exclusive right to consider all disputes relating to this [Labour] Law and the disputes arising from work contracts'' and to art.222(3) which bars any complaint being heard after twelve months (according to the *Hijri* or Islamic calendar) following the date of the occurrence of the ''violation''. He suggested that the claims would be time-barred ''if brought under the Labour Law''. However, he also drew attention to the proposition that the *Shari'ah* courts are courts of general jurisdiction and ''may agree to hear the matter'', though he

said it was ''important to note that the court may refuse to hear the matter because it is one that is within the jurisdiction of another specialized court''.

55 The disagreement in the Joint Statement between Professor Amkhan and Mr Alissa in relation to the applicability of the Labour Law appeared to focus solely on the effect of art.222(1). Professor Amkhan maintained his view that the *Shari'ah* courts would not have declined jurisdiction, but said that if the Labour Law was applied art.222(1) permitted a claim until 12 months had elapsed ''following termination of the work relation'' and the ''work relation'' in each case here did not terminate until June 2006 when ADAMS ceased making payments to each claimant. Mr Alissa expressed the view that as the claimants did not perform any work for ADAMS from the time of the incident on May 7, 2003 any monies paid by ADAMS could not be deemed a wage. Since the Labour Law required a ''wage'' be ''given to the worker for his work'' the payments made did ''not evidence . . . any such work relationship''.

56 Very oddly, there was no reference at all to art.222(3) in the Joint Statement. It emerged that it was not even discussed. If it was Mr Alissa's clear view (which certainly emerged in his second report dated December 6, 2008) that art.222(3) governed the situation and, as he asserted, ''the *Shar'iah* courts have no jurisdiction to hear the claims'', it is, I have to say, surprising that these matters did not find clear and explicit expression in the Joint Statement. In his second report dated December 10, 2008 Professor Amkhan expresses himself in a way that suggests that he thought that Mr Alissa was no longer pursuing a view based on art.222(3).

57 I do not know why this should have occurred and I am, of course, concerned not to hold it against Mr Alissa if it occurred through some misunderstanding of the English court procedures or some language difficulties. Neither really ought to have occurred and there is nothing upon which I could truly form such a conclusion. To that extent it has shaken my confidence to some extent in the reliability I can attach to his evidence. If he had said that, on reflection, he felt he was wrong about the relevance of art.222(3) I would have understood. My conclusion, doing the best I can on the basis of my reading of the Labour Law with the assistance of Professor Amkhan (who I did regard as a reliable and distinguished witness within the areas comprising his experience), is that this particular part of art.222 does not apply to the claims made in this case.

58 I will deal with my reasons for so concluding now, although logically it does not arise until I have determined whether the Labour Law generally applies in a way that places these claims in the exclusive jurisdiction of the labour courts. I will deal with that as a discrete issue later (see [66]–[78]), but for present purposes will consider the Labour Law as having general applicability.

59 In order to put the arguments into context it is necessary to set out some of the provisions of the 2005 Labour Law to which reference was made in the evidence and argument. In addition to art.222 (which is set out in [51] above) they were as follows:

"Article (4):

When implementing the provisions of this Law, the employer and the worker shall adhere to the provisions of Shari'ah.

Article (5):

The provisions of this Law shall apply to:

(1) Any contract whereby a person commits himself to work for an employer and under his management or supervision for a wage.

Article (8):

Any condition that contradicts the provisions of this Law shall be deemed null and void. The same applies to any release or settlement of the worker's rights arising from this Law during the validity of the work contract, unless the same is more beneficial to the worker.

Article (37):

The work contract for non-Saudis shall be written and of a specified period. If the contract does not specify the duration, the duration of the work permit shall be deemed as the duration of the contract.

Article (55):

(1) The fixed-term contract shall terminate upon expiration of its term. If the two parties continue to implement it, it shall be deemed renewed for an indefinite period of time, subject to the provisions of Article (37) of this Law for non-Saudi workers.

Article (74)(2):

A work contract shall terminate in the following cases:

(2) If the term specified in the contract expires unless the contract has been explicitly renewed in accordance with the provisions of this Law in which case it shall remain in force until the expiry of its term.

Article (122):

An employer shall take the necessary precautions to protect the workers against hazards, occupational diseases, the machinery in use, and shall ensure work safety and protection. He shall post in a prominent place in the firm the instructions related to work and workers safety in Arabic and, when necessary, in any other language that the workers understand. The employer may not charge the workers or deduct from their wages any amounts for the provision of such protection.

Article (137):

In the case of temporary disability arising from work injury, the injured party shall be entitled to financial aid equal to his full wage for thirty days, then 75% of the wage for the entire duration of his treatment. If one year elapses or it is medically determined that the injured party's chances of recovery are improbable or that he is not physically fit to work, his injury shall be deemed total disability. The contract shall be terminated and the worker shall be compensated for the injury. The employer may not recover the payments made to the injured worker during that year.

Article (219):

Each of these Commissions shall solely have exclusive right to consider all disputes relating to this Law and the disputes arising from work contracts. It may summon any person for interrogation or assign one of its members to conduct such interrogation. It may also require submission of documents and evidence and take any other measures it may deem fit. The Commission shall also have the right of access to any premises of the firm for the purpose of conducting the investigation and reviewing all books, records and documents it deems necessary.

Article (220):

Cases shall be filed through the competent labour office with the preliminary commissions in whose locality or under whose jurisdiction the place of work falls. Prior to referring the dispute to the Commission, the labour office shall take the necessary measures to settle the dispute amicably. The Minister shall issue a decision setting forth the relevant procedures and rules.

Article (236):

Any person who violates the provisions of Chapters One and Two of Part VIII of this Law and the rules issued in accordance with the provisions of Article (121) of this Law shall be subject to a fine of not less than three thousand riyals and not more than ten thousand riyals for each violation or closing down the firm for not more than thirty days or permanently. The fine and the closing down may be combined along with the elimination of the course of the hazard.''

60 After the conclusion of the arguments and when reviewing the material for the purposes of drafting the judgment I noted the terms of art.214 which, though mentioned in passing by Mr Alissa in his first report (see [54] above), was not referred to explicitly by either expert. I invited the assistance of Counsel on the question whether it was of relevance to the issues that fell to me to consider. They consulted the experts, made further submissions in writing and the experts furnished further brief reports. I am grateful to them all for their further assistance

and I will set out below my conclusions on these matters, based upon all the material I have received. For present purposes I will merely record the terms of art.214:

"Article (214):

The Preliminary Commission shall have jurisdiction to:

(1) Render final decisions on:

(1.1) Labour disputes irrespective of their type, the value of which does not exceed 10,000 Riyals.

(1.2) Objection to the penalty imposed by the employer upon the worker.

(1.3) Imposition of the punishments provided for in this law for a violation of which the punishment does not exceed 5,000 Riyals and violations with a combined punishment not exceeding 5000 Riyals.

(2) Render preliminary decisions on:

(2.1) Labour disputes the value of which exceeds 10,000 Riyals.

(2.2) Disputes over compensations for work injuries, irrespective of the amount of compensation.

(2.3) Disputes over termination of service.

(2.4) Imposition of the punishments provided for in this law for a violation the punishment of which exceeds 5000 Riyals and violations with a combined punishment exceeding 5000 Riyals.

(2.5) Imposition of punishments on violations punishable by fines and consequential punishments."

61 Plainly, one must be careful not to construe this code (for that is clearly what it is) as if it was an English statute. It is the product of a different legal system with differing approaches to the interpretation of documents such as these. In the first place, art.4 demands adherence to *Shari'ah* law in the implementation of the law set out in the code. Secondly, it appears to deal with various aspects of the law relating to employment and the rights and obligations of employers and employees in one code where as in the UK they tend to be dealt with separately. In the particular context of this case, concepts of "compensation" may differ as between jurisdictions. However, notwithstanding differences of this nature, it is possible to gain a sense of what the code deals with by simply reading aspects of it. It seems to me to be possible to decide whether art.222(3) could apply to the claims made here by the determining whether what the claimants are seeking is some kind of remedy for a "violation". It is a "violation" to which the limitation period provided for in that provision applies.

62 Even without the need to rely upon the expert evidence of Professor Amkhan, it is not difficult to discern that a "violation" is something that leads either to a "fine" or the "closing down of the firm" for a period or permanently. In other words, the penalty is being imposed by the State for some breach of c.1 and c.2 of Pt VIII of the Code. Part VIII is entitled "Protection against occupational

hazards, major industrial accidents and work injuries, and health and social services''. Reference to those Chapters shows that the provisions relate to the general health and safety requirements that an English lawyer would ordinarily associate with the Health and Safety Act, including the provision of suitable protective equipment, the taking of precautions against fire hazards and to the requirements for firms that undertake ''high risk'' activities that could lead to a major industrial accident.

63 In his second report Professor Amkhan said that:

> ''Article 222(3) covers complaints concerning non-compliance with the provisions/rules provided for in the Labour Law or relevant regulations and decisions . . . [in contrast] to Article 222(1) . . . [which applies] to reciprocal rights and obligations emanating from the Labour law or the Contract of Employment.''

He maintained that position in cross-examination saying that it was ''quite clear from the context'' that it had nothing to do with a right to compensation.''

64 It does seem to me that Professor Amkhan is correct on this issue and Mr Alissa is incorrect. That Mr Alissa was not completely consistent about this particular feature of his evidence has made me wonder whether that at one stage he was not so sure himself that he was right. At all events, on this issue I prefer the evidence of Professor Amkhan and, accordingly, find that art.222(3) has no bearing on the issue of limitation.

65 Since I have been asked to deal with arguments and issues that might arise if I was held, in due course, to have been wrong about any particular matter, I will return to the consequences of a contrary conclusion in due course (see [86]–[95] below).

The Shari'ah courts or the labour courts?

66 Before turning to deal with the implications of art.222(1), I must address the fundamental issue of whether the *Shari'ah* courts would retain jurisdiction over claims such as these rather than deferring to the Labour courts. If that is so, it is conceded on behalf of ADAMS that no limitation point could succeed.

67 If one took the first five bullet points agreed between the experts (see [51] above), it would seem that they had agreed all the elements that would lead to the conclusion that there is a wide margin of discretion for the *Shari'ah* courts to entertain and deal with tortious claims. If that is so, and even if there was some kind of concurrent jurisdiction with the Labour courts, then I think that Mr Weir's argument would be right, namely, that there would have been no limitation period that would necessarily (or, perhaps more accurately, would probably) have applied in the KSA. If the option existed of commencing a claim such as that advanced by the claimants in this case before the *Shari'ah* courts and there was no compulsion upon the *Shari'ah* court to transfer it to the Labour courts, then there would be no basis for concluding that such a claim would be defeated by limitation.

68 However, if the reality is that such a claim (however it may be characterised or classified according to the English law as the *lex fori*) would, notwithstanding where it was commenced, find inevitably its way to the Labour court where it would certainly be defeated by limitation, would that make a difference? Mr Weir's primary argument, as I understand it, was that if there was the slightest chance that a *Shari'ah* court would retain jurisdiction over such a claim given that it should be seen as a tortious claim (in other words, say, a small minority of judges would retain it rather than sending it to the Labour courts) then that is sufficient for an English court to hold that no limitation point has been established by ADAMS.

69 Whilst I do not regard this as a particularly easy area, in my judgment that would represent too limited and too parochial an approach (see [42] above) to the characterisation or classification of the cause of action. If the reality is that the claim would almost certainly be treated in the KSA as one that fell within the jurisdiction of the Labour courts then, in my judgment, the question of limitation would have to be assessed by reference to the way in which the Labour courts would treat such a claim.

70 In order to try to answer this question it is necessary to look at the structure of the judicial system in the KSA. My attention was drawn to certain provisions of ''The Law of the Judiciary'' promulgated by Royal Decree. Those provisions are as follows:

> **"Article 5:**
>
> The Shari'ah Courts shall consist of:
> (a) The Supreme Judicial Council
> (b) The Appellate Court
> (c) General Courts
> (d) Summary Courts
>
> Each of these courts shall have jurisdiction over cases brought before it in accordance with the law.
>
> **Article 26:**
>
> Courts shall have jurisdiction to decide with respect to all disputes and crimes, except those exempted by law. Rules for the jurisdiction of courts shall be set forth in the Shari'ah Procedure Law Courts and Law of Criminal Procedure. Specialised Courts may be formed by Royal Order on the recommendation of the Supreme Judicial Council.
>
> **Article 28:**
>
> If a case brought before the court is challenged by a defense that raises a dispute falling under the jurisdiction of another judicial body, and the Court deems it necessary that the defense should be decided upon before it renders a judgment on the subject matter of the case, it shall stay the case proceedings and set for the litigant against whom the defense was made a period

within which he should obtain a final judgment from the competent authority. If the Court finds no requirement, it may disregard the subject of the defense and render a judgment on the merits of the case. If the litigant fails to obtain a final judgment on the defense within the designated period, the court may decide the case as it stands.''

71 Mr Cogley draws attention, in particular, to arts 26 and 28. The Labour courts (in other words, The Preliminary Commissions for the Settlement of Disputes and The High Commission for the Settlement of Disputes) are ''specialised courts'' formed by Royal Order and, it is argued, all the other courts (including the *Shari'ah* courts) are ''exempted'' from having jurisdiction in the areas provided for in relation to those specialised courts. If, therefore, the *Shari'ah* courts are effectively deprived of jurisdiction in relation to the claims advanced then, it is argued, the effect of art.28 would be that the issue of limitation would be dealt with by the Labour courts.

72 On the material before me, I accept the general thrust of this argument. Whilst all law in the KSA is subject to *Shari'ah* law, it does appear that the effect of the Royal Decree is to render jurisdictional matters of this nature (including the *Shari'ah* courts) subject to the terms of the Royal Decree. Professor Amkhan agreed that it would be the expectation that the *Shari'ah* courts would act in accordance with the law promulgated in a Royal Decree. The Royal Decree dated December 15, 2007, whilst post-dating the material events, was acknowledged by Professor Amkhan to be some confirmation of existing practice (though, interestingly, he says in his most recent report that there is a proposal on foot to abolish the Labour Commission and to set up new labour courts under the aegis of the *Shari'ah* courts.) If, therefore, on the balance of probabilities, I am satisfied that the claims advanced were within the exclusive jurisdiction of the Labour courts then I am of the view that I must assess the limitation argument on the basis of the approach of those courts.

73 As I have indicated (see [53] above), Professor Amkhan had regarded the claims advanced here as not embracing a ''labour dispute'' and, accordingly, would not be subject exclusively to the Labour law. He has maintained that view, though has addressed the interpretation of the expression ''work relations'' if he was wrong and art.222(1) is held *prima facie* to govern the position. Whatever uncertainty Mr Alissa may have demonstrated over the relevance of art.222(3) (see [56]–[57] above), he has maintained consistently that the Labour law *does* apply to these claims. The essential issue for this purpose would seem to be whether the dispute concerning the circumstances of the incident ''related to'' the Labour law and/or arose ''from [a] work contract'' (see art.219 of the Labour law referred to in [59] above).

74 Mr Alissa's opinion as to the exclusive jurisdiction of the Labour courts in this regard was, as I have said, broadly consistent throughout although I detected a strengthening of that view in his second report. Whilst, as I understood that report, it was to the effect that the *Shari'ah* courts still retained a theoretical discretion to retain such a claim, he said that he had not ''come across or found reference to any occasion where the *Shar'iah* courts [had] agreed to hear a

claim which falls under the provisions of the statutory labour laws, and none of [his] colleagues [had] come across such a situation''. That is an example of uncontradicted evidence (evidence that is almost impossible to contradict) that, for my part, I would not regard as susceptible to rejection only if ''patently absurd'' (see [46]–[47] above). Given that there is, I have been told, no doctrine of precedent in the KSA as is known in other legal systems, it is not an assertion that could, in any event, be regarded as particularly persuasive.

75 English law would recognise the incident as giving rise to three potential causes of action:

(i) A claim of negligence against Mr Smith and ADAMS.
(ii) So far as the claims against ADAMS are concerned, the tort of breach of statutory duty (if the particular statute gave rise to a civil claim).
(iii) Breach of contract against ADAMS.

Given that this is a claim for personal injuries, it is unlikely that the potential claim in contract would be regarded as of significance in seeking compensation for those injuries. The position within a foreign jurisdiction may, of course, be different.

76 Doing the best I can on the material and arguments before me, it seems to me that the Labour law of the KSA was, subject to art.4 (see [59] above), intended to be a single code embracing all aspects of the relationship between employer, employee and fellow employees. It seems to me that this is to be deduced from art.5(1) (see [50] above) and art.214(1) and (2) (see [60] above). Whatever the internal meaning of the expressions, a distinction is drawn between ''labour disputes'', ''violations'', ''disputes over termination of service'' and ''disputes over compensation for work injuries''. This would suggest a broad remit for the labour courts.

77 If that analysis is correct, then it would seem that any issue arising out of something that occurred within the working environment is potentially within the jurisdiction of the Labour courts. Professor Amkhan accepted that what occurred in this case, albeit tortious in classification whether under English or Saudi Arabian law, was something that arose from the ''work contract'' and related to the employer/employee relationship. Whilst English law would not necessarily see a claim pleaded solely in tort as ''arising from the work contract'', that is not the test I should apply at this stage in the process.

78 Accordingly, I hold that the claims made by the claimants, including the claim made against Mr Smith are or would be subject to the exclusive jurisdiction of the Labour courts in the KSA. Whilst I have reached this view with some hesitation (and, of course, merely on the balance of probabilities), I am comforted to some degree by the fact that the Saudi diver (Mr Ahmed Ali al Ahmadi) who sustained similar injuries to those sustained by the claimants in the same incident brought his claim against ADAMS in the first instance before The Primary Committee For Settlement of Labour Disputes and on appeal before The Higher Committee for Settlement of Labour Disputes. He was claiming that he should be referred by ADAMS to the centre in Aberdeen that the claimants went to in due course and was also seeking compensation. His claim in relation to the first matter was

allowed, but the latter was rejected on the basis, as I understand the copy of the judgment that I have seen, that it was a matter to be dealt with by GOSI (General Social Insurance Organisation). Although the role, if any, of GOSI in respect of non Saudis was not explained to me, the short point is that, at least in principle, it appears that the Labour courts will consider compensation in whatever manner it is permitted as indeed art.214 appears to confirm. In his subsequent report, following my enquiry about the relevance of art.214, Professor Amkhan does not really challenge this.

Article 222(1)

79 Mr Alissa says that this article (see the 7th bullet point in [51] above) contains a limitation period that applies to the claimants' claims.

80 Although the 2005 Labour law was not in force at the time of the incident, it is common ground that, if the Labour law applies, it is that version of the law I should consider. The predecessor of 2005 Labour law was the 1969 Labour law. In relation to art.222(1), my attention was drawn by Mr Alissa to the difference between it and its predecessor. The latter was in these terms:

> ''No complaint shall be heard by any Commission in respect of violations of the provisions of this Law or of the rules, decisions or orders issued in accordance therewith, after the lapse of 12 months from the date of the occurrence of such violation. No case or claim relating to any of the rights provided for in this Law shall be heard after the lapse of 12 months from the date termination of the contract. Also, no action or claim relating to any of the rights provided for in any previous regulations shall be heard after the lapse of one full year from the effective date of this Law.''

81 Mr Alissa made a number of assertions in his second report concerning this change and the thinking behind the phraseology of the 2005 Labour Law. They were, so far as material, as follows:

> (i) ''. . . the 2005 Labour Law has again the same three separate and distinct limitation periods, each running from almost exactly the same dates as those under the 1969 Labour Law. The only minor amendment is that the limitation period set out [in Article 222(1)] is now specified to run from the date of termination of the work relation, rather than termination of the work contract as under the 1969 Labour Law. The reason why this amendment was made is to improve the drafting of the law. For example, if an employer and employee enter into a contract for employment for a term of one year, and the employee or the employer terminates the employment relationship prior to the expiration of such a term, the period would begin to toll from the end of the relationship and not the date set out in the employment contract. Again, these limitation periods are designed to be exclusive of one another and one is not supposed to extend the period allotted for another.''

(ii) . . . "[the] limitation period which begins to run at the date of termination of the work relation was never intended to apply to personal injury matters".

He gave as his reason the following:

> "My reasoning behind this opinion is simple: if a worker who has a personal injury claim against an employer is allowed to rely on the limitation period commencing at the date of termination of the work relation (or if the worker is allowed to rely on either and/or both of the limitation periods set out above) that worker could continue to work for the employer for many years after the date of their injury and still be entitled to submit their personal injury claim against the employer, as long as they did so within 12 months of termination of the work relation. Such an outcome would not accord with the intended purpose of the statutory labour laws and a claim could be entertained many years after the incident at a point when there may no longer be any written records and witnesses may have forgotten the events even if they could be located."

82 Although Professor Amkhan was not asked directly about these matters, (a) it is plain that he did not accept the rationale of either position and (b) he did reassert (which art.4 and the general law of the KSA make plain) that the Labour law had to be interpreted and implemented in accordance with *Shari'ah* law. The logic of this, presumably, in relation to the first of the matters raised by Mr Alissa would be that the 2005 Labour law was phrased differently from the 1969 law in order to render less inflexible the starting point for the relevant limitation period, but that the flexibility should be seen as, in appropriate circumstances, postponing the commencement of that period until the true working relationship between the employer and employee is over. That would, in the context of a personal injury claim, liberalise what would otherwise be a strict limitation period and would be more consistent with the *Shari'ah* principles of there being no limitation period (or at least none as short as one year) in relation to ordinary personal injury claims. The same approach would presumably apply to the second matter upon which Mr Alissa also relies. Whilst the reasoning I have recorded sounds very much like the reasoning that might be advanced in opposing an extension of the limitation period under the English jurisdiction in relation to a personal injuries claim, it cannot, in my view, withstand the logic of the application of *Shari'ah* principles to the interpretation of this particular provision of the Labour law. Equally, it does not explain why a claim for personal injuries by an employee arising from an accident within the workplace should possess a limitation period so completely different from the position of the victim of an accident caused outside the work relationship.

83 What Mr Alissa did not do was to give the source for his assertions concerning the policy lying behind the drafting of the 2005 Labour law. His opinion is, of course, to be respected, but it is one person's opinion without any additional material to support it. Professor Amkhan, who was not a practising lawyer in Saudi Arabia, is as well qualified as Mr Alissa to speak about the generalities

of the interpretation of a code such as the Labour law and, as I have indicated, does not share Mr Alissa's approach. Whilst I do not place significant reliance upon it, it is impossible not to observe (rather as I observed in relation to the way the Saudi diver's own claim was advanced: see [78] above) the nature of the advice given to the solicitor acting for Mr Harley and Mr Iles, the late Mr John Bridge of Bridge McFarland, by a Saudi lawyer, Mr Hussan Hejailan of the law firm of Salah al-Hejailan. Mr Bridge recorded it as follows:

> ''There is one important point that Mr Hejailan has dealt with for us. We were under the impression that under Saudi Arabian law, court proceedings had to be commenced within 12 months of the date of an application in respect of which the proceedings were brought. However, Mr Hejailan informs us that that Rule is not applicable where an employer continues to meet his obligation under the Contract of Employment. Furthermore, as [ADAMS] had continued to make regular payments to you, the employment relationship between you and [ADAMS] continues and it is therefore unnecessary for us to bring proceedings immediately in order to protect your position.''

84 Doing the best I can, therefore, on evidence that is not particularly clear, my conclusion is that the limitation period under art.222(1) does not end until the effective termination of the relationship of the employer and employee which does not necessarily mean the time at which the strict contractual period comes to an end. In this case, each claimant continued to be paid as if still employed by ADAMS until June 2006. During this period they were undergoing periodic medical examinations funded by ADAMS and the mutual hope, as I perceive it, was that they would one day be able to resume diving for ADAMS. In a sense, the payments were a kind of ''sick pay'' although, interestingly, Mr Stonebanks said that ''personally [he] considered they were still employed by ADAMS''. Indeed this is broadly consistent with the letter that he and Mr Owens sent to each claimant on June 16, 2003 which confirmed that each would ''continue to be paid in accordance with your contract of employment'', something, in my view, unaffected by the phraseology of a letter written on the following day referring to a request from each of them that they would be ''re-employed'' by ADAMS once they had passed their diving medical. However the matter is analysed, in my judgment, the ''work relations'' in respect of each claimant did not end until June 2006. If that conclusion is correct, it is accepted that the claims presently being advanced by the claimants are not defeated by limitation.

85 If that conclusion should be wrong and/or I have reached the wrong conclusion about art.222(3), and very much shorter limitation periods apply to the claims being advanced, I need to consider whether those periods should in effect be disapplied by virtue of the Foreign Limitation Periods Act 1984.

The Foreign Limitation Periods Act 1984

86 Section 1 of the 1984 Act is in these terms:

"(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter —. . .

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and

(b) except where that matter falls within subsection (2) below,

the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.

(3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(a) above whether, and the time at which, proceedings have been commenced in respect of any matter; and accordingly, section 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(a) above as it applies in relation to time limits under that Act.

(4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

(5) In this section 'law', in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act."

87 Section 2 is in these terms:

"(1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

(3) Where, under a law applicable by virtue of section 1(1)(a) above for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption shall be disregarded for those purposes.

. . ."

88 These provisions were largely based upon the draft Bill annexed to the Law Commission Report entitled 'Classification of Limitation in Private International Law' (Law Com. 114) presented to Parliament in June 1982. Section 1 was identical in all material respects to the draft Bill. Section 2 differed somewhat. The section appearing in the draft Bill was in these terms:

> ''(1) In any case in which the application of section 1 above would conflict to any extent with the principles of public policy applied by the courts of England and Wales in determining whether to give effect to the law of any other country, that section shall not apply to the extent that its application so conflicts.
>
> (2) Where, under a law applicable by virtue of section 1(1)(a) above for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption shall be disregarded for those purposes.''

89 Mr Weir has drawn attention to the words ''or otherwise'' in subs.1 of the Act as indicating that Parliament did not intend that it was only ''undue hardship'' that could give rise to an effective disapplication of s.1, although it is the ''undue hardship'' provision upon which he relies.

90 The meaning of the expression ''undue hardship'' in this context was considered by the Court of Appeal *Jones v Trollope Colls Cementation Overseas Ltd The Times*, January 26, 1990 CA. There the plaintiff, a US citizen, sustained serious injuries including fractures of both legs in an accident in Karachi in May 1984. In Pakistan the limitation period for a claim for personal injuries arising from a road traffic accident was 12 months. After emergency treatment in Pakistan she was flown to West Germany where she was in hospital until the December of that year. On her discharge she intimated a claim for compensation to the employers of the driver who was responsible for the accident. She received various responses from those employers and their insurers that led her to believe that she would receive a speedy settlement. That remained her state of mind until after the 12-month period elapsed. When, in due course, she issued a claim it was met with the argument that the limitation period had expired. The 1984 Act came into force between the date of the accident and the issue of the writ and was held to apply to the case. The Pakistani limitation period was held to apply.

91 The Court of Appeal, with some hesitation, concluded that the ''undue hardship'' test was met in the circumstances, particularly because for the major part of the limitation period she was hospitalised in Germany and that she was led to believe that her claim would be met. In analysing the meaning of the expression ''undue hardship'' the Court of Appeal expressed itself thus:

> ''There has been argument before us as to the true meaning of the phrase 'undue hardship'. Counsel for the plaintiff argues that it means only hardship and the word 'undue' adds nothing. Some reference has been made to a corresponding provision in s.27 of the Arbitration Act 1950, although

counsel have not greeted it with much enthusiasm. The reference is developed in Mustill and Boyd on Commercial Arbitration, second edition, at pages 211-2.

The learned authors said, starting at the foot of page 211:

> 'Much less straightforward is the question when the discretion arises. The section requires the Court to form the opinion that ''undue hardship'' will be caused if any extension is withheld. ''Hardship'' is easy enough to comprehend: it might be said to exist whenever a claimant loses a valid claim through failure to comply with a short time limit. But the word ''undue'' plainly calls for something more than this. Precisely how much more is a matter upon which there have been two perceptible shifts in the attitude of the Court. When the power was first conferred by the Act of 1934, the Court appears to have given a wide interpretation of the section. There followed a period in which the courts adopted a much more severe interpretation of the section. It was said that the power should be exercised only in ''very restricted cases'' or ''very special circumstances''. This narrow interpretation deprived the section of most of its effect. For example, in two reported cases, extensions were refused where the claims were only two days and six days late. This interpretation prevailed for some 15 years, until in 1967 the Court of Appeal reviewed the matter and reinstated the earlier and more liberal view of the section. In the words of Lord Denning M.R. in *Liberian Shipping Corporation v A King and Sons Limited* [1967] 1 Lloyd's Rep 302:
>
> > '''undue' simply means excessive. That is greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault.''
>
> ...'

Counsel on both sides have sought to distinguish the meaning of undue hardship in the Arbitration Act as being founded on a commercial agreement. For my part I cannot see that makes any difference. By the time the parties have reached the question of limitation they are in dispute. I would respectfully adopt the meaning of 'excessive' given by Lord Denning Master of the Rolls in the passage cited by the learned authors. One has to see whether the plaintiff has suffered greater hardship in the particular circumstances by the application of section 1(1) than would normally be the case.

. . .

On the present facts . . . the court must consider whether the plaintiff will suffer excessive hardship if Pakistani law is applied and look at the relevant facts in that context.

. . .

> In deciding whether the plaintiff has suffered undue hardship within the meaning of section 2 . . . the court is not called upon to conduct a balancing exercise as between the plaintiff on the one hand and the defendants on the other. The court must look at the circumstances of the plaintiff and decide whether she has suffered hardship of an undue or excessive character.''

92 This approach was followed by the Court of Appeal in *Arab Monetary Fund v Hashim (No.9)* [1996] 1 Lloyd's Rep. 589. It was a case in which s.1 of the 1984 Act was not disapplied because the court was not satisfied that the plaintiff had suffered undue hardship from the relevant limitation period: there was no evidence to suggest that the plaintiff in that case was misled about the relevant limitation period and it was conceded that the plaintiff was to be treated as being fully aware of the relevant provisions of English and Abu Dhabi law.

93 In *Durham v T&N Plc* Unreported May 1, 1996 Court of Appeal said (*per* Sir Thomas Bingham M.R.) that:

> ''[It] would in our judgment be wrong to treat a foreign limitation period as contrary to English public policy simply because it is less generous than the comparable English provision in force at the time . . .''

94 The following propositions can be deduced from these authorities:

(i) That it is not sufficient to cross the ''undue hardship'' threshold by reason only of the fact that the foreign limitation period is less generous than that of the English jurisdiction.
(ii) That the claimant must satisfy the court that he or she will suffer greater hardship in the particular circumstances than would normally be the case.
(iii) That in considering (ii) the focus is on the interests of the individual claimant or claimants and is not upon a balancing exercise between the interests of the claimants on one hand and the defendant on the other.

95 Applying these principles on the basis that the Saudi limitation period was either 12 months from the date of the incident or somewhat longer, but no longer than the expiration of the fixed term contracts that each claimant had, I would be satisfied that the ''undue hardship'' threshold had been crossed in respect of each claimant in this case. On the premise to which I have referred the following factors would persuade me that this is so:

(i) Each claimant was impeded in obtaining local advice and representation in the KSA in the manner I referred to in [33]–[35] above.
(ii) Had each of them obtained such advice or representation at the time, their respective interests would probably have been protected.
(iii) Each sought advice in the UK as soon as it was practicable to do so upon their return.
(iv) Each was misled by advice that was received to the effect that the limitation period did not begin until June 2006.

(v) Those giving the advice, whether in the UK or in the KSA, were disadvantaged because of the uncertainty of the legal position in the KSA and, as a result, the claimants were victims of that uncertainty.

(vi) Through no fault of their own they will be deprived of any opportunity of seeking any kind of redress as a result of the incident unless the limitation period is disapplied.

Summary

96 It follows that my essential conclusion is that, whilst a 12-month limitation period does apply to a case such as this, the period runs from the end of the ''work relations'' between employer and employee which, in this case, did not come to an end until June 2006.

97 If I was wrong about that, I would have held that the ''undue hardship'' threshold was crossed in this case and that the more limited 12-month period than that referred to in [96] should be disapplied.

Concluding remark

98 I should like to express my gratitude to Mr Weir and Mr Cogley for their assistance in a case that is not free from difficulty.