CLAIM No 3MB 90058

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MIDDLESBROUGH DISTRICT REGISTRY

BETWEEN:

JIKHABANADUR RAI

Claimant

And

THE MINISTRY OF DEFENCE

Defendant

# JUDGMENT

## *(1))Introduction)*

1. On or about **27th July 2010** the Claimant was injured when a horse kicked him in the head as he was attempting to clean its hoof whilst in Alberta, Canada in the course of his duties as a Ghurkha soldier in the British Army. The accident happened at the Lazy H Trail Camp, a ranch operated by Lazy H Trail Company Limited ("Lazy H Trail"), a company incorporated in Alberta.

2. In due course the Claimant instructed solicitors and proceedings were issued against the Defendant in the Middlesbrough District Registry on **21st June 2013** claiming damages for personal injury in excess of £300,000. In its Defence (dated **15th November 2013**) the Defendant denied any breach of duty and averred that the law applicable to the claim was the law of Alberta, where the accident took place.

3. The Defendant issued Pt. 20 proceedings against Lazy H Trail which challenged the jurisdiction of the court. This issue was resolved in favour of Lazy H Trial at a hearing before HH Judge Gillian Matthews QC in **March 2014**.

4. The Claimant then re-considered its position in the light of the Defence and Amended Particulars of Claim were served on **12th June 2014**. An Amended

Defence was served on **1st September 2014** and the pleadings were completed by a Reply dated **10th September 2014**.

5. On **22nd October 2014**, following a request by the Claimant, the Defendant served Further Information explaining more fully why it contended that the law of Alberta applied together with a document setting out its stance on the law of limitation in Alberta. This prompted a further Reply from the Claimant dated **28th November 2014**.

6. On **13th October 2014** DJ Temple ordered: *Breach of duty and the applicable law (to include limitation) to be tried as a preliminary issue*. However, in a further order (dated **23rd June 2015**) DJ Temple ordered that "*The issue of choice of law is listed to be dealt with as a discrete issue on 5th November 2015 …*" . Unfortunately, HH Judge Matthews QC was not available to deal with the case when listed and it had to be taken out of the list. It is that issue which I must now try.

7. Pursuant to DJ Temple's order, the parties have agreed the factual matrix upon which I must base my decision and the relevant facts are set out in a document entitled *Joint Statement of Facts for Determination of Choice of Law Issue* which is at [76-93] in the trial bundle.

8. The parties have also lodged detailed Skeleton Arguments which develop and expand upon the legal arguments identified in the pleadings.

9. At the outset I record my thanks to Counsel, Mr Mead for the Claimant and Mr Browne for the Defendant, for the expert and helpful way in which the argument was conducted.

## *(2) A summary of the Skeleton Arguments*

10. I start by summarising the position as it appeared from the Skeleton Arguments

### (2)(a) The starting point: Does Rome II apply

11. Both the Claimant and the Defendant agree that:
    11.1 The Claimant's claim is a claim in tort (or delict);
    11.2 If the claim falls within the definition of *civil and commercial matters* in **Art 1(1)** of **Rome II Regulation 864/2007** ("Rome II") the choice of law should be determined by the provisions of that Regulation.

12. The Defendant contends that **Rome II** does not apply because the claim falls outside the definition of *civil and commercial matters* and relates to the *liability of the State*

*for acts and omissions in the exercise of State authority* ("acta iure imperii") which **Art1(1)** provides lie outside the scope of **Rome II.**

13. The Claimant contends that **Rome II** does apply.

14. Therefore the issue is whether the claim should properly be characterised as (a) a *civil* or *commercial matter* or (b) as arising out of *the exercise of State authority (acta iure imperii)*.

### (2)(b) What if Rome II does apply

15. **Art 4(1)** of **Rome II** sets out the basic rule that:

> *Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur;*

16. It is agreed by both Claimant and the Defendant that the damage occurred in Alberta. Therefore, the appropriate law will be that of Alberta **unless** the Claimant establishes that **Art 4(1)** does not apply.

17. **Art 4(2)** provides that:

> *However, where the person claimed to be liable and the person sustaining damage both have the habitual residence in the same country at the time when the damage occurs, the law of that country shall apply*

18. As both parties agree that the Claimant and the Defendant were habitually resident in England at the time of the accident **Art 4(2)** applies and English law will be the appropriate law **unless** the Defendant can show that **Art 4(2)** does not apply.

19. The Defendant relies on **Art 4(3)** which provides that:

> *Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties such as a contract that is closely connected with the tort/delict in question*

20. The Defendant:

    20.1 Accepts that:

    .1 the burden will be on the Defendant to show that the tort is *manifestly more closely connected* with Alberta rather than England;

.2 the standard required to satisfy the court of any such close connection is *high;*

20.2 Contends that it can satisfy that high standard on the grounds set out in paragraphs 43-44 and 53 of the Skeleton Argument.

21. The Claimant does not accept that the Defendant has satisfied that high standard.

### (2)(c) What if Rome II does not apply

22. If **Rome II** does not apply the parties agree that the applicable law is governed by sections 11 and 12 of the **Private International Law (Miscellaneous Provisions) Act 1995** (PILA).

23. Pursuant to **section 11(2)** the applicable law in claims for personal injury should be that of the country *where the individual was when he sustained the injury*. Therefore under the *general rule* in **section 11** the applicable law would be that of Alberta and it is for the Claimant to show that this general rule should not apply.

24. The Claimant relies on **section 12** which provides that:

> *(1) If it appears, in all the circumstances, from a comparison of:*
>
> *(a) The significance of the factors which connect a tort … with the country whose law would be the applicable law under the general rule; and*
>
> *(b) The significance of any factors connecting the tort with another country*
>
> *That it is substantially more appropriate for the applicable law for determining the issues arising in the case, or for any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country;*
>
> *(2) The factors that many be take into account as connecting a tort … with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort … in question or to any of the circumstances or consequences of those events …*

25. The Claimant contends that the factors which must be considered under this heading are similar to those which must considered when determining the question as to whether **Art 4(3)** can be relied upon to establish that the law of Alberta should displace the presumption of English law.

26. The Defendant agrees with the Claimant that the test of *manifestly closer connection* in **Art 4(3)** should be regarded as broadly equivalent or analogous to the

*substantially more appropriate exception* in **section 12** of PILA[1]. However, both parties agree that the test is not exactly the same.

27. The Defendant contends that, when considering **sections 11 and 12**, the court should conduct a three-stage exercise in accordance with the decision of the Court of Appeal in **Roerig v Valiant Trawlers Limited** [2002] EWCA Civ. 1. The test is formulated by the Defendant as follows:
    27.1 Identifying the issue to which it is suggested that the general rule is not to be applied;
    27.2 Identifying the factors which connect the tort to Alberta and the factors which connect the tort to England;
    27.3 Considering the significance of the factors connecting the tort to each jurisdiction in determining whether it is substantially more appropriate for the law of England and Wales to be the applicable law for determining the substantive issues.

## (3) The material facts

28. The material facts are set out in the *Joint Statement of Facts for Determination of Choice of Law Issue*. However, it is important to note that the *Joint Statement of Facts* refers to a number of documents the full text of which are in the Main Bundle. In the course of their submissions the parties have highlighted and drawn my attention to a number of matters that I set out below.

### (3)(a) Facts: the Claimant

29. Mr Mead made the following points in relation to the respective documents in the Main Bundle:

30. The *Joint Statement of Facts* itself:
    30.1 On the Claimant's case there was no articulation of any facts which amounted an assertion that the accident occurred in the course of the Defendant exercising anything amount to a sovereign power;
    30.2 BATUS[2] was the British Army's training facility in Alberta which it leased from the Canadian Government (the Department of National Defence or DND);

[1] The important difference is that under Rome II it is for the Defendant to establish the exception whilst under PILA it is for the Claimant to do so.

[2] British Army Training Unit Suffield

30.3 The accident occurred whilst the Claimant was involved in a training exercise that was being carried out by Lazy H Trail. Lazy H Trail was acting pursuant to a *standard contract* for the provision of services which could have been made with any private client - for example a private company seeking to use the course as part of an executive training programme[3];

30.4 This was a private law agreement for the provision of private law services provided by a private company which should be governed by private law;

30.5 The Contract was made between Lazy H Trail and Canada and neither the Ministry of Defence or the United Kingdom were expressed to be parties to it However, the Claimant accepted that the Contract was expressly made on behalf of the Defendant;

30.6 Pursuant to the Contract:

.1 Lazy H Trail were obliged to take out General Liability insurance;

.2 Lazy H Trail's services were subject to the supervision of the Technical Authority, which was defined as the Officer Commanding the British Adventure Training Camp.

31. The document at Tab 19 which represents the agreement between the respective governments in relation to British Armed Forces' Training in Canada[4]:

31.1 Because the British Army is permitted to train in Canada under the terms of *The Agreement* the Claimant contends that it was not acting in the exercise of its sovereign power but pursuant to a licence granted by Canada which constrains the areas (both geographical and operational) in which the British Army can operate;

31.2 *The Agreement* expressly provides that Canadian Forces *shall exercise command and control over the base and training facilities used by the British Armed Forces*[5]. The Claimant contends that this establishes that the Defendant had no sovereign rights over the Camp or the training facilities.

31.3 Further the Defendant's right to procure services to support its activities in Canada is severely constrained because Article 5 provides that *the Canadian Forces shall act as the agent of the British Armed Forces for the provision of all goods, services and facilities to be either supplied in Canada or procured through Canadian sources in support of British Armed Forces' training in Canada* save for those goods, services and facilities identified under Art. 9.

---

[3] The contract is at Tab 21 in the Main Bundle and is hereinafter referred to as *The Contract*.

[4] *The Agreement*.

[5] See Art. 3

31.4 Where the Defendant was entitled to contract directly for goods, services and facilities within Canada under Art.9 it was required to do so subject to Canadian laws and regulations;

31.5 The Claimant again argues that these provisions amount to further restraints on the autonomy of the Government which is not consistent with the exercise of *imperii* or a sovereign power;

31.6 Therefore, the Claimant contends that there is no evidence in *the Agreement* of the Defendant exercising powers of a public nature consistent with the exercise of sovereign authority (*imperii*) in Canada.

32. The document at Tab 20 *The Memorandum of Understanding "MOU":*

32.1 The Claimant points to paragraphs 2.1 and 4.2 which assert that the British Army units are training at the *Canadian Forces Base, Suffield* and that BATUS is therefore a semi-permanent British Unit at a Canadian Base*;*

32.2 The Claimant also refers to para 5.1 to make the same point that the Defendant had *controlled access to but not exclusive use of CFB Suffield*;

32.3 The Claimant contends that both factors demonstrate that the Defendant's operations at Suffield are permissive and inconsistent with the exercise of Sovereignty;

32.4 The Claimant points to the provisions para 5.9 which, he contends, establish that training was subject to:

.1 Canadian Forces' approval and hence inconsistent with the exercise of British sovereignty;

.2 British Armed Forces training safety regulations which suggests that English law is the appropriate law for determining whether there has been a breach of such regulations;

32.5 At Para 7.4: the Claimant points to the phrase *the maintenance of real and visible Canadian sovereignty in relation to Foreign Military Training* and contends that this demonstrates that the only exercise of sovereignty at Suffield was by the Canadian *DND* (Department of National Defence).

33. The Claimant made further observations about *the Contract* at Tab 21 pointing out that:

33.1 The applicable law was the law of Alberta;

33.2 Except for Government Property specifically identified in the contract, Lazy H Trail was to provide everything necessary for the performance of the *Work* including equipment and labour-in other words the training was being provided by a private company.

34. The Defendant's policy on Health and Safety: Tab 22: This provides that the Defendant will apply *UK standards where reasonably practicable.* The Claimant contends that this creates a legitimate expectation that service personnel will benefit from English standards wherever they are and that this is part of the bargain made in the contract of service between the MoD and its service personnel, namely that wherever they go their health and safety will be protected in accordance with English standards. Further, this expectation is repeated in the document given to Commanders who have to carry out risk assessments and establish safe systems of work.

35. The document at Tab 24 sets out the regulations which apply to *Adventurous Training* and argues that the Defendant's desire to expose soldiers to risk as part of their training is heavily qualified by the statement that *It is wholly indefensible to expose anyone to unnecessary risk*. Further, the Claimant argues that the existence of some risk in this context does not preclude the existence of a private law duty (in accordance with UK standards) not to expose service personnel to unnecessary risk.

36. The Claimant also referred me to the documents at Tab 25 and 26 which (he contends) demonstrate that the Defendant was concerned to undertake a risk assessment of the training exercise and to avoid unnecessary risk.

### (3)(b) Facts: The Defendant

37. The Defendant also referred me to specific passages in the documents that I identify below.

38. *The Agreement* at Tab 19:
    - 38.1 The Defendant stresses that this document is an agreement made between Governments for the purposes of training the British Armed Forces;
    - 38.2 Therefore, it contends that this is an agreement entered into pursuant to its sovereign powers for the purposes of facilitating military training–a task which can only be undertaken (legitimately) by a sovereign state;
    - 38.3 Mr Browne contends that the force of his point about the nature and purpose of the agreement is unaffected or undiluted by the Canadian Government's decision to retain its autonomy;
    - 38.4 Further, Mr Browne refers me to Article 15 which imposes a duty on the UK Government to provide extensive information to the Canadian Government about the munitions it proposes using in the course of any training exercises. Mr Browne contends that this shows the nature and purpose of the training

that was being undertaken and that it plainly had a military, and hence sovereign, purpose.

39. The MOU: Tab 20:
    39.1 Mr Browne contends that a private individual could not enter into this type of agreement because it expressly relates to Armed Forces' training and to the obligations and rights of the respective governments including for example the rights and obligations under the NATO treaty and the SOFA[6];
    39.2 To emphasise his argument Mr Browne points to the following:
        .1 There is a specific unit deployed in Canada, BATUS, which includes **military** staff for the specific purpose of carrying out **military** training;
        .2 Any use of CFB Suffield by Canadian forces or others with the permission of the DND must take into account the potential disruption to *the United Kingdom's* ***force***)***preparation***;
        .3 The Annexes show that the MOU involves National Chains of Command relevant to military activity;
    39.3 He contends that such activity necessarily relates to the exercise of sovereign power and is not an area in which a private individual could be involved.

40. *The Contract* with Lazy H Trail at Tab 21:
    40.1 Mr Browne acknowledges that the Defendant has not signed the contract but points out that it was entered into on behalf of the Defendant and argues that Canada entered into the contract as its agent, a matter expressly recorded in the first paragraph of the document;
    40.2 The services were being provided to the Defendant in order to *provide support to Adventurous Training to* ***Military*** *Personnel.*
    40.3 Mr Browne also points to the role of the *Technical Authority,* namely the officer commanding the British Adventure Camp who has the right to reject the services if they do not meet the required standards.

41. Mr Browne also referred to the document entitled Adventurous Training at Tab 24 and in particular to the following passages:
    41.1 Para **11.002**:

> *AT is a valuable addition to formal military training, helping support the values and standards of the British Army. When properly conducted it enhances an individual's ability to withstand the rigours of operations and rapid deployments. It also develops environmental awareness. Since military training in peacetime is becoming increasingly restricted, AT is likely to play a more important role in enhancing personal development*

[6] The Status of their Forces Agreement.

*and military qualities. The effectiveness of adventurous training as a tool for recruiting and retention should not be underestimated*

41.2 Para **11.005**:

*Duty of care: By its very nature AT involves potential risk to life and limb … .*

41.3 Para **11.008**: and in particular the passage:

*It is this element of challenge, requiring individuals involved to develop qualities of fitness, courage and endurance that distinguishes AT from sport.*

41.4 Mr Browne relies on these passages to demonstrate further that the exercise was being undertaken with a military purpose, namely to train a soldier to cope in real life battle situations. This should be distinguished from the type of management training exercise that might be undertaken by a large company which would not involve the same degree of risk as that required to train soldiers.

42. The Defendant also sought to rely on certain passages in the witness statement of Lt. Col. Nevin. I was concerned that in doing so the Defendant was going beyond the agreed factual matrix and seeking to rely on matters that were not properly in evidence. However, on reading the relevant passages it seemed to me that Lt Col Nevin was merely commenting on the documents to which I had been directed. In large measure Lt Col Nevin's comments are similar to those of Mr Browne and, in my view, do not add to the argument.

## *(4))Rome)II:)Acta)iure)imperii?)*

43. I now turn to look at the first issue of law, namely whether the claim falls within the definition of *civil and commercial matters* within **Rome II** or whether it falls outside the scope of **Rome II** because it arises out of *acta iure imperii.*

## (4)(a) Matters upon which agreement was reached

44. As the argument developed the parties reached agreement on the following matters:

44.1 My task is to determine the effect of **Article 1(1)**;

44.2 Where a claim against a State or public authority falls outside the scope of **Rome II** on the grounds of *acta iure imperii*, **Recital (9)**[7] operates to prevent

[7] *Claims arising out of acta iure imperii should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office holders. Where the exclusion is applicable it covers officials of the state acting in their official capacity*

the claim being brought against the individual officials responsible for the act/omission being challenged. **Recital (9)** does not otherwise widen the scope of those claims which fall outside the definition of *civil and commercial matters*;

44.3 There is no free standing definition of *acta iure imperii*. Matters fall into that category if they are not properly considered to be within the scope of *civil and commercial matters*;

44.4 **Article 1** of the **Brussels Regulation 2001 44/2001** is expressed to apply to *civil and commercial matters*[8]. Although it does not expressly exclude *acta iure imperii* it is clear from the case law that such claims fall outside the scope of the Convention. Further the **Brussels Regulation has** now been amended expressly to state that it does not apply to *acta iure imperii*;

44.5 The scope of **Rome II** should be consistent with the **Brussels Regulation;**

44.6 Therefore, case law from the CJEU dealing with the scope of the **Brussels Regulation should** be applied when interpreting **Rome II**;

44.7 The principal authority from the CJEU which deals with *acta iure imperii* and the role of a country's armed services is **Lechouritou and others** [2007] ECR I-1540.

### (4)(b) The Claimant's argument

45. The Claimant's argument can be broken down into 2 sections:

45.1 The cases Mr Mead considered relevant and his argument as to why the principles derived from the cases supported his approach to the facts of this case;

45.2 Looking at the relevant textbooks to see whether any guidance can be found from them and rebutting the argument put forward by the Defendant in its Skeleton Argument which is based on para 34-015 in **Dicey, Morris & Collins: *On The Conflict of Laws (15th ed)*.**

46. The starting point was an analysis of the decision in **Lechouritou**. This was an action brought by a number of Greek citizens claiming compensation for a massacre committed by the Wehrmacht during the course of World War II. The court had to consider the provisions of the (unamended) Brussels Convention and determine whether the claim fell within the definition of *civil and commercial matters.*

[8] *This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs, or administrative matters.*

47. I summarise the Claimant arguments in relation to the decision in **Lechouritou** as follows:

47.1 The definition of *civil and commercial matters* must be regarded as an independent concept and part of the jurisprudence of European Law rather than as a reference to the law of England and Wales: see paragraphs 29 and 30 below:

*29*

*It is to be remembered that, in order to ensure, as far as possible, that the rights and obligations which derive from the Brussels Convention for the contracting states and the persons to whom it applies are equal and uniform, the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the states concerned. It is thus clear from the court's settled case law that 'civil and commercial matters' must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of the Brussels Convention and, second, to the general principles which stem from the corpus of the national legal systems (see, inter alia, LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol Case 29/76 [1976] ECR 1541 (paras 3, 5), Netherlands v Rüffer Case 814/79 [1980] ECR 3807 (para 7), Gemeente Steenbergen v Baten Case C-271/00 [2003] All ER (EC) 289, [2003] 1 WLR 1996, [2002] ECR I-10489 (para 28), Préservatrice foncière TIARD SA v Netherlands Case C-266/01 [2003] ECR I-4867 (para 20) and Land Oberosterreich v CEZ as Case C-343/04 [2006] 2 All ER (Comm) 665, [2006] ECR I-4557 (para 22)).*

30

According to the Court, that interpretation results in the exclusion of certain legal actions and judicial decisions from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action (see *LTU*, paragraph 4; *Rüffer*, paragraph 14; *Baten*, paragraph 29; *Préservatrice foncière TIARD*, paragraph 21; *ČEZ*, paragraph 22; and Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 29).

47.2 The test to determine whether an act is an act *iure imperii* is explained in paragraph 46 of the Opinion of the Advocate General:

*46.*

*It may be deduced from the case law cited that, in order to determine whether an act is an act iure imperii and, therefore, not subject to the Brussels Convention, regard must be had, first, to whether any of the parties to the legal relationship are a public authority, and, second, to the origin and the basis of the action brought, specifically to whether a public authority has exercised powers going beyond those existing, or which have no equivalent, in relationships between private individuals. The 'private' criterion refers to a formal aspect, while the 'subordination' criterion relates to the basis and nature of the action and to the detailed rules for exercise of the right of action.*

47.3 The test proposed by the Advocate General is then confirmed in paragraphs 31-34 of the Judgment which state:

*31.*

*Thus, the court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (see the LTU case (para 4), Rüffer's case (para 8), Henkel's case (para 26), Baten's case (para 30), the Préservatrice foncière TIARD case (para 22) and Sonntag v Waidmann Case C-172/91 [1993] ECR I-1963 (para 20)).*

*32.*

*It is pursuant to this principle that the court has held that a national or international body governed by public law which pursues the recovery of charges payable by a person governed by private law for the use of its equipment and services acts in the exercise of its public powers, in particular where that use is obligatory and exclusive and the rate of charges, the methods of calculation and the procedures for collection are fixed unilaterally in relation to the users (see the LTU case (para 4)).*

*33.*

*Similarly, the court has held that the concept of 'civil and commercial matters' within the meaning of the first sentence of the first paragraph of the Brussels Convention does not include an action brought by the state as agent responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck, in performance of an international obligation, carried out by or at the instigation of that administering agent in the exercise of its public authority (see Rüffer's case (paras 9, 16)).*

*34.*

*Disputes of that nature do result from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals (see, to this effect, Sonntag's case (para 22), Henkel's case (para 30), the Préservatrice foncière TIARD case (para 30) and Assitalia SpA v Frahuil SA Case C-265/02 [2004] All ER (EC) 373, [2004] ECR I-1543 (para 21)).*

47.4 Applying that test to the present case:

.1 The Defendant satisfies the first limb because the MoD is plainly a public authority;

.2 However, when one looks at the second limb of the test one must look at *the basis and nature of the action and to the detailed rules for the exercise of the right of action*;

.3 the Defendant was not exercising powers going beyond those existing in relationships between private individuals because the Claimant's accident arose from the provision of training within an employment relationship. Alternatively, in so far as the agreement by which a soldier

serves in the armed forces is not strictly a contract of employment, the Defendant was exercising powers equivalent to those existing between private individuals. Therefore the power being exercised by the state did not go beyond that which might be exercised by a private individual into an exceptional area

.4 In the circumstances the claim is a *civil and commercial matter* within Rome II;

47.5 Paragraph 37 of the CJEU judgment in **Lechouritou** states:

*37*

*As the Advocate General has observed in points 54 to 56 of his Opinion, there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy.*

The Claimant acknowledges that armies are part of the structure of the State and that therefore claims involving armies **can** arise out of *acta iure imperii,* as in the **Lechouritou case**. However, the Claimant contends that there is significant difference between a claim against the German state for the acts undertaken by the German Army in the furtherance of an armed conflict and a claim for failure to exercise care when training a soldier which it argues is a claim that arises out of an employment or quasi-employment relationship and which has no bearing upon the State's foreign or defence policy.

48. The Claimant referred to the decision of the Court of Appeal in **Grovit v De Nederlandsche Bank NV** [2008] 1 WLR 51 in which the distinction between a *civil and commercial matter* and public matters falling into the category *acta iure imperii* was considered. In **Grovit** the Claimant was claiming damages for defamation arising out of an alleged libel contained in a letter written by the Dutch Central Bank when considering the Claimant's application to be registered to carry out certain financial transactions in the Netherlands. At first instance the judge held that the Defendant bank and its officials were exercising public law powers and therefore the **Brussels Convention** did not apply. The Claimant appealed.

49. The Court of Appeal upheld the first instance decision on the grounds that the letter had been sent in the course of exercising the bank's supervisory functions. In paragraphs 12 and 13 of his judgment Dyson LJ set out and approved an extract from *Briggs & Rees, Civil Jurisdiction and Judgments,* 4th ed (2005):

It is clear that the phrase "civil and commercial matters" bears an autonomous meaning rather than one drawn from national law. Having reviewed a number of decisions of the Court of Justice, the authors say, at para 2.24:

*"The broad principle of the distinction is therefore this. First, if the claim is one based on ordinary civil law, it will be a civil or commercial one, even if it is brought by a public law entity. It will retain this character even if the only claimant which could bring the proceedings is a public law entity, for it is the character of the right relied on, rather than the nature of the claimant doing the relying, which determines the impact of article 1. But secondly, if the claim is one which appears to be vested in only a public body, which is bringing a claim which no other claimant could have brought, attention then turns to the obligations imposed on or owed by the defendant. If these are obligations owed by him as a matter of ordinary civil or commercial law the claim likewise falls within article 1, no matter how or by whom they come to be enforced. Thirdly, only if the position of the defendant is one in which he is placed as a matter of public law, and the claim is made against him by an entity exercising rights which only it has, will the claim not be a civil or commercial one. In other words, there is a dual test which requires the non-civil or non-commercial law character of the claim to be established by reference to claimant and defendant. To the extent that the case law provides any more detailed guidance, the Court of Justice indicated in LTU Lufttransport GmbH v Eurocontrol (Case 29/76) [1976] ECR 1541 and The Netherlands v Rüffer (Case 814/79) [1980] ECR 3807 , that recourse could be had to the general principles of member states' legal systems to see how similar claims are there categorised; but in practice such guidance may be of extremely limited help.) More helpful will be to ask the question: is the action brought by or against a public law body acting as such, or by or against it instead acting as any other private individual? If the claim is one brought by or against a private law person, performing duties which in other states are performed by organs of government, the claim should nevertheless be seen to be based in private law and to fall within the scope of the Judgments Regulation."*

50. Further, the Claimant referred to paragraphs 16 and 17 of **Dyson LJ's** judgment in **Grovit** which are set out below:

16

In my judgment the judge clearly reached the right conclusion on this point. The bank and its employees, the second and third defendants, were undoubtedly exercising public law powers. They were performing the role of an administrative authority carrying out governmental supervisory functions which had been delegated to the bank by the Dutch Government to protect the integrity of the financial system in the Netherlands: see the statement of Professor Dr Schilder, quoted by the judge, at para 14 of his judgment.

17

These functions included dealing with the applications for registration that were made by Carigna. The letter on 16 July 2004 was sent in performance of those functions. If there had been a challenge to the lawfulness of the letter under English domestic law, it would have been by way of judicial review and not in a private law claim; that is because the sending of a letter was a public law function. The fact that incidentally the letter contained libelous material did not deprive it of its essentially public law character. For these reasons, I would uphold the judge's decision on the civil and commercial matter issue.

The Claimant argues that there could be no question of the Claimant challenging the Defendant by way of judicial review in this case because the issue is the extent to which the Defendant complied with the non-delegable duty of care it owed its employee.

51. The Claimant then went on to review a number of the other authorities identified in the judgment of the CJEU in **Lechouritou**.

52. In **Sonntag v Waidmann:**
    52.1 Mr Sonntag was a teacher who took a school party on a trip to Italy. Following a criminal trial in Italy, Mr Sonntag was found guilty of causing the death of Stefan Waidmann. The judgment also contained certain civil law provisions for damages;
    52.2 The Waidmanns tried to enforce that judgment in Germany and a question arose as to whether the judgment was a civil matter or whether it fell outside the convention on the basis that it arose out of *acta iure imperii* because the teacher was a public official and the underlying insurance was provided under a social insurance scheme governed by public law;
    52.3 The CJEU found that although the teacher was a public official he was not acting in the exercise of his public powers at the time of the accident;
    52.4 The court enunciated the relevant principle to be applied in paragraph 20 of the Judgment:

> *It follows from the LTU and Ruffer cases cited above that such an action falls outside the scope of the Convention only where the author of the damage against whom it is brought must be regarded as a public authority which acted in the exercise of public powers*

    52.5 The court then explained the way in which that principle applied to the facts before it in: paragraphs 21-26;

> *[21] In this connection it should be noted, firstly, that the fact that the teacher has the status of a holder of a public office and acts as such is not decisive. Although he acts on behalf of the State, a holder of a public office does not always exercise public authority powers.*
>
> *[22] Secondly, it should be observed that in the legal systems of most of the member-States the acts of a State-school teacher, in his duty of organising and directing the activities of pupils during a school excursion, are not a manifestation of a public authority power in that such acts are not pursuant to powers which are exorbitant by reference to the rules applicable in relations between private individuals.*
>
> *[23] Thirdly, in a situation such as that with which the main action is concerned, the duties of a State-school teacher in relation to the pupils are the same as those of a private-school teacher.*

*[24] Fourthly, in Case 66/85, Lawrie-Blum, [56] the Court held, although in a different factual and legal context, that a teacher does not exercise public authority powers even when he awards marks to pupils and participates in the decisions on whether they should move to a higher class. This must a fortiori be the case, in relation to organising and directing pupils' activities, with regard to the teacher's duty of supervision in the course of a school excursion.*

*[25] Finally, it must be added that, even if the internal law of the Contracting State where the judgment was given classifies the teacher's supervisory function in relation to his pupils as an exercise of public authority power, this is not material to the classification of the main action by reference to Article 1 of the Convention.*

*[26] It follows from what has been said that the action for damages brought by the creditors in the main action in this case against a State-school teacher is a 'civil matter' within the meaning of Article 1(1) of the Convention.*

52.6 The Claimant relies on **Sonntag** and contends that in the current claim an employee engaged in horse management as part of a training exercise albeit with the Army was not taking part in an activity which involved the manifestation of a public authority power and that the duty of care owed by the Defendant to its employee was the same as or similar to the duty of care which would be owed by a private employer.

53. I deal rather more briefly with the references to the ECJ decisions in **Baten:** [2002] ECR I-10508, **Tiard:** [2003] ECR I-4881 and **Frahuil:** [2004] ECR I-1546 as these cases are really examples of the principles outlined above being put into practice:

53.1 **Baten:**

.1 A local authority brought proceedings against a divorced spouse to claim monies it had paid out by way of maintenance and child support;

.2 Although the claim was being brought by a statutory authority in respect of monies paid by way of social assistance the court held that it was:

*necessary to examine the basis and the detailed rules governing the bringing of that action.*

The court then found that the claim was based on a private law matter relating to maintenance and child support;

53.2 **Tiard:**

.1 the Dutch state brought a claim to recover monies due in respect of customs duties;

.2 however, the claim was brought against a guarantor of the primary debtor;

.3 although customs matters fell outside the definition of *civil and commercial* matters the court held that the subject matter of the action

was the enforcement of a guarantee: see paragraphs 42 and 43 which are set out below:

> 42.
>
> In order to determine whether an action falls within the scope of the Brussels Convention, only the subject-matter of that action must be taken into account. It would be contrary to the principle of legal certainty, which is one of the objectives pursued by that convention, for its applicability to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties (see, to that effect, Case C-190/89 Rich [1991] ECR I-3855, paragraphs 26 and 27, and Case C-129/92 Owens Bank [1994] ECR I-117, paragraph 34).
>
> 43.
>
> Where the subject-matter of an action is the enforcement of a guarantee obligation owed by a guarantor in circumstances which permit the inference that that obligation falls within the scope of the Brussels Convention, the fact that the guarantor may raise pleas in defence relating to whether the guaranteed debt is owed, based on matters excluded from the scope of the Brussels Convention, has no bearing on whether the action itself is included in the scope of that convention.

53.3 **<u>Frahuil</u>**

.1 The two parties to the action were private companies with the Claimant seeking reimbursement of customs dues it had paid as a guarantor on behalf of the Defendant;

.2 The Court had little difficulty in finding that this was a private law dispute that fell within the scope of the rules applicable to relationships between private individuals.

54. The Claimant contends that applying the principles outlined above:

54.1 There is no evidence that the Defendant was exercising any public or sovereign power;

54.2 The framework of agreements under which the Defendant operates in Canada expressly reserves sovereign power to Canada or its DND;

54.3 The Defendant has produced a number of documents relevant to its training responsibility which regulate its liability as an employer and all the provisions fall within the scope of those that might be used by private individuals to regulate employer's liability claims;

54.4 Nothing in the pleaded case, the policies or the evidence suggests that the Defendant was exercising powers falling outside the scope of ordinary private law rules;

54.5 The services provided by Lazy H Trial were the services of a private company under a private contract and therefore any failure to exercise care in relation that contract cannot relate to the exercise of any sovereign power;

54.6 Therefore, although the Defendant is a public body, this is a straightforward civil matter and not one that relates to *acta iure imperii*.

55. I then turn to the Claimant's review of the academic writings on these issues.

56. I start by setting out the relevant passage from **Dicey (above):**

> *Claims Involving States and Public Authorities*
>
> *34-015*
>
> *By contrast with the wording of the Brussels I Regulation,[112] the Rome II Regulation specifically excludes from its scope "the liability of the State for acts and omissions in the exercise of State authority". The meaning and scope of this exclusion is expanded upon by Recital (9) where claims arising out of acta iure imperii are said to include "claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office holders." This seems apt to exclude from the ambit of the Regulation, in England, cases involving State liability for non-commercial acts such as Sharp v Ministry of Defence[113] and R. (on the application of Al-Jedda) v Secretary of State for Defence.[114] If this observation is correct, such cases will continue to be governed by Part III of the 1995 Act.[115]*
>
> *Claims by a public authority may also fall outside the Rome II Regulation if they pertain to the exercise by that authority of powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals.[116] The Regulation will not apply to claims by a State or its representative based on the exercise of sovereign or governmental authority of the kind that attract the operation of the common law prohibition on the enforcement by English courts of foreign penal, revenue or other public laws.[117] Questions as to the lawfulness of the acts of public authorities may also arise in proceedings based on an essentially private law cause of action. A good example of this is provided by claims by (or against) local authorities to recover amounts paid under contracts held to be outside their powers and ultra vires.[118] Insofar as the legal basis of the claim is one which would be the same irrespective of the identity of the parties and which may equally be relied on by public and private claimants (for example, a claim to recover sums paid on the basis of a mistake, the relevant mistake being one of law as to the existence of a contractual obligation to make the payment), it is submitted that the matter should be viewed as a civil and commercial matter.[119] It must, however, be noted that claims such as these would be removed from the scope of the Rome II Regulation for a different reason, as a result of its interaction with Art.12(1)(e) of the Rome I Regulation. As the proceedings concern "the consequences of nullity of the contract", the rules of the latter Regulation would apply instead of those in the Rome II Regulation to determine the applicable law. This is dealt with in Chapter 36.[120]*

57. The Claimant criticises this passage on 6 separate grounds:

57.1 The author refers to a contrast between the **Brussels Regulation and Rome II** which specifically excludes from its scope *the liability of the State for acts and omissions in the exercise of State authority*. The Claimant contends that there is no real *contrast* because the case law establishes that *acta iure imperii* are equally not within the scope of the Brussels Convention;

57.2 It is wrong to categorise the provisions in relation to *acta iure imperii* as an exclusion. The liability of the State for acts and omissions in the exercise of State authority are not specifically excluded. It is simply that **Rome II** is expressed to apply to *civil and commercial claims*;

57.3 **Recital (9)** does not extend the scope of what constitutes a civil and commercial matter. As agreed and set out above **Recital (9)** merely confirms that where *acta iure imperii* applies it covers the acts/omissions of individual public servants;

57.4 The author states that **Rome II** appears to exclude *from the ambit of the Regulation, in England, cases involving State liability for non-commercial acts such as Sharp v Ministry of Defence and R. (on the application of Al-Jedda) v Secretary of State for Defence.* This is surprising as the Regulation applies not merely to *commercial acts* but to *civil and commercial matters*;

57.5 On its facts **Sharp v MoD** [2007] EWHC 224 is a claim arising out of a road traffic accident which occurred when an army convoy was travelling to Berlin on the autobahn was instructed to stop by a civilian employee responsible for highway safety and maintenance. Therefore the Claimant does not accept that is a claim which arises out of the exercise of military/public powers. Further the Claimant points out that both parties in **Sharp** agreed the issue as to the proper law which was not litigated before the court[9].

57.6 I was also referred to:

.1 *The European Private International Law of Obligations* by Wilderspin (4th ed) which considered that **Sharp** would fall within **Rome II**[10]; and

.2 *Accidents Abroad: International Personal Injury Claims:* by *Bernard Doherty* which somewhat unhelpfully states *A case arising from facts such as those in **Sharp**, on the other hand, may not be clear cut either way*;

57.7 Therefore the Claimant contends that the decision in **Sharp** does not assist the Defendant and represents a claim which falls outside *acta iure imperii*;

57.8 Finally the Claimant contends that, even if **Sharp** does represent a case that falls within *acta iure imperii* the current facts do not as it arises out of the employment relationship.

---

[9] It was agreed that section 12 of PILA should be applied to displace German law in favour of English law.

[10] See para 17-035 page 492 footnote 99

58. In closing his argument on this issue Mr Mead reiterated his central point that the claim did not arise out of the exercise of state power.

### (4)(c) The Defendant's argument

59. The Defendant does not accept that the accident can be categorised simply as one which arises in the course of training by an employer. It is an accident that arose in the course of *military training for military operations* which are the exclusive preserve of the state because no private employer can ever be involved in providing military training for its staff. In support of that argument the Defendant refers back to the points made on the documents and set out above under section 3(b) of this judgment all of which emphasise that the training which was being provided was for the purpose of making the participants better soldiers.

60. The Defendant then referred me to **Grovit** and in particular to the judgment of **May LJ** at paragraph 21:

> The Claimant's simple but only point is that claim for libel is a "civil matter". This supposes that the question only has to address the nature of the claim which the claimant brings irrespective of the nature of the defendant, and the function which it was undertaking and from which the Claimant's claim derived. Dyson LJ has referred to the judgment of the Court of Justice in **Sonntag's case** … and in **Lechouritou's case …** and the matter to my mind is shortly and decisively, for present purposes, put in those judgments and in summary in para 31 of **Lechouritou's case** where the court said:
>
> *Thus, the court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers*

Therefore the Defendant argues that one cannot look at this case as simply a claim for breach of the employer's duty of care as that would be the equivalent of looking at **Grovit** only as a libel claim. The Defendant contends that the court must also look at the nature of the Defendant and the function it was undertaking and from which the claim is derived.

61. Applying that test, the Defendant is plainly a public authority. The Defendant accepts that this is just the pre-condition to success in its argument and that it must go on to show that it was undertaking a public function and that the claim is derived from it doing so. Mr Browne argues that the Ministry of Defence carries out a uniquely public function in being responsible for the armed services. However, he does not go so far as to assert that every claim against the armed services would amount to *acta iure imperii* and accepts that there must be a dividing line, with some claims falling either side of that line. **Lechouritou** is obviously at one end of the spectrum, relating to the exercise of military power during a war. Although this

case is not as clear-cut as **Lechouritou** the Defendant contends that the exercise was being carried out for military purposes because it was part of the Claimant's training to be a soldier and that therefore its underlying function was ***military) training*** designed to expose soldiers to a degree of risk. The Defendant argues that the key is to ask "***for)what)purpose*** *is the training being provided?"*. If the training is being undertaken to provide soldiers with the skills that they need to take part in armed conflict then that is sufficient to render the matter *acta iure imperii* even if the particular training exercise does not involve fighting or a simulated battle.

62. The Defendant referred me to, and relied upon the three arguments set out in paragraph 55 of the Advocate General's Opinion in **Lechouritou:**

> —Armies are part of the structure of the state. Soldiers are subject to strict discipline and must obey their superiors[47] within a hierarchical organisation at whose head are the highest authorities of the nation[48] .
>
> —Armies are governed by principles which are solemnly proclaimed in the highest-ranking laws of each country, and those laws also set the limits, the objectives and the conditions of military activity with increasing precision as they descend the chain of command.
>
> —Armies exercise powers which are not held by other people, who are required to obey the orders of soldiers and must pay harsh penalties for disobedience.

63. The Defendant then referred to *Rome II: The law applicable to non-contractual obligations* by Andrew Dickinson[11]**.** The Defendant relied on the passage at para 3-264 to 3-266. In particular the Defendant relies on:
    63.1 The highlighted passage in paragraph 41 of the judgment in Lechouritou set out below:

> First of all, the Court has already held that the fact that the plaintiff acts on the basis of a claim which arises from an act in the exercise of public powers is sufficient for his action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the scope of the Brussels Convention (see *Ruffer,* paragraphs 13 and 15). **The fact that the proceedings brought before the referring court are presented as being of a civil nature in so far as they seek financial compensation for the material loss and non-material damage caused to the plaintiffs in the main proceedings is consequently entirely irrelevant**.

    63.2 The Defendant makes the point that in **Lechouritou** the claim was for financial compensation for material loss and non-material damage very similar to a personal injury or fatal accident claim in England. Although that may have looked like a civil matter it was held not to fall within the scope of

[11] Hereinafter referred to simply as "Dickinson".

the Convention because the basis of the claim was an act in the exercise of public powers. By analogy the Defendant contends that the claim for damages for personal injury in this case may look like a civil matter but it is not because it arises out of the exercise of public powers, namely the conduct of military training because it is the underlying purpose of that training which is relevant.

63.3 The Defendant then quoted **para 3.275** and **3.376** in **Dickinson** which in turn set out paragraph 36 of the Opinion of the Advocate General in **Lechouritou** and makes the following comments[12]:

> *36*
>
> *As Advocate General Jacobs pointed out in the Opinion in Henkel, the difficulty is that 'it may not always be easy to distinguish between instances in which the State and its independent organs act in a private law capacity and those in which they act in a public law capacity' (point 22), in particular if it is borne in mind that countries which have common law systems are not familiar with the distinction between public and private law, in the sense that civil law covers all matters which are not part of criminal law. Accordingly, although the legal systems of the Contracting States provide some guidance in this connection, the definition of a situation governed by public law may not be found in those systems, which in many instances are divergent and imprecise.*

Although the continental distinction between "public" and "private" law may be unfamiliar to common lawyers, the approach of the ECJ in deciding whether a matter is or is not a "civil or commercial matter" is resonant of the distinction drawn in public international law between sovereign (immune) acts (*acta iure imperii)* and private (non-immune) acts (*acta iure gestionis)* as applied by UK courts. In **Kuwait Airways Corporation v Iraqi Airways Co Lord Goff** stated:

> *The ultimate test of what constitutes an act iure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform.*

63.4 The Defendant argues that there is no private law equivalent to running and training an Army which must amount to a governmental act rather than an act that a private citizen can perform. Therefore although private companies can and do enter into private contracts for staff training and although the Defendant has entered into a contract with a private company for the training of its soldiers that does not mean that it was acting in a private capacity-again because this was training for soldiers and no private enterprise could (legitimately) train its staff to fight in wars. Therefore the fact and nature of the training in this case which involved training the Claimant so that he was better prepared to fight in battle is a prime example

[12] The extract from the opinion of the A-G is shown in italics

of the Defendant exercising a state power and not an act that a private citizen could perform;

63.5 I was also referred to para **3.279** in **Dickinson** which reiterates the point that the test to be applied is whether *the action is based on the exercise of state powers going beyond those existing under the rules applicable to relations between private individuals.*

64. The Defendant then referred me to **Wilderspin** at page 490 in particular:

64.1 **Para 17-033** where the author states:

> What is decisive in this regard is whether the authority was acting in the course of its public powers, which are defined as "powers falling outside the scope of the ordinary legal rules applicable to relationships between individuals"

64.2 The last two sentences of **para 17-034** which state:

> The court in the operative part of the judgment in Lechouritou limited the scope of its ruling to acts perpetrated by armed forces in the course of warfare. However, in para 37 it opined more generally that operations conducted by armed forces are one of the characteristic operations of state sovereignty.

The Defendant contends that this supports its argument that the training of a soldier to take part in military operations is one of the characteristic operations of state sovereignty;

64.3 **Para 17-035** in which the editors state in particular:

> It is thought that the exclusion should relate only to matters relating to the core area of State sovereignty, such as acts of warfare or peacekeeping which are closely related to States' foreign and defence policy;

The editors then go on to contrast a claim arising out of the use of a military base in Kosovo which it was alleged amounted to a nuisance and a claim arising out acts committed in the course of peace keeping operations. The former would represent a civil claim whilst the latter would arise out of acta iure imperii.

64.4 The Defendant contended that the fact that the Defendant did not enjoy any sovereign rights in Canada should not affect the outcome.

65. The last academic text to which Mr Browne referred me on behalf of the Defendant was the passage from **Dicey** set out at paragraph 56 above which he, understandably, contends is supportive given the approach it takes to the decision in **Sharp.** Mr Browne realistically accepted that **Sharp** is not a binding authority as jurisdiction was agreed but argued that I should regard both the approach taken in the case and the academic commentary on it as persuasive.

66. I have already dealt with the Defendant's approach to the documents and the way in which the Defendant contends that the factual matrix supports its argument. I do not repeat it here.

67. Finally the Defendant referred me to the decision of the Court of Appeal in **Littrell v USA: 12.11.1993**[13] and the decision of the House of Lords in **I Congresso del Partido** [1983] AC 244.

68. In **Littrell** a US serviceman stationed in England was injured during the course of medical treatment he received at the US Military Hospital at the US base at Lakenheath in Suffolk. He first claimed damages for negligence in the US but found that his claim would not succeed under US law which provided that the Government was not liable for injuries sustained by servicemen whilst on active duty overseas as a result of the negligence of other members of the armed services. The Claimant then brought an action against the US Government in England arguing that English law should apply.

69. The Defendant relies in particular on a passage at pages 26-27 in **Littrell** where **Hoffman LJ** stated:

> The context in which the act took place was the maintenance by the United States of a unit of the US Strategic Air Force in the United Kingdom. This looks about as imperial an activity as could be imagined. But it would be facile to regard this context as determinative of the question. Acts done within that context could range from arrangements concerning the flights of the bombers (plainly jure imperii) to ordering milk for the base from a local dairy or careless driving by off-duty airmen on the roads of Suffolk. Both of the latter would seem to me to be *jure gestionis,* fairly within an area of private law activity. I do think that there is a single test or "bright line" by which cases on either side can be distinguished. Rather there are a number of factors which may characterise the act as nearer or further from the central military activity.
>
> ... Thirdly what kind of act was it. Some acts are wholly military in character, some almost entirely private or commercial and some in between.

70. Mr Browne accepted that the court in **Littrell** had not been considering the application of **Rome II** but contended that the approach taken provides some assistance when deciding where to draw the line between a *civil matter* and *acta iure imperii*.

### (4)(d) The Claimant's response

71. In response to the Defendant's submissions on the case of **Littrell** Mr Mead noted that the Court of Appeal had been concerned with the doctrine of state immunity and that the test which the Court of Appeal was applying was principally derived

[13] I was given a copy of the transcript rather than being referred to a report.

from the decision of the House of Lords in **I Congresso** to which I was referred in some detail.

72. In **I Congresso** 2 ships carrying cargoes of sugar were despatched to Chile. The sugar was to be sold to a Chilean company by one Cuban state enterprise and the ships were under charter to another, known as Mambiasa. Following a revolution in Chile, the Cuban government decided to have no further commercial or diplomatic dealings with it and the ships were ordered to leave Chile/not to enter Chilean waters respectively. Proceedings were issued in England when the Chilean company brought an action in rem against a ship that Mambiasa was collecting from Sunderland on behalf of the Cuban government. Further actions by the Chilean company followed. The issue for the House of Lords was whether the Cuban government was entitled to state immunity.

73. I was referred to the judgment of Lord Wilberforce in **I Congresso** at 262E to 264C and to the passages at 267B-C and 269B-C. I do not propose to set out all of those passages in full. However, I do set out the following:

    73.1 At page **263H** Lord Wilberforce approved the following passage in the reasoning of the Federal Constitutional Court of the German Federal Republic in **Claim against Empire of Iran Case 1963 45 ILR 57:**

    *As a means of determining the distinction between acts jure imperii and jure gestionis one should rather refer to the nature of the state transaction or the resulting legal relationships and not to the motive or the purpose of the state activity. It thus depends upon whether the sovereign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law*

    73.2 **267C:**

    The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made with a view to deciding whether the relevant act(s) upon which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state had chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.

    73.3 **269B-C:**

    It may be too stark to say of a state "once a trader always a trader": but, in order to withdraw its action from the sphere of acts done jure gestionis, a state must be able to point to some act jure imperii. Though with much hesitation, I feel obligated to differ on this issue from the conclusion of the learned judge, I respectfully think that he well put this ultimate test **[1978] QB 500, 528:**

    > *... it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which a private citizen can perform"*

74. Mr Mead argues that in the circumstances it is the character of the relevant act that is decisive and not its purpose. If a state acts in a way that is quintessentially private then the act is not a governmental act. Applying that to the current claim Mr Mead argues that there is a distinction between the purpose of an act and the nature of the activity being undertaken. He accepts that (a) the army is part of the public function of the state and (b) the purpose of the training that the Claimant was undergoing was to make him more resilient. However, Mr Mead contends that the Claimant was being trained under the supervision of a private company and that the tasks being undertaken as part of that training were not of a particularly military nature. The Defendant was not exercising governmental powers because it had no right to do so in Canada when one looks at the documents identified above. Further, the relationship between it and the Claimant was essentially a private law relationship governing the nature of extent of the duty owed by the Defendant to keep the Claimant safe whilst undertaking that training.

75. Mr Mead pointed out that, on the facts in **Littler**, the court prevented a US serviceman bringing an action subject to English law against the US government for an accident which occurred in England by holding that it was *acta iure imperii*. Therefore the US government adopted a position opposite to that taken by the Defendant in this case where, despite being an arm of the UK government, the Defendant is arguing that its national law should not apply.

76. Mr Mead points out that the issue in **Littrell** was slightly different as it related to the question of state immunity and that the English courts rightly rejected the proposition that a US national should be allowed to bring a claim against a sovereign state where there was no domestic remedy. In his submission this was not the same issue as the court was obliged to consider under Rome II.

### (4)(e) My ruling

77. Having set out the respective arguments I must now reach my decision and determine whether the claim is properly to be regarded as a *civil and commercial matter* or as arising out of *acta iure imperii*.

78. The parties have, rightly, agreed that the scope of **Rome II** should be consistent with the **Brussels Regulation**. It follows that the definition of *civil and commercial matters* must be regarded as an independent concept and its boundary with *acta iure imperii* must be part of the jurisprudence of European law: see paragraphs 29 and 30 of **Lechouritou**.

79. I respectfully agree with paragraph 36 of the Opinion the Advocate General in **Lechouritou** where he states that

> *'it may not always be easy to distinguish between instances in which the State and its independent organs act in a private law capacity and those in which they act in a public law capacity' (point 22), in particular if it is borne in mind that countries which have common law systems are not familiar with the distinction between public and private law, in the sense that civil law covers all matters which are not part of criminal law. Accordingly, although the legal systems of the Contracting States provide some guidance in this connection, the definition of a situation governed by public law may not be found in those systems, which in many instances are divergent and imprecise.*

80. In my judgment the test to be applied is to be found in paragraph 31 of the judgment in **Lechouritou:**

> *Thus, the court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (see the LTU case (para 4), Rüffer's case (para 8), Henkel's case (para 26), Baten's case (para 30), the Préservatrice foncière TIARD case (para 22) and Sonntag v Waidmann Case C‑172/91 [1993] ECR I‑1963 (para 20)).*

The question I must answer in this case is whether claim arises out of the ***exercise)*** of the Defendant's ***public)powers***.

81. I agree with the Defendant that paragraph 41 of the judgment in **Lechouritou** requires me to look at the basis of the claim and the circumstances from which it arises. The fact that the proceedings are presented as being of a civil nature in seeking compensation for personal injury and financial loss is "*entirely irrelevant".*

82. However, it is then necessary to look at the case law to see what assistance it gives:
    82.1 Once the court in **Lechouritou** had identified the test set out above the outcome was inevitable as the claim plainly arose out of the exercise of state power by the Wehrmacht during the course of World War II. Therefore, I do not regard the facts as particularly helpful to the present case which, even on the Defendant's view, involves a more subtle exercise of state power;
    82.2 In **Ruffer's case** the court held that a civil action to recover certain costs incurred in clearing a waterway pursuant to National Treaty obligations was a claim arising out of *acta iure imperii* even though it was ostensibly a claim for damages. I find this case helpful in that it demonstrates the importance of the underlying basis of the claim and the ***positive) exercise*** of a State power or duty, in that case a treaty obligation (peculiar to a State) to clear the waterway;

82.3 I also find the decision of the Court of Appeal in **Grovit** very helpful. Again it seems to me that the important factor was that the claim arose out of the ***positive*)** ***exercise*)** of a public power (a projection of State power), namely an act done by the Bank in course of carrying out its public, regulatory, functions;

82.4 This should be contrasted with the position in **Sonntag** where a public employee, a teacher, was negligent in supervising children during a school trip. In that case the court held that the underlying claim did not arise out of the exercise of a power particular to the State because the supervision of children was something that could equally be carried out by a teacher in the private sector. There was no positive exercise of a power which was peculiar to the State;

82.5 I do not consider that the *purpose* or *motive* behind the claim should be equated to the *basis of the claim*. The motive behind any claim by a government organisation is to further the purposes of the State. For example in **Tiard** the Dutch government was seeking to further purposes of the State by recovering monies due to it. However, the ECJ held that the claim did not arise out of *acta iure imperii* because the claim was based on a guarantee which was a private law matter. (This was also recognised by Hoffmann LJ in **Littrell**. He recognised that a claim arising out of the delivery of milk to the base would not fall within *acta iure imperii* even though such a delivery furthered the purposes of the base);

82.6 For the avoidance of doubt, I have taken into account the other European authorities to which the Claimant referred but do not consider it necessary to set them out in any detail here.

83. I acknowledge the force of the arguments identified by the Advocate General in paragraph 56 of his Opinion in **Lechouritou** which I have set out above. Further I note paragraph 37 of the judgment in **Lechouritou** which states:

> As the Advocate General has observed in paragraphs 54 to 56 of his Opinion, there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy.

However, I do not consider that the mere fact the claim is brought by a soldier against his employer is sufficient to establish that the claim arises out of *acta iure imperii*. In my judgment the important phrase in paragraph 37, when viewed in the context of the other European authorities, is *operations conducted by armed forces***.**

Further, such *operations* are said to be the characteristic emanations of State sovereignty where they appear as *inextricably linked to States' foreign and defence policy*. In my view the observations of the Advocate General and paragraph 37 of the judgment are authority for the proposition that the claim will be *acta iure imperii* where the Army is involved in operations and those operations are linked to the States' foreign and defence policy. In my view this is entirely consistent with the principle that for a claim to be *acta iure imperii* the underlying claim must arise out of some positive exercise or projection of a power that is peculiar to the state.

84. Although the test under **Rome II** requires me to deal with a free-standing concept I regard the approach identified above as consistent with the passage from **Dickinson** dealing with the distinction drawn in public international law upon which the Defendant relied. In particular it seems to me that the reference to the exercise of a public power is consistent with the reference to a governmental act contained in in the following extract from the judgment of **Lord Goff** in **Kuwait Airways Corporation v Iraqi Airways Co:**

> *The ultimate test of what constitutes an act iure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform.*

85. I do not derive any assistance from the case of **Sharp** for a number of reasons:
    85.1 Primarily because the question as to whether the claim was a *civil and commercial* matter or *acta iure imperii* was not decided by the court. The parties agreed that English law should apply to the personal injury claim of a British soldier injured overseas in the course of his duties with the Defendant;
    85.2 Further, I do not find the passage in **Dicey** particularly helpful. As far as I can see in **Sharp** the underlying claim arose out of issues of road safety/safe driving which do not involve any *exercise* or projection of State power or authority. Further, there does not seem to have been any suggestion that the accident occurred during the course of any military *operation* connected with the exercise of the UK's defence or foreign policy. Therefore, as far as I can see the claim in **Sharp** would fall into the definition of *civil and commercial matters* and I prefer the analysis in **Wilderspin**.

86. I have considered the parties competing submissions about the cases of **Littrell** and **I Congresso**. These cases are not directly on point as they do not concern **Rome II** and do not form part of the body of European law dealing with the issue of *acta iure imperii* under the **Brussels Regulation.** However, I note in particular the following:
    86.1 In **I Congresso** Lord Wilberforce endorsed the relevant test as follows:

> Though with much hesitation, I feel obligated to differ on this issue from the conclusion of the learned judge, I respectfully think that he well put this ultimate test **[1978] QB 500, 528:**
>
> > *… it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which a private citizen can perform"*

86.2 In **Littrell** Hoffman LJ (as he then was) stated:

> The context in which the act took place was the maintenance by the United States of a unit of the US Strategic Air Force in the United Kingdom. This looks about as imperial an activity as could be imagined. But it would be facile to regard this context as determinative of the question. Acts done within that context could range from arrangements concerning the flights of the bombers (plainly jure imperii) to ordering milk for the base from a local dairy or careless driving by off-duty airmen on the roads of Suffolk. Both of the latter would seem to me to be *jure gestionis,* fairly within an area of private law activity. I do think that there is a single test or "bright line" by which cases on either side can be distinguished. Rather there are a number of factors which may characterise the act as nearer or further from the central military activity.
>
> … Thirdly what kind of act was it. Some acts are wholly military in character, some almost entirely private or commercial and some in between.

87. It seems to me that the approach adopted by Lord Wilberforce above is not inconsistent with the formulation of the test that I have adopted. It follows from the test he approved that it is not enough that the purpose or motive of the relevant act is to serve the purposes of the State–for example to train a soldier, it is necessary that the act has the character of a governmental act as opposed to an act with a private citizen can perform, for only then is the state acting in the exercise of its public/sovereign powers rather than in its private capacity. Further, I consider that the formulation of the test I have adopted is not inconsistent with the approach adopted by Hoffman LJ in **Littrell**. Hoffman LJ noted that it was not sufficient that the claim arose out of the presence of US servicemen in England as part of the US Strategic presence there must be something more, stating that there was no *bright line)* to distinguish cases but requiring the court to consider what kind of act was involved.

88. I therefore ask the question as to whether the basis of the claim in this case arises out of some positive exercise or projection of a power which is peculiar to the state. In doing so I take into account both the legal analysis set out above and the factual matters to which I have been referred.

89. In my judgment the answer must be No for the following reasons:
    89.1 The basis of the claim must be the training exercise in which the Claimant was engaged at the time of the accident;

89.2 In the course of that exercise the Claimant was being trained how to manage and care for a horse;

89.3 Although this was part of training the Claimant to be a soldier I do not consider that he can properly be regarded as undertaking any *military operation* on behalf of the UK state whilst being so trained;

89.4 Equally, I do not consider that the underlying claim arises out of the exercise of sovereign power by the Defendant. The Defendant was not seeking to exercise of sovereign authority in Alberta. It was merely seeking to use the facilities available there to train its soldiers so that they might better be deployed in the exercise sovereign authority in the future. Further, as the Claimant has pointed out the Defendant enjoyed no sovereign rights over the base;

89.5 In my view the injury or loss in this case does not result from the exercise or projection of state power but rather from part of the Defendant's internal training programme which was being carried out by a private company. The claim is founded on an allegation that the Defendant was in breach of the non-delegable duty of care it owed as employer or quasi employer to ensure that such training was carried out safely;

89.6 In my view the provision and management of such training is not a governmental act but the type of act in which any private company could become involved. It is not wholly military in character but one wholly consistent with the type of training which could be undertaken within the private sector;

89.7 Therefore, in my view the claim is a *civil and commercial matter* to which **Rome II** applies.

### *(5) What next assuming Rome II applies*

90. As set out above the parties agree that:

90.1 If Rome II applies then, *unless otherwise provided for in this Regulation*, the appropriate law would be the law of Alberta pursuant to **Art 4(1)**;

90.2 As both parties were habitually resident in England at the time the damage occurred **Art 4(2)** *otherwise provides* that the appropriate law is the law of the country in which both were habitually resident, namely England;

90.3 Therefore, the appropriate law is English law **unless**, pursuant to **Art 4(3)** *it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2 the law of that other country shall apply*;

90.4 The burden is on the Defendant to show such a *manifestly closer connection* to Alberta than England.

### (5)(a): The Defendant's submissions

91. I start with the submissions of the Defendant because the burden is on the Defendant to show that there is a manifestly closer connection between Alberta than England.

92. If Rome II had not applied then, pursuant to **section 11** of **PILA** the appropriate law would have been the law of the place where the injury occurred, namely Alberta **unless** the Claimant could show that it was *substantially more appropriate* for English law to be applied: see **section 12**. Whilst these tests are not exactly the same they are certainly similar.

93. Mr Browne, on behalf of the Defendant, had structured his argument to deal first with the situation on the basis that, contrary to my ruling, he had succeeded on the **Rome II** issue. This was entirely understandable. However, as a result it will be easier if I set out the argument that he developed in relation to both issues at this stage so as to ensure that I do not fail to take into account any matter or argument raised by him which might be relevant to the question as to whether the Defendant can satisfy the test under **Art 4(3)** and show that there is such a manifestly closer connection to Alberta.

94. The Defendant referred me to Recitals (14) and (18) which are set out below:

> (14)
>
> The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.
>
> (18)
>
> The general rule in this Regulation should be the lex loci damni provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

The Defendant pointed out that Art 4(2) created an exception to the general principle that the relevant law should be that of the country in which the injury occurred where both parties had their habitual residence in the same country. The role of Art 4(3) was to be an *escape clause* where it was clear from all the circumstances that the tort was *manifestly more closely connected* with another country.

95. The Defendant argued that the court should reject the Claimant's suggestion that the court should depart from the rule in **Art 4(2)** only if it was "80% sure" or "satisfied to the criminal standard" that it was appropriate to do so. The Defendant's point was that I must simply apply the test that is set out in the Regulation and its Recitals. However, the Defendant accepted that **Art 4(3)** placed a *high hurdle* in its path if it was to displace **Art 4(2):** see paragraph 63 of the judgment of Slade J in **Winrow v Hemple and Ageas Insurance Ltd** [2014] EWHC 3164.

96. Further, Mr Browne pointed out that the question to be determined under **Art 4(3)** was not whether *an issue* in the proceedings was more closely connected with another country but whether *the tort* was more closely connected: see Slade J in **Winrow (above)** at para 34. (This should be compared to the similar but slightly different test under **section 12** which requires the party relying on it to show that it is substantially more appropriate for the applicable law for determining the issues arising in the case or for any of those issues to be the law of another country).

97. In his Skeleton Argument Mr Browne identified the following factors as demonstrating that the tort was more closely connected to Alberta than England:

(a) Significant weight should attach to the place of the tort by reason of the effect of the general rule in section 11;

(b) The alleged tort took place in Alberta on land leased from an Albertan company– Lazy H Trail;
(c) The horse which injured C was provided by Lazy H Trail;
(d) At the time of the injury the Claimant was temporarily resident in Alberta;
(e) He was carrying out his duties there;
(f) The training which C was receiving was carried out by an Albertan based organisation–Lazy H Trail and its Albertan resident (Canadian national) employees;
(g) The activity was supervised by the employees of Lazy H Trail;
(h) The training was provided pursuant to a contract executed in Canada and governed by the laws of Alberta for the benefit of D;

(i) While that contract governed the relationship between Lazy H Trail and BATUS it defined the nature, extent and stipulated standards which governed the delivery of services pursuant to it to C (and other soldiers);

(j) C's injuries were suffered in Alberta and the treatment he received from them in the period post-accident were provided in Alberta

98. In the course of oral argument Mr Browne submitted that the starting point was to look at the allegations made by the Claimant in the Amended Particulars of Claim which he contended could be distilled down into:

98.1 The factual assertions at paragraphs 5 to 7 which record the brief facts of the accident;

98.2 The particulars at paragraph 8 which in reality amount to an argument that the Defendant failed properly:

.1 To train;

.2 To warn of risk;

.3 To risk assess;

.4 To supervise.

Mr Browne argued that this demonstrated that all the elements of the tort occurred in Alberta. Further, he argued that the injury was suffered in Alberta and so too were the consequences of that injury.

99. However, in argument Mr Browne accepted that:

99.1 Paragraph 4 of the Amended Particulars of Claim was also relevant which set out the Defendant's assertion in the Health and Safety Handbook that it would apply UK standards when overseas "*where reasonably practicable*";

99.2 The Claimant had suffered financial detriment in England and that this was a factor to which I should have regard given the decision of Slade J in **Winrow (above)** and in particular the passage at paragraph 59 which states:

> In my judgment "all the circumstances" of the case relevant to determining whether a tort is manifestly more concerned with country A than country B can include where the greater part of the loss and damage is suffered

100. Mr Browne further submitted that the following factors connect the tort to Alberta rather than England:

100.1 The investigation at trial will focus on:

.1 the suitability or otherwise of the staff provided by Lazy H Trail;

.2 the acts or omissions of the Lazy H Trail staff;

.3 whether the Defendant properly investigated Lazy H Trail's suitability to provide the training;

100.2 All the Lazy H Trail staff are Albertan residents;

100.3 As the Defendant is primarily liable for any failure by Lazy H Trail given the nature of the non-delegable duty of care there is no suggestion of any breach of duty by the Defendant in England.

101. The Defendant contends that:

101.1 The fact that both the Claimant and the Defendant are habitually resident in England is incidental to the tort or wrong which occurred in Alberta;

101.2 Although the Claimant was engaged by the Defendant under an English contract of service that again is not significant to the tort which occurred in Alberta and, for the reasons set out, involved the exercise of care by Albertan nationals or by members of the UK armed forces in Alberta;

101.3 The promise to observe UK standards of health and safety as set out in paragraph 4 of the Amended Particulars of Claim was precisely that-a promise, so far as practicable, to apply UK standards and not a promise to apply UK law. It is clear from the expert opinions from Albertan Counsel contained in the main bundle that Albertan law does not impose a materially different duty/standard of care so that the Claimant would not be prejudiced in terms of that duty if Albertan law were adopted. Whilst the position may not be so advantageous for him under Albertan law because of the 2-year limitation period that is not a matter about which the Defendant has given any commitment to its soldiers overseas.

102. Mr Browne contends that in the circumstances the centre of gravity of the tort is Alberta as the focus will be on the activities of Lazy H Trail and its employees. Therefore, he can discharge the burden on him to demonstrate a manifestly closer connection to Alberta than to England such that **Art 4(2)** should be disapplied.

103. Mr Browne was conscious that it might have appeared somewhat odd for the Defendant, an arm of the UK Government, to be contending that Albertan law rather than English law should apply. Therefore, he referred me to a number of authorities in order to demonstrate that, in certain circumstances, the courts had found it appropriate to apply foreign law to determine the liability of the UK government. I shall endeavour to deal with each of these cases fairly briefly, explaining Mr Browne's submissions and making my own assessment of the relevance of each to the matters which I must determine:

103.1 **R (on the application of Al Jeddah) v Secretary of State for Defence: [2007] EWCA Civ 327:**

.1 The appellant was an Iraqi national who brought a claim arising out of his detention by British troops at a facility in Iraq. He claimed damages

on the basis that his detention infringed his rights under Art 5(1) of the European Convention and that it was wrongful at common law–a claim in tort;

.2 The House of Lords had to determine whether the claim in tort should be resolved pursuant to English or Iraqi law, question to which **sections 11 and 12** of **PILA** applied;

.3 The primary position was that Iraqi law should apply because the tort occurred in Iraq;

.4 It was therefore for the Claimant to show that it was substantially more appropriate for the claim to be tried according to English law;

.5 The House of Lords upheld the decision of the Court of Appeal that the circumstances occasioning and surrounding the Claimant's detention were entirely particular to Iraq;

.6 In my judgment the background factors in **Al-Jeddah** are very different to the matters relating to Mr Rai's claim;

.7 Al-Jeddah was taken into custody after the Coalition Provisional Authority had been dissolved and power had been transferred to the Interim Iraqi Government. Therefore the UK armed forces were acting as agents for the Interim Government at the time Al-Jeddah was taken into custody. Therefore, the UK armed forces were not acting on behalf of the UK state but on behalf of the Iraqi state. In those circumstances it seems clear that a tort by an agent of the Iraqi government against an Iraqi national should be governed by Iraqi law;

.8 Therefore I do not consider **Al-Jeddah** as being helpful to the claim I have to decide;

103.2 **Bel Hadj and another v Rt Hon Jack Straw MP and others [2014] EWCA Civ 1394:**

.1 I was referred by Mr Browne to paragraphs 134 and 143;

.2 This was a claim by a Libyan citizen against the UK Secretary of State, Jack Straw, arising out of torts committed in China, Malaysia, Thailand, the USA and Libya which the appellants contended should be determined according to English law;

.3 The court rejected the appeal and held that English law did not apply;

.4 I do not consider that **Belhaj helps** me to resolve the issues in the current claim other than to show that, in some circumstances, it is appropriate for the actions of the UK state (or its officers) to be judged according to the law of a foreign State;

.5 However it is clear that, unlike the present case, (a) the Claimant in **Belhaj** was not habitually resident in the UK and (b) he was not serving in the British Army;

103.3 **Mohammed v Secretary of State for Defence: [2104] EWHC 1369 (QB):**

.1 The Claimant was an Afghan national who was captured and detained by British armed forces during a military operation in Helmand;

.2 It was agreed by the parties that Afghan law applied: see para 55;

.3 Again I do not consider that this decision is particularly helpful to the issues that I must resolve. It goes no further than showing that in appropriate circumstances it is proper for the actions of the UK state to be judged according to the law of a foreign state. The obvious distinction to the present case being the same as those identified in relation to **Bel Hadj above** the Claimant in **Mohammed** was not habitually resident in the UK nor a member of the British Army;

103.4 **Rahamatullah v Ministry of Defence: [2014] EWHC 3846 (QB):**

.1 I was referred to paragraphs 25-26;

.2 This was a claim by Iraqi civilian claimants for torts allegedly committed in Iraq;

.3 The Claimants accepted that Iraqi law applied;

.4 In the circumstances I do not consider that this case adds anything to the decision in **Al Jeddah above.**

### (5)(b) The Claimant

104. Mr Mead argued that the purpose of Art 4(3) is to align the tort claim with any coexisting contract claim. It is there to ensure that, if the contract between the parties provided for a choice of law then the law applying to any claim in tort should not be different. For example Mr Mead suggested it would be inappropriate if the court were required to determine a tort claim under English law in circumstances where there was an equivalent contract claim under an agreement which included a clause that Alberta law should apply.

105. The Claimant referred me to the Explanatory Memorandum and the Proposal for the Regulation which eventually became **Rome II** which was at Tab 18 in his bundle of authorities and in particular to pages 11 to 14 of that document. On Mr Mead's analysis:

105.1 Article 4(1) was intended to introduce certainty into the law;

105.2 It is agreed that Article 4(1) does not apply and that 4(2) does so unless the Defendant can discharge the burden imposed on it by Art 4(3). The comment at page 12 of the above document notes that Art 4(2) is intended to give effect to the legitimate expectations of parties who are both habitually

resident in a particular jurisdiction and who will therefore expect the law of that state to be applied;

105.3 Art 4(3) is an exemption clause which is intended to adapt the rigid rules reflected in Arts 4(1) and 4(2) so as to alter the position where to do so would reflect the centre of gravity of the situation;

105.4 A move away from the certainty expressed in Arts 4(1) and 4(2) should occur only in exceptional circumstances;

105.5 Even in English law a test of exceptional circumstances imposes a high bar. As European law is generally more prescriptive and requires more certainty so therefore the use of the term "exceptional" imposes a correspondingly higher bar.

106. Mr Mead argues that the significance of the Art 4(2) is that the Claimant would be protected by English standards wherever he was. One may also note that the Defendant would then be subject to English standards (be they higher or lower than local standards) wherever they required the Claimant to perform his duties.

107. Mr Mead then refers me to the second part of Art 4(3) which contains some guidance as to where there might be a *manifestly closer connection*, namely where there was a pre-existing contract between the parties which was closely connected with the relevant tort. In this case there was a pre-existing contract of service namely the employment relationship between the Claimant and the Defendant that was subject to English law. Therefore, that factor would tend to rebut any argument that there was a manifestly closer connection to Alberta.

108. Mr Mead then looked at the factors relied on by the Defendant and argues that they go little further than to state that the accident occurred in Alberta. He further contends that the Defendant's analysis fails properly to recognise that:

108.1 The Claimant was injured in his capacity as a soldier in the Armed Services of the Crown, employed by the Defendant and hence part of the British State;

108.2 There was a pre-existing contractual relationship between the Claimant and the Defendant made in England which meant that the Claimant was subject to the direction of the Defendant as to where he was trained;

108.3 The tort concerned the breach of the non-delegable duty of care owed by an English employer;

108.4 The Defendant's health and safety polices indicated that English standards should be applied to the training it provides;

108.5 The Defendant as employer had the responsibility for risk assessing the activity such that there was a potential breach of an obligation on the English employer not just the Albertan company and its employees;

108.6 Whilst the tort and hence the immediate injury occurred in Alberta the consequences of that injury, namely the financial loss and the long term pain, suffering and loss of amenity are all suffered in England.

109. Mr Mead expanded on the matters set out in his Skeleton Argument by arguing that it would be surprising for a soldier entering into an employment relationship with the MoD to find that the tortious duty owed to him/her by his/her employer varied according to the jurisdiction in which they operated. Rather, the position should be that the English duty of care should apply in all circumstances subject to some variations in the standards to be expected of the employer pursuant to that duty where it was appropriate to make such adjustments because of the differing circumstances in which it operated which might change according to the country in which the soldier was discharging his/her duties. If this were not the case the soldier would have only patchwork protection and would be vulnerable to losing the benefit of a claim, for example by the operation of different limitation periods.

110. The Claimant also points to the Skeleton Argument that the Defendant filed in support of its application for permission to join Lazy H Trail to these proceedings. In that Skeleton Argument the Defendant was attempting to show that England was the proper place to bring the claim. In paragraph 70 of that Skeleton Argument the **Defendant** (then as now, represented by Mr Browne) argued:

> **70. *The present case manifestly closer connection***
>
> On the facts here, the Claimant was injured while employed by the British Army carrying out services on behalf of the British Crown pursuant to a contract executed for the benefit of the MoD. The Third Party was (or ought to have been) aware that the services it provided were provided to members of the British Army, likely domiciled in England and Wales. Further, that should the Third Party not discharge its contractual duties properly and/or should it fail to perform those duties with reasonable care and skill then, if injury was suffered, the medium/long term harm would be likely suffered by British soldier(s) in the UK not in Canada. Therefore the effects of such tort(s) would be overwhelmingly felt in the UK. This is it is submitted a highly material factor in determining the *manifestly closer connection* exception.

Further, that Skeleton Argument went on to explain why it was more convenient for the Third Party action to be heard in England.

111. Mr Browne (rightly in my view) pointed out that his comments about the test for determining the more convenient forum were aimed at a different target to that

with which I am concerned in this case. However, the Claimant contends that this argument cannot apply to Mr Browne's comments at paragraph 70 set out above and that it is wholly inconsistent for the Defendant then to have been arguing a manifestly closer connection with England and now to arguing a manifestly closer connection to Alberta.

112. For all the reasons set out the Claimant contends that the Defendant has not discharged the heavy burden on it to establish that there is a manifestly closer connection between the tort and Alberta rather than England.

### 5(c) My ruling

113. In my judgment I must apply the language of the Regulation and must consider whether the tort is *manifestly more closely connected* to Alberta than to England. I do not find it helpful to think in terms of requiring the Defendant to make me 80% sure that the tort is more closely connected to Alberta or of requiring the Defendant to satisfy me of that to the criminal standard.

114. It is helpful to note that Art 4(3) represents an escape clause from the strictures of Art 4(1) and 4(2) as set out in Recitals 14 and 18.

115. Further, the decision of **Slade J** in **Winrow** makes it clear that:

115.1 The test in Art. 4(3) imposes a *high hurdle* which it is for the Defendant to overcome: see paragraph 63 of the judgment;

115.2 I can and should take into account all the circumstances including:

.1 Where the greater part of any loss is suffered: para 59 of the judgment;

.2 The nationality or habitual residence of those involved in the tort: para 55 of the judgment;

.3 Where the tort occurred: see para 62 of the judgment.

116. There is considerable tactical advantage in the Claimant's point about the content of paragraph 70 of the Defendant's Skeleton Argument in relation to the Third Party Claim. It seems to me that in that paragraph the Defendant was seeking directly to address the test with which I am concerned and that it was arguing for the opposite result. However, that the Defendant has earlier taken such a position cannot be determinative of the outcome of the argument before me. I must look at all the circumstances and apply the appropriate test.

117. In my judgment the Defendant cannot overcome the high hurdle contained in Art. 4(3) and establish that there is a *manifestly closer connection* between the tort and Alberta rather than England.

118. In reaching that conclusion:

118.1 I accept that the tort occurred in Alberta and that the immediate injury was sustained in Alberta;

118.2 Further, I accept the Defendant's argument that examination of breach of duty will principally involve consideration of events which occurred in Alberta and that Lazy H Trail was providing its services under a contract which was subject to the law of Alberta;

118.3 However, I must balance against this a number of other factors:

.1 The parties involved were both habitually resident in England;

.2 The relationship between the parties was governed by a contract of service made in England and subject to English law;

.3 The claim is based on the non-delegable duty of care which arises out of the contract of service. This will involve the examination of the conduct of members of the British Army resident in England who were responsible for risk assessments;

.4 The Defendant had agreed that it would, so far as reasonably practicable, adopt English standards for decisions relating to health and safety. (I accept that this is not an agreement to apply English law but it is nevertheless a factor which shows a connection with England and tends to rebut a *manifestly closer connection* to Alberta);

.5 The medium and long term consequences of the injury sustained will be suffered in England and the Defendant must have known that this was likely to be the result of any injury to one of its soldiers carrying out his duties in Canada;

118.4 Taking all those factors into consideration it seems to me that the closer connection was to England rather than Alberta and in any event the Defendant falls some way short of establishing a *manifestly closer connection* to Alberta.

### *(6) What if Rome II does not apply*

119. If **Rome II** does not apply then the court has to determine the appropriate law in accordance with the provisions of **sections 11 and 12** of **PILA**.

120. Given my conclusion that **Rome II** does apply it is not necessary for me to go on to consider this issue. However, for the sake of completeness I shall do so-albeit somewhat more briefly than I have dealt with the matters above.

121. It is agreed that if **Rome II** does not apply then the appropriate law is the law of Alberta unless the Claimant can show that it is *substantially more appropriate* for the law of England to apply.

### (6)(a) The Claimant

122. The Claimant relies on the factors that have been identified above as showing a connection to England. However, he also relies on one further argument that he contends has overwhelming force.

123. Mr Mead argues, rightly, that the court only comes to consider this test if it has found that the claim arises out of *acta iure imperii*–in other words one only reaches this point if the tort gives rise to a potential state liability for acts undertaken in the exercise of a sovereign power. Mr Mead contends that it would be perverse to argue that Canadian law should apply to judge the sovereign conduct of the UK forces against one of its own servicemen. He argues that, if that were the case it would mean that wherever the army operated its actions would be judged by the law of the country in which it operated which was viewed as wholly inappropriate by the Court of Appeal in **Littrell**.

124. Therefore, given the effect of this additional factor it is *substantially more appropriate* that English law apply.

### (6)(b) The Defendant

125. I have already set out the bulk Defendant's arguments on this issue when considering the whether there was a *manifestly closer connection* for the purposes of **Rome II**.

126. However, I should set out the test that Mr Browne asks me to apply when considering **sections 11 and 12** of **PILA** which he draws from the decision of the Court of Appeal in **Roerig v Valiant Trawlers Limited** [2002] EWCA Civ 1 and in particular to paragraph 12. Mr Browne submits that I should apply a 3 stage test formulated as follows:

126.1 First, identify the issue to which it is suggested that the general rule is not to be applied;

126.2 Second, identify the factors which connect the tort to Alberta and the factors which connect the tort to England;

126.3 Third, consider the significance of the factors connecting the tort to each jurisdiction in determining whether it is substantially more appropriate for the law of England and Wales to be the applicable law for determining the substantive issues.

127. Further, I should mention at this stage that I was referred to the decision in **VTB Capital v Nutritek: [2013] UKSC 5** and to the observations it contains as to the way in which the test in **section 12** should be applied. I therefore set out the Defendant's arguments in relation to this case**:**

127.1 I was referred to the following paragraphs (a) 1 to 6, (b) 196 and (c) 204–206;

127.2 The appellant, VTB, was a bank incorporated and registered in England. However, it was a subsidiary of VTB Moscow, a state owned bank. VTB contended that it was induced to enter into a Facility Agreement to enable a Russian company to buy other Russian dairy companies by reason of misrepresentations made by other Russians in London;

127.3 The Supreme Court had to consider whether English law should apply by reason of **section 11** of **PILA** because the tort occurred in London or whether it was *substantially more appropriate* for the applicable law to be Russian law;

127.4 I set out paragraphs 204 to 206 of the speech of Lord Clarke:

> 204
> In every case to which the 1995 Act applies in which the court has considered the general rule under section 11, the court must consider whether the general rule is displaced under section 12. There is an illuminating discussion of the general approach in para 35–148 of the 15th edition of *Dicey*. The editors say that the application of the displacement rule in section 12 first requires, taking account of all the circumstances, a comparison of the significance of the factors which connect the *tort* with the country the law of which would be applicable under the general rule (in this case English law) and the significance of any factors connecting the *tort* with another country (here Russia). The word *tort* is italicised in the text in *Dicey*. The editors say that secondly, it then has to be asked, in the light of the comparison, whether it is "substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues," to be the law of that other country.
>
> 205
> The editors note that the general rule has been displaced on very few occasions. They further observe that, although section 12 applies in all cases to which section 11 applies, it would seem that the case for displacement is likely to be most difficult to establish in the case of section 11(2)(c) because the application of that provision itself requires the court to identify the country in which the most significant element or elements of the tort are located. Importantly they stress the use of the word "substantially", which they describe as the key word, and conclude that the general rule should not be dislodged easily, lest it be emasculated. The party seeking to displace the law which applies under section 11 must show a clear preponderance of factors declared relevant by section 12(2) which point to the law of the other country.

206

That approach is borne out by the cases. The idea that "substantially" was the key word was derived from the judgment of Waller LJ in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 WLR 2304, at para 12(v). The principles were considered in more detail by Brooke LJ in *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621 at paras 103 and 104, where he noted that the 1995 Act derived from a report of the Law Commission, from which he quoted. He added that Lord Wilberforce, who was a member of the House of Lords Committee which considered the Bill, had expressed the view that it would be a "very rare case" in which the general rule under section 11 would be displaced: "Prima facie there has to be a strong case".

128. The Defendant contends that:

128.1 The key word in the test to be applied is *substantially*;

128.2 It will only be in exceptional cases that the effects of **section 11** will be dislodged by the provisions of **section 12**;

128.3 Therefore the Claimant has a heavy burden to discharge if it is to show that it is *substantially more appropriate* for English law to apply to the issues involved in the claim;

128.4 By reason of the factors which I have set out in support of the Defendant's argument on *manifestly closer connection* it can rebut any such argument by the Claimant.

### (6)(c) My ruling

129. I accept the Defendant's argument that there is a heavy burden on the Claimant and that he must establish that it is *substantially more appropriate* that English law should apply. Further, it seems to me that it will generally be only in rare cases that it will be appropriate to depart from the law determined in accordance with **section 11.**

130. Applying the 3 stage test identified by the Defendant:

130.1 The issues which must be resolved in the claim are: (a) breach of duty, (b) the question of the causation and extent of any loss and (c) limitation;

130.2 It seems to me that the factors to be taken into account are those which I have already identified when carrying out the balancing exercise under Section 5 of this Judgment. However, if I had reached this point, there is one further factor which must be added on to the scales, namely that claim arises out of a potential breach of duty owed by the UK Government in the course of the exercise of its sovereign powers to one of its own soldiers who was habitually resident in England;

130.3 When considering the significance of all these factors taken together I am firmly of the view that it is *substantially more appropriate* for the applicable law for all issues arising out of the claim to be English law;

130.4 In carrying out that balancing exercise I have given considerable weight to the fact that this is not (or would not be) a civil and commercial matter but a claim arising out of *acta iure imperii* involving an alleged breach of duty owed by the UK state to a person habitually resident in England.

## *(7))Conclusion)*

131. In my judgment:

131.1 The claim is a *civil and commercial matter* within the ambit of **Rome II** and does **not** arise out of *acta iure imperii*;

131.2 Pursuant to Art 4(2) the appropriate law is the law of England and Wales as both the Claimant and the Defendant were habitually resident in England;

131.3 The Defendant has failed to establish that the tort was manifestly more closely connected to Alberta for the purposes of Art 4(3) and therefore is unable to displace the operation of Art 4(2);

131.4 If I am wrong in relation to the ambit of **Rome II** and the claim does arise out of *acta iure imperii:*

.1 the appropriate law is the law of Alberta **unless** the Claimant can establish that it is substantially more appropriate for English law to apply;

.2 the Claimant has established that it is substantially more appropriate for English law to apply to the claim.

132.Therefore, I conclude that English law is the appropriate law for this claim.

9th May 2016

HH Judge Mark Gargan