

IN THE COURT OF APPEAL
CIVIL DIVISION

APPEAL NO. CA 2024 001695

ON APPEAL FROM

THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES

CLAIM NO: LM-2023-000173

LONDON CIRCUIT COMMERCIAL COURT (KBD)

Mr David Quest KC sitting as a Deputy High Court Judge

BETWEEN

KERISH INTERNATIONAL MOTORS AGENCY

Claimant/Appellant

- and -

OPEL AUTOMOBILE GMBH

Defendant/Respondent

APPELLANT'S REPLACEMENT SKELETON ARGUMENT

I. INTRODUCTION

1. The Appellant / Claimant (***KIMA***) is a family-run Palestinian company carrying on business as a car dealership from headquarters in Ramallah. It has a prominent business reputation, especially in Palestine.
2. The Defendant / Respondent (***Opel***) is a German automobile manufacturer. Having previously been owned by General Motors, it was acquired by the French automaker Groupe Peugeot SA (***PSA***) in around 2017. In January 2021, PSA merged with Fiat Chrysler to create Stellantis.

3. KIMA had been acting as Opel's sole dealer in Palestine since 1998 under a series of written agreements. KIMA had always performed to an exemplary standard to Opel's frequently expressed satisfaction. KIMA invested substantially in the relationship, spending vast sums on a high tech showroom in Ramallah and in purchasing large quantities of Opel stock – all with Opel's encouragement and approval.
4. In 2019, Opel decided they did not wish to deal with KIMA any longer and purported to give notice that the dealership arrangements would come to an end from 28 February 2020. KIMA's case at trial was that the reasons given by Opel were unjustified and that under Palestinian law KIMA was entitled to compensation when an agreement such as this came to an end. It is that entitlement which KIMA sought to vindicate in this action.
5. After a 5 day trial in March 2024 before David Quest KC (sitting as a Deputy High Court Judge), KIMA succeeded on almost all of the issues in the case but lost on a technicality under Palestinian law. In particular, the Judge held that (in ***the Judgment***):
 - 5.1. Opel had not established that KIMA was in breach of the Dealer Standards in the relevant contract;
 - 5.2. Opel did not terminate and was not entitled to terminate the agreement for such a breach or otherwise for cause and did not have a serious reason for terminating or not renewing the agreement; and
 - 5.3. KIMA was entitled under the agreement to compensation if mandated by the Palestinian Commercial Agents Law No. 2 of 2000 ("***the 2000 Law***")
6. However, the Judge held that KIMA was not entitled to compensation under the 2000 Law only because it was not a "*Commercial Agent*" for the purpose of the 2000 Law. The correctness of that determination is the issue on this appeal. It was (to say the least) a surprising determination, as will be shown below, given that KIMA was registered as a "*Commercial Agent*" under the 2000 Law by the relevant Ministry and that the 2000 Law was precisely enacted to protect parties in exactly the same position as KIMA. If KIMA is not a Commercial Agent under the 2000 Law then almost no-one is.

7. The Judge wrongly relied on principles of Jordanian law which were not directly comparable given (among other things) that Jordanian law deals with a concept of “*commission agent*” rather than “*commercial agent*” under statutes which are in different form.
8. In granting permission to appeal, Males LJ identified a new issue which had not been raised at the trial i.e. whether Palestinian law should be recognised or treated as “national law” in the light of the British Government’s non-recognition of Palestine as a state. This issue is considered in **Part V** below. The appellant has made a separate application for permission to rely on new evidence in relation to this issue which was not raised at trial and could not therefore have been produced earlier.
9. This Skeleton deals with the following issues:
 - 9.1. **Part I:** This Introduction
 - 9.2. **Part II:** A brief summary of the factual background.
 - 9.3. **Part III:** The appellant’s case on the primary issues.
 - 9.4. **Part IV:** The proper approach to appeals on issues of foreign law.
 - 9.5. **Part V:** The meaning of ‘national law’ and whether it refers to Palestinian Law.
 - 9.6. **Part VI:** The various Grounds of Appeal.

II. BACKGROUND

The Parties and the Agreement

10. KIMA has held the sole dealership licence from the Palestinian Ministry of National Economy (“*the MNE*”) since 1999 and has been the only agent for Opel within Palestine. Before that, from 1996 until 1998, KIMA acted as sub-agent for Universal Motors Israel (“*UMI*”) who was the authorised agents of General Motors with exclusive rights to promote its vehicles (including Opel) in Israel and Palestine. In September 1998 KIMA was required under Palestinian law to cease acting as subagent as the Palestine Ministry of National Economy required subagents to separate the sale of certain vehicles in the Palestinian market (West Bank and

Gaza Strip) from the Israeli market. KIMA therefore acquired from UMI the exclusive rights to promote the Opel brand in Palestine at a cost of almost US\$500,000.

11. During 1998 and after lengthy negotiations between KIMA, on the one hand, Opel, GM and UMI on the other hand, it was agreed that KIMA would become the sole importer and distributor of Opel motor vehicles, parts and accessories in Palestine and the provider of warranty, maintenance and repair services.
12. The licences and the agreements entered into between KIMA and Opel are registered and deposited for legal protection within the MNE's Commercial Registry Department. KIMA was required to obtain authorisation to import and promote and sell the Opel brand in Palestine.
13. By way of an agreement dated 13 September 1998 ("**the 1998 Agreement**"), KIMA was authorised by Opel to promote and sell Opel vehicles, parts and accessories in the State of Palestine and to carry out routine and warranty inspections, maintenance and repair of Opel vehicles. The parties entered into a new agreement for the same purpose on 16 March 2012 which became effective on 1 April 2012 ("**the 2012 Agreement**"). The 2012 Agreement was extended by way of three extension agreements ultimately extending the term to 31 December 2019.
14. All of these agreements were subject to English law and jurisdiction save that clause 19.1 of the 2012 Agreement provided that compensation would be payable on termination of the agreement if "*mandated*" by "*national law*". Clause 19.1 provides as follows:

"If this AGREEMENT is terminated under Articles 18.3.1, 18.3.2, 18.3.3, 18.3.4, or 18.3.7, DEALER shall have no right to compensation or indemnification resulting from the termination. If this AGREEMENT is otherwise terminated, DEALER shall have no right to compensation or indemnification from OPEL NSC resulting from the termination unless otherwise expressly mandated by national law"
15. KIMA's position is that this refers (in this case) to certain provisions of Palestinian law governing compensation in these circumstances.

The Termination of the Agreement

16. On 4 July 2019 representatives from Opel carried out an unannounced inspection of KIMA's premises in Ramallah, Palestine. The visit took place at around 4:40 pm on a Thursday – i.e. at the end of the last day of the working week in Palestine. Only 30 minutes' notice was given of the intention to visit. The visit lasted only around 30 minutes.
17. Without any notice 53 days later, by a letter dated 26 August 2019 (but sent on 30 August 2019) ("***the 26 August letter***"), Opel notified KIMA that it had allegedly failed to meet the minimum standards set out in the 2012 Agreement due to certain alleged matters and notified KIMA that the 2012 Agreement would terminate as of 28 February 2020.
18. On 15 October 2019 ("***the 15 October letter***"), Opel sent a further letter to KIMA stating that Opel had decided not to renew the agreement purportedly on the basis that it was not convinced by the business plan submitted by KIMA or by the standard of the showroom following the inspection on 4 July 2019. The letter stated that the agreement would be terminated as of 28 February 2020.
19. Following exchange of correspondence and the parties' inability to resolve their differences amicably, these proceedings were commenced.

III. THE APPELLANT'S CASE ON THE PRIMARY ISSUES

Introduction

20. By way of an amendment to their Defence shortly before trial, Opel deployed a new argument of Palestinian law. In particular, paragraph 32.2 of the Amended Defence provides:

"...Palestinian Law No 2 of 2000...applies (as per Article 1) to "any natural or legal person who has a contractual right to sell, distribute, or promote goods and commodities or to provide services in Palestine for the account of a principal, manufacturer or supplier in exchange for commission or profit margin" – the Claimant was not such a person as it sold goods which it acquired from the Defendant on its own account in return for receipt of the sale price (rather than remitting the sale proceeds to the Defendant and receiving a commission or profit margin in respect thereof)."

21. This is wrong.

22. Article (1) of the 2000 Law defines “*commercial agent*” as follows:

“Commercial agent: [a] natural or legal person who has the right, according to an agreement, to sell, distribute or promote goods and products or provide services in Palestine on behalf of a producer or supplier in return for a commission or profit margin”.

23. A Commercial Agent is thus (1) a natural or legal person (2) who has the right, according to an agreement (3) to sell, distribute or promote (4) goods and products or provide services (5) in Palestine (6) on behalf of a producer or supplier (7) in return for a commission or profit margin.

24. As to these:

(1) – KIMA is a legal person

(2) – KIMA has rights according to an agreement.

(3) – KIMA has the right to sell, distribute and promote under this agreement

(4) – KIMA is selling, distributing and promoting goods and products (i.e. cars and parts) and services (i.e. after sales services and warranties)

(5) – KIMA is acting in Palestine

(6) – KIMA is acting on behalf of Opel who is the producer or supplier of the cars and parts and of the warranties.

(7) – KIMA acts in return for a profit margin.

Registration

25. It was a requirement of the law that the “*commercial agent*” should be registered in the Commercial Agents Register. The State of Palestine, Ministry of National Economy, Registration Procedures provided:

“To register commercial agency contracts, the commercial agent (company or commercial registry) must be registered in the commercial agents’ registry in accordance with the following procedures and conditions:

1. To possess a commercial agency contract in accordance with the law.”

26. KIMA and the 2012 Agreement were duly registered in the Commercial Agents Register and this registration was officially certified.

Commission or Profit Margin

27. The definition of “*commercial agent*” recognises that the agent may either act in return for a “*commission*” or a “*profit margin*”. The fact that both terms are used shows that they have a distinct meaning. They are both well understood concepts:

27.1. A “*commission*” is a form of remuneration paid in return for selling a good or performing a service. It may be in the form of a percentage of sales price or calculated in some other way.

27.2. A “*profit margin*” is a form of reward calculated by the difference between the revenue generated and the cost of sale.

28. Payment by “*commission*” or “*profit margin*” are to be distinguished, for example, by a party who acts gratuitously. Such a person would not be regarded as a “*commercial agent*”. Equally, a person who acts for a fixed salary would not fall within this definition.

Jordanian authorities

29. The definition of a “*commercial agent*” in the 2000 Law is to be distinguished from the Jordanian laws relied on by Opel’s expert, Mr Attereh, in particular, Article 87 of the Jordanian Law of Commerce defines a “*commission agent*” and that such a person is one who acts “*for the account of his principal ... in return for a commission*”.

30. There is no reference to a “*commercial agent*” nor reference to parties acting on the basis of a profit margin rather than a commission. Mr Attereh brushed away the fact that the Jordanian law refers to “*commission agent*” rather than “*commercial agent*” without analysis but in fact the difference is clearly significant. Little is therefore to be gained by consideration of how the Jordanian Law of Commerce is applied to different factual scenarios and to deciding whether or not a party is a “*commission agent*” for the purpose of the different Jordanian provisions.

31. The Judge failed to pay sufficient attention to this key difference between Jordanian and Palestinian law. In particular:

31.1. At Judgment/115 he referred to Jordanian case 538/2019. However that case was considering a claim under Art 2 of the Jordanian Commercial Agents and Intermediaries Law No. 28 of 2001. This law does not refer to acting in return for a profit margin and defines an agent in different terms to the 2000 Law.

31.2. At Judgment/116 he referred to Jordanian case 2949/2007 but that was a claim under the Jordanian Commercial Agents and Intermediaries Law No. 44 of 1985. The Court considered Article 80 and 87 of the Jordanian Commercial Law No. 12 of 1966 and concluded that a “commercial agency” required the agent to receive “a commission agreed upon”. There is no scope in that definition for an agent who acts in return for a profit margin.

31.3. At Judgment/117 he referred to Jordanian case 1295/2020. This was a case under Commercial Agents and Intermediaries Law No. 20 of 1974. This also defined one of the characteristics of an “agency” contract as being “acting in one’s name but for a commission”. This again does not cover the situation of a non-commission agent acting in return for a profit margin.

32. Although the Judge paid lip service to the fact that the Jordanian cases are under different legislation (Judgement/118), he downplayed the significance of this and should have concluded that the Jordanian authorities were of no assistance at all to his enquiry. He should have disregarded them and simply construed the 2000 Law by its terms.

The Relationship between KIMA and Opel

33. This was not a relationship whereby KIMA simply bought a product and then sold it freely at its chosen price and without reference to the supplier in the way that, for example, a merchant might sell oranges it bought wholesale. Rather, KIMA and Opel had an ongoing relationship and Opel maintained control over the way the cars were sold and the prices achieved. Opel took an interest in the way its products were sold by KIMA, their presentation, whether other brands were in the same location etc. It carried out regular inspections to ensure the sale was satisfactory.

34. The 2012 Agreement set out obligations on KIMA to comply with intellectual property requirements (Art 16), warranties and guarantees (Art 10.6), dealer

operation requirements (Art 4.4.3), vehicle modifications as required by Opel (Art 4.10), minimum purchase levels (Art 8.1), sales targets (Art 10.2), safety requirements (art 10.16), insurance requirements (Art 10.13), training programmes (Art 11.5) and reporting requirements (art 12).

35. Notably, KIMA was obliged to honour vehicle warranties and provide after sales services in Palestine for all Opel cars, irrespective of whether the particular customer had purchased the particular car from KIMA (Art 4.4.3). This is a clear example of KIMA acting on behalf of Opel.

36. This was then not a simple merchant relationship or a buyer/seller relationship. This type of relationship is what is envisaged as a “commercial agency” under the 2000 Law.

The Purpose of the 2000 Law

37. The 2000 Law clearly has in mind – perhaps above all – motor vehicle agencies. This is apparent from Article 5(7) which expressly provides that an agreement must include an undertaking “*to provide sufficient spare parts and necessary maintenance for cars [etc]*”. It was Dr Hussein’s evidence (who appeared as KIMA’s expert) that dealers in Palestine customarily sell for a profit margin after paying the sale price to the principal.

38. Dr Hussein’s report explained in some detail the legislative aims of the 2000 Law. They include the protection of commercial agents in Palestine and proper regulation of commercial imports from foreign manufacturers and principals in Palestine. No foreign car brand would be willing to sell cars in Palestine except on the basis that the cars would become the property of the dealer and be sold by them on that basis. Yet the 2000 Law was intended to offer protection to Palestinian car dealers from termination of their supply agreements. This again supports the view that the 2000 Law should apply to the factual situation under consideration in this case.

39. Opel’s analysis appeared to turn simplistically on the narrow question of who retained legal ownership of the vehicles. However that is not a requirement spelled out in the definition of “commercial agency” which is a far more nuanced analysis seeking to distinguish between the relationship of a simple merchant and wholesaler and the more complex relationship of a party such as KIMA with Opel.

40. Furthermore, as Mr Attereh himself recognised, his interpretation of the meaning of a “commercial agent” under 2000 Law is at odds with Article 14 of that same law. In particular, Article 14 provides that in the event of termination of a commercial agency, the supplier will purchase the stock and spare parts. However, on Mr Attereh’s analysis such stock and spare parts always remain in the ownership of the supplier. This Article would, on his analysis, be fundamentally inconsistent. Indeed he is forced to concede that the Article “*appears to conflict with the fundamental nature of a commercial agency relationship and the very definition of a commercial agent*”.

IV. THE PROPER APPROACH TO APPEALS ON FOREIGN LAW

41. It is fair to recognise that generally an appellate court, which will not have the opportunity to put questions to expert witnesses on foreign law, will be slow to substitute its opinion for that of the trial judge: *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755 at [29].

42. However there is no kind of bar on appeals against judgments which depended on issues of foreign law. It is trite that foreign law is treated as a question of fact in English law. However, appeals are heard even on questions of fact where the Court of Appeal is, for example, satisfied that there was no evidence to support findings made or a failure to consider relevant evidence. The hurdle is “*formidable*” (*Farrar Construction Ltd v Rylatt* [2019] EWCA Civ 1864 at [21] per Coulson LJ) but not insurmountable.

43. Furthermore, although questions of foreign law are questions of fact, they are questions of fact of a special nature and not treated in the same way as ordinary questions of fact. As the Court held in *Parkasho v Singh* [1968] P 233 (at 250) per Sir Jocelyn Simon P:

“Now we are asked by the appellant wife here to say that that decision was wrong: that the justices were wrong in their interpretation of the foreign law. The question of foreign law being a question of fact in our courts, must this court regard itself as bound by the findings of the justices on this matter? In my view the question of foreign law, although a question of fact, is a question of fact of a peculiar kind and the same considerations do not apply in considering whether and to what extent this court should interfere with the decision of the

magistrates, as in the case of the ordinary questions of fact which come before a magistrates' court. It is not, I think, inappropriate to bear in mind that under the provisions of section 102 of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided that an issue of foreign law in a case which is being tried by a jury is a question of fact for the judge and not the jury. and bearing that in mind, and bearing also in mind the provisions of rule 73 (7) of the Matrimonial Causes Rules, which enable this court to draw any inference of fact which might have been drawn in the justices' court, I think it is our duty in this case to examine the evidence of foreign law which was before the justices and to decide for ourselves whether that evidence justifies the conclusion to which they came."

44. This was cited with approval by the Court of Appeal in Dalmia Dairy Industries Ltd v National Bank of Pakistan [1978] 2 Lloyd's Rep 223, 289 per Megaw LJ:

"But a finding of fact on an issue of foreign law is a finding of fact of a very different character from the normal issue of fact: we would adopt as correct the observations of Cairns J. (as he then was) in Parkasho v. Singh [1986] P. 233, 250 as to the position of an Appellate Court on a matter of this kind. An Appellate Court must not by uncritical acceptance of a trial judge's conclusions of fact shirk its function of considering the evidence afresh and forming its own view of the cogency of the rival contentions, whilst of course always remembering that the trial judge had the undoubted initial advantage of having seen and heard the witnesses."

45. The Court of Appeal in Bumper Development Corporation v Commissioner of Police of the Metropolis [1991] WLR 1362 approved both of these judgments (at 1370-1).

46. In King v Brandywine Reinsurance Co [2005] EWCA Civ 235, the Court of Appeal held (at [67]) that although foreign law was a question of fact "*it is in our view rather different from other findings of fact*".

47. Furthermore a distinction is drawn between cases where the trial judge has made findings as to what the foreign law is (where the appeal court will be less inclined to interfere) and cases where the trial judge has applied the foreign law to the facts (where there is more scope for the appeal court to interfere): see Banca Intesa Sanpaolo SpA v Comune di Venezia [2024] Bus LR 228 at [151-2].

48. The fact that an appealed decision turned on questions of foreign law has not inhibited the Court of Appeal from considering and deciding appeals in numerous cases. The Grounds of Appeal set out below set out the basis on which the Judge's

determination of this issue was wrong, disregarded relevant evidence and relied on irrelevant factors.

V. THE MEANING OF NATIONAL LAW

The construction of the Agreement

49. Clause 19.1 of the 2012 Agreement provides (emphasis supplied):

“If this AGREEMENT is terminated under Articles 18.3.1, 18.3.2, 18.3.3, 18.3.4, or 18.3.7, DEALER shall have no right to compensation or indemnification resulting from the termination. If this AGREEMENT is otherwise terminated, DEALER shall have no right to compensation or indemnification from Opel NSC resulting from the termination unless otherwise expressly mandated by national law”

50. At trial there was a difference of opinion between the parties as to the meaning of the phrase “*national law*”.

50.1. KIMA alleged that “*national law*” refers to Palestinian law.

50.2. Opel alleged that it referred to the governing law of the contract i.e. the law of England and Wales. Opel relied in this regard on clause 22.1 of the 2012 Agreement which provides:

“This AGREEMENT will be governed by the laws of England and Wales ... DEALER and Opel NSC agree that the Commercial Court located in London, UK will be the place of proper venue for the resolution of all disputes in connection with this AGREEMENT, subject to Articles 18.4 and 22.8”

51. Which of these arguments is correct is a matter of contractual interpretation under English law principles. A proper interpretation of the 2012 Agreement supports KIMA's position:

51.1. The drafting of Clause 19.1 – by using the wording “*national law*” – appears to be deliberately worded in order to distinguish “*national law*” from the governing or applicable law of the contract. (Clause 22.1 refers to “*govern[ing]*” law to mean English law).

51.2. The 2012 Agreement is plainly in standard form with the specific party details set out in the Annex. It is a contract that can be used by Opel for their contracts with dealers in many countries around the world. Thus, for example, the contract is with “*Dealer*” who is not identified save in the Annex. Likewise, the “*Area of Responsibility*” is a geographical area defined in the Annex. Accordingly, the words “*national law*” are intended to reflect a law which varies according to the particular circumstances of each contract rather than English law, which is presumably fixed as the applicable law in all Opel contacts wherever they may operate.

51.3. Clause 3.1.10 of the 2012 Agreement provides (emphasis supplied):

“All of DEALER’s ... business activities which may affect, directly or indirectly, Opel NSC ... shall comply with European competition law and/or, where applicable, national competition rules as well as with all laws and governmental regulations relating to its performance of this AGREEMENT.”

This clause again suggests a distinction between the governing law of the contract and the “*national*” competition rules.

51.4. If the reference to “*national law*” in clause 19.1 was simply referring to the governing law i.e. English law then the sentence in question would be largely redundant. It goes without saying that any right to compensation mandated by English law (being the law of the contract) would supercede any contractual exclusion of compensation. The reference to “*national law*” ought to apply to something other than the governing law.

52. The Judge agreed with this analysis and interpreted “*national law*” as referring to Palestinian Law (Judgment/96-101).

The New Issue

53. In granting permission to appeal, Males LJ raised a new issue which had not been relied on by either party at trial or by the Judge:

The case has proceeded on the basis that ‘national law’ in Article 19.1 of the DSSA refers to Palestinian law. However, as I understand it, HMG does not recognise the state of Palestine. It will therefore need to be considered whether the Commercial Agents Law can or should be recognised as ‘national law’ for the purpose of Article 19.

54. KIMA's position is that the legal status of the State of Palestine is irrelevant to the analysis. In particular:

54.1. The meaning of "national law" is a question of contractual interpretation i.e. ascertaining the objective intention of the contracting parties. They intended to refer to the law of the place where the contract was performed. They were not interested in contentious issues of international foreign policy.

54.2. In any event, as a matter of fact Palestine has all the necessary qualities of a "nation" or "state". Its non-recognition as a state by the UK Government is a matter of politics; not legal analysis. The Court will disregard political factors.

54.3. Finally, there is no policy reason to refuse to recognise "national law" as Palestinian law. The English Court regularly applies the law of territories not recognised by the UK Government as a nation e.g. (on occasion) Palestine and (often) Taiwan.

55. These points are considered briefly below.

(a) Contractual interpretation

56. It is irrelevant to the construction of Article 19.1 of the Contract whether or not the UK Government recognises Palestine as a "State". The construction of Article 19.1 is a matter of contractual construction aimed at identifying the objective intention of the parties. It is obvious that the parties' objective intention was to use the phrase "national law" to identify the law of the place most closely connected to the contract.

57. In using this term the parties were (on any objective analysis) not seeking to embark on some geo-political analysis of foreign relations. It is clear that the place with which the contract was most closely connected is Palestine. The parties expressly agreed that the "Area of Responsibility" in the contract was "*Palestinian National Authority Areas*" (Annex 2).

58. It is furthermore clear that Palestine has a sophisticated and well regulated legal system and a body of laws which can be described as "Palestinian Law". Accordingly it is clear that the reference to "national law" in Article 19.1 referred to

Palestinian Law, irrespective of whether or not the UK Government recognised Palestine as a country.

59. It would be absurd for the meaning of a private contract between commercial entities to change according to international diplomatic machinations.

(b) Status of Palestine

60. In any event, as the report by Dr Victor Kattan makes clear, Palestine has all the key elements of a “State”. It is recognised as a State by many countries and international bodies around the world. Although the UK does not currently recognise Palestine as a State, this is as result of a political judgment rather than on the basis that it does not legally qualify as a state. The conditions that the UK Government imposed prior to recognition of Palestine – e.g. a commitment to negotiations, agreement not to join the ICC, when the timing is right for “peace” – are nothing to do with the legal requirements of statehood.

61. On questions of international recognition of foreign states, the English Court should limit itself to legal considerations and put to one side political aspects: Somalia v Woodhouse Drake & Carey (Suisse) SA (The Mary) [1993] Q.B. 54.

62. In the circumstances, adopting a purely legal perspective and eschewing political considerations, the English Court should recognise Palestine as an entity capable of having a “national law” irrespective of the UK’s Governments current formal position.

(c) Policy

63. Finally, noting Males LJ’s reference to whether the Court “*should*” recognise Palestinian law here, the status of Palestine is no bar to the English Court recognising and applying Palestinian law.

64. So far as Palestine is concerned – albeit the changing nature of that region renders these decisions primarily of historical interest – the English Court has without difficulty felt able to apply Palestinian law in various previous decisions:

64.1. In The Torni [1932] P 78, the Court of Appeal applied Palestinian Law. Palestine was then a mandated territory under the King.

- 64.2. In Zabrowsky v General Office Commanding Palestine [1947] AC 246, the Supreme Court applied relevant provisions of the Law of Palestine to the issue.
65. More recently, an analogy can be drawn with Taiwan which is also a state which is not recognised by the British government.¹ The English Court has no difficulty in applying or taking into account Taiwanese law: see for example In the Matter of Yunneng Wind Power Co., Ltd. v In the Matter of the Companies Act 2006 [2023] EWHC 2111 (Ch); Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [2002] EWCA Civ 248 at [26]; Central Insurance Co. Ltd. v Seacalf Shipping Corporation (CA) (17 February 1983).
66. In Vegeentials Limited, Fibre Water Limited v The Shanghai Commercial & Savings Bank Limited (a company incorporated in Taiwan) [2024] EWHC 7 (Ch), the Court was called upon to decide the applicable law by application of the Rome II Convention. The claimant contended it was English law. The defendant contended it was the law of Taiwan on the basis that the fraud in question was part of a larger scheme which was planned, orchestrated and implemented there. The Judge concluded (at [33]) that he preferred the claimant's submissions and chose English law. However, there was no suggestion that there was any reason as a matter of principle why he could not have chosen Taiwan as the "country" to which the claim was manifestly more connected.
67. Likewise, the Court has recognised a divorce granted in the Turkish Republic of Northern Cyprus (Emin v Yeldag [2002] 1 F.L.R. 956) and a marriage celebrated in Somaliland (MM v NA [2020] EWHC 93 (Fam.), [2020] 1 F.L.R. 967). Neither of these are states recognised by the UK Government.
68. More generally, as Dicey summarises (at 8-050):

In Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2) the House of Lords left open the question whether, despite the principle that laws of unrecognised governments were to be regarded as ineffective, the courts might, as Lord Wilberforce put it, in the interests of justice and common sense and where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. In Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd Lord Denning M.R. said that the English court could recognise the laws or acts of a body which is in effective control of a territory even though it had not been recognised de jure or

¹ [Taiwan: History, politics and UK relations - House of Commons Library](#)

de facto, at any rate in regard to the laws which regulate day-to-day affairs of the people, such as marriage, divorce, and property.

69. These principles clearly apply to laws created in Palestine. Accordingly there is no reason barring the English Court from recognising “national law” as referring to Palestinian law if that is the correct contractual interpretation.

VI. THE GROUNDS OF APPEAL

GROUND 1: Failure to give sufficient weight to the fact of registration

70. The Court paid insufficient regard to the fact that KIMA had been registered by the Commercial Agents Directorate of the Ministry as a Commercial Agent. The Court wrongly considered (Judgment / 110) that it was relevant to consider “*the Ministry’s specific reason for issuing a certificate to KIMA*” and that the absence of such evidence in some way counted against the significance of the registration. There was no proper basis for concluding such evidence was relevant as a matter of Palestinian law. Neither party’s expert had put forward evidence that the question of the Ministry’s reason for issuing a certificate was relevant and therefore the Judge ought not to have considered that the absence of evidence of such reason was in any way material to the assessment before him. Unless contradicted, the reason the Ministry registered KIMA as a “Commercial Agent” is obvious; because it was a “Commercial Agent”.

71. In fact, the Court should have paid strong regard to the fact that KIMA was registered. Beyond mentioning the fact of registration in paragraph 110 of the Judgment, the Court did not appear to have taken the registration into account in its analysis. Even if not determinative, it was obviously a material fact that the Palestinian Ministry had registered KIMA as a Commercial Agent and registered the agreement as a Commercial Agency Agreement. The conclusion of the Court that KIMA was not in fact a Commercial Agent ran contrary to the certification of the Ministry and the Court should have explained why this was appropriate.

72. The Court thereby failed to take proper account of a material factor as a matter of Palestinian law.

Ground 2: Wrongful approach to Palestinian Case 872/2021 and 325/2022

73. The Court considered Palestinian Case 872/2001 (in fact 872/2021) and 325/2022 without paying sufficient weight to the significant factual difference between that case and the present case. In particular, in that case the defendant (Shell) authorized its agent in Jordan (Al-Omari) to appoint the plaintiff (International Mineral Oil, IMO) as its distributor in Palestine. The appointment was made by way of a contract between Al-Omari and IMO. There was no contract between the supplier (Shell) and IMO. The Court of Appeal (upheld by the Court of Cassation) held that no claim could be made as the 2000 Law did not protect contracts of sub-agency.

74. By contrast, in the present case there was a direct written agreement between the agent (KIMA) and the supplier (Opel); it was a contract of agency rather than sub-agency; and the contract had been duly registered as a direct commercial agency agreement. These were very material distinctions from the present case which the Judge simply ignored.

75. Worse, the Court wrongly stated that KIMA “*is in the same position in the present case*” (Judgment / 113) as in case 325/2022 without consideration of these two key differences and in circumstances where KIMA was therefore clearly not in the same position as the parties in the case under consideration.

76. The Court thereby made an error of law by ignoring a key part of the evidence before it and wrongly applying by analogy a Palestinian case which was in fact materially different from the present case.

Ground 3: Emphasis of ownership as a relevant factor

77. The Court wrongly concluded that ownership of the goods is a “*relevant factor*” in determining whether or not a party is a Commercial Agent (Judgment/121). It is apparent from the face of the Commercial Agents Law that ownership cannot be a relevant factor in circumstances where Article 14 of the 2000 Law provides that on termination of an agency agreement the new agent is obliged to purchase all stock and spare parts.

78. Article 14 provides:

“If the principal terminates the agency agreement for any reason whatsoever, the new supplier, producer or agent shall be required to purchase all stocks of

products and spare parts in the possession of the agent on the date of termination of the agreement at the price at which the agent purchased these products or parts”

79. This does not only lead to a conclusion that ownership is not conclusive but must lead to a conclusion that ownership is irrelevant to the question of Commercial Agency. The Court made an error in applying an illogical analysis of Article 14 of the 2000 Law.

80. The Court concluded that it was “*particularly significant*” that KIMA bought and sold vehicles in its own name and for its own financial account (Judgment/126). However far from being particularly significant, this fact was irrelevant to the proper analysis of whether or not KIMA was a commercial agent given the irrelevance of ownership.

81. Unless a party bought and sold vehicles in its own name it would never have “stocks of products” to pass on to the new agent under Article 14.

Ground 4: Excessive reliance on Article 4.11

82. The Court wrongly considered that Article 4.11 of the Agreement was a “powerful indicator” of the nature of the agreement (Judgment/133).

83. Article 4.11 of the Agreement provided:

“This AGREEMENT does not make either party the agent or legal representative of the other for any purpose whatsoever, nor does it grant either party any authority to assume or to create any obligation on behalf of or in the name of the other”

84. However, this article is irrelevant to the analysis. This article provides only that KIMA would not be treated (as a matter of English law) as an agent i.e. that no English law agency relationship was created. This sheds no light on whether KIMA would be (as a matter of Palestinian law) a “*Commercial Agent*”. This is a term of art which depends on the application of the definition in the 2000 Law and to which English laws of agency have no relevance.

85. The Judge was wrong to interpret Article 4.11 as if it made any determination as to whether (as a matter of Palestinian law) KIMA was or was not a “Commercial

Agent” – a technical term and an issue of Palestinian law which was unconnected to issues of English agency law.

Ground 5: Wrong construction of Article 4.11

86. The Court wrongly took the view that, as a matter of English law, Article 4.11 should “*extend to, and exclude, Palestinian law concepts of agency*” (Judgment / 133). However this was an erroneous application of principles of English law of contractual construction. There is no objective or commercial basis on which Article 4.11 could be read as to extend to cover principles of foreign law, which are not referred to in that Article.

87. The only relevance of foreign law to the terms of the agreement was the provision in Article 19.1 requiring compensation if mandated by “*national law*” (i.e. the law of whichever country the contract was performed in). However the agreement was in all other respects governed by English law and the effect of Article 4.11 was only to provide that there would be no English law agency relationship created.

Ground 6: Confusion of “profit margin” with “profit share”

88. The Court wrongly interpreted the words “*profit margin*” to mean “*profit share*” in circumstances where the two concepts are completely distinct as a matter of economic principle (Judgment / 136-8). The Court ought to have concluded that KIMA operated its business in return for a “*profit margin*” (which was clearly the case).

89. The Court had no basis for reading the 2000 Law as requiring a party to be acting on the basis of a “*profit share*” when those words were not used in the 2000 Law. There is no proper basis for construing the words “*profit margin*” to mean “*profit share*”.

90. The concepts of “*profit margin*” and “*profit share*” are familiar and well known concepts. There is no ambiguity as to their meaning. There was no basis for the Court to interpret the words “*profit margin*” to mean “*profit share*” in circumstances where (i) the concepts are quite distinct; and (ii) the use of the word “*profit margin*” was entirely appropriate.

91. The Court should have accepted that KIMA acted on the basis of a profit margin and was therefore included within the definition of “Commercial Agent”.

92. Opel argued that “profit margin” cannot simply refer to parties who are in receipt of profits as the definition would then encompass all dealers. However this was wrong. For example, it would exclude parties who act gratuitously or for a fixed salary.

Ground 7: Some Other Compelling Reason

93. As explained in the witness statement of Mr Dahoud, the Judgment has had a profound impact in Palestine for the very many car dealers, and other commercial agents, who operate there and the suggestion that none of them are protected by the Commercial Agency Law given the terms of their contractual arrangements. Although the judgement may not be binding on third parties as a matter of *stare decisis*, it has significant *de facto* impact on the economy of Palestine. Given the substantial economic impact of the Judge’s decision it is appropriate that this matter be reconsidered by the Court of Appeal.

VII. CONCLUSION

94. For the above reasons, this appeal should be granted.

PAUL SINCLAIR KC
11 November 2024

Fountain Court Chambers
Temple