

1. THE CHANNEL TUNNEL GROUP LTD.

2. FRANCE-MANCHE S.A.

and

1. UNITED KINGDOM

2. FRANCE

DISSENTING OPINION OF LORD MILLETT

1. I am in entire agreement with the present Award save on one point only, on which I find myself reluctantly compelled to dissent. With one exception (United Kingdom removal requirements) I consider that the United Kingdom has no legal liability in respect of the Sangatte claim.

1. Clause 2.1. of the Concession Agreement.

2. We have held that the primary basis of liability is to be found in Clause 2.1. of the Concession Agreement. The obligation imposed by this Clause (“to take such steps as are necessary for the operation of the Fixed Link”) is a joint and several obligation of both Respondents and a breach may give rise to the liability of both or either of them. It will give rise to the liability of both where both fail to take a step which either of them could take; and to the individual liability of either one of them where it failed to take a step which only it could take. The Clause imposes a separate obligation on each Respondent to take whatever steps are necessary for the operation of the Fixed Link and are within its power and sphere of responsibility, and to do so by co-ordinating its actions with those of the other where necessary.

3. Neither Respondent is absolved from the obligation to take independent action on its own where it can do so without the assistance or co-operation of the other; nor is either Respondent under any obligation to take steps which are not necessary to enable the other to fulfil its own obligations under the Concession Agreement. I agree with the majority (para. 187) that nothing in the Concession Agreement makes either Respondent liable for the default of the other.

(a) The closure of the Sangatte Hostel

4. We have held that from September 2000 onwards the closure of the Sangatte Hostel (or at least the imposition of a curfew at night to prevent its occupants from leaving with intent to break into the Coquelles Terminal) was necessary for the operation of the Fixed Link, and that the failure to take either of these steps constituted a breach of Clause 2.1. of the Concession Agreement. The question is whether the United Kingdom bears any part of the responsibility for this failure.

5. In my opinion the question must be answered in the negative. The closure (or securing) of the Sangatte Hostel was something which the French Government, and only the French Government, could do; and for which the assistance or co-operation of the United Kingdom was not needed.

6. It is true that the United Kingdom's eventual offer to permit many of the remaining occupants of the Hostel entry into the United Kingdom facilitated its closure by making it politically easier for the French Government to accept the consequences of closure. But Clause 2.1. cannot possibly be treated as imposing an

obligation on the United Kingdom to make such an offer or as making the United Kingdom liable for its failure to do so earlier. Even if the French Government had made this a condition of closure (as to which there is no evidence), by acceding to its demand the United Kingdom would not be co-operating in closing the Hostel but merely paying the price demanded by the French Government for doing so. If the French Government had demanded, not the admission of immigrants into the United Kingdom, but payment of an appropriate sum of money to defray the costs of removing them elsewhere, Clause 2(1) would not impose an obligation on the United Kingdom to make the payment. Failure by one Respondent to comply with a requirement imposed unilaterally by the other as a condition of fulfilling its obligations under Clause 2.1. does not in itself amount to a breach of the Clause unless compliance is objectively necessary (and not merely politically convenient) to enable the other Respondent to act. Demanding something as a precondition for action does not make it “necessary” within the meaning of Clause 2.1.

7. While, therefore, it is not untrue to say that it was through the co-operative action of both Respondents that the problem was eventually solved, the statement is potentially misleading. The action which the United Kingdom took (in allowing a number of the migrants in the Sangatte Hostel to enter the United Kingdom) was not a step which the United Kingdom was obliged to take, and its failure to do so earlier was not a breach of the Concession Agreement.

8. In my opinion there was nothing which the United Kingdom was required (and failed) to do in relation to the Sangatte Hostel in order to comply with its obligations under Clause 2.1.

(b) The failure to protect the Terminal against mass incursions.

9. We have rejected the Respondents' contention that the Claimants were responsible for the defence and security of the Coquelles Terminal. This was based on a miscategorisation of what took place. The Claimants, like any other commercial undertaking (or householder), were responsible for the protection of the Fixed Link from the normal risk of occasional, sporadic and individual incursions into and damage to their property, the kind of normal risk against which they can insure. But what took place was not of this character; it represented a major breakdown of public order. The provisions of the Concession Agreement on which the Respondents relied do not make the Claimants responsible for the maintenance of public order or for securing their property against mass incursions on the scale that occurred.

10. I agree with the view of the majority (para. 319) that the overall responsibility for the maintenance of public order and the security of the Fixed Link was shared by both Respondents. But I am unable to accept their view that their responsibility was undivided. It was nowhere their joint responsibility. The maintenance of public order, like the defence of the realm, is an exercise of sovereign power and is the sole responsibility of the state within whose territory it falls to be exercised. The Respondents shared responsibility for maintaining public order, but they were not jointly responsible for the security of the entire Link from one end to the other. Each was separately and alone responsible for public order within its own territory, the United Kingdom in Kent and France in the Pas de Calais. Insofar as the security of the Fixed Link was compromised by a failure to maintain public order, liability must rest

exclusively with the Respondent responsible for (and alone capable of maintaining) public order in the territory concerned. In the case of the Coquelles Terminal that was France, which did not need the co-operation or assistance of the United Kingdom in order to comply with its obligations under Clause 2.1. of the Concession Agreement.

(c) Summary

11. The United Kingdom had no power to close the Sangatte Hostel or prevent clandestine migrants from leaving it at night in order to break into the Coquelles Terminal; and it was not responsible for the maintenance of public order in the Pas de Calais. The failure to take the necessary steps in either respect is not attributable to the United Kingdom, which accordingly was not in breach of its obligations under Clause 2.1. of the Concession Agreement.

2. Clause 27 of the Concession Agreement

12. The Intergovernmental Commission (“the IGC”) was established by Clause 27.1 of the Concession Agreement pursuant to Article 10 of the Treaty, but it was not made a party to the Concession Agreement. It owed no contractual obligations of its own to the Claimants and had no operational responsibilities. Its function was “to supervise, in the name and on behalf of the [Respondents] all matters concerning the.....operation of the Fixed Link.” The closure of the Sangatte Hostel and the protection of the Coquelles terminal from mass incursions were not its responsibility.

13. The IGC was established as a mechanism to enable the Respondents to facilitate the exercise of their rights and the performance of their

obligations under the Concession Agreement where they were in agreement on what needed to be done. It was unable to act where the Respondents were not in agreement; but where they were it was to act "in the name and on behalf" of both Respondents: Clause 27.3. In such a case then, in accordance with the principle *respondeat superior*, its acts and omissions are attributable to both Respondents, though it does not follow that they necessarily engage the joint liability of both. Whether they do or not depends on whether the particular acts or omissions, if committed by the Respondents directly instead of by the IGC on their behalf, would constitute a breach of the Concession Agreement by both Respondents or by only one of them.

14. Clause 27.7 by contrast imposes a direct obligation on the Respondents themselves to ensure that the IGC should "take the necessary steps to facilitate the implementation of" the Concession Agreement.

15. Although not in breach of Clause 2.1. of the Concession Agreement by failing to take any steps necessary for the operation of the Fixed Link, the United Kingdom cannot escape criticism. Like France, it misconstrued the Concession Agreement and together with France must be taken to have authorised the IGC to write the letter of 25 September. Its conduct was feeble in the extreme. It ought not to have supported the French Government's position that the security of the Coquelles Terminal was the responsibility of the Claimants. It ought to have urged the French Government, either directly (as in its belated but unsuccessful requests to close the Sangatte Hostel) or indirectly through the IGC to act more decisively to prevent the mass incursions into the Coquelles Terminal. Whether, had it done so, it would have had any effect is a matter of pure speculation. The question is whether these failings

have the effect of making the United Kingdom jointly liable with France, either vicariously under Clause 27.3 or directly under Clause 27.7, for breaches of the Concession Agreement for which France was solely responsible. In my opinion both principle and justice require this question to be answered in the negative.

(a) Clause 27.3. (vicarious responsibility)

16. It must be acknowledged that the IGC was wrong to write the letter dated 25 September 2000. It was wrong to hold the Claimants responsible for the defence and security of the Coquelles Terminal and to exonerate the French Government. The maintenance of public order in the Pas de Calais and the protection of the Coquelles Terminals against mass incursions on the scale that took place were not the responsibility of the Claimants. But neither were they the responsibility of the United Kingdom. The misunderstanding of the legal position was shared by both Respondents and caused them to authorise IGC to write the letter, for which they must take full responsibility. But it is not a breach of contract for a party to misconstrue it. The breach, if any, occurs only if and when its misunderstanding of its own responsibilities leads it to fail to perform a contractual obligation. The Respondents' conduct in authorising the IGC to write the letter was not, therefore, itself a breach of the Concession Agreement; the most that can be said is that it may have given some encouragement to France to know that its understanding of the legal position was shared by the United Kingdom. The breach of the Concession Agreement occurred when, consistently with the understanding of the legal position which it shared with the United Kingdom, France (but not the United Kingdom) failed to comply with its obligations under Clause 2.1.

(b). Clause 27.7. (direct responsibility).

17. There remains the obligation placed on both Respondents by Clause 27.7 of the Concession Agreement to “ensure that.....the IGCshall take the necessary steps to facilitate the implementation of this Agreement.” This is a joint obligation of both Respondents, but again it does not follow that both Respondents are jointly or equally liable for the loss occasioned by any breach. That depends on the nature of the breach.

18. In the present context the steps in question can only be the steps required by Clause 2.1., that is to say the closure or securing of the Sangatte Hostel and the maintenance of public order in the Pas de Calais, for both of which France was responsible and the United Kingdom was not. For present purposes Clause 27.7., therefore, adds nothing to Clause 2.1. Each of them imposes obligations on both Respondents to take action, in the one case directly and in the other through the medium of the IGC; and in both cases the breach consisted of the failure of France to take the necessary action.

3. Primary and secondary liability.

19. Although the relevant obligations are the joint obligations of both Respondents, this is not a case where they have been guilty of the same internationally wrongful act (see Article 47 of the ILC Articles on State Responsibility and para. 173 above). France’s wrongful act lay in its failure to take the steps which were necessary

for the operation of the Fixed Link. The most that can be said against the United Kingdom is that it wrongly supported France's misreading of its obligations and failed to do more to induce France to discharge them. That was not something which it had undertaken to do and did not constitute a breach of the Concession Agreement. But even if it did, it would not be the same wrong but a wrong of a very different order.

20. It is not uncommon, where two parties are subject, either jointly or severally, to the same (or as in the present case different) obligations, for the liability of one to be a primary liability and that of the other to be secondary. In such a case justice demands that as between them the liability is the liability of the former only. This is certainly the rule of the common law, and I have no reason to suppose that the civil law is different. The most obvious example is that of debtor and guarantor, but the principle extends beyond this. It applies whenever there is a primary and a secondary obligation, so that as between the obligors the obligation is the obligation of one and not of both. Should the party secondarily liable be compelled to pay, he would be entitled to be reimbursed by the party primarily liable. As we have observed, where both are nation states which are before the Tribunal and there is no doubt of the ability and willingness of the party primarily liable to meet an award, there is no point in imposing liability on the party secondarily liable with a right of full recourse to the other.

21. France was alone capable of closing or securing the Sangatte Hostel and maintaining public order in the Pas de Calais. Its failure to do so was a breach of the Concession Agreement. The United Kingdom was not responsible for France's failure to discharge its obligations, nor had it guaranteed their performance by France. But even if it had done so its responsibility would be secondary to that of

France, so that as between them the liability to compensate the Claimants ought to be borne wholly by France.

22. The present case is *a fortiori*. The United Kingdom cannot be in a worse position than if it had actually guaranteed the performance of those obligations by France. Its failings should not expose the United Kingdom to liability in damages, thereby reducing the amount of the compensation payable by France. This would transfer part of the liability in damages from the party actually responsible to a party which, however wrongfully, failed to do more to get the other to discharge its contractual obligations.

23. The key proposition on which the majority base their finding against the United Kingdom is that it did not “do everything within its power to bring an unsatisfactory situation promptly to an end” (see para. 318 above). This is, with respect, an abbreviated version of the truth, omitting as it does a crucial qualification. The true position is that the United Kingdom did not do everything within its power to bring an unsatisfactory situation promptly to an end *by getting France to perform its obligations*.

24. It is the omission of the words which I have emphasised which leads the majority to take the view that holding both Respondents liable is not inequitable *vis-vis* the United Kingdom. But the injustice does not lie in holding the United Kingdom liable to the Claimants, possibly in a very small amount. It lies in reducing the liability of France to any extent. Whatever the failings of the United

Kingdom, ultimately the cause of the United Kingdom's supposed liability is that France failed to discharge its obligations under the Concession Agreement.

25. The reasoning of the majority appears to be as follows: the IGC was more than a mere conduit pipe; it was a joint organ with its own affirmative responsibilities which adopted a wrong position for the consequences of which the Respondents are both liable as members. With respect, there are two false steps in this chain of reasoning. First, it makes the elementary mistake of equating responsibility (which is a question of fact) with liability (which is a question of law). As I have observed above, the IGC was not a party to the Concession Agreement and owed no contractual obligations to the Claimants. It could not itself possibly be under any legal liability to them. This is not, therefore, a case where an international organ has committed an international wrong for which its members may be liable by virtue of their membership. It is a true case of vicarious liability, where the acts and omissions (*not* the liability) of the agent is attributed to his principals.

26. Secondly, the only consequence (if any) of the IGC's taking a false position was that France failed to discharge its obligations under the Concession Agreement. Even if it were established that France would have honoured its obligations had the United Kingdom not supported its position, this would not diminish France's liability nor establish that of the United Kingdom.

4. Procedure

27. I understand that the majority consider that this issue should be the subject of a further hearing on quantum. This is wrong in principle. The incidence of liability as between several obligors is a question of liability not quantum. It might be right to delay the determination of the issue to the hearing on quantum if it depended on questions of causation, but in the present case it does not. It does not depend on weighing relative degrees of fault or the relative contribution of each Respondent to the cause of the loss. It depends on a proper analysis of the relationship of the Respondents and the nature of the obligation undertaken by each, and in particular whether it is a primary or a secondary obligation; and this is a question which falls to be determined as a question of liability. It is no defence for France to say that it would have complied with its obligations if only the United Kingdom had asked it to do so; nor, even if true (which is highly doubtful), would it go to reduce the extent of France's liability.

28. Practical considerations reinforce the view that the incidence of liability should be dealt with as part of the hearing on liability and not be left to a further hearing on quantum. The quantification of damages attributable to the mass incursions is likely to be difficult and may well require not only a further and more detailed enquiry into the facts, but expert evidence. It cannot be right to compel the United Kingdom to incur the considerable costs of attending and contesting such a hearing when, as a matter of principle, its liability is secondary to that of France and carries with it no liability to contribute to the payment of damages.

29. There can be no question of a determination of this question at the present stage being *ultra petita*. The Claimants seek damages against both Respondents jointly or either of them individually. France denies liability; while the United Kingdom's position is that, even if France is liable (which it denies) at least it is not. It is clearly open to the Tribunal to uphold both the Claimants' case against France and the United Kingdom's denial of its own liability. Moreover, we have dealt with joint and several liability in the present award; one would expect the incidence of liability as between the two Respondents to be dealt with at the same time. To hold both of them jointly liable without dealing with the incidence of liability as between themselves would give the wrong (and a surprising) impression.

5. The United Kingdom's Removal Requirements

30. I agree with the majority that this is best treated as a head of damage referable to the breaches of the joint obligations with which the Sangatte claim is concerned, but this does not mean that France is liable to any extent. It is a head of damage for which the United Kingdom was solely responsible. Clauses 2.1. and 27 of the Concession Agreement impose joint obligations on both Respondents, but as I have observed above it does not follow that a breach of a joint obligation must be attributed to both. There is nothing in the Concession Agreement to make either Respondent liable for a default which is solely attributable to the other. Just as, in my view, the failure to close the Sangatte Hostel or maintain public order in the Pas de Calais was a breach of the Concession Agreement for which France was solely responsible and which does not engage the liability of the United Kingdom, so the imposition by the United Kingdom of removal requirements was a breach for which

the United Kingdom was solely responsible and which does not engage the liability of France.

31. To this extent, but no further, I would hold the UK liable, and solely liable, in damages.

Millett