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Case No: B3/2019/1212

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Mr Justice Soole
[2019] EWHC 1104 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2020

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE IRWIN
and
LORD JUSTICE PHILLIPS

Between:

**MASTER HARRY ROBERTS (A protected party by his
mother and litigation friend Mrs Lauren Roberts)**

Claimant

- and -

**(1) THE SOLDIERS, SAILORS, AIRMEN AND
FAMILIES ASSOCIATION - FORCES HELP**

**Respondents/
Defendants**

(2) MINISTRY OF DEFENCE

-and-

ALLGEMEINES KRANKENHAUS VIERSEN GMBH

**Appellant/
Third Party**

Charles Dougherty QC (instructed by DAC Beachcroft LLP) for the Appellant
Charles Hollander QC (instructed by The Government Legal Department) for the
Respondents

Hearing date: 28 April 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on 17 July 2020.

Lord Justice Irwin:

Introduction

1. In this case the point at issue is a single piece of statutory interpretation. The question is whether the Civil Liability (Contribution) Act 1978 (“the 1978 Act”) has extraterritorial effect.
2. In June 2000, the claimant Master Harry Roberts suffered brain damage at birth in the Viersen General Hospital (“AKV”) in Germany. His claim is that this occurred as a result of the negligence of the attendant midwife, who was employed by the first defendant the Soldiers, Sailors and Airmen and Families Association – Forces Help (“SSAFA”). He also sued the Ministry of Defence. The Ministry of Defence will indemnify SSAFA in respect of any successful claim.
3. There are third party proceedings brought by SSAFA and MOD against AKV, which are only effective if the Claimant succeeds against SSAFA and/or MOD. The basis of the contribution claim is the statutory liability laid down by the 1978 Act. The relevant sections from the 1978 Act are sections 1, 2(3), 6(1) and 7(3). For convenience, they are annexed to this judgment. As I have said, the critical point is whether the 1978 Act has extraterritorial effect. It is agreed that under the operation of private international law, the proper law of the liability for contribution would be German law. It is also agreed that if German law applies to the contribution, then the claim for contribution will be out of time. If however the 1978 Act has extraterritorial effect, and the liability arises under the Act, the contribution claim will be in time.
4. In approaching the interpretation of the statute, the parties have considered the language of the statute, and have also considered a purposive interpretation of the statute, amongst other things looking at the *travaux préparatoires*. The parties have made extensive reference to academic commentary and judicial decisions on analogous questions under this statute, and I consider it is helpful to begin by examining the history and the origins of the Act, including its introduction before Parliament.

The preliminary issue

5. The appeal arises from a preliminary issue as defined by Master Yoxall, following consent of the parties, as follows:
 - “a. the defendant’s claims for contribution against the part 20 defendant will not be time-barred if the question whether the defendants are entitled to contribution is covered by English law by reason of the applicability of the Civil Liability (Contribution) Act 1978..., but will otherwise be time-barred because German law applies;
 - b. the relevant question for the purposes of the trial of the preliminary issue is whether or not the 1978 Act has mandatory or overriding effect and applies automatically to all proceedings for contribution brought in England and Wales, without reference to any choice of law rules. If not, German law will

apply to the Defendants' claims for contribution against the Part 20 Defendant and they will be time-barred".

The Background to the Act

6. The Law Reform (Contributory Negligence) Act 1945 [“the 1945 Act”] made radical reform to the law of tort. The statute introduced the concept of contributory negligence. Against that background the distinguished jurist Prof Glanville Williams considered the law of contribution in relation to the conflict of laws, in his book entitled “*Joint Torts and Contributory Negligence*” 1951. At page 414, he wrote:

“A converse question is when the English courts will enforce a right of contribution arising under a foreign system of law. It is clear that both these questions – the scope of the English Act and the effect to be given to foreign systems – should be answered on the same principle; but on what that principle is there is little authority.

It is submitted that the matter in issue is not one of procedure, governed by the *lex fori*, but is a substantive-law claim arising *e lege* (whether it is called a quasi-contractual or a statutory claim makes no difference). There appear to be two possible ways in which the choice of law may be made. Since the right of contribution arises out of a tort, it may be held to be governed by the same law as the tort, namely the *lex loci delicti*. An analogy for this might be found in the Law Reform (Frustrated Contracts) Act, 1943, s.1(1), which makes the claim for restitution consequent upon a frustrated contract dependent on the law governing the contract. Alternatively, since the right of contribution rests upon the notion of unjust enrichment, it may be held to be governed by the law of the place of enrichment. This raises the question where is the place of enrichment. The defendant's enrichment occurs because the plaintiff, by satisfying the judgment debt or tortious liability, has satisfied a liability that ought sue D2 for contribution, notwithstanding that it may be just as difficult for D2 to resist the claim for contribution after the lapse of this time as if he were being directly sued for damages by P. It is submitted that while D1 should have an extra period of time after satisfying P's claim in which to sue D2, he does not need as long a period as six years. It might be provided by legislation that D1 should be able to enforce his right to contribution within either of two periods, whichever is the greater: (1) the same period as that in which the injured plaintiff can enforce his claim against the contributor, (2) the period of say one or two years after the liability of the claimant is ascertained or the injured plaintiff's damages paid, with a discretion in the court to extend the period in meritorious cases (as where it has been practically impossible to serve the defendant).

Where a claim for contribution is made under the heading of damages in accordance with the argument in §§32-3, time commences to run when the cause of action accrues. This means, where the action is for negligence, that it accrues on the first occurrence of damage. Suppose that P is a passenger in a car driven by D2, whom he has exempted from liability for negligence: there is a collision between this car and a lorry driven by D1, owing to the negligence of both drivers, and P and D1 are injured. P sues D1, and D1 sues D2 for damages for his own injuries and damages for the damages that he has had to pay P. Time runs from the accident, for that was when D1 suffered the first damage. But now suppose that D1 was not injured, and that his only damage was his liability to P. Did his damage occur when this liability arose (i.e. when P was first damaged), or does it occur only when he pays damages to P? The question has not been decided, but it is suggested that the simpler alternative and on the whole the better one is the first. This would mean that when contribution is claimed by way of damages, time runs from the same moment as in the injured plaintiff's action.

The question whether a tortfeasor who has settled a statute-barred claim can sue for contribution was discussed in §31 (e) (ii).

The period of limitation for claims to contribution under s.3 of the Maritime Conventions Act, that is to say in respect of an overpaid proportion of any damages for loss of life or personal injuries (§32), is one year (see s.8 of that Act). The period of limitation for claims to contribution by way of damages for tort under the decision in part to have been borne by the defendant. It may therefore be thought that the place of enrichment is the country where the tortious liability arose – which puts us back to the *lex loci delicti*. Alternatively, it may be thought that the place of enrichment is the place where the present plaintiff made the payment to the victim of the tort. This place, however, is perfectly fortuitous so far as the defendant is concerned, for the payment was not made to him and he was no party to it. On the whole, therefore, the argument seems to be in favour of the *lex loci delicti*. This means that the Tortfeasors Act should apply to torts committed in England, while for torts committed in other jurisdictions the question of contribution should be regulated by the law of the place of commission of the tort.”

7. In March 1977, the Law Commission issued its report on Contribution in the Law of Contract. It is not necessary to consider all the contents of the report. Appendix C to the report consisted of a draft of the proposed Civil Liability (Contribution) Bill. The provisions of this draft Bill differ from the 1978 Act, although providing a large part

of the basis for the eventual statute. Nothing in the report indicates an intention that the proposed Act would have extraterritorial effect.

8. Mr Dougherty QC for the appellant took us to the record of Hansard, as the Civil Liability (Contribution) Bill, developed from the draft annexed to the Law Commission Report, was introduced into the House of Lords in July 1978 by Lord Scarman. He emphasised Lord Scarman's introductory paragraph, where he described the measure as:

“...a modest Bill, designed to effect a degree of law reform in a very technical field of the law. It is drafted so as to give effect, with certain modifications, to the report and recommendations of the law commission... The major difference [from the Law Commission Report] is that the Bill as drafted will apply to Northern Ireland...”.

Mr Dougherty's point is that had Bill had been understood or intended to override existing private international law and to create a jurisdiction for contribution claims which was extra-territorial, then such a mover as Lord Scarman, of such a radical measure, could not have described the Bill as he did.

Authority and Comment Following the Act

9. In the Law Commission Working Paper number 75, published in 1980¹, the Commission addressed the topic of Classification of Limitation In Private International Law. Beginning at page 74, the report addressed the existing law as it affected contribution claims. Referring back to the Report on Contribution, the Commission observed:

“73. ...One particular problem with which we were concerned was this. If P has recovered damages from D1, should D1's right to contribution from D2 be affected by the fact that P could no longer sue D2 because of the expiry of the relevant limitation period? It was the rule under the Law Reform (Married Women and Tortfeasors) act 1935 that D1 could recover in the situation just given and D2 could not shelter behind the Limitation Act 1939. However, if P had in fact sued D2 and the court had held that the claim was statute-barred, D1 could recover no contribution. We recommended that the law should be altered so that when D1 sued D2 for contribution, D2's liability should be the same whether he had been sued by P and won on a 'limitation' point or had never been sued at all.

74. This recommendation was substantially implemented by section 1(3) of the Civil Liability (Contribution) Act 1978. The effect of this subsection is that D1 can recover contribution from D2 even if D2 has defeated a claim by P on a 'limitation' point. However, D2 can resist a contribution claim if the expiry of a period of limitation or prescription has the effect of

¹ See footnote 1972 to the Law Commission working paper 87, fifth ed.

extinguishing P's right of action against D2, rather than just barring his remedy. The effect of the Limitation Act 1939 is usually to bar the remedy and not extinguish the right, but such extinction of the right of action does occur under sections 3 and 16 of the 1939 Act and as such is also the effect, as we have seen, of many foreign statutes of limitation.

75. Foreign limitation provisions may be of significance in the context of this working paper not only because our provisional recommendations could lead to their being applied by our courts much more frequently but also because of the implications of our recommendations on the law relating to foreign judgments. It is therefore necessary to examine together the effects of our recommendations on both the law of contribution and of recognition of foreign judgments. Accordingly we now consider the extent to which the Civil Liability (Contribution) Act 1978 applies to contribution claims involving foreign elements.

76. First, it should be borne in mind that the 1978 Act will only apply to those claims for contribution involving rules of private international law where the law governing the contribution claim (as opposed to P's right of action) is English law. There is no direct English authority on the law to govern a contribution claim but the better view would seem to be that it is a matter to be governed by the proper law of the obligation.

77. If the contribution claim is governed by the 1978 Act, liability under that Act to make contribution requires the liability of D1 and D2 to be such that it has been, or could be, established by an action in England and Wales, taking into account rules of private international law. If, therefore, D1 alleges that D2 is liable to P for breach of contract under French law, though not under English law, D2 will be regarded as liable if the English courts held or would have held French law to be the proper law of the contract."

10. It is therefore evident that the authors of the Working Paper thought that the "better view" was that the 1978 Act did not have extraterritorial effect. One of the Law Commissioners at the time of the Working Paper number 75 was Prof North, the joint author of *Cheshire and North: Private International Law*.

11. In 1984 there was enacted the Foreign Limitation Periods Act: ["1984 Act"]. As the Short Title of the Act makes clear, this was an:

"Act to provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure."

Hence, the basis upon which the classification of a foreign limitation period for the purposes of deciding which was the governing law was made explicit.

12. It was against that backdrop there arose the first judicial consideration of the 1978 Act in a reported case. In *RA Lister and Co Ltd and Others v EG Thompson (Shipping) Ltd and Another* [1987] 1 WLR 1614 (“*The Benarty*”), the owners of cargo carried aboard the vessel commenced an Admiralty action *in personam* for negligent damage to cargo, against the shipowners and charterers of the vessel. In June 1984, the action against the charterers was stayed. In 1986 the shipowners claimed contribution from the charterers under the 1978 Act in the event the shipowners were found liable. The charterers applied to strike out the notice on the ground that, the proceedings against them having been stayed, they were no longer a party to the action. The application was dismissed on the ground that despite the stay, the action against them remained a pending or subsisting action, and they were still “a party to the action” within RSC O16 r8. Hobhouse J concluded that, for the purposes of recovering a contribution under the 1978 Act, the liability of the person from whom contribution was sought did not need to be procedurally enforceable as a current and subsisting liability, provided it had had the character of a liability at the time the damage was suffered by the injured party.
13. Hobhouse J addressed section 1 (6) of the Act. He rejected the argument that the relevant liability had to be procedurally as well as substantively established. He said:

“Section 1(6) of the Act of 1978 is concerned with providing a definition of, or guidance about, what liabilities may be taken into account for the purposes of section 1 of the Act. I consider that the subsection is concerned with the character of the liability and not with any merely procedural considerations as to how it might be enforced. As it was put (admittedly obiter) by Sir John Donaldson M.R. in *Logan v. Uttlesford District Council* (unreported), 14 June 1984; *Court of Appeal (Civil Division) Transcript No. 263 of 1984*:

“Subsection (6) merely provides that the test of liability is to be applied by reference to such liability as could be established before a court in England and Wales, irrespective of what substantive law that court would apply.”

I do not consider that section 1(6) is concerned with such problems as whether or not a writ could have been served out of the jurisdiction of the court. Such considerations are alien to the substantive scheme that is being provided for in the Civil Liability (Contribution) Act 1978 and would serve no purpose relevant to the scheme of the Act which I am able to discern. If the respondent to the contribution claim is, as here, a foreigner then before such a foreigner can be made the subject of a contribution claim the claimant must establish some procedural right recognisable under R.S.C., Ord. 11, or other relevant provision, which entitled him, the claimant, to proceed against the respondent in this country. If he cannot establish such a

procedural entitlement no question of liability under the Act of 1978 will arise; if he can then there is no need for any further inquiry and the provisions of the Act should be applied. I have not, of course, lost sight of the fact that section 1(6) deals not with the liability of the respondent to the contribution claimant, but with the liability of either or both of them to the person who has suffered the damage. If the respondent is present within the jurisdiction then his liability could be established here; if the claimant, however, was not, what purpose is served by asking purely hypothetically whether he would if sued in this country have chosen to submit to the jurisdiction or could have been compelled to appear before the English courts under some provision of Order 11, as, for example, a necessary and proper party to proceedings by the injured party against the respondent? Similarly, what useful purpose is served by asking similar questions about a foreign respondent once one has established that it is proper for the claimant to proceed for contribution against that respondent in this country. If counsel for the charterers had been able to demonstrate before me some coherent purpose which was served by the construction of section 1(6) for which he contended, his submission would have become much more plausible.

The language of section 1(6) does leave open a construction which includes procedural considerations. But, having regard to the scheme of the Act as a whole and to its purposes both expressed and potential, I do not consider that it is correct to read section 1(6) as imposing a procedural criterion as well as a substantial, or remedial, criterion on the concept of liability that is being used.”

14. Mr Hollander QC for the respondent relies on this case, alongside his principal contention based on the wording of the statute, as suggestive that the 1978 Act represents a “complete code”. Mr Dougherty QC rejects that contention. It is agreed the authority is not directly on the point.
15. The next case of relevance is *Virgo Steamship Co SA v Skaarup Shipping Corporation (“Kapetan Georgis”)* [1988] 1 Lloyds Law reports 352. In that case the plaintiff owners (Virgo) let their vessel to the charterers (Skaarup). The charterers entered into a voyage charter with an English company BM, who in turn entered into a sub-voyage charter with OAM. Shippers Devco shipped a cargo of coal from Canada to Germany. An explosion during the voyage caused damage and loss of life.
16. The owners brought an action against Skaarup and BM for damages and/or indemnity. Skaarup issued a third party notice against Devco, alleging that a clause in the contract between Virgo and Devco meant that, if it was established the explosion occurred in consequence of Devco’s breach of warranty and Skaarup were liable to Virgo, then Skaarup were entitled to a contribution from Devco under the 1978 Act. Devco applied under RSC O12 r8 to set aside the third-party proceedings and to set aside service of those proceedings, on the ground that Skaarup had failed to establish any basis for the proper exercise of jurisdiction to order service of the third-party

proceedings in Canada. Hirst J rejected that argument on grounds not relevant for our case. However, he went on to consider in the alternative the implications of the 1978 Act. He found that s1(6) of the 1978 Act created a cause of action in its own right. There was nothing in the Act to limit its scope to liabilities incurred in England and Wales. On the contrary, the terms of section 1(6) with its reference to private international law, represented a “small pointer” in favour of an international dimension. Even if there had been no good foundation for a claim in tort, the judge found that Skaarup’s alternative reliance on the 1978 Act was sound. Once again, Mr Hollander argues this case supports the contention that the 1978 Act represents a complete code with extraterritorial effect. Mr Dougherty submits that it does not. Once again, this is a jurisdiction case. The parties are agreed once again that the case is not directly in point

17. In 1993, there was published the 12th edition of *Dicey and Morris on the Conflict of Laws*, under the general editorship of Mr Lawrence Collins, as he then was. At pages 1533/4, the editors wrote:

“Contribution and Indemnity

There does not appear to be any English authority on the question what law governs the right of one tortfeasor to claim contribution or indemnity from another. If the right to contribution is statutory, as it is in English domestic law, it is submitted that an English court would characterise it as quasi-contractual and not as delictual and would apply the proper law of the obligation in accordance with Rule 201 and not a combination of the *lex fori* and the *lex loci* in accordance with Rule 203. For if A is injured by the joint negligence of B and C, and recovers judgment against B, B and C have each committed a tort against A but C has not committed a tort against B. Hence B’s right of contribution from C cannot be delictual. It must surely be either quasi-contractual or *sui generis*. In such a case the proper law of the obligation will prima facie be the *lex loci delicti* unless perhaps the joint tortfeasors are both resident in another country and there is some special relationship between them, *e.g.* that of employer and employee or bailor and bailee, which is centred in that country.

If, however, one tortfeasor can claim an indemnity or contribution from another by virtue of a contract express or implied, his right to do so would be determined by the law applicable to the contract. That law will determine, *e.g.* the scope and effect of a warranty given by an author to his publisher that his work contains no libellous material, or of an implied undertaking given by an employee to his employer to use reasonable care and skill.”

18. Mr Dougherty relies on this analysis as supporting his contention that the 1978 Act was not understood to have extraterritorial effect. Were it otherwise, he says, such a

distinguished author could not have failed to introduce the statute in the course of this discussion.

19. In 1994, there came the only case which is fully in point before the instant case, and which was followed by the judge below. The appellant argues that this case was wrongly decided.
20. In *The Arab Monetary Fund v Dr Hashim and others* (1994) The Times 11 October, the plaintiff Arab Monetary Fund (“AMF”) sought damages against its former director-general, Dr Hashim. He was said to have misused his powers so as to appropriate funds. Some of the money had found its way to the First National Bank of Chicago (“FNBC”). AMF sought damages against the American bank and its affiliates. By a contribution notice, FNBC sought an indemnity or contribution from Dr Hashim. Considerable sums were involved. For reasons which need not be set out, the FNBC defendants were able to rely only on their right to contribution (if any) arising under the 1978 Act.
21. It was argued on behalf of Dr Hashim that the 1978 Act did not apply to all contribution claims brought in the English court, but only to those claims governed, in accordance with the rules of private international law applicable in that court, by English domestic law. On the facts of that case, Mr Ross-Munro QC for Dr Hashim argued that the substantive law of the contribution, as a matter of private international law, was Swiss. It would follow that the 1978 Act could have no application to the contribution claims and the FNBC defendants must fail in their contribution proceedings.
22. In *Hashim* Chadwick J noted the passage in paragraph 76 of Law Commission Working Paper number 75 (quoted above) where it was stated that –

“... The 1978 Act will apply only to those claims for contribution... where the law governing the contribution claim (as opposed to P’s right of action) is English law. There is no direct English authority on the law to govern a contribution claim but the better view would seem to be that it is a matter to be governed by the proper law of the obligation.”

The judge observed that no authority was cited in the Working Paper for that proposition. Chadwick J went on to say:

“The view expressed in para 76 of Law Commission Working Paper No 75 was not reflected in the subsequent Law Commission Report (Law Com. No 114). The relationship between contribution and limitation is discussed, briefly, at paras 4.72 and 4.73 of the Report. The Law Commission accepted that amendment of the 1978 Act was neither necessary or desirable; and made no proposal relating specifically to the law of contribution between joint wrongdoers. The view expressed in Working Paper No 75 was, however, carried forward into a subsequent working paper on a different topic. In or about 1984 the Law Commission published Working Paper No 87 on Private International Law:

Choice of Law in Tort and Delict. Paragraph 2.83 contains this sentence:

“2.83 The Civil Liability (Contribution) Act contains no general choice of law rules and may be taken not to apply directly to all claims for contribution arising in a court in England and Wales or in Northern Ireland, but only to such of those claims as are governed by British or Northern Ireland law respectively.”

Again, no authority is cited for that proposition. The Law Commission was content to refer back to para 76 in Working Paper No 75.”

23. Chadwick J went on to consider the Australian decision in *Plozza v South Australian Insurance Co Ltd* [1963] SASR 122. For reasons which he explained later, he did not consider that authority of assistance. He went on to consider the two English authorities of which he was aware, those being *The Benarty* and *The Kapetan Georgis*. He stated shortly he considered those decisions as appearing to be inconsistent Dr Hashim’s proposition. He went on to consider what he concluded was the correct approach, which he expressed as follows:

“The premise which is, I think, implicit in Mr Ross-Munro’s proposition – and, perhaps, also in the Law Commission Working Papers – is that the 1978 Act contains rules which are only applicable as part of the English domestic law; and does not itself contain private international law rules for the purpose of identifying the circumstances in which the English Court is to apply the Act to cases involving foreign elements. In my view this is a false premise.

The correct approach is not to ask whether, under some rule of English private international law which is to be found or ascertained independently of and without regard to the provisions of the Act itself, the contribution claim which has been made in the proceedings which are before the Court is to be determined by reference to the Act: the correct approach is to ask whether under the rules of law applicable in an English court (which include the provisions of the Act itself) the contribution claim ought to succeed. In a case involving foreign elements that approach requires the Court to decide whether, upon a true construction of the Act, the legislature intended to confer on the claimant (B) in the contribution proceedings which are before it a right of contribution against the respondent to those proceedings (C) which was to be recognised and enforced in England.

It is, I think, important to keep in mind that the right of contribution created and conferred by the 1978 Act is not based upon the breach of any existing obligation owed by C to B. In his judgment in *Ronex Properties Ltd -v- John Laing*

Construction [1983] 1 QB 398, [1982] 3 All ER 961, Donaldson LJ explained the position – in the context of a contribution claim under s6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935 – in these terms, (ibid, at page 407 A-C):

“It [the statutory right of contribution created by the 1935 Act] is based upon breaches of tortious duties owed by both parties to the contribution suit, whether jointly or severally, to a third party and stranger to that suit, the plaintiff in the main action. As it was put in geometrical terms in argument, the rights of those concerned are triangular, the sides A B and A C representing the tortious rights and causes of action, and the base B C representing rights which are sui generis, not being tortious but arising out of tortious rights: see dicta of McNair J. in *Harvey v. R. G. O'Dell Ltd.* [1958] 2 Q.B. 78, 107.”

In deciding whether, upon a true construction of the 1978 Act, the legislature intended that B, the claimant in the contribution proceedings which are before it, should have a statutory right of contribution against C, the Court is not concerned with any obligation to contribute which might exist between C and B independently of the Act; or with any relationship between C and B other than the relationship which gives rise to the statutory right – that is to say, that each is, or would have been, liable to A in respect of the same damage. The English Court is concerned with what – to borrow the geometric model described by Donaldson LJ – may be referred to as the other two sides of the triangle, AB and AC. If those two sides are established – in the sense that both B and C are or were (or would be or would have been) liable to A in respect of the same damage – then (subject to any express contractual provision between B and C relating or excluding contribution) the third side BC – which may be regarded as representing C’s liability to contribute to B – is put in place by the statute.

In deciding whether the other two sides of the triangle, AB and AC, are established the questions which the Court has to address in contribution proceedings brought under the 1978 Act – including contribution proceedings involving foreign elements – are those which I have identified earlier in this judgment: namely (i) whether B is a person liable in respect of damage suffered by A and (ii) whether C is a person liable in respect of the same damage. For this purpose the existence of liability is to be determined in the light of the provisions of ss1(6) and 6(1) of the Act. Section 1(6), and other sections, contemplate that the Court may be required (by its own rules of private international law) to answer those questions by reference to some system of foreign law. If those questions are answered in the affirmative, then s7(3) of the Act provides that

the statutory right to contribution supersedes any right (other than an express contractual right) which might arise or exist otherwise than under the Act.

It would be strange, therefore, if – before it came to construe the 1978 Act at all – the Court were required to answer a preliminary question which was unrelated to and inconsistent with the basis upon which the statutory right of contribution arises under English law. To ask whether a right of contribution arising out of any relationship between B and C other than their relationship as persons each of whom is liable to A in respect of the same damage ought to be determined by English domestic law would be to ignore the basis upon which the right arises under that law. To ask whether a right of contribution arising out of the relationship between B and C as persons who are each liable to A in respect of the same damage would be to ask the very question to which the 1978 Act provides the answer.”

24. Chadwick J returned to the two English decisions of *The Benarty* and *The Kapetan Georgis*. He noted that in neither of those cases had the court asked itself the question whether the contribution claim was governed by English law. Yet, in the judge’s view, if Dr Hashim’s submission were correct, that question would have required an answer. In respect of *The Benarty*, the judge observed that if the court had thought it necessary to address as a preliminary question what law ought to govern the shipowners’ claim for contribution, “it is difficult to see how that question could have been answered in favour of English law”. In respect of *The Kapetan Georgis*, the judge observed that the facts were not dissimilar to those in *The Benarty*. Once again, Chadwick J considered that if Hirst J:

“...had thought it necessary to address the preliminary question of what law to govern the charterers claim against the shippers it is difficult to see how that question could have been answered in favour of English law. Like Hobhouse J... Hirst J did not address that question. He, also, dealt with the matter on the basis that the solution to the questions before him was to be found in the 1978 Act itself.”

25. Chadwick J was then referred to the passage from Prof Glanville Williams which I have considered earlier in this judgment. He analysed the implications of that passage, and of the 1935 Act, in the following terms:

“The 1935 Act contained no indication whether "liable" in s 6 (1) (c) was restricted to liability under English domestic law or extended to liability under some foreign system of law. Following the enactment of the 1978 Act it is, of course, not only "possible ... literally speaking" for parties to be "liable", in the context of the contribution legislation, in respect of the same damage under a foreign system or systems of law; the Act itself recognises that foreign law may determine or affect liability see ss 1 (3), 1 (6) and 2 (3) (c). As Hirst J pointed out in *The Kapetan Georgis* (supra, (1988) 1 Lloyd's Rep 352 at

page 359) the provision in s 1 (6) goes beyond anything contained in the 1935 Act.

It does not follow that the 1978 Act "is capable of being applied indiscriminately" whenever two parties are liable for the same damage under foreign law. The criteria, under s 1 (6) of the Act, is that the liability has been or could be established in an action brought in the English court by the person who has suffered the damage. Although it is immaterial that, in deciding whether or not liability is established, the Court may (in accordance with its own rules of private international law) apply foreign law, the "liability" is a liability which could be established in an English court. So, for example, liability under foreign law alone in respect of a tortious act committed abroad would not be sufficient; liability under English law also would need to be established in accordance with the test of double actionability recognised in *Boys -v- Chaplin* [1971] AC 356, [1969] 2 All ER 1085, But if that test is satisfied, then it is immaterial whether a right of contribution between the tortfeasors exists under any foreign law. That right is conferred by s1(1) of the 1978 Act and the English court must give effect to it.

It follows that, if the English court assumed jurisdiction in the litigation in which Professor Glanville Williams' Ruritarians were involved and - after applying the relevant provisions of English and Ruritanian law in accordance with the principles explained in *Boys -v- Chaplin* (supra, [1971] AC 356) - reached the conclusion that two (say, B and C) were liable to the third (A) in respect of the same damage, it would, in my view, not only be conceivable but correct in law for the Court to apportion the damages between B and C *inter se*. It would be remarkable if the Court could not do so. It would be a surprising defect in the law if the English court, having decided in an action to which A B and C were party that B and C were each liable to A in respect of the same damage - suffered in, say, a collision between motor vehicles in Ruritania in which the three were involved - and having assessed that damage, were precluded by the absence of any law of contribution in Ruritania from deciding also how its judgment for that sum against each of B and C should be apportioned *inter se*. I am satisfied that, following the enactment of the 1978 Act, that defect is not a feature of English law.

Properly understood the 1978 Act gives does not give rise to the consequence which Professor Glanville Williams regarded as "inconceivable". B would not obtain the benefit of a statutory right of contribution "merely by coming to England and suing here". B would need to establish that both he and C were, or would have been, liable to A on the basis of the law

applicable in an English court. He would also, of course, have to establish some basis upon which the English court could assume jurisdiction over C. The position was explained by Hobhouse J in *The Benarty* (supra, [1988] 1 WLR 1614) at page 1622 C-F:

"If the respondent to the contribution claim is (as here) a foreigner, then before such foreigner can be made the subject of a contribution claim the claimant must establish some procedural right recognisable under R.S.C. 011, or other relevant provision, which entitles him, the claimant, to proceed against the respondent in this country. If he cannot establish such a procedural entitlement no question of liability under the 1978 Act will arise: if he can then there is no need for any further enquiry and the provisions of the 1978 Act should be applied."

26. Chadwick J went on to consider *Plozza* and the other South Australian cases. It is not necessary for me to analyse his treatment of this line of authority, since these cases are not relied on by Mr Dougherty, recognising as he does that they arose from a different legislative position.

27. Chadwick J therefore went on to consider the five questions which he found arose for decision under the 1978 Act. He had identified these in the following terms:

"Prima facie, therefore, in any proceedings in an English court by a person (B) to recover contribution from another (C) under the 1978 Act there are five questions which will or may arise: (i) is B a person liable in respect of any damage suffered by another person (A); (ii) is C a person liable in respect of the same damage; (iii) is the amount which has or might have been awarded against C in respect of that damage in an action brought by A in an English court subject to any limitation or reduction imposed by or under any statute (including any foreign law which would have been applicable in such an action); (iv) is there any express contractual provision between B and C regulating or excluding contribution; and (v) what amount is it just and equitable for C to contribute having regard to the extent of his responsibility for the damage in question?"

28. He answered those questions on the facts adversely to Dr Hashim.

29. The decision in *Hashim* was the subject of an early expression of doubt by Prof Robert Stevens, in the 1995 edition of *Restitution and the Conflict of Laws*. Prof Stevens argued that by parity of reasoning to the process by which the proper law of an obligation between debtor and creditor was established: "... the law applicable to the obligation which the plaintiff claims to have discharged or had assigned to him should determine his right to a contribution". Prof Stevens quoted the relevant passages from the 1978 Act, and then continued:

“The statutory right to contribution only arises in respect of “any damage” suffered. The statutory right does not cover the situation where persons are jointly liable for the same debt. If liability can be established in an English court against two or more persons in respect of the same damage, the Act applies regardless of the rules of private international law. Application of the *lex fori* simplifies the position but seems unprincipled. If by the law(s) of the obligations no contribution action would be possible, why should the *lex fori* determine the issue in a different way?

Does the Act apply to foreign judgments? If such liability could not be established in an action brought in an English court, it should not. Does recognition of a foreign judgment suffice? The position is unclear.”

30. In a 1995 article in the *Lloyds Maritime and Commercial Law Quarterly*, Prof Briggs noted the decision in *Hashim*, but went on to comment as follows:

“There is an immediate attraction to the result reached by Chadwick J, If the court has jurisdiction over R (the more so when the claim for contribution is brought in the very proceedings brought by P against D), the convenience of settling all issues once and for all is plain. But it does not follow that, just because the court has and will exercise jurisdiction to order contribution, it should apply its domestic law to the issue without regard to choice of law. True, the power given to the court to award whatever is just and equitable also looks unobjectionable; but is that sufficient? Maybe not. A close analogy exists in the power to assess contributory negligence between a plaintiff and defendant under the Law Reform (Contributory Negligence) Act 1945. Suppose that a plaintiff has been injured in circumstances in which an English court, left to its own devices, would reduce damages on account of contributory negligence. But suppose that the tort took place in Ruritania. And suppose that Ruritanian law on contributory negligence was different: a different fractional apportionment, or a last opportunity rule to bar recovery altogether. Would the 1945 Act apply to the exclusion of the Ruritanian rule? Common law authority was thin, but a modern consensus would accept that the issue was one of substance, and should on that account be governed by the law governing the substance of the claim. Now that this is declared by statute to be Ruritanian law, would an English court still apply its own provisions on contributory negligence? Almost certainly not: it would apply those of the *lex loci delicti*.

So why is contribution between wrongdoers different? The wording of the two statutes is strikingly similar, and neither gives any indication that it is to apply notwithstanding, or is not to apply in the face of, international elements in the claim. One

arguable distinction may be that there is a clear choice of law rule for tort (hence for contributory negligence as an issue) but that, as clarity is rather lacking for quasi-contractual or restitutionary claims, the case for applying the 1978 Act *faut de mieux* is stronger. But is it principled?”

31. Prof Briggs continues by considering a number of arguments both principled and practical. His conclusions however are adverse to the thinking of Chadwick J. His reasoning is expressed as follows:

“Two things follow from this procedural murk. First, a court should be willing to accept jurisdiction over contribution claims when it has jurisdiction over the claim of P against D: one single determination binding on all will be a solution much preferable to the anarchy of separated parts of a single story being litigated in separate courts. This insight tipped the balance and led the Privy Council to issue an injunction in *S.N.I. Aérospatiale v. Lee Kui Jak* and caused Phillips, J., to accept jurisdiction over the contribution claim in *Kinnear v. Falconfilms NV*. But second, this pragmatic encouragement to take a wider-than-usual view of jurisdiction should lead to a greater-than-usual sensitivity to issues of choice of law: this is, after all, the very foundation of private international law. The blanket application of English law to the substance of the contribution claim is inappropriate, at least in cases where the claim, when seen in simple isolation, would not otherwise have belonged within the jurisdiction of the English court or to English law. In other words, the relationship created or arising between D and R should be treated as self-contained, and the law appropriate to it selected to govern the claim. No doubt it is then true to say (i) that this should be that with which the claim for contribution has its closest and most real connection and (ii) that such claims should be accommodated within the emerging choice of law rule for restitutionary claims. As far as this group is concerned, much careful and detailed work has been recently done by others. But for present purposes there is much to recommend the view that a contribution claim should be governed by the law with which it has its closest and most real connection, and that in the absence of clear and compelling words in the 1978 Act, the operation of the Act should be limited to cases where the law with the closest and most real connection to the contribution claim is English law.”

32. In 1997, writing in *Restitution Law Review*, Dr Charles Mitchell engaged in a full review of the 1978 Act and its provisions. At the conclusion of his review, he too was, by implication, critical of the decision in *Hashim*. He wrote:

“This understanding [as decided in *Hashim*] of the effect of s1(6) has the merit of simplicity, but it may be questioned whether the wording of the section clearly indicates that

Parliament intended the 1978 Act to apply without regard to the choice of law rules which would otherwise come into play.”

33. The next ensuing judicial consideration of the 1978 Act germane to our issue, arose in *Petroleo Brasileiro SA v Mellitus Shipping Inc (The Baltic Flame)* [2001] 2 Lloyd’s Law Reports 203. In that case the claimant holder of the bills of lading claimed against the defendant owners of the *Baltic Flame*. Saudi Aramco was the shipper of the relevant cargoes which were defective at discharge arising from contamination. The defendant issued third party/Part 20 proceedings against Fortum Oil and Gas (“Fortum”). Fortum obtained permission to serve its own Part 20 claim on Aramco out of the jurisdiction, on the ground that Aramco was a necessary or proper party to the proceedings, the claim being made pursuant to section 1 of the 1978 Act. Aramco applied to set aside Fortum’s Part 20 Claim and/or service out of the jurisdiction. Longmore J dismissed those applications.
34. The Court of Appeal held that for the purposes of recovering a contribution under section 1 of the 1978 Act, the liability to the injured party of the person from whom the contribution was sought did not need to be procedurally enforceable as a current and subsisting liability, provided it had the character of a liability at the time the damage was inflicted or suffered. All that was required was that liability had been or could be established in the action against him in England and Wales by or on behalf of the person who suffered the damage. The fact that the claim by Fortum against Aramco was subject to a stay for the purposes of arbitration was no bar Fortum’s contribution claim. Authority cited to the court included *the Benarty*, *the Kapetan Georgis*, and *Hashim*.
35. In considering the question of service out of the jurisdiction in the contribution claim, the court’s reasoning began with the starting point that –

“generally a person who may be joined in proceedings in accordance with the rules as to joinder of parties is a “proper party” and that... [as was made clear in *the Benarty*]... all that is required is that liability “has been *or could be* established in the action against him in England and Wales by or on behalf of the person who suffered damage”” (paragraphs 33 and 34).
36. Under Saudi law there was no right to contribution. In meeting the argument based on the somewhat different facts arising in *The Eras Eil Actions* [1992] 1 LLR 1, where the parties had chosen Illinois arbitration as the forum for disputes between them and arbitration proceedings were already afoot, and therefore service of contribution proceedings out of the jurisdiction was refused, Potter LJ said:

“35. ...What the court did not say was that the absence of a right to contribution in Illinois was itself a reason why joinder in the English proceedings should not be permitted.

36. Nor in my view is it. The 1978 Act is strictly territorial in scope. However, it is unequivocal in its application to all proceedings brought in England, and there is nothing in the Act, or in particular in s.1(6), to limit the right of contribution to liabilities incurred in England and Wales: see the

observations of Hirst J in *The Kapetan Georgis* at p.357-9. Contribution proceedings are in turn generally proceedings appropriate to be tried in the course of proceedings already afoot. The draftsman of the 1978 Act and the Supreme Court Rules Committee may be taken to have had in mind that the combined effect of the 1978 Act and O.11 r1(1)(c) would be to permit joinder of a foreign party who would not be liable if sued directly in his own country. Similar issues arise in cases where the limitation period in the foreign country may be different from that in England. Depending on the overall circumstances, a shorter local time bar may on occasions be an argument for confirming the need to serve out of the jurisdiction.

...

38. In my opinion, in relation to a question of contribution, the court should similarly be guided by the interests of the parties and considerations of practical justice. This is a case where plainly Fortum are acting reasonably in seeking to issue contribution proceedings against Saudi Aramco in proceedings in which Fortum have themselves been sued and require to protect their position. So far as practical justice is concerned, while Saudi Aramco would be under no liability if sued in Saudi Arabia, it will only be held liable to contribute in this country if it is in truth directly liable to Mellitus pursuant to a claim for damage already asserted and required to be determined in England under English law (albeit in arbitration proceedings). In such circumstances, as it seems to me, the demands of practical justice plainly favour joinder of Saudi Aramco.”

37. It will be clear that the *Baltic Flame* is another jurisdiction case and the parties are agreed that it is not directly in point. I will consider the parties’ submissions below.
38. No further authority was cited to us directly concerned with the terms of the 1978 Act. However, critical to the approach to interpretation of the statute is the case of *Cox v Ergo Versicherung AG* [2014] AC 1379. That case concerned a claim brought by the widow of a British Army officer killed whilst cycling in Germany. Subsequent to her husband’s death, the widow entered into another relationship and had two children with her new partner. It was accepted that German law governed the issue of liability, but the widow contended that the quantification of damages recoverable from the defendant was governed entirely by English law and by the provisions of the Fatal Accidents Act 1976 [”the 1976 Act”]. If the 1976 Act applied, the widow would recover more than if her claim fell to be decided by German law. The question therefore was whether the 1976 Act had extraterritorial effect.
39. When the *Cox* case was before the Court of Appeal ([2012] EWCA Civ 854) the leading judgment was given by Etherton LJ, as he then was. He concluded that the 1976 Act did not have extraterritorial effect. As we shall see, his conclusion was affirmed by the Supreme Court in due course. However, Mr Hollander QC for the

respondent places some emphasis on a passage from Etherton LJ's judgment as follows:

“The FAA reflects public policy in the obvious sense that it expresses the will of Parliament. As I have said, however, FAA does not expressly or impliedly provide either that a claim arising out of an accident abroad can only ever be brought before an English court under its provisions, or that the English courts must apply its provisions in a case like the present where the head of loss is different from loss of dependency in the FAA sense. If FAA does not expressly or impliedly so provide, there is no scope for a further argument based on public policy. A good contrast with the present case is section 1(6) of the Civil Liability (Contribution) Act 1978 , which expressly provides as follows:

“References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.””

40. When the matter came before the Supreme Court, Lord Sumption gave the leading judgment with which all the others agreed. In the course of doing so, he laid down a principled approach to statutory interpretation on the issue of the extraterritorial effect of English statute. He said:

“Extra-territorial application

27. Whether an English statute applies extra-territorially depends upon its construction. There is, however, a presumption against extra-territorial application which is more or less strong depending on the subject-matter. It arises from the fact that, except in relation to the acts of its own citizens abroad and certain crimes of universal jurisdiction such as torture and genocide, the exercise of extra-territorial jurisdiction is contrary to ordinary principles of international law governing the jurisdiction of states. It follows, as Lord Scarman observed in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 145, that “unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction”.

28. It is, however, important to understand what is meant when we talk of the extra-territorial application of an English statute. There are two distinct questions, which are not always distinguished in the case-law. The first question is what is the proper law of the relevant liability. The answer will usually depend on the extent of any connection between the facts giving rise to liability and England or English law. If the proper law of the liability is English law, no question of extra-territorial application arises. In principle the exercise is no different from that which the court performs when it identifies the proper law of a non-statutory tort, by reference to the connection between the facts and the various alternative systems of law. This is what Lord Hodson (at p 380) and Lord Wilberforce (at pp 390–392) did in *Boys v Chaplin [1971] AC 356*, when they held that liability in respect of a road accident in Malta in which only English parties were involved was governed by English law. The same basic principle has applied under sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 since that Act came into force. The second question is one of extra-territorial application, properly so-called. It is the question posed by section 14(3)(a)(i) and 14(4) of the Private International Law (Miscellaneous Provisions) Act 1995, which had its counterpart in the common law, namely whether the choice of law arrived at in accordance with sections 11 and 12 is displaced by some mandatory rule of the forum. This is not a choice of law principle at all, but turns on the overriding rules of policy of the forum.

29. In the present case it is common ground that the *lex causae* arrived at on ordinary principles of private international law is not English but German law. There is nothing in the language of the Fatal Accidents Act 1976 to suggest that its provisions were intended to apply irrespective of the choice of law derived from ordinary principles of private international law. Such an intention would therefore have to be implied. Implied extra-territorial effect is certainly possible, and there are a number of examples of it. But in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extra-territorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to any one resorting to an English court regardless of the law that would otherwise apply.”

41. In his judgment at paragraph 32 and following, Lord Sumption considered the specific question of the 1976 Act. He first looked at history. At the time of commencement, the question of extraterritorial application could not have been in issue, because at that time actions brought in England on a foreign tort were subject to the double-

actionability rule. Hence, reliance on a foreign proper law of the tort was “pointless” since the elements of the English tort had in any event to be satisfied. Secondly (para 33) Lord Sumption considered the purpose of the 1976 Act, which was to correct an anomaly in the English law of tort. There was nothing in the mischief addressed by the legislation requiring it to be applied to foreign fatal accidents. Thirdly, Lord Sumption considered (paragraph 34) that he could see nothing in the terms of the Act which depended on its having extraterritorial effect. Here Lord Sumption continued:

“34. ...Neither the terms nor the purpose of the Act depend for their effect on its having extra-territorial effect. The only other basis for imputing to Parliament an intention to apply the Fatal Accidents Act internationally irrespective of ordinary rules of private international law, is that the Act, and in particular its damages rules, represent a “mandatory rule”. This is the expression commonly employed to describe what the Law Commissions of England and Scotland have called “rules of... domestic law... regarded as so important that as a matter of construction or policy that they must apply in any action before a court of the forum, even where the issues are in principle governed by a foreign law selected by a foreign choice of law rule”: Law Commission and Scottish Law Commission Working Paper No. 87 (1984), para. 4.5. Section 14(3)(a)(i) and 14(4) of the Private International Law (Miscellaneous Provisions) Act 1995 have the effect of saving such rules. Some foreign laws governing the availability of damages for fatal accidents may no doubt be so offensive to English legal policy that effect would not be given to them in an English court. A rule of foreign law that women or ethnic minorities should have half the damages awardable to white males similarly placed was cited as an example. But the German rules with which this case is concerned are based on a perfectly orthodox principle which is by no means unjust and is accepted in principle by English common law in every other context than statutory liability for fatal accidents.”

The Judgment below

42. In his careful judgment, Soole J began by observing that he was not formally bound by the judgment in *Hashim*, but should observe the rule of precedent restated by the Supreme Court in *Willers v Joyce (NO2)* [2018] AC 843, namely that he should generally follow the decision of a court of coordinate jurisdiction unless there was a powerful reason not to do so.
43. The judge gave a careful analysis of the facts. He then noted as a preliminary point that the choice of law rules for contribution in this claim were to be derived from the common law, by contrast with the provisions of *Parliament and Council regulation (EC) number 864/2007 (“Rome II”)*, because Rome II applies only where the events giving rise to damage occurred after 11 January 2009. He also noted that the claim for contribution in such cases this is not a claim in tort. The parties agree with these conclusions.

44. The judge then set out the relevant provisions of the 1978 Act. He considered the Law Commission Working Paper of 1980, and much of the academic material I have analysed above. He considered the Australian authorities cited in *Hashim* as well as the English authorities which I have summarised. The judge quoted extensively from the judgment of Chadwick J in *Hashim*, laying emphasis on the comment by Chadwick J as to the “surprising defect in the law” which would ensue if the absence of any law of contribution in the proper foreign law were to prevent an English court from deciding how contribution should be apportioned. The judge then summarised the submissions of the parties.
45. In formulating his analysis and conclusions, Soole J cited from the judgment of Lord Sumption in *Cox*. He began by seeking to characterise or classify the claim or issue in question. He said:

“81. Whilst the preliminary issue is confined to the question of whether the 1978 Act has mandatory/overriding effect, I think it necessary to start with the approach of the common law to any dispute on choice of law in a claim with a foreign element. As authority cited in *Cox* makes clear, the first question in such a dispute is the characterisation (or classification) of the claim or issue in question. Such classification should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other’s system; and should be taken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum : *Cox* per Lord Mance at [46] citing *Macmillan Inc v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 WLR 387 per Auld LJ at 407C; and *Raiffeisen Zentralbank Osterreich AG v. Five Star Trading LLC* [2001] QB 825 per Mance LJ at [25-27].

82. Following classification, the second and third questions require selection of the rule of conflict of laws which lays down a connecting factor for that claim or issue; and then identification of the system of law which is tied by that connecting factor to that claim or issue: *Raiffeisen* at [26].

83. Having determined the choice of law in accordance with these rules, there may be a further question as to whether that result is displaced by a mandatory rule of the forum. However, as Lord Sumption observed ‘This is not a choice of law principle at all, but turns on the overriding rules of policy of the forum’ [28]. That this is so is inherent in the very concept of a ‘mandatory rule’ which applies ‘irrespective of ordinary rules of private international law’ [34]; and thus in the terms of the present preliminary issue.

84. For this reason I do not accept that this preliminary issue can be approached on the basis that it involves no question of extraterritoriality and is to be answered on the simple basis that the 1978 Act applies where any claim for contribution is sought

from a party who has been brought before the Court or otherwise submitted to the jurisdiction. To approach the question in that way would indeed involve circularity – and be at odds with the terms of the preliminary issue.

85. Thus I do not accept Mr Hollander’s submission that Lord Sumption’s first question ‘what is the proper law of the relevant liability’ [29] can be answered as (i) the ‘relevant liability’ to contribute is provided by the 1978 Act; therefore (ii) the proper law is English law; therefore (iii) no question of extraterritoriality arises. Identification of the proper law of the relevant liability, i.e. the claim for contribution, starts with classification and the two further stages. The effect of the parties’ agreement is that this produces the answer ‘German law’. The next stage is to consider whether that choice of law, reached in accordance with the ordinary principles of private international law, has been displaced by the 1978 Act.”

46. Soole J noted that Chadwick J in *Hashim* had rejected the submission that there was a preliminary question in contribution proceedings involving foreign elements, concluding that the 1978 Act provided the answer. The judge continued:

“89. Thus whilst Chadwick J did not approach the question by sequential consideration of (i) classification and (ii) statutory construction, the effect of his decision was that, properly construed, the 1978 Act overrode any choice of law rule which would otherwise apply. This is particularly apparent from his closing observations (p.13) when he considered the position which would have arisen if the 1978 Act did not apply. Furthermore his focus on construction anticipates Lord Sumption's statement that *'Whether an English statute applies extraterritorially depends on its construction* [27].

90. All that said, I accept that the question of construction has to be reviewed in the light of the principles identified in *Cox*.

91. I do not accept Mr Hollander's submission that the 1978 Act expressly provides that it has overriding effect. His argument stretches the language of Lord Sumption [29] and in substance depends on an implication to be derived from the express statutory provisions concerning choice of law. The question is whether a statutory intention of overriding effect can be implied; and in particular having regard to the two bases identified by Lord Sumption at [29].

92. In my judgment it is implicit from the provisions of the 1978 Act that the statute does have overriding effect; and that the presumption to the contrary is accordingly rebutted.

93. I consider that the express references in the 1978 Act to private international law (ss.1(6), 2(3)(c)) support this

implication. Parliament having chosen to identify specific circumstances in which choice of law rules are to apply (and the extent of that application) in a claim under the statute, the natural implication is that the availability of this statutory cause of action was not itself to be subject to choice of law rules.

94. I do not accept that the FAA or the 1945 Act provide any useful comparison, when these are distinguished by the absence from their provisions of any reference to private international law. The same applies to the suggested comparison with the general domestic law of tort. Nor do I see any significance in the fact that all these statutes made significant changes to the common law.

95. Although this was not cited in argument, I note that when *Cox* was before the Court of Appeal ([2012] EWCA Civ 854), Leading Counsel for the Claimant supported his contention that the FAA had overriding effect with the argument that this was consistent with the approach to the 1978 Act in *Hashim*: see at [20]. In rejecting the argument in respect of the FAA, Etherton LJ observed that s.1(6) of the 1978 Act was '*A good contrast with the present case...*' [60].

96. On its proper construction, s.7(3) is consistent with this conclusion. In the context of the express references in s.1(6) and s.2(3)(c) to private international law, I consider that the natural meaning of '*supersedes any right*' is that '*any right*' includes any right of contribution which would otherwise arise under foreign law: see also *Hashim* at pp.7 and 13. I do not accept that the exception in s.7(3) for contractual provision which excludes a contribution claim is a pointer the other way.

97. A further pointer is provided by the combined effect of ss.1(3) and 1(6). Where the statute makes express provision (in a case where the Act applies) to disregard foreign law of limitation which bars the remedy, it would be inherently anomalous for it to provide otherwise for the purpose of deciding whether the Act does apply. The implication must be that this was not the statutory intention.

98. Whilst the position could have been put beyond doubt by express provision of the types seen in the Unfair Contract Terms Act 1977 and the Third Parties (Rights against Insurers) Act 2010, I am not persuaded that its absence in the 1978 Act provides any support to the case against implication.”

47. Soole J went on to suggest Law Commission Report number 79 was of “no assistance either way; in particular when it’s draft Bill did not include any references to foreign law”. He considered that the Law Commission working papers and the textbook references took the matter no further.

48. Soole J gave his conclusions as to the application of *Cox*, shortly, in the following terms:

“102. I also conclude that the implication of overriding effect is justified on each of the two bases identified by Lord Sumption in *Cox* at [29]. The purpose of the 1978 Act cannot effectually be achieved unless it has extraterritorial effect; and the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to anyone resorting to an English court regardless of the law that would otherwise apply. In each case, this is most obvious where the foreign law provides no right of contribution; but it applies equally where a foreign limitation provision would otherwise defeat the claim.

103. In *Hashim* Chadwick J observed that it would be a serious defect in the law if contribution could not be obtained between the tortfeasors who have been or could be found liable in the courts of England and Wales. I agree.

104. As to the other English decisions, the present issue was not argued. In each case the question was jurisdictional, in the sense of whether the proposed contributing party should be brought before the Court. It is not fruitful to consider the particular facts and circumstances of those cases. However, the judicial observations therein display a persistent theme that the statutory intention is to provide a right of contribution which is available, according to its terms, in respect of all claims before the courts of England and Wales. These observations are consistent with the proposition that the 1978 Act has overriding effect; and provide comfort to that conclusion.

105. For all these reasons I am not persuaded that *Hashim* was wrongly decided, whether considered before or after the decision in *Cox*; and conclude that the answer to the preliminary issue is that the 1978 Act does have mandatory/overriding effect.”

The submissions

49. I have already touched upon a number of the points made by the parties. Their respective submissions can be summarised relatively shortly.
50. The appellant emphasises that the starting point in all such cases must be to identify the character of the issue to be considered, and the connecting factor which determines the proper law of that issue. In that respect the appellant accepts the approach of Soole J. Mr Dougherty emphasises that the choice of law here is very clear. He submits firmly that *Hashim* was wrongly decided at the time. Nothing in the wording of the Act points unequivocally or even clearly to extraterritorial effect. He submits, with respect, that Chadwick J was in error when he described the application of the relevant foreign law to a contribution claim as a “defect”. The

defect, so-called, is merely the application of the appropriate foreign law. There is nothing objectionable about the application of the German law of limitation. Mr Dougherty does lay emphasis on the fact that Lord Scarman promoted the Bill in its final form in such a way that demonstrates beyond doubt Lord Scarman himself did not consider this measure to have a general extraterritorial effect. The authorities relied on by the respondent are all jurisdiction cases. They are not directly on point. They must be considered carefully in context. The question of “what is the applicable law?” was simply not in issue. The risk and difficulty attending an application to set aside service forms a real disincentive in such cases. The relevant point may simply never have been taken. Finally, the principles laid down by Lord Sumption in *Cox* are unequivocal. This statute cannot pass the relevant tests. It can and is effectually applied without being given extraterritorial effect.

51. Mr Hollander QC for the respondent places at the heart of his submissions the text and terms of the statute, particularly sections 1(3), 2(3)(c) and 7(3). All these provisions bear the appearance of a complete code addressing all contribution claims arising under the Act. If the appellant were correct and the statute only applied where the right to contribution is governed by English law, what would be the point of superseding any other right to recover contribution? In the respondent’s submission *Hashim* was correctly decided. Chadwick J was correct as to the defect in the law which would follow were it not so. The academic comment, including that from the editors of Dicey and Morris, represents (as often) a tension or blurring between what the author considered what should be and what is the law. The only really detailed analysis in the academic literature was in the article by Prof Briggs. One must set the academic comment against the detailed analysis in the reported cases. It would be remarkable if the distinguished advocates and judges appearing or sitting in *the Benarty*, *the Kapetan Georgis* and *the Baltic Flame* all missed this point. Mr Hollander commented that the analysis of principle by Lord Sumption in *Cox* was, strictly speaking, *obiter*. Nevertheless, he accepted the authority of those passages and that analysis. In addressing the application of Lord Sumption’s analysis to this statute, it was noteworthy that Mr Hollander was unable to say that there was any passage in the Act which would be redundant unless the Act had extraterritorial effect. Mr Hollander’s central point was that it is apparent from the terms of the Act, in particular sections 1(6) and 7(3), that the draftsman was contemplating a position where this Act would apply to any case in the English courts where the pre-requisites in sections 1 (1) and 1 (6) were satisfied. In the end, this was a compelling matter of construction of the statute.

Conclusions

52. I approach this question of statutory construction with three principles in mind. Firstly, what is the ordinary and natural meaning of the language considered in context and thus the presumed intention of Parliament? Secondly, what was the purpose of the legislation, so far as that can properly be ascertained? Thirdly, in the context of this case, does the approach laid down by Lord Sumption in *Cox* enfranchise an interpretation of the statute which gives it extraterritorial effect? Clearly, the three principles will interact.
53. The fundamental approach to the interpretation of statutory language was laid down by Lord Reid in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613, as cited and approved by Lord Nicholls of

Birkenhead in the famous passage from *R v Environment Secretary Ex parte Spath-Holme Ltd* [2001] 2 AC 349, at 396G/397A, where he said:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the “intention of Parliament” is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the Minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of the majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such and such a meaning “cannot be what Parliament intended”, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 “we often say that we are looking for the intention of Parliament but that is not quite accurate. We are seeking the meaning of the words which Parliament used.”

54. Adopting that approach, I turn to the 1978 Act. Entitlement to the contribution claim under the Act, provided for in section 1 (1), is dependent upon threshold provisions in section 1 (2), (3) and (6). Since the instant primary case is a tort case, I shall illustrate the provisions by referring to the “person[s]” in these subsections as “the claimant”, “tortfeasor one” and “tortfeasor two”. Beginning with section 1 (6), the liability of tortfeasor one and tortfeasor two to the claimant is confined to “liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage”. This threshold condition arises in respect of each of tortfeasor one and tortfeasor two. In my view, the second part of section 1 (6), in making the qualification which follows, (“ it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales”) makes two things clear, as a matter of ordinary language. Firstly, the relevant liability must have been or must be able to be established in an English court, but not necessarily by an application of English law. For example, in a case where the application of private international law has or would result in a ruling that an English court would be the *forum conveniens*, then the threshold condition would be satisfied even though the English court would apply foreign substantive law. It seems to me that the phrase “any issue” cannot naturally be read down to mean “any single issue”. On the face of it, therefore, the necessary threshold condition could be established where an English court gave or would give

judgment against tortfeasor one and tortfeasor two, even when applying foreign law to all the issues in the case(s).

55. Mr Dougherty's argument is that this question does not even arise, since by operation of first principles, the Act cannot apply where by operation of private international law, the proper law of a contribution claim is foreign law. This seems to me a problematic argument, if I am right about the natural meaning of the language in section 1 (6). It is not a straightforward question of the Act providing a "complete code". The question is crisper. Provided liability can be established against tortfeasor one and tortfeasor two, so as to gain judgment in an English court whether or not any issue or issues are decided by foreign law, the threshold condition for a contribution claim is fulfilled. If by its own terms the Act applies in relation to the principal liability of the tortfeasors, even where the proper law of the tort is foreign law, then why should a consequential contribution claim where the proper law of the claim is foreign law, fall outside the ambit of the Act? I shall return to this point when considering a purposive interpretation of the statute, but as a matter of ordinary language it seems to me the meaning of section 1 (6) is tolerably clear.
56. Mr Hollander in his written submissions emphasised that section 1 (2) and (3) address entitlement to claim and liability for contribution notwithstanding the expiry of the limitation period. He submits that section 1 (3), in distinguishing limitation provisions "which extinguish the right" must be a reference to foreign law provisions, whereby limitation provisions go beyond barring the remedy and extinguish the right to claim itself. However, in the course of oral argument, Mr Hollander conceded that there are some periods of limitation within English law that also extinguish pre-existing rights.
57. In my view, the language of section 2 (3) adds little illumination to the issue in question. In limiting the amount of contribution required to be paid to the amount to which recovery by the claimant against tortfeasor 2 would be confined, by English or foreign law, if litigated before an English court, this provision appears to me simply consistent with the language of section 1. Contribution claims which are not enfranchised by section 1 cannot be enfranchised by section 2. Section 2 (3) does not clarify the ambit of the Act.
58. In considering the language of section 7 (3), the appellant argues that the phrase "the right to recover contribution in accordance with section 1" means that the subsection only applies when section 1 applies, and cannot help as to the starting point, in other words the ambit of section 1. In Mr Dougherty's submission, this provision does nothing more than specify that the statutory right to contribution, where it arises, does not supersede an express contractual right to contribution, existing rights to indemnity or express contractual provisions regulating or excluding contribution.
59. Mr Hollander, by contrast, places great emphasis on section 7 (3). He says that since the right to recover contribution under the Act "supersedes any right other than an express contractual right to recover contribution" otherwise than under the 1978 Act, the Act therefore provides for foreign law rights (e.g. right under German proper law) to be superseded. An example might be a rule under Ruritanian law, being the proper law, that any right to contribution be limited to 50%." Mr Hollander says that Chadwick J was therefore right to hold this section overrode any such foreign law.

60. If Mr Hollander is correct that the phrase “any right” under section 7 (3) includes a right under foreign law, then it seems to me that is a powerful argument in his favour. The supersession by the statutory right to contribution under the first part of the subsection must be read alongside the limits on the supersession by the statutory right in the second part. Setting aside questions of indemnity, the supersession by the statutory right is not affected by a “provision regulating or excluding contribution” other than one which is an “express contractual” provision.
61. I find it hard to see why this should not be thought to include provisions of foreign law. We were given no examples of an English ‘provision’ other than a contract which might have this effect. But of more importance may be the terms of s1(6) which we have already seen. The liability of both tortfeasors to the claimant, provided that is “established ... in England”, may be “determined” by foreign law. Given that is so, it seems to me that it would be surprising, and not a natural use of language, if Parliament is not taken to have had in contemplation that foreign law ‘provisions’ affecting indemnity might arise. If that was contemplated by Parliament, then the natural reading of s7(3) is that such provisions fall outside the exclusions and within the ‘supersession’ provided by s7(3).
62. The statute is certainly somewhat tortuous in its structure, but on close consideration, it seems to me that analysis of the language of the Act favours the Respondent’s interpretation.
63. I turn to consider the purpose of the statute. I accept that it is a powerful comment on the part of the appellant that Lord Scarman as the promoter of the Bill spoke as he did. But it seems to me no more than a comment. Even so distinguished a jurist fulfilling this function in Parliament was not interpreting the Bill following argument or judicial consideration. It is a fair comment to say that he cannot have had in his mind extraterritorial effect. However, it does not seem to me that the matter goes beyond a question of comment
64. Looking at the provisions themselves, it seems to me that the purpose of Parliament is tolerably clear. At the forefront, was the object of simplifying and standardising contribution claims, whatever form of liability gave rise to the common liabilities to the “person... [suffering]... damage”. This was the main thrust of the interpretation of liability and damage set out in section 6 (1). As the clear purpose for change in domestic law, this was well articulated by the Law Commission in paragraphs 73 and 74 of the Working Paper No 75, see paragraph 9 above. As Professor Briggs accepted in his 1995 article quoted in paragraph 32 above, there is an ‘immediate attraction’ to that result. Parliament then had in contemplation the two important criteria by which the liability of those in respect of whom contribution might arise to be established. Section 1 (6), stipulating that liability must be capable of being established in England, also stipulated that it might be established on the basis of foreign law. If so established in a given action, there was an obvious question as to what law would govern contribution claims in such cases. The Act is wholly directed to contribution claims. It would have been simplicity itself to provide that where the proper law of the contribution claim was a foreign law, then the statutory right did not arise. Parliament set no such limit or exclusion. As we have seen, in section 7 (3) much narrower limits were set. In my judgment, the natural interpretation of the language of the Act sits well alongside a presumed purpose of a standardisation and simplification of limits on the statutory claim for contribution which otherwise would be affected by foreign law.

As Chadwick J identified in *Hashim*, there would otherwise arise the lacuna or ‘defect’ that principal liability could be established in an English court against tortfeasor 2, including establishment of principal liability according to foreign law, but a contribution claim could be defeated. Whilst I accept Mr Dougherty’s comment that there is no inherent defect in German law, it is nevertheless logical, in a standardising and simplifying statute, that such considerations should be set aside once it is shown that primary liability can be established, if necessary by reference to the relevant foreign law.

65. Finally, I turn to the principles laid down in *Cox*. Since the matter was raised in argument, I mention *en passant* the remarks of Etherton LJ in the course of his judgment in the Court of Appeal. In my view no reliance can be placed upon these observations, which were tangential to the reasoning in that decision and were not the consequence of focused argument.
66. I have set out above the essential passages from the judgment of Lord Sumption. Both sides accept the authority of those remarks, although they are strictly *obiter dicta*.
67. Lord Sumption began (in paragraph 27) by quoting with approval Lord Scarman’s observation in *Clark v Oceanic Contractors Inc* that “unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation [is not extraterritorial in effect]”. His further observations are developments of that principle. It is also common ground that the position advanced by the appellant does not involve reliance upon a rule of foreign law that is so objectionable in policy terms that Parliament must be presumed to have precluded its application, in the way contemplated by Lord Sumption in paragraph 34 of *Cox*, which I have quoted above. Therefore the question becomes: is there anything in the language of the 1978 Act “to suggest that its provisions were intended to apply irrespective of the choice of law derived from ordinary principles of private international law”, as Lord Sumption expressed it in the first part of paragraph 29 of his judgment. For the reasons I have already given, I have formed the view that there is. Properly construed, I consider the language of section 7 (3) has that effect.
68. The approach laid down by Lord Sumption in the second part of paragraph 29 only arises, he says, where the statutory language does not suggest extraterritorial effect. At that point one looks for an implied extraterritorial effect, which he says will not arise unless the legislation cannot effectually be applied or its purpose effectually achieved, setting aside the case where the legislation gives effect to policy so significant that Parliament must be taken to have intended that policy. Mr Hollander conceded that the provisions of the 1978 Act could be applied, absent extraterritorial effect. In my view he was right to make that concession. However, it does seem to me that the policy to be construed from the Act, and in particular from section 7 (3), would not be achieved otherwise than through extraterritorial effect.
69. Earlier in this judgment I have summarised the academic commentary on the legislation and on the decision in *Hashim*. It is of great interest, particularly in the construction of such a nice point as here arises. However, like Chadwick and Soole JJ, I too find that the academic commentary and that from the Law Commission cannot in the end be decisive.
70. For those reasons, I would dismiss the appeal.

Lord Justice Phillips:

71. I agree that the appeal should be dismissed for the reasons given by Irwin LJ. I add some observations of my own solely because David Richards LJ, whilst agreeing in the result, takes a different view as to the significance of section 7(3) of the 1978 Act in the analysis.
72. The 1978 Act does not state in express terms that it has extraterritorial effect, so the question which arises is whether such effect is “so plainly to be implied” from its provisions. That entails considering that 1978 Act as a whole.
73. In creating a statutory right of contribution between persons liable for the same damage, the 1978 Act recognises that issues of private international law will arise and makes provision for their effect. Thus section 1(6) provides that the statutory right of contribution under section 1(1) arises notwithstanding that foreign law may govern issues relevant to the liability of one or more of the persons in question. Further, section 2(3)(c) provides that a person whose liability for damages would have been limited or reduced as a matter of applicable foreign law will not be required to contribute a sum greater than the amount of that person’s liability so limited or reduced.
74. In that context, and in agreement with both Irwin LJ and David Richards LJ, it is plainly implicit that the statutory right of contribution under section 1(1) arises regardless of the law which might otherwise have governed such rights between the parties. In my judgment, however, such implication arises not only because of the interplay between section 1(1) and 1(6), but also because the rights of contribution superseded by virtue of section 7(3) must be taken, in the context of provisions which fully recognise the likely relevance of private international law, to include rights of contribution under the otherwise applicable foreign law. The creation of (i) a statutory right of contribution as between persons notwithstanding that the liability of one or more of them arises under foreign law and (ii) the exclusion of other rights of contribution (save for express contractual rights) can and should be read together as giving rise to the plain implication that the 1978 Act has extraterritorial effect.

Lord Justice David Richards:

75. The issue on this appeal is whether section 1 of the Civil Liability (Contribution) Act 1978 (the 1978 Act) creates a statutory cause of action for contribution governed by the Act and hence by English law in a case where, applying the common law rules of private international law, any claim for contribution would be governed by foreign law. Does the 1978 Act in this respect have extra-territorial effect?
76. To take a familiar example, and adopting Irwin LJ’s terminology, the claimant is injured in a car accident in (say) Germany caused by the drivers of two other vehicles, tortfeasor one and tortfeasor two. In any proceedings that might be brought by the claimant against the tortfeasors, whether in Germany or in England, the claims would be governed by German law. Assuming that tortfeasor two were amenable to the jurisdiction of the English court, any claim for contribution brought against him in England by tortfeasor one would likewise, at common law, be governed by German law. This would be so whether the claim was made in proceedings brought by the

claimant against tortfeasor one or against both of the tortfeasors or was made in separate proceedings.

77. The question is whether the 1978 Act applies to a claim for contribution made by tortfeasor one in England and displaces the rights, obligations and limitations to such a claim under German law which would otherwise apply in any contribution proceedings. The effect may significantly enhance the position of tortfeasor one and correspondingly worsen the position of tortfeasor two, even (as in this case) depriving tortfeasor two of an accrued limitation defence and therefore exposing him to a liability which would not arise under the law which would otherwise govern the contribution claim.
78. As Irwin LJ observes, this is a question of statutory construction, to determine the effect in this respect of the 1978 Act. As he also observes, the Act must be construed in the light of the presumption against a statute having extra-territorial effect. This is a longstanding principle of statutory construction, discussed in detail by the Supreme Court in *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379. Like other presumptions applying to the construction of statutes, it requires Parliament to be clear when it wishes a statute to have extra-territorial effect and thereby to provide assurance that Parliament has confronted the issue. Some presumptions, such as those designed to protect the civil liberties of citizens or the independence of the courts, may require language that leaves no room for doubt at all: see *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 1 AC 1787. Others, such as the presumption against extra-territorial effect, may set a less exacting standard.
79. In *Cox* at [27], Lord Sumption cited Lord Scarman's observation in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 at 145 that "unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it", statutes do not have extra-territorial effect. At [29], Lord Sumption said that as regards an implied intention that a statute should apply irrespective of the choice of law derived from ordinary principles of private international law:

"...in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be achieved unless it has extra-territorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to anyone resorting to an English court regardless of the law that would otherwise apply."
80. Given the presumption against the 1978 Act having extra-territorial effect by subjecting to its provisions a claim for contribution that would otherwise be governed by German law, it is for SSAFA as the contribution claimant to identify the basis on which it is said to have such effect. It does so by reliance principally on section 1(1), read with sections 1(6) and 2(3)(c), and on section 7(3). It submits that the express or necessarily implicit effect of these provisions is that any contribution claim brought in England is governed by the 1978 Act. Soole J accepted these submissions.
81. Mr Hollander QC, appearing for SSAFA, supported his submissions with citations from two decisions at first instance of Hobhouse J and Hirst J, and one decision of this court, in which the judges appear to have assumed that contribution claims which

might well at common law have been governed by foreign systems of law were subject to the 1978 Act and in which those parties, represented by distinguished commercial counsel, whose interests might have been served by arguing the contrary did not do so. Mr Dougherty QC, appearing for AKV, relied on Law Commission reports and leading academic texts, including the 12th edition of Dicey and Morris on the Conflict of Laws, which considered that the 1978 Act did not have extra-territorial effect. I am grateful to Irwin LJ for reviewing these judgments and texts. While it might be said that this division of expert opinion suggested that Parliament had not made clear an intention that the presumption against extra-territorial effect was not to apply to the 1978 Act, I have not in the end gained much assistance from these differing views. None of them was the result of sustained adversarial argument or of detailed analysis of the provisions of the Act addressed to this issue.

82. That cannot be said of the only decision directly in point, the decision at first instance of Chadwick J in *Arab Monetary Fund v Hashim* (1994), a transcript of which was provided to us. After a careful review of the provisions of the Act, as well as the first instance decisions and texts referred to above, Chadwick J concluded that the 1978 Act applied to contribution claims brought in England, irrespective of their governing law under English principles of private international law. However, the presumption against extra-territorial effect does not appear to have been the subject of argument before him and it plays no part in his judgment, as no doubt it would have done if a case such as *Cox* had recently been decided. Chadwick J's analysis therefore proceeds without any presumption as to the effect of the Act's provisions. For this reason, I have also found this decision to be of limited assistance.
83. The issue must be decided on a consideration of the terms of the 1978 Act, read in the light of the presumption and the analysis in *Cox*, without reliance on the divided views previously expressed.
84. Reversing the logical order, I will first say something about the implied effect of the 1978 Act. I have earlier cited from Lord Sumption's judgment in *Cox*. He identified the two circumstances in which most, if not all, cases of implied effect would arise. The first was that the terms of the legislation could not effectually be applied, or its purpose effectually achieved, unless it had extra-territorial effect. Mr Hollander accepted that this could not be said of the 1978 Act. The second was that the legislation gives effect to a policy so significant in English law that Parliament must have intended it to apply to anyone having resort to the English courts. The example given in argument and recorded by Lord Sumption at [34] was the exclusion of a rule of foreign law that discriminated in the award of damages on grounds of race or sex. It cannot be said that the 1978 Act embodies any policy of such significance that it can by implication have extra-territorial effect.
85. It is worth noting here that some reliance was placed by Soole J and by Mr Hollander in argument before us on what Chadwick J had said in *AMF v Hashim* about the effect of the 1978 Act in remedying what would otherwise be a defect in English law:

“It would be a surprising defect in the law if the English court, having decided in an action to which A, B and C were party that B and C were each liable to A in respect of the same damage – suffered in, say, a collision between motor vehicles in Ruritania in which the three were involved – and having

assessed that damage, were precluded by the absence of any law of contribution in Ruritania from deciding also how its judgment for that sum against each of B and C should be apportioned *inter se*.”

86. I find myself, with respect, unable to accept this view. The more common example would be of a foreign law of contribution which, while doing justice between the parties, differed in some respects from English law. I find it difficult to say, in a case where the claims of A against the two tortfeasors B and C are governed by (say) German law, that it would be a defect in English law if the contribution claims between B and C were also governed by German law. Indeed, it is not immediately obvious why it should be thought appropriate that such claims should be governed by English law when, under private international law as applied under English law and in accordance with the principles underpinning private international law, they would be governed by German law. In commenting on this point in an article in Lloyd’s Maritime and Commercial Quarterly (1995 at p.437), Professor Adrian Briggs said, correctly in my view:

“There is an immediate attraction to the result reached by Chadwick J. If the court has jurisdiction over [tortfeasor two] (the more so when the claim for contribution is brought in the very proceedings brought by [the claimant] against [tortfeasor one]), the convenience of settling all issues once and for all is plain. But it does not follow that, just because the court has and will exercise jurisdiction to order contribution, it should apply its domestic law to the issue without regard to choice of law.”

87. Nor is there any practical advantage in applying English law to the contribution claim because, in determining the respective liabilities of B and C to A, the English court would in any event be applying German law, on the basis of expert evidence. Moreover, taking the possible but unusual example of the absence of any right of contribution under the applicable foreign law, it is not clear why B and C should obtain rights *inter se* under English law which would not be available to them if, as generally would be the case, A’s claims were proceeding in the courts of the country where the collision occurred.

88. I come therefore to the express terms of the 1978 Act. In my judgment, the critical provisions are section 1(1) and section 1(6), which for convenience I will set out here:

“(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

(6) References in this section to a person’s liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance

with the rules of private international law) by reference to the law of a country outside England and Wales.”

89. Section 1(6) addresses the liability of the two tortfeasors (B and C) to the claimant (A). The first part of the sub-section provides that it is sufficient for a contribution claim by B against C that the liability of each of them to A has been or could be established in an action brought against them in England and Wales. In *Petrolio Brasileiro SA v Mellitus Shipping Inc (The Baltic Flame)* [2001] EWCA Civ 418, [2001] 2 Lloyd’s LR 203, this court established that section 1(6) does not impose a procedural requirement that B could sue C in England and Wales – that would be a matter for the rules governing jurisdiction and the service of proceedings out of the jurisdiction – but is directed to substantive law. What is postulated is liability that is or could be established in English proceedings.
90. The effect of the second part of section 1(6) is that, in applying the requirement of the first part, it is “immaterial” that either or both of A’s claims against B and C may be governed, in accordance with private international law, by a foreign law and may be determined by the English courts in accordance with foreign law.
91. The effect of this provision, in my judgment, is that a contribution claim lies under the 1978 Act (and is thus governed by English law) even though the liabilities to which it relates, that is the liabilities of B and C to A, may both be governed by foreign law. It thus expressly contemplates the situation in the present case, where any liability of SSAFA and of AKV to the claimant will be governed by German law but a claim for contribution will nonetheless lie under the 1978 Act. It might be said that this will be so only if the contribution claim would, under private international law principles, be governed by English law. However, the chances of a contribution claim in such circumstances being governed by English law appear to be small to the point of invisibility.
92. The conclusion, in my judgment, is thus inescapable that the 1978 Act is intended to have extra-territorial effect, in the sense that claims lie under it even though, applying the principles of private international law, they would be governed by a foreign law.
93. While section 2(3)(c) is consistent with this result, it provides little or no independent support for it. It would serve a clear purpose even if it was clear that the 1978 Act did not have extra-territorial effect.
94. Mr Hollander placed greater stress on section 7(3). Read literally, it was capable on its own of excluding, in proceedings brought in England and Wales, contribution claims governed by foreign law. Mr Hollander at first went further: the provision would serve no purpose if it did not exclude contribution claims governed by foreign law. In the course of argument, he retreated somewhat from this position, accepting rightly that there were various rights of contribution at common law and in equity which were superseded by the operation of section 7(3).
95. In my judgment, the answer to the issue on this appeal is not to be found in section 7(3). If, on analysis of the remaining provisions of the 1978 Act, it were found that it did not have extra-territorial effect, section 7(3) could not produce a different conclusion. It is consistent with either conclusion. If the Act did not have extra-territorial effect, it would still have the effect of excluding other rights of contribution

under domestic law. If the Act does have extra-territorial effect, it is properly construed as excluding contribution claims governed by foreign law. It would make no sense for there to be concurrent but inconsistent contribution claims in English proceedings, under the 1978 Act and under foreign law.

96. For the reasons given above, I agree that this appeal should be dismissed.

ANNEX

The 1978 Act: material provisions

1. Entitlement to contribution

- (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
- (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
- (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.
- (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
- (5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.
- (6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

2 Assessment of contribution

...

- (3) Where the amount of damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to –
- (a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;
 - (b) any reduction by virtue of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976 ; or
 - (c) any corresponding limit or reduction under the law of a country outside England and Wales;

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.

6 Interpretation

- (1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)

...

7 Savings

...

- (3) The right to recover contribution in accordance with [section 1](#) above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances; but nothing in this Act shall affect –
- (a) any express or implied contractual or other right to indemnity; or
 - (b) any express contractual provision regulating or excluding contribution;

which would be enforceable apart from this Act (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this Act).'