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changes between the actual and contractual return dates, that may have to be taken into account in increasing or decreasing the owner’s loss of revenue. This will complicate claims. It relies on the benefit derived from the sale being caused by the breach, rather than the breach being the opportunity for it. The sale did not avoid the loss of an income stream. Nor was the sale itself a “benefit”. If there was any “gain” which was “secured” it depended on how the fruits of the sale were used, including during the financial crash, and was far removed from the breach.

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THE SINO-BRITISH TREATY AND THE HONG KONG BOOKSELLERS AFFAIR

Recent events in Hong Kong raise questions which recall the post-war prosecution of the famous Nazi propaganda broadcaster, William Joyce (Joyce v DPP [1946] A.C. 347; [1946] 1 All E.R. 186). Joyce was an American citizen who had acquired a British passport by stating, be it by deliberate misrepresentation or simple mistake, that he had been born a British subject. Pleading his alien status was his strongest defence to a charge of treason committed outside the realm for it would then need to be asked how an alien could be guilty of treason in these circumstances. However, since he had for long lived within the realm and acquired a valid British passport, that defence did not save him. Lord Jowitt L.C., who wrote for the majority in the House of Lords, considered that the true question was not where treason can be committed but by whom (at 357). Their Lordships held that acquiring a British passport, by whatever means, entitled Joyce to the Crown’s protection and thus having sought such protection he owed a reciprocal duty of allegiance to the Crown. The majority of their Lordships considered that this duty of fidelity was owed for as long as the passport remained valid. Lord Porter dissented on the ground that it was for the jury to determine whether William Joyce had renounced British protection by that time, for, while it was assumed that he had entered Germany with it, the passport was never found, and Joyce himself claimed that by then he had decided to become a German citizen. The trial judge had instead directed the jury that the question of Joyce’s continuing allegiance was an issue of law, and because of that Lord Porter would have allowed Joyce’s appeal on the ground that the jury had been misdirected (at 374–382).

A similar issue now arises in Hong Kong under Chinese law, in respect of those Hong Kong Chinese residents whom China has for long considered to be “Chinese Hong Kong compatriots”. In the recent Hong Kong booksellers affair, the police had received various reports last year concerning an eventual total of five missing persons who had disappeared in the period between October and December. All five were connected to the same Hong Kong bookstore. Allegedly, three had disappeared while present on the Chinese mainland, one while in Thailand and, in the final case of Mr Lee Po, from Hong Kong itself. The whole affair received global press coverage amid ample public speculation that Mr Lee in particular had...
perhaps been unlawfully removed to the mainland by the Chinese authorities. Mr Lee denies this but his case culminated in the British Foreign Secretary’s report to Parliament in February this year that, although “the full facts of the case remain unclear”, “our current information indicates that Mr. Lee was removed to the mainland without any due process under HKSAR law”. Mr Hammond concluded that “this constitutes a serious breach” of the Sino-British Joint Declaration (Secretary of State for Foreign and Commonwealth Affairs, Six Monthly Report on Hong Kong, July to December 2015, 11 February 2016, at p.3).

This is the first time the UK Government has publicly declared a treaty breach since the handover. The reader can imagine the reaction in Hong Kong. The Joint Declaration contains the terms of China’s commitments concerning Hong Kong’s governance and they are to last for a period of 50 years commencing on 1 July 1997, the date of China’s resumption of sovereignty. It is the very basis for claiming British treaty rights in Hong Kong until 2047.

The Hong Kong bookstore itself is owned by a publishing company which apparently specialises in a thriving market for titillating, at times admittedly even blatantly fictional, works on the personal lives of China’s political leaders. Things came to a head when Mr Lee Po, who holds a British passport, was alleged to have disappeared from Hong Kong on 30 December last year, one week before Mr Hammond’s visit to Beijing in early January 2016. China’s Foreign Minister, Mr Wang Yi, responded to the press while speaking alongside Mr Hammond by stating that under both Chinese and Hong Kong law Mr Lee is “first and foremost a Chinese citizen” (The Guardian, 5 January 2016). The implication of Mr Wang’s statement is that this matter, as with others past, should not trouble the UK. It recalls a more sweeping Chinese assertion two years ago that Britain has no remaining rights left to press in respect of Hong Kong since all outstanding obligations have been honoured (on which, see Lim (2015) 131 L.Q.R. 348).

However, the latest Chinese statement is more specific and sits uneasily with any blanket denial of British treaty rights. It raises a real but thorny question, about the position of Sino-British dual nationals, whose existence the British and Chinese governments prefer not to admit. That is the first aspect. There is however a second aspect which recalls the famous post-war case involving William Joyce. That case too had concerned penal authority over an “alien” national in connection with a crime committed outside the territorial criminal jurisdiction of the claiming state.

Turning to the first aspect of dual nationality, the problem has to do with the Chinese view that Britain never was a legitimate sovereign power in Hong Kong. As such, it could never have possessed the authority to award British passports to the Hong Kong Chinese in that capacity. At the same time, Chinese law does not recognise dual nationality. Thus, during the Sino-British negotiations the fact that there were more than three million Hong Kong Chinese British Dependent Territories Citizens (BDTCs) under Britain’s Nationality Act of 1981 had to be side-stepped. However, in order to preserve confidence in post-handover Hong Kong, they were to be granted the right to become British Nationals Overseas (BNOs) under the Hong Kong (British Nationality) Order of 1986. Others were granted the right to become British Overseas Citizens (BOCs), a new category for non-Chinese Hong Kong BDTCs instituted at the Hong Kong Indian community’s behest. Since there could be no agreement between Britain and China on the
question of nationality, the UK appended a memorandum to the 1984 Sino-British Joint Declaration, instituting the BNO scheme which entitles holders of British passports to travel and to consular protection except for entry into and protection on the Chinese mainland (United Kingdom Memorandum, 19 December 1984, reproduced in Chan and Lim, Law of the Hong Kong Constitution, 1st edn (2011), at p.993). At the same time, Beijing appended its own separate memorandum declaring BNOs to be Chinese nationals as of 1 July 1997 while still recognising British “travel documents” (as opposed to “passports”) for third-country travel. (See Chan, in Chan and Lim, Law of the Hong Kong Constitution, 2nd edn (2015), at para.5.005; Ghai, Hong Kong’s New Constitutional Order, 2nd edn (1999), at p.157). Neither memorandum forms a part of the Joint Declaration itself and this delicate compromise, of having Chinese nationality existing alongside BNO “status”, has worked until Lee Po’s case.

That compromise leads us to the second, jurisdictional, dimension to the present, strange affair. Here the similarities with Joyce’s case come into focus. In Joyce, uncertainty too had surrounded William Joyce’s British passport but, as the trial judge and the House of Lords had held, what mattered was that Joyce held a valid British passport in his own name at the time he committed the offence. He could therefore be charged with and convicted of treason. It did not matter that he was actually an American citizen. As Lord Jowitt had put it, Joyce was “claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity” (Joyce at 371). In Lee Po’s case, China also claims Mr Lee’s allegiance, notwithstanding his British nationality. Beijing’s claim however was not founded upon any act of Mr Lee in seeking Chinese protection, unlike in Joyce where William Joyce had applied for a British passport (Joyce at 369–371), rather that claim is supported by the Chinese Memorandum’s statement that all Hong Kong Chinese compatriots are nationals of China (Chinese Memorandum, 19 December 1984, second paragraph; reproduced in Chan and Lim, (2011), at p.994). The term “Chinese compatriot” has at least a historical meaning. It is taken to refer to the Chinese overseas under the principle of jus sanguinis. Thus, “Hong Kong Chinese compatriots” refer specifically to the “Hong Kong overseas Chinese”. It is another way of saying that the Hong Kong Chinese have always been Chinese notwithstanding British rule. As with Joyce, the existence of a duty of allegiance is what truly matters. In Mr Lee’s case, however, that allegiance exists not because of what he did but because of what he had omitted to do, for he had chosen not to divest himself of Chinese nationality. The fact that Mr Lee holds a British passport is considered by China to be an insufficient act of renunciation of his Chinese nationality. Presumably the reason would not be very different from the House of Lords’ reason for holding that William Joyce’s treason was insufficient to withdraw him from his allegiance to the UK (Joyce at 371–372). Had Joyce sought British protection by using his passport, he would still have been entitled to it. Similarly, were Mr Lee to apply for a Hong Kong Chinese passport, as he now apparently wishes to do, he would still be entitled to it. Consequently, he would enjoy China’s protection notwithstanding the fact that presently he holds a British passport. That is the whole purpose of the Chinese Memorandum referred to earlier, which states that Mr Lee’s British passport is only a “travel document” (Chinese Memorandum,
19 December 1984, third paragraph). From the Chinese viewpoint, Mr Lee’s BNO passport has no bearing on his true nationality at all.

It remains to be tested whether ordinary Hong Kong Chinese who hold British passports ever gave any real thought to this matter until now. Unlike William Joyce’s case, there will be many who have never been resident on the mainland. Presumably, “Chinese Hong Kong compatriots” hold British passports precisely because they do not wish to possess a Chinese passport, specifically a Chinese passport issued by the Hong Kong authorities to Chinese citizens who have the right of abode in Hong Kong (Hong Kong Basic Law art.154). Such Chinese Hong Kong residents cannot be expected to read diplomatic memoranda appended to an international treaty. Even if they should have they are unlikely to have considered it necessary as a practical matter formally to renounce their Chinese nationality, and even if they did attempt to do so such renunciation may be refused (see PRC Nationality Law of 1980 art.10; Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930 arts 1 and 6).

But because they, like Mr Lee, are considered Chinese nationals “first and foremost”, a subtly ambiguous turn of phrase which only highlights the difficulty during the Sino-British negotiations and China’s rejection of dual nationality, the usual international law rule is that Britain cannot espouse a claim on behalf of such persons against China. In short, the Chinese Minister’s recent statement was a textbook example of the treaty and customary international rule that in cases involving dual nationals one country of nationality cannot espouse a claim on behalf of that national against the person’s other country of nationality (Hague Convention 1930, to which Britain and China are party, art.4; see further, Forcese (2006) 17 E.J.I.L. 369 at 384–385).

Mr Lee now wishes to renounce his British nationality and there is already a suggestion that he should be refused. Such refusal following the Foreign Secretary’s assertion of a treaty breach would not only mire Britain in deeper diplomatic controversy with China, it could unravel the delicate compromise reached during the Sino-British negotiations. Britain’s current position is likely to have been based upon practical necessity, principle or both. Passive British acceptance of the affair would have eroded any British authority left under the Joint Declaration. Amid a widespread public outcry, Britain could not have done less than it did. Lastly, it may be thought that the proper answer to any sweeping denial of British treaty rights lies in pointing to those very aspects of the Sino-British treaty which guarantee the rights of Hong Kong residents and Hong Kong’s autonomy until 2047.

To be sure, nothing prevents China from extending its laws to Hong Kong residents so long as that is limited to mere prescription and does not stretch to actual enforcement action in Hong Kong in violation of a resident’s rights under Hong Kong law. Unlike Joyce’s case, the booksellers’ alleged crime of selling banned books may also be easier to be proven to have occurred at least partly on the mainland. While the Sino-British Treaty does require rights attending upon arrest or extradition to be observed and prohibits any hint of Chinese enforcement action in Hong Kong territory in breach of those rights, such rights under the Sino-British Joint Declaration hold good only in Hong Kong. But they do hold good in Hong Kong; hence the outcry caused by Lee Po’s case.
As it turned out, it was unclear that Mr Lee was ever detained or charged with any crime on the mainland, and he was the only one of the five booksellers who was said to have been “involuntarily removed” from Hong Kong. So where do we go from here?

International law advisors know that the ideal solution is almost always diplomatic. While there continue to be several twists to the story, involving the momentary return to Hong Kong of at least three of the booksellers thus far, with Mr Lee having since returned twice, Mr Lee’s claim that he had entered China voluntarily makes a British treaty objection practically impossible to sustain. All that the Foreign Secretary was left with was this carefully-worded statement to Parliament:

“The full facts of the case remain unclear, but our current information indicates that Mr. Lee was involuntarily removed to the mainland without any due process under Hong Kong SAR law” (Six Monthly Report, February 2016, at p.3).

No international claim can be supported by instinct alone, and the UK appears to have already done all that it can. It has insisted on Hong Kong’s autonomy, the exclusive powers of the Hong Kong authorities and the legal rights of Hong Kong residents within the territory. Beijing, for its part, does not disagree with any of this. As for consular access, the situation is at least complicated by Britain’s own Memorandum to the 1984 Sino-British Joint Declaration, which states that BNOs shall (only) be entitled to “consular services and protection” upon request “when in third countries” (United Kingdom Memorandum, para.(d)). With Mr Lee’s return to Hong Kong, the question of British consular access on the mainland has become moot. The question of British consular access in Hong Kong is governed by the two memoranda with the Chinese Memorandum clearly forbidding it (Chinese Memorandum, 19 December 1984, fourth paragraph), although there is a separate consular agreement between China and Britain which may also be relevant. However, the short point is that there is no suggestion of any controversy there.

That is the diplomatic solution. Three decades of constructive ambiguity on the position of dual nationals, so carefully crafted in 1984, remains intact and any advantage in pressing the argument further must be weighed against it.

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TAKING STOCK OF VICARIOUS LIABILITY

For vicarious liability to exist, two stages must be satisfied. First, there must be a sufficiently close relationship between the defendant and the tortfeasor, the classic relationship being that of employer and employee. Secondly, the tort must be sufficiently connected to that relationship, such as where the tort occurred in the course of a tortfeasor’s employment with the defendant, but not where a tortfeasor goes on a “frolic of their own.” The proper limits of both of these stages were...