Neutral Citation Number: [2022] EWHC 2266 (Comm)

Case No: CL-2020-859

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/10/2022
Date Offered to Parties: 3 August 2022

Before :
HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) CRANE BANK LIMITED
(2) DR SUDHIR RUPARELIA
(3) MS JYOTSNA RUPARELIA
(4) MS MEERA RUPARELIA
(5) MR RAJIV RUPARELIA
(6) MR TOM MUGENGA
(7) MS SHEENA RUPARELIA **Claimants**

- and –

(1) DFCU BANK LIMITED
(2) DFCU LIMITED
(3) MR JIMMY MUGERWA
(4) MR JUMA KISAAME
(5) MR WILLIAM SEKABEMBE
(6) CDC GROUP PLC
(7) NORFINANCE AS
(8) RABO PARTNERSHIPS B.V.
(9) ARISE BV
(10) MR STEPHEN CALEY
(11) MR MICHAEL ALAN TURNER
(12) MR ALBERT JONKERGOUW
(13) MR WILLEM CRAMER
(14) MR OLA RINNAN
(15) MR DEEPAK MALIK **Defendants**

Joe Smouha KC and Jackie McArthur (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **1st and 2nd Defendants/ Applicants**
Georges Chalfoun (instructed by **Jenner & Block London LLP**) for the **3rd 4th and 5th Defendants/Applicants**
Hannah Brown KC, David Caplan and Ben Lewy (instructed by **Greenberg Traurig LLP**) for the **Claimants/Respondents**

Hearing dates: 18-19 May 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……
HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. These are applications by the 1st-2nd and 3rd-5th defendants and applicants ("applicants") issued on 26 October 2021 for orders declaring that the English courts have no jurisdiction over the claim against them and setting aside permission to serve these proceedings on them out of the jurisdiction. The remaining defendants have conceded jurisdiction and have filed Defences in response to which the claimants have filed Replies.

2. Before a court permits jurisdiction to be asserted against a party located outside England and Wales it must be satisfied that (i) there is a serious issue to be tried as between the claimant and the relevant defendant, (ii) there is a good arguable case that the claim passes through one or more of the jurisdictional gateways set out in in PD6B paragraph 3.1; and (iii) England and Wales is the most appropriate forum for the dispute to be determined – see Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7; [2012] 1 WLR 1804.

3. On these applications, the applicants do not suggest that the gateway or forum requirements have not been established. They contend however that the serious issue to be tried requirement has not been demonstrated, because:

    i) The claim is founded upon a foreign Act of State and the Courts of England and Wales have no jurisdiction in relation to claims that depend on such acts by operation of the common law foreign Act of State rule ("Act of State Issue");

    ii) The parts of the claim that rely on an unlawful means conspiracy have no real prospect of success because there is no pleaded basis which establishes, or from which it can properly be inferred that, the defendants had the required knowledge of the unlawful means relied on ("Knowledge Issue"); and

    iii) In relation to the 3rd-5th defendants:

        a) The claim depends on acts done by them in their capacity as directors of the 1st defendant in the performance of their constitutional duties as such, which is submitted to be an insufficient basis on which to found claims in unlawful means conspiracy and/or dishonest assistance of a breach of trust ("Constitutional Duties Issue"); and

        b) The allegations of guilty knowledge to be inferred from primary alleged facts is an inadequate foundation for allegations of dishonesty or fraud against them ("D3/5 Knowledge Issue").

Background

4. Crane Bank Limited ("CBL") was, until 2016, one of Uganda's largest commercial banks. It was regulated by Uganda's central bank, the Bank of Uganda ("BoU").

5. In 2016-2017, the BoU, in exercise of its statutory and regulatory powers, took over management of CBL, then closed it and sold off some of its assets and liabilities to the 1st defendant. The claimants (CBL and some of its shareholders) contend that this sale, together with various side agreements, was a sale of CBL's assets and liabilities at a "*gross*" undervalue in furtherance of a corrupt scheme carried into effect by the BoU using its statutory and regulatory powers in the way I have described. In these proceedings, the claimants allege against the defendants both that they participated in an unlawful means conspiracy and provided dishonest assistance in breach of trust and/or of fiduciary duty. In addition, the claimants allege unconscionable receipt against the 1st defendant. The claims are quantified at over £170m. The claimants accept that their claims are all governed by Ugandan law.

6. The applicants are respectively the purchaser of CBL's assets and liabilities (1st defendant), its parent company (2nd defendant) and certain former or current directors of the 1st defendant (the 3rd to 5th defendants). The remaining defendants were directors of, or direct or indirect shareholders in, the 1st defendant.

7. Mr Smouha KC characterises the claim in his skeleton submissions as being "*... essentially an allegation, by a Ugandan bank, that the Central Bank of Uganda acted contrary to Ugandan law in the way it exercised its statutory and regulatory bank resolution powers, which should have been exercised in the public interest but instead were exercised to benefit certain individuals in the BoU and those associated with them ...*" and submits that in consequence the claim is bound to fail by application of the common law foreign Act of State rule.

The Act of State Issue

The Applicable Principles

8. Whether a serious issue to be tried has been demonstrated by the claimant is to be tested on an application of this sort by applying the summary judgment test – see Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd (ibid.) *per* Lord Collins at paragraph 71. In relation to issues of law, when applying that test, a court will generally resolve short points of law or construction where it has all the evidence necessary for a proper determination of that issue – see Easy Air Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), as summarised and approved by the Court of Appeal in TFL Management Services Ltd v Lloyds Bank Plc [2013] EWCA Civ 1415 at paragraph 26 (vii) – but not generally ones that are concerned with controversial questions in developing areas – see Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd (ibid.) *per* Lord Collins at paragraph 84.

9. The scope of the foreign Act of State rule is now well established. Subject to various exceptions and limitations, to which I refer in more detail below, courts in this jurisdiction will not adjudicate on the lawfulness or validity, under its own laws, of an executive act of a foreign state, performed within the territory of that state – see "Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central

Bank of Venezuela [2022] 2 WLR 167 ("Maduro") *per* Lord Lloyd-Jones at paragraphs 135 and 181(2)(a). Lord Sumption summarised the rule in Belhaj v Straw [2017] AC 964 at paragraph 228, as being that "*... English courts will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law ...*". Lord Neuberger PSC (in a judgment agreed with by three other Supreme Court Justices) in the same case summarised the principle in three rules. The one relevant to this case is "*... that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state ...".* The applicability of this rule does not depend upon who the parties to the claim are because, as Lord Neuberger observed at paragraph 118, the rule *"... applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully*" and because it operates *"... by reference to the sovereign character of the conduct which forms the subject matter of the proceedings*" - see Maduro *per* Lord Lloyd-Jones at paragraph 135. It is therefore immaterial that the BoU is not a party to these proceedings.

10. The rule is subject to at least the exceptions and limitations identified by Lord Lloyd-Jones in Maduro at paragraph 136. There is a suggestion in at least one of the later authorities that the list may be "*non-exhaustive*". It is not necessary for me to consider that further in this case because no reliance is placed by the claimants on any exception not in the list set out by Lord Lloyd-Jones, other than a point concerning Article 6 of the European Convention on Human Rights ("ECHR") to which I refer at the end of this part of this judgment.

11. Three of the limitations and exceptions identified by Lord Lloyd-Jones are relied on by the claimants. They exclude the application of the rule respectively where:

    i) The conduct of the foreign state is in breach of clearly established rules of international law, or is contrary to English principles of public policy – see Maduro *per* Lord Lloyd-Jones at paragraph 136(2) ("the Public Policy Exception");

    ii) The conduct of the foreign state is of a commercial as opposed to a sovereign character – see Maduro *per* Lord Lloyd-Jones at paragraph 136(4) ("the Commercial Activity Exception"); or

    iii) The only issue is whether certain acts have occurred and the court is not asked to inquire into them for the purpose of adjudicating on their legal effectiveness ("the Kirkpatrick Exception") – see Maduro *per* Lord Lloyd-Jones at paragraph 136(5).

12. The claimants submit that I should refuse to determine the foreign Act of State point at all on this application, applying the principles summarised earlier, on the ground that its scope is a controversial question in a developing area. I reject that submission for the following reasons.

13. Firstly, I consider the claimants' comment, in paragraph 22 of their written submissions, that the foreign Act of State doctrine "*… has recently been described by the Supreme Court as "one of the most difficult and most perplexing topics which, in the field of foreign affairs, may face the municipal judge in England": see* ***Belhaj v Straw*** *[2017] AC 964 at §33*" as an over exaggeration. The underlined text is a quote by Lord Mance

in the introductory part of his judgment in Belhaj v Straw (ibid.) from a text book published in 1986. That was well before the comprehensive consideration and common formulation of the rule both in the result in Belhaj v Straw (ibid.) itself and subsequently by the Supreme Court in Maduro.

14. Secondly, each of the cases relied on by the claimants in paragraphs 23 and 24 of their written opening submissions were decided years prior to Belhaj v Straw (ibid.) and Maduro and thus before the elucidation provided by those cases and in particular Maduro. For those reasons they provide no support for the suggestion that the rule is either controversial or developing in any relevant sense.

15. Finally, but most importantly, the general principles have now been set out clearly and comprehensively by the Supreme Court in Maduro. Having stated the general principle at paragraph 135 and the limitations and exceptions to it in paragraph 136, Lord Lloyd-Jones concluded his judgment at paragraph 181(2) by stating the law to be that:

> "(a) There exists a rule of domestic law that, subject to important exceptions, courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state.
>
> (b) There exists a rule of domestic law that, subject to important exceptions, courts in this jurisdiction will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state."

I refer to the first of these rules as "Rule 1". Rule 1 is what is sometimes referred to as Lord Neuberger's Rule 2.

16. In my judgment, following Belhaj v Straw (ibid.) and Maduro, whether a claim can be disposed of summarily by reliance on these rules will now generally be a fact and evidence sensitive issue applying the rules and the exceptions and limitations set out by Lord Lloyd-Jones in Maduro. It is not a question that can or should be postponed to trial simply because it engages Rule 1.

17. In this case the three broad issues that arise are (a) whether the acts complained of by the claimants as actions by the BoU were acts by the Ugandan executive; (b) whether those acts are sovereign or governmental acts and (c) whether any of the limitations or exceptions relied on by the claimants apply.

The Claimants' Substantive Case

18. It is agreed that I should proceed on the basis of the amended Particulars of Claim ("APC") even though the amendments that have been permitted have been made after permission had been obtained to serve these proceedings on the applicants out of the jurisdiction. It is common ground that it is to be assumed that the claimants' factual case is correct for the purpose of resolving these applications.

19. It is necessary to start with the allegedly corrupt scheme at the heart of the claimants' case. As summarised at paragraph 8(c)-(e) of the APC it is that:

> "(c) The Defendants were, together with the BoU and/or its officers and/or agents (who are unknown to the Claimants save as appears below), each a party to a corrupt scheme in relation to the takeover and resolution by the BoU, purportedly pursuant to its statutory powers under the FIA, of CBL during 2016 and early 2017 (the "Corrupt Scheme"). The aim of the Corrupt Scheme was to take control of a Ugandan bank and sell it, or in the event, its assets and liabilities, for corrupt purposes…
>
> (d) Notwithstanding CBL's strong financial position, and despite having approved CBL's audited accounts only three months earlier, in July 2016 the BoU asserted that CBL was suffering from a serious capital deficit. The BoU then took a series of actions which ultimately led to CBL being placed into receivership immediately prior to, and in order to enable, the sale of some of its assets and some of its liabilities to DFCU Bank under a Purchase of Assets and Assumption of Liabilities Agreement dated 25 January 2017 (the "P&A Agreement").
>
> (e) The execution of the P&A Agreement, and the steps taken thereafter to put it into effect, were the culmination of the Corrupt Scheme. The P&A Agreement represented a sale of CBL's assets and liabilities at a gross undervalue and followed a sham bidding process orchestrated by the BoU, by its officers and/or agents, in breach of trust and of its and/or their fiduciary duties to CBL and of the provisions of the FIA and in abuse of office."

The claimants' case depends on allegations that, in furtherance of the allegedly corrupt scheme, the BoU (a) ordered CBL to raise capital - see paragraphs 14 and 15(b) of the APC; (b) withdrew authorisation from CBL to carry on financial business when it did not or could not raise the additional capital – see paragraph 15(a) of the APC; (c) directed it how to manage its financial affairs – see paragraphs 15(a), (d) and (e) of the APC; (d) placed CBL into statutory management – see paragraph 21 of the APC; and (e) finally transferred CBL from statutory management to receivership, after which the impugned sale took place - see paragraphs 39 and 46 of the APC.

20. It is alleged by the claimants, therefore, that the BoU exercised its powers first to weaken CBL, then to take over its management and then to close it and sell its assets – see paragraphs 8(c) and (d) of the APC – and did so unlawfully as part of a corrupt scheme – see paragraphs 8(c) and (e) of the APC.

21. The applicants submit that (i) the BoU is part of the executive of the Ugandan state, (ii) the claim against them in unlawful means conspiracy, dishonest assistance and knowing receipt is for alleged wrongs by the BoU against CBL in exercise by it of its statutory powers and regulatory functions in its own jurisdiction and (iii) the claim against them cannot succeed unless this court concludes that the BoU's acts were

unlawful as a matter of Ugandan law. They submit therefore that this claim is bound to fail applying Rule 1, because none of the exceptions and limitations on which the claimants rely are realistically arguably of any application to the facts as alleged by the claimants.

The BoU as Part of the Executive of the Ugandan State for the Purposes of Rule 1

22. The first issue that arises is whether the BoU is part of the executive of the Ugandan state in relation to the events relied on in the APC. In my judgment this issue can safely be resolved in favour of the applicants even on an application of this sort.

23. The claimants maintain that it is realistically arguable that the BoU is not part of the executive of the Ugandan state because it is subject to special provisions within Article 162 and following of the Constitution, and is not mentioned in the section of the Constitution concerned with the executive branch of government. I do not agree.

24. In these proceedings the claimants allege that the BoU has exercised its statutory powers corruptly so as to deprive CBL of its or most of its assets. Those powers and the exercise of them are governmental in nature. Banking is a function or service for which the Government of Uganda is exclusively responsible under Uganda's Constitution - see Article 189(1) of, and paragraph 3 of the Sixth Schedule to, the Constitution. By Article 161(1) of the Constitution it is provided that the BoU is "… *the central bank of Uganda* …" and by Article 162(1)(c) of the Constitution, one of the functions of the BoU is stated to be to "… *encourage and promote economic development and the efficient utilisation of the resources of Uganda through effective and efficient operation of a banking and credit system* …". Finally, by Article 162(3), "(*s)ubject to the provisions of this Constitution, Parliament may make laws prescribing and regulating the functions of the Bank of Uganda*." Parliament has exercised that power by passing first the Bank of Uganda Act 1993, then the Financial Institutions Act 2004 ("FIA"), one of the purposes of which is expressly stated to be "… *to provide for the regulation, control and discipline of financial institutions by the Central Bank* …", which is defined as being the BoU – see section 3. The powers exercised by the BoU that form the subject matter of this claim are the subject of Parts VIII, IX and X of the FIA.

25. The claimants rely on Article 162(2) of the Constitution, by which the BoU is required to "… *conform to this Constitution but shall not be subject to the direction or control of any person or authority* …". In my judgment that does not impact on the issue I am now considering, particularly when considered together with the other factors to which I have so far referred. That the BoU enjoys operational independence is not material for present purposes because the powers that it is alleged were exercised unlawfully were powers conferred on it for the purpose of carrying out what are governmental functions on behalf of the Ugandan state within Uganda's territorial borders. The position is no different from that of the judiciary, which Lord Justice Diplock described in Attorney General v Buck [1965] Ch. 745 at p.770 as "… *the judicial branch of the United Kingdom Government*…" – see the quotation in paragraph 127 of Calver J's judgment in Surkis and others v Poroshenko and another [2021] EWHC 2512 (Comm). That is so notwithstanding the independence of the judiciary from the executive of the state.

26. It was suggested that this conclusion was one that was not available at least at this stage in light of the conclusions of the Court of Appeal in Trendtex Trading Corp. v Central Bank of Nigeria [1977] QB 529 *per* Lord Denning MR at 560G. I do not agree. That case is not relevant to the foreign Act of State doctrine that has been comprehensively reconsidered and clarified since 1977, most recently by the Supreme Court in Maduro. It was concerned with state immunity issues that are now, but were not then, encoded by the State Immunity Act 1978. In any event, that case was not ultimately decided on the basis that the Central Bank of Nigeria could not be or was not part of the executive of the state by either Lord Denning MR or Stephenson LJ – see 560H and 575H. That case was concerned with an irrevocable letter of credit issued by the Central Bank of Nigeria and was resolved on the basis that it was an ordinary commercial transaction for which there was no immunity from suit.

Were the Actions of the BoU Acts Within the Scope of Rule 1 as Qualified by the Limitations and Exceptions Identified in Maduro?

27. The claimants contend that the acts of which complaint is made in the APC fall outside the scope of Rule 1 relying on the principle that commercial transactions or other acts of private law character are excluded from the scope of Rule 1.

28. Where a claim is started concerning property seized by the government of the foreign territory in which it is situated (and that is what in substance is alleged in this case), the court will not examine whether the foreign government concerned acted validly or not within that government's own domestic laws – see Piramal v Oomkarmal (1933) 60 LR Ind App 211 and Reliance Industries Ltd v Union of India [2018] EWHC 822 (Comm);[2018] 2 All ER (Comm) 1090 *per* Popplewell J (as he then was) at paragraph 105, cited with approval by Lord Lloyd-Jones at paragraphs 126 and 130 of his judgment in Maduro – and whether that act is governmental as opposed to private or commercial depends on its juridical character not its purpose or underlying motive or legality – see Kuwait Airways Corporation v Iraqi Airways Co (No 1) [1995] 1WLR 1147 *per* Lord Goff at 1160; and Benkharbouche v Embassy of the Republic of Sudan [2017] UKSC 62; [2019] AC 777 *per* Lord Sumption at paragraph 8. Rule 1 applies (subject to the exceptions and limitations referred to by Lord Lloyd-Jones in Maduro) to the exercise of powers that are inherently governmental. The acts of a state's central bank, when exercising regulatory and supervisory powers conferred on it by the domestic laws of that state for the purpose of enabling it to manage, regulate and supervise the banking and financial system of that state are such acts, at least when carried out within the territorial borders of that state.

29. I turn now to the acts relevant in these proceedings. In this case all the relevant acts took place in Uganda. None of the acts could have been carried out by a private citizen in Uganda. Each of the acts relied on by the claimants was an act that could only be carried out by the BoU pursuant to the statutory supervisory and regulatory powers referred to earlier. Whether such acts were unlawful according to the governing law of the dispute is neither here nor there – the acts of which complaint is made were executive acts that were and could only have been carried out by the BoU using its statutory powers.

The Commercial Activity Exception

30. I am willing to accept that the act of selling assets was an act that at least realistically arguably was private or commercial but that does not assist. That might be relevant to a claim as between the buyer and the BoU as vendor but that is not this case. This is a claim by an allegedly dispossessed former owner or its connected parties, formulated exclusively in unlawful means conspiracy, dishonest assistance and unconscionable receipt. The sale came only after the takeover of CBL during 2016 and early 2017 by the BoU, pursuant to its statutory powers under the FIA. It is no answer to say that private individuals can enter into corrupt arrangements. What is critical is the nature of the corrupt scheme alleged. In this case it is alleged that the BoU as an executive organ of the state used its statutory and regulatory powers unlawfully to facilitate the sales at an undervalue. That is something that a private individual could not do. That is only something that the BoU as part of the executive of the Ugandan state could do by reason of the powers conferred on it by the Constitution and legislation referred to earlier. It is only if the takeover by the BoU, pursuant to its statutory powers under the FIA, of CBL during 2016 and early 2017 is held to be unlawful that this claim can succeed.

The Kirkpatrick Exception

31. It is not realistically arguable that this claim comes within the Kirkpatrick Exception because the claim as formulated involves a direct attack on the lawfulness and validity of BoU's conduct or, as it was put by Lord Sumption in Belhaj v Straw (ibid.) at paragraph 240, the lawfulness of that conduct is "… *part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it* …". Lord Lloyd-Jones preferred the formulation adopted by Rix LJ in Yukos Capital Sarl v OJSC Rosneft Oil Company (No.2) [2012] EWCA Civ 855; [2014] QB 458 at paragraph 109, where it was said that the foreign Acts of State in issue must lie at the heart of the case and must not be "…*merely ancillary or collateral aspersion* …" – see Maduro at paragraph 151-152. However in this case, as in Maduro, it is not necessary to decide whether there is any difference between the two. On the basis that the Kirkpatrick test favoured by Lord Sumption is arguably conceptually narrower than that favoured by Rix LJ and Lord Lloyd-Jones, I am nonetheless satisfied to the standard that applies on an application of this sort that the Kirkpatrick test is satisfied and the contrary is not realistically arguable.

The Public Policy Exception

32. The factual basis for the claimants' reliance on this exception is based on an assertion that it is English public policy to combat and not give legal protection to corrupt practices. If such a policy exists, it will require a trial to determine if the scheme the claimants allege existed when the purpose of the rule is to deprive the court of jurisdiction to examine such issues. That will involve an English court enquiring into and passing judgment on the activities of part of the executive of a foreign state, carried on within the borders of that state. It is because that is the effect of the exception that caution is required before concluding that this exception applies.

33. No authority has been cited that suggests the existence of such a policy in this context. To date public policy has only been engaged in relation to grave infringements of fundamental human rights and breach of a group of international legal norms, the

common feature of which is that they are accepted as binding by all states. I accept that this is a category of norms that by its nature will change or develop over time. However it is necessary to note the very confined nature of the rights concerned. This was something that Lord Hope in particular focussed upon in Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19; [2002] 2 AC 883, where he said at paragraph 140:

> "The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated."

The emphasis was on respect for the Act of State rule and on the need for care to ensure it was not undermined. In Yukos Capital Sarl v OJSC Rosneft Oil Company (ibid.) Rix LJ said of this issue at paragraph 72:

> "…it should be said that the exception where English public policy is concerned … has not as yet recognised expropriation without compensation as having been outlawed by clearly established international norms."

The only example of a case where a court in England has decided otherwise is Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) (ibid.) but that case was extreme – as Lord Nicholls put it in paragraphs 28-29 of his opinion:

> "… RCC Resolution 369 was not simply a governmental expropriation of property within its territory. Having forcibly invaded Kuwait, seized its assets, and taken KAC's aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait's existence as a separate state. An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today.
>
> 29. … A breach of international law of this seriousness is a matter of deep concern to the worldwide community of nations . . . Such a fundamental breach of international law can properly cause the courts of this country to say that, like the confiscatory decree of the Nazi government of Germany in 1941, a law depriving those whose property has been plundered of the ownership of their property in favour of the aggressor's own citizens will not be enforced or recognised in proceedings in this country. Enforcement or recognition of this law would be manifestly contrary to the public policy of English law …"

34. As I have said earlier, I accept Ms Brown KC's submission that on an application of this sort, a court should not attempt to resolve controversial questions in a developing area. However in my judgment that principle does not apply in the circumstances of

this case to the point I am now considering. No rule of international law relevant to corruption has been identified as triggering the exception I am now considering, much less one that can be said to engage English public policy. It is clear from the statements set out above that the exception is a narrow one that must not be allowed to defeat Rule 1 and the *rationale* for it, which is to prevent English courts from enquiring into allegations of wrongdoing alleged to have been committed by foreign states in their own territory. It is clear that as recently as 2012, the Court of Appeal concluded that English public policy had not yet recognised expropriation without compensation other than in very extreme circumstances as engaging public policy. Since then the Act of State doctrine has been considered by the Supreme Court in Belhaj v Straw (ibid.) and Maduro. The former was concerned with the public policy exception. There is nothing within the judgments in either of these cases that suggest a different approach from that adopted in Yukos Capital Sarl v OJSC Rosneft Oil Company (ibid.) should be adopted now. In my judgment the exception I am now considering is not engaged in this case because there is no evidence of a relevant developing area of international law.

35. After completion of the hearing, I was sent the judgment of Cockerill J in Federal Republic of Nigeria v JPMorgan Chase Bank, NA [2022] EWHC 1447 (Comm). No submissions specific to this case were advanced by reference to this judgment and I consider it is of no relevance to the issues I have to decide in this case because it was concerned with whether Rule 1 applies where a state requests that a court adjudicate on its own acts. That issue does not arise in this case, nor does the other issue in that case concerning enforcement of a contract to pay a bribe.

European Convention on Human Rights

36. After the applicants had filed their skeletons, the claimants for the first time suggested that the ECHR impacted on the issue I am now considering. In essence it is argued by Ms Brown that the application of the foreign Act of State doctrine would breach ECHR Article 6, or at least realistically arguably would do so.

37. I have no hesitation in rejecting this submission. Article 6 is concerned with procedural fairness, not the creation of substantive rights. Rule 1 operates as a substantive limitation – see Belhaj v Straw (ibid.) *per* Lord Mance at paragraphs 11(v)(b) and 110, where he held that

> "Foreign act of state … operates, even under the case law of the European Court of Human Rights, as a substantive bar to liability or adjudication: see Roche v United Kingdom (2005) 42 EHRR 30 and Markovic v Italy (2006) 44 EHRR 52). On this basis, foreign act of state, even if it had been otherwise applicable, would not engage Article 6."

Lord Sumption agreed with this analysis at paragraphs 282-283, where he held that generally the foreign Act of State rule operates as a limitation on the subject matter jurisdiction of the English court and in Markovic v Italy (ibid.) the European Court of Human Rights ("ECtHR") had applied the distinction between substance and procedure and concluded that Article 6 was not engaged where the relevant domestic law was concerned with the extent of the domestic court's powers.

38. I do not accept Ms Brown's submission that Lords Mance and Sumption misunderstood the ECtHR authorities to which they referred or that a first instance judge should proceed on that basis to ignore the obiter view of a majority of the Supreme Court on an issue such as this, nor do I accept that the Court of Appeal's view is to be preferred given that it was not referred to the authorities to which Lords Mance and Sumption referred. The decision of the Supreme Court in Benkharbouche v Embassy of the Republic of Sudan [2017] UKSC 62; [2019] AC 777 is concerned with state immunity, which is a procedural immunity, not the foreign Act of State rule and so is immaterial to the issue I am now considering.

Conclusion

39. In my judgment the applicants are entitled to succeed on the Act of State Issue. That means that it is not necessary for me to consider further the other issues that arise. However I will address them briefly given they were fully argued.

Knowledge and D3/4-5 Knowledge Issues

40. In order to succeed in a claim based on unlawful means conspiracy, it is necessary to demonstrate (or in the context of an application such as this to show a realistically arguable case) that the defendants knew or turned a blind eye in a legally relevant way to the facts that made the acts of (in this case BoU and its relevant officials) unlawful. I do not understand this principle to be in dispute between the parties. So far as the first and second defendants are concerned, this point is advanced by reference to the allegations of unlawful conduct pleaded in paragraph 69(ca), (d), (e), (i) and (j). These defendants submit that although the claimants allege that these defendants turned a blind eye to the misconduct alleged in those paragraphs, the allegations are bound to fail because to make good such an allegation it is necessary to plead (and at trial prove) that in relation to the facts relied on, the defendants had taken a deliberate decision to avoid obtaining confirmation of those facts in circumstances where they had "*... good reason ...*" to believe they were, or were likely to be, as alleged – see Manifest Shipping Co v Uni-Polaris Insurance Co [2001] UKHL 1;[2003] 1 AC 469 *per* Lord Scott at 116 and Stanford International Bank Ltd v HSBC Bank plc [2021] EWCA Civ 535; [2021] 1 WLR 3507 per Sir Geoffrey Vos MR at paragraph 41, where he summarised the applicable principles as being:

> "… the imputation of blind-eye knowledge requires two conditions to be satisfied: (i) the existence of a suspicion that certain facts may exist, and (ii) a conscious decision to refrain from taking any step to confirm their existence … The suspicion in question must be firmly grounded and targeted on specific facts, and the deliberate decision not to ask questions must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. Blind-eye knowledge cannot be constituted by a decision not to inquire into an untargeted or speculative suspicion …"

41. Turning now to the APC, the claimants allege at paragraph 69 as follows:

> " …

> (ca) a breach on the part of the BoU and its officers and agents of trust and/or fiduciary duty and/or the duties of good faith and to act for proper purposes in the conduct of CBL's statutory management, including by procuring that Mr Mugwanya, its delegate, failed to (i) discharge his duties with diligence and in accordance with sound banking and financial principles and, in particular, with due regard to the interests of CBL, its depositors and other creditors, and (ii) carry out the evaluations and reports required under FIA section 90(4);
>
> (d) a breach on the part of Mr Mugwanya, as statutory manager, to discharge his duties with diligence and in accordance with sound banking and financial principles and, in particular, with due regard to the interests of CBL, its depositors and other creditors;
>
> I a breach on the part of Mr Mugwanya, as statutory manager, of his duty to carry out the evaluations and reports required under FIA section 90(4);
>
> …
>
> (i) a breach of the BoU's duty under FIA section 95(3)(b) to document the evaluation of the amount of CBL's assets likely to be realised and the assumptions on which the evaluation was based;
>
> (j) a breach of the BoU's duty as receiver to prepare a statement of affairs for CBL in Receivership;"

At paragraph 36 of the APC, the claimants allege that BoU:

> "needed to find a buyer who would turn a blind eye to … the wrongdoings in relation to the takeover of CBL and in return be treated favourably and secure a windfall from the acquisition. That buyer was DFCU Bank."

At paragraph 47 of the APC it is alleged that:

> "… the P&A Agreement was the result of a corrupt agreement between DFCU Bank and the BoU whereby (i) DFCU Bank would turn a blind eye to the BoU's and/or its officers' and/or agents' wrongdoing in relation to the takeover of CBL and/or (ii) DFCU Bank would turn a blind eye to the BoU's and/or its officers' and/or agents' wrongdoing in relation to the Purported Liquidity Support Facility and the UGX 274bn (as pleaded above) and/or (iii) the BoU and/or its officers and/or agents would obtain the UGX 100bn portfolio (as defined and pleaded below), and in return (iv) DFCU Bank would acquire CBL's assets at a gross undervalue."

At paragraph 64 of the APC it is pleaded that:

> "There was no legitimate justification for the extraordinary terms, unusual structure and opacity of the P&A Agreement or the substantial windfall gain made by DFCU Bank pursuant to it, and the related agreements, namely the Side Letter and the BoU Facility Agreement, at the expense of CBL and its shareholders. The P&A Agreement and related agreements were the result of a corrupt agreement between DFCU Bank and the BoU, executed pursuant to the Corrupt Scheme, which (i) involved DFCU Bank turning a blind eye to the BoU's and/or its officers' and/or agents' wrongdoing in relation to the takeover of CBL and/or (ii) involved DFCU Bank turning a blind eye to the BoU's and/or its officers' and/or agents' wrongdoing in relation to the Purported Liquidity Support Facility and the UGX 274bn (as pleaded above) and/or (iii) enabled the BoU and/or its officers and/or agents to obtain the UGX 100bn portfolio, and in return (iv) allowed DFCU Bank to acquire CBL's assets at a gross undervalue."

At paragraph 68 of the APC it is pleaded that:

> "From or shortly after the time that DFCU Bank was approached as a potential acquirer of CBL (as pleaded at paragraph 34 above), it is averred that the Defendants became parties to the Corrupt Scheme. Alternatively, they formed a new conspiracy with the BoU and/or its officers and/or agents. In either case, wrongfully and with intent to injure the Claimants, the Defendants conspired and combined together, and with the BoU and/or its officers and/or agents, to use unlawful means to effect the sale of CBL's assets and liabilities to DFCU Bank at a gross undervalue as a quid pro quo for an arrangement whereby (i) DFCU Bank would turn a blind eye to the BoU's and/or its officers' and/or agents' wrongdoing in relation to the takeover of CBL and/or (ii) DFCU Bank would turn a blind eye to the BoU's and/or its officers' and/or agents' wrongdoing in relation to the Purported Liquidity Support Facility and the UGX 274bn (as pleaded above) and/or (iii) the BoU and/or its officers and/or agents would obtain the UGX 100bn portfolio (as pleaded above). They entered into the conspiracy on dates which the Claimants are currently unable to particularise but, at the latest, when each acted pursuant to and/or in furtherance of the conspiracy, as particularised below."

At paragraph 68A, the claimants plead that pending disclosure, the best particulars they are able to give of (inter alia) the defendants' knowledge "*… are set out below"*. Those particulars are then set out at paragraphs 70-76. These paragraphs extend over six pages and are too lengthy to set out in full. However, the case is an inferential one. Key to what is alleged is paragraph 70, in which it is pleaded that:

> "The Defendants' Knowledge
>
> The circumstances of the resolution of CBL, including the matters at paragraphs 38 and 48-64 above, raised a number of "red flags" indicating corruption. It is averred that all of the Management and Director Defendants, being experienced bankers and directors operating, inter alia, in Uganda, would have been familiar with and alert to such red flags. It is further averred that DFCU Limited and the Shareholder Defendants, being experienced emerging market investors who conducted their own due diligence, would have been familiar with and alert to such red flags. In particular, the following individually and/or cumulatively would have been recognised by the Management, Director, DFCU Limited and the Shareholder Defendants as red flags indicating corruption."

The various "*red flags*" relied on are then set out. They include that:

i) it was widely known that there is a high risk of corruption in Uganda;

ii) the defendants would have been aware of the BoU's and Mr Mugwanya's fiduciary and statutory obligations in relation to the regulation, statutory management and receivership of CBL and that they were not or were likely not being complied with which it is alleged was to be inferred from the facts and matters set out in paragraph 72 including (a) the allegedly highly irregular procedure adopted by the BoU and/or Mr Mugwanya in relation to the management and resolution of CBL; (b) the informality and partiality in the manner in which DFCU Bank was privately approached concerning the acquisition; (c) a sudden switch from a sale as a going concern to an asset sale; (d) the preferential treatment given to DFCU Bank in relation to the acquisitioI(e) the informality of the bid process; (f) the lack of involvement of Mr Mugwanya in the negotiations even though he was the statutory manager of CBL; (g) the absence of any valuation of the assets by either the BoU or DFCU Bank prior to the sale to DFCU Bank; (h) that the sale was at a gross undervalue that conferred an immediate windfall gain on DFCU Bank; and (i) that the terms of the P&A Agreement were "*... extraordinary ... and were inexplicably generous to DFCU Bank at the expense of CBL ...*"; and

iii) the facts and matters summarised above were known to the Management Defendants as a result of (i) their oversight and/or involvement in the due diligence undertaken by DFCU Bank, (ii) the dealings between DFCU Bank and the BoU prior to 9 December 2016, (iii) in the preparation, approval and submission of the Bid, and (iv) in the negotiations with the BoU from 23 December 2016 until execution of the P&A Agreement; and to the Director and Shareholder Defendants and DFCU Limited when they were presented with the CBL opportunity and supported DFCU Bank's management in concluding the transaction.

This necessarily compressed summary of what has been alleged sets out the basics of the claimants' inferential case concerning knowledge.

42. The low threshold test that is to be applied to factual issues of this nature has recently received firm re–emphasis – see Okpabi v Royal Dutch Shell plc [2021] UKSC 3; [2021] 1 WLR 1294 *per* Lord Hamblen at paragraph 22, where he stated:

> "Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable "ssue."

Critically, as Lord Hamblen observed, a failure to focus on this relatively narrow issue will lead to a court being:

> "… drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at this interlocutory stage. The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable."

In my judgment, it follows from this that unless a defendant on an application of this sort can demonstrate that a relevant allegation either has not been made at all or if made is demonstrably untrue or unsupportable, then a jurisdiction challenge based on the facts alleged is bound to fail.

43. Applying this low threshold test, I do not accept that the claimants have failed to plead a viable claim in conspiracy. Whilst it is true to say that it is not expressly alleged that the defendants had taken a deliberate decision to avoid obtaining confirmation or explanation of the facts as alleged in the sub-paragraphs of paragraph 69 on which the defendants rely in circumstances where they had "*... good reason ...*" to believe they were, or were likely to be as alleged, in my judgment this is to adopt an unreasonably formal approach at a very early stage in the process. In my judgment it can fairly be inferred from the facts and matters relied on by the claimants in paragraphs 70-76 of the APC that the claimants allege by reference to those facts that it is to be inferred that the defendants had good reason to believe the facts were as alleged in paragraph 69 on the basis of what is alleged. On this basis it cannot be said that their case is unsupportable or that they have failed to address the issue at all.

44. There can be no real doubt that the applicants understood or ought reasonably to have understood that is what the claimants were alleging as a result of what was pleaded in paragraphs 68A and 70. It is wrong in principle on an application of this sort to go further than that. That is all the more so because this element of the challenge is based on a limited number of the allegations made in paragraph 69 so that the point is not one that (if accepted) would result in the court having no jurisdiction other than in relation to the particular allegations relied on. It is wrong to read the various allegations in

isolation, yet that is what the applicants seek to do, or to require the claimants to advance their case by reference to some but not all the allegations made when coherence requires that they be considered together.

45. A further reason for caution concerning a point of this sort at this stage is what Ms Brown calls the "… *obvious informational asymmetry* …" between the parties – a point which is expressly referred to and relied on in paragraph 68A of the APC as a basis for providing further particularisation after the disclosure process has been completed. On this issue therefore, I would not have acceded to the applicants' submissions.

46. It is necessary that I deal briefly with a distinct argument advanced on behalf of the third to fifth defendants to the effect that knowledge has not been and cannot be sufficiently pleaded against them, relying on Stanford International Bank Limited (In liquidation) v HSBC Bank Plc (ibid.). In my judgment this authority is of no application in the circumstances of this case. It was concerned with an allegation of dishonest assistance made against a bank by aggregating the knowledge of various individuals in an attempt to establish dishonesty against the bank. That attempt failed. That authority is distinguishable for a number of different reasons. In that case, as Sir Geoffrey Vos MR said at paragraph 45, the claimant had not alleged that any specific employee of the defendant had either been dishonest or suspected fraud and made a conscious decision not to ask questions. That is not this case. It may be that the allegations made will fail at trial. It may be that at a trial and following disclosure the inferences the claimants seek to draw cannot ultimately be drawn. However, as I have explained above, the relevant allegations have been made on the pleading in this case. Secondly, on analysis the allegations being made in Stanford were of "*… gross neglect on a grand scale …"*. However that is not what is being alleged here as I have explained already. Finally, in this case but not in Stanford, relevant allegations have been made against natural persons.

47. As is observed in Grant and Mumford, Civil Fraud, 1st ed at paragraph 2-147:

> "There has been wide judicial recognition of the difficulties of pleading a fully particularised claim in conspiracy at the outset of proceedings, bearing in mind that matters such as the defendants' knowledge or intentions are peculiarly within the defendant's knowledge and (if the claim is justified) likely to have been concealed from the claimant."

Bearing this factor in mind and at the risk of repeating myself, if all the facts and matters pleaded are read as a whole, paragraphs 5, 30, 21, 32, 63A-63D, 70, 72, 73,74 and 75 of the APC set out a pleaded case that the third to fifth defendants had the relevant knowledge that passes the threshold test that applies on an application such as this.

Constitutional Duties Issue

48. The third defendant was at all material times a non-executive director of the first defendant and the fourth and fifth defendants were its executive directors. They submit that the claim against them suffers from an incurable defect because, they allege, the claim against them is:

> "… anchored in the exercise, by the Ugandan Directors, of their constitutional duties in DFCU Bank. As against directors in a large corporation, that is an insufficient basis on which to advance a plea that they combined such as to form a conspiracy and/or that they provided dishonest assistance to a breach of trust (MCA Records Inc v Charly Records Ltd [2001] EWCA Civ 1441)."

49. It is well established that a director generally cannot be jointly liable in tort with the company of which he or she is a director if he or she does no more than carry out his or her constitutional role in the governance of the company, that is to say, by voting at board meetings – see Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830 *per* Lord Steyn at 835 and MCA Records Inc v Charly Records Ltd [2001] EWCA Civ 1441; [2002] BCC 650 *per* Chadwick LJ at paragraph 49, where he summarised the position as being that "*… if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed*." I refer to this below as "the MCA Records Principle". However, as Chadwick LJ emphasised at paragraph 50, where:

> "… the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control …"

It follows therefore that even in relation to joint liability the applicable principle is confined.

50. It is submitted by the third to fifth defendants that the MCA Records Principle applies where a director is accused of an unlawful means conspiracy with the company of which he is a director. The legal basis for this submission depends on two first instance authorities - Digicel (St Lucia) Ltd v Cable & Wireless Plc [2010] EWHC 774 (Ch) and Palmer Birch (a partnership) v Lloyd and another [2018] 4 WLR 164; [2018] EWHC 2316 (TCC). In my judgment, for the reasons I set out below, it is at least realistically arguable that this is not the law but that issue is one that should be resolved at a trial once all relevant findings of fact have ben made. That is fatal to the submission that I should hold that the courts of England and Wales have no jurisdiction applying the MCA Records Principle.

51. In Digicel (St Lucia) Ltd v Cable & Wireless Plc (ibid.), at paragraph 77 within Annex 1 to the Judgment, Morgan J stated (*obiter*) that:

> "Further a director can combine with the company he directs and a shareholder (whether a corporate body or a natural person) can combine with the company in which the shares are held. Whether such a combination has taken place will depend upon the detailed facts"

but added at paragraph 78:

> "The above conclusions are also subject to the limitation identified by Chadwick LJ in MCA Records Inc v Charly Records Ltd [2003] 1 BCLC 93. That case concerned the circumstances in which a director of a company could be held to be a joint tortfeasor with the company. The case did not involve the tort of conspiracy as such. However, the law on joint torts was explained so that a person was liable as a joint tortfeasor if he participated in a common design to commit the tort or otherwise procured or induced the tort. There are obvious similarities between the test as to a common design for a joint tort and as to a combination for the tort of conspiracy."

Morgan J then set out paragraphs 49–52 of Chadwick LJ's judgment. Thus even if in principle what Morgan J said in paragraph 78 was to be followed, it would be subject to the factual qualifications that Chadwick LJ identified. Palmer Birch (ibid.) does not take matters any further beyond the emphasis in paragraph 209 of HHJ Russen KC's judgment of the *rationale* for the MCA Records principle – that is that joint liability and "*claims in conspiracy … would become very oppressive tools if, without more, mere fulfilment of board functions or attendance at members' meetings exposed individuals to joint liability with the company of which they were directors or members …"* [Emphasis supplied]. Thus HHJ Russen KC was drawing essentially the same distinction drawn by Chadwick LJ.

52. In my judgment, therefore, whether a claim in conspiracy could succeed would depend on the detailed facts, as would the applicability of the MCA Records Principle, assuming that it applies to conspiracy at all. So far as this last point is concerned, there are at least two reasons why it is at least realistically arguable that it should not. As Ms Brown submits, it is now well established that the tort of conspiracy to injure by unlawful means is a tort of primary liability – see JSC BTA Bank v Ablyazov and another (No.14) [2020] UKSC 19; [2020] AC 727 per Lords Sumption and Lloyd-Jones at paragraphs 9 and 11 – which requires proof of an intention to injure. This gives rise to two distinct problems for the applicants, on this application at any rate.

53. Firstly, the third to fifth defendants accept in paragraph 15 of their skeleton argument that the MCA Records Principle is of no application "*… where the actions of a director attract primary liability …"*. It is thus realistically arguable that it is of no application to a claim against a director formulated as an unlawful means conspiracy. That is fatal to the submission that I should hold that this court has no jurisdiction by operation of the MCA Records Principle.

54. Secondly, as is observed in Grant and Mumford, Civil Fraud, (1st Ed.) at paragraph 2-022 (having noted Morgan J's dicta in Digicel (St Lucia) Ltd v Cable & Wireless Plc set out above):

> "… it may be difficult in a given case to argue that a director or shareholder who has the necessary intention to injure a claimant is nevertheless simply carrying out his constitutional role within the company."

It follows that the submission that I should hold that the court has no jurisdiction applying the MCA Records Principle is one that I would have been bound to reject had the point been material.

55. Even if this is wrong, on what side of a line conduct falls between (i) a director carrying out the duties entrusted to him as such by the company under its constitution and (ii) involvement in ways which go beyond the exercise of constitutional control involves an intense factual examination. This is not an enquiry that it is appropriate to carry out on an application of this sort – see Okpabi v Royal Dutch Shell plc (ibid.). It must be decided on the factual averments made in the APC.

56. Applying that approach, I am not able to conclude that the claim against the third to fifth defendants must necessarily fail applying the MCA Records Principle, assuming that it is capable of applying to an unlawful means conspiracy claim. I am satisfied essentially for the reasons set out earlier in relation to the Knowledge Issues that the factual allegations made by the claimants against the fourth and fifth defendants go well beyond voting at board meetings.

57. The main focus of this part of the third to fifth defendants' submissions was on what is alleged against the third defendant. The primary focus of this submission is on what is pleaded in paragraph 84(a) of the APC. It comes in the section of the pleading headed "*Acts of the Defendants pursuant to and/or in furtherance of the conspiracy"*. What is then set out is qualified as being the best particulars the claimants are able to give prior to disclosure. This reflects what Ms Brown characterises as the "… *obvious informational asymmetry* …" between the parties at this stage. As I said earlier I accept that this is so. It should also be noted that this part of the pleading cannot and should not be read in isolation from what has gone before. What is being pleaded at this point are the acts of the defendants which it is alleged have been committed in furtherance of the unlawful means conspiracy pleaded earlier.

58. What is alleged against the third defendant in paragraph 84(a) of the APC is:

> "In the case of Mr Mugerwa, by having oversight, as Chairman of the board of DFCU Bank, of and/or approving and/or directing the participation of DFCU Bank in its dealings with the BoU prior to 9 December 2016, in the preparation, approval and submission of the Bid and in the negotiations with the BoU from 23 December 2016 and in the agreement to and/or voting in favour of execution of the transaction agreements."

This allegation even on its face goes further than merely alleging that the third defendant carried out the duties entrusted to him by the first defendant under its constitution. It is not an allegation "*... without more ..."* that the third defendant was merely fulfilling board functions. To the contrary – and certainly when read in the context of what has gone before in the pleading – it is an allegation that he has participated or been involved in ways that go beyond the exercise of constitutional control because it is alleged that he approved or directed the participation of the first defendant in its dealings with BoU and in the preparation, approval and submission of the first defendant's bid. Voting in favour of execution is only a small part of what is alleged and even that cannot sensibly be separated from the core point that it is alleged

he voted not *bona fide* in the exercise of his constitutional responsibilities but in furtherance of the conspiracy that is set out in the paragraphs of the APC that precede paragraph 84. Had it been relevant therefore I would have dismissed the jurisdictional challenge based on the MCA Records Principle.

Conclusion

59. For the reasons set out above, the applicants' applications succeed on the foreign Act of State issue. In consequence it is unnecessary for me to decide the remaining issues. Had I concluded that the foreign Act of State issue should be resolved in favour of the claimants, I would have dismissed the applications made by reference to the other issues that arise, for the reasons I have summarised above.