BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 2010/0125

BETWEEN:

CONGO MINERAL DEVELOPMENTS LIMITED

Claimant/Respondent

and

HIGHWIND PROPERTIES LTD
PAREAS LIMITED
INTERIM HOLDINGS LTD
BLUE NARCISSUS LIMITED

Defendants/Applicants

Appearances: Mr Kenneth MacLean QC and Mr James Nadin for the Applicants
Mr Paul Girolami QC and Mr Andrew Willins for the Respondent

JUDGMENT

[2011: 25, 26 July, 16 September]

(Claim arising out of alleged breach of contract by foreign state – defendants alleged to have procured breach of contract – defendants alleged to have caused economic loss to claimant by wrongful interference – defendants alleged to have conspired with foreign state to injure claimant by unlawful means – whether claim infringes Act of State principle – whether summary judgment should be given for applicant defendants – whether claim should be struck out)

[1] **Bannister J [ag]:** This is an application by the four BVI incorporated defendant companies to have the claim against them summarily dismissed or struck out on the grounds, or on the principal ground, that for the Court to entertain it would be contrary to the so-called act of state rule. For strike out purposes the defendants are required to accept the allegations in the statement of claim as true, although they are entitled to lead evidence on their summary judgment application and I have looked at a small proportion of that evidence on these applications. The defendants have not

put in a defence, although they have put in so-called points of defence identifying what aspects of the claim they maintain infringe the rule.

Facts

[2] I take the facts almost exclusively from the statement of claim. On 23 March 2004 the claimant ('CMD') entered into a contract with the Democratic Republic of Congo ('DRC') and a DRC owned enterprise called La Générale des Carrières et des Mines ('Gécamines') for the exploitation of residual minerals which CMD hoped to extract from spoil deposited over a sixty eight square kilometre area in the province of Katanga. The right to exploit these deposits had been conferred on Gécamines by the DRC. The contract provided for the formation of a joint venture DRC incorporated company ('KMT') in which CMD was to hold 82.5%, the DRC 5% (for which CMD would pay) and Gécamines 12.5% (the subscription price for which was to be lent to Gécamines by CMD). There was an ICC arbitration clause,[1] in respect of which the DRC waived sovereignty.

[3] On conclusion of the contract Gécamines was to make available to CMD all data which it possessed concerning the deposits and CMD was to embark upon the production of Feasibility Studies and procure finance from outside sources. Gécamines was to procure that its rights over the deposits were converted into a permit and Gécamines undertook that it would transfer that permit to KMT in consideration of a payment of US$15m. Gécamines and the DRC gave separate warranties that upon transfer of the permit KMT would, in effect, have quiet enjoyment of the deposits and would be furnished with all necessary governmental or administrative licences and permits to enable the business of extraction to be carried out lawfully. There were provisions for Gécamines to be paid a management fee during the process of exploitation and profits not required for the further capitalisation of the business were to be shared between KMT's members at the end of each financial year.

[4] The contract was subject to DRC law and it is pleaded that it was an implied term that none of the parties would do anything to prevent or hinder any other party from carrying out its terms.

[1] which, in the events which have happened, is now engaged

[5] On 27 May 2004 a permit ('Permit 652') for the exploitation of the deposits was transferred from Gécamines to KMT under the provisions of the DRC Mining Code. The transfer was registered in the books of the DRC Mining Registry ('CAMI'). It is pleaded that the Feasibility Studies have been completed and that they remain the property of CMD and of the external financing parties.

[6] In April 2007 the DRC established a 'Revisitation Commission,' the purpose of which was to review all mining contracts between the DRC (or state owned enterprises) and investors. It is pleaded that in effect the process was a form of compulsory review under threat of withdrawal of the necessary consents. The process resulted in a variation of the CMD contract in favour of Gécamines, which was concluded in March 2009.

[7] On 4 August 2009 a Council of Ministers of the DRC resolved that it was impossible to continue the CMD contract. The Attorney General subsequently wrote to CMD demanding that KMT be dissolved and to CAMI asking for the cancellation of the transfer of Permit 652. On 25 August 2009 CAMI notified KMT that the transfer of Permit 652 would be revoked.

[8] I was taken to a letter dated 12 August 2009 from the Minister of Mines of the DRC to the Chairman of Gécamines, notifying him of the decision of the Council of Ministers of 4 August 2009. The reasons for that decision were given as: (1) breach of the performance schedule; (2) lack of evidence that KMT had been properly incorporated; (3) breach of the terms and conditions of the tender; and (4) nonpayment of fees due to Gécamines and the external financing parties. The Minister accordingly asked the recipient to perform all procedures required to return Permit 652 and dissolve KMT. It will be noticed that all the reasons given for termination were (with the exception of the complaint as to the validity of KMT's incorporation) founded upon alleged breaches of the terms of the contract. There was no suggestion that the DRC wished to determine the contract on policy grounds.

[9] On 15 September 2009 'Government officials' (so the pleading alleges) accompanied by armed police sealed KMT's administrative offices and on the following day sealed the site and stopped all further activity. On 7 January 2010 Gécamines gave CMD notice to terminate the contract. It is pleaded that no grounds existed for such a notice to be given lawfully. On the same day DRC and

Gécamines entered into an inconsistent contract with the defendants for the exploitation of the same deposits which had been the subject of the CMD contract, but providing for a higher return for the DRC and for Gécamines. That contract ('the Highwind JVA') contained provisions limiting the liability of the DRC and Gécamines to the defendants in case they were sued for damages arising out of the breach (so it is pleaded) of the CMD contract.

[10] CMD (and the external financing parties) filed a request for ICC arbitration on 29 January 2010, but (despite interim awards made in the arbitration proceedings) the DRC, Gécamines and the defendants are continuing to perform the Highwind JVA.

[11] On 6 August 2010 CAMI registered a transfer of Permit 652 to Metalkol (the joint venture company established to carry out the Highwind JVA).

The claim

[12] CMD pleads that the seizure and sealing of KMT's premises, the purported termination of the CMD contract, the entry into the Highwind JVA and other consequential matters constitute breaches by the DRC and Gécamines of the CMD contract. No claim is made against the DRC or Gécamines, neither of which is party to these proceedings. Instead, it is pleaded that the defendants induced or procured these breaches or have otherwise wrongfully interfered with CMD's contractual relations or business or economic interests, causing loss to CMD by unlawful means. There is a further claim that the defendants, by agreeing to enter and entering into the Highwind JVA, conspired with the DRC and Gécamines to injure CMD by unlawful means, that is to say by breaching the CMD contract, wrongly transferring Permit 652 and wrongfully using the Feasibility Studies and the facilities on site belonging to CMD, the financing parties and KMT.

The act of state rule

[13] The act of state rule precludes the Court from entertaining a claim for injury[2] suffered by a claimant within a recognised[3] (or subsequently recognised[4]) sovereign state in any case where a claim for

[2] I use a neutral term

redress in respect of the same injury would, if made in the courts of the state in question, be met *in limine* with the objection that the injury resulted from an act of that state done in its character as a state[5] and thus not actionable within its jurisdiction. An act of state is such an act as can only be done by a sovereign power, such as raising a standing army[6], issuing currency[7], making military levies[8], granting concessions[9] or enacting primary legislation.[10] Commercial arrangements or ministerial acts entered into or done in the course of exercising sovereignty in these or other ways are not acts of state.[11]

[14] That the rule is one of pure policy is demonstrated by the fact that no allowance is made for the possibility that the act might be challengeable in the Courts of the foreign state.[12] The rationale for the rule is that without it international relations between states would be unworkable.[13]

[15] Although I am satisfied that the principle underlying the act of state rule is as I have set it out in paragraph [13] above, the English and United States Courts[14] have rationalised their refusal to entertain actions founded upon the acts of state of recognized foreign sovereign powers in different ways. It has been said that the Court cannot sit in judgment upon[15] or adjudicate upon[16] the acts of a foreign sovereign effected by virtue of his sovereign authority abroad; and that the Court will not question the validity of such acts or entertain claims that question[17] or turn upon[18] their validity; that it is impermissible for the Courts of one country to reexamine and possibly condemn the validity of the acts of another sovereign state;[19] that the Court will not entertain cases where the

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[3] **Luther v Sagor** [1921] 3 KB 632
[4] **Princesss Paley Olga v Weisz** [1929] 1 KB 718
[5] **Underhill v Hernandez** 168 US 250
[6] **Playa Larga v I Congreso del Partido** [1983] AC 244 at 278
[7] **Gladstone v Ottoman Bank** (1863) 1 H&M 505; **A Ltd v B Bank** [1997] 1 ILPr 586, 595
[8] **Oetjen v Central Leather Company** 246 U.S. 297
[9] **Gladstone v Ottoman Bank** (supra)
[10] **Luther v Sagor** (supra)
[11] **Playa Larga v I Congreso del Partido** (supra) 278, 279
[12] **Oetjen v Central Leather Company** (supra) 304
[13] **Underhill v Hernandez** (supra); **Oetjen v Central Leather Company** (supra)
[14] it is from these jurisdictions that the bulk of the authorities derives. There is no authority in the BVI
[15] **Duke of Brunswick v King of Hanover** (supra); **Kuwait Airways Corporation v Iraqui Airways Co (Nos 4 and 5)** [2002] 2 AC 883, 1066, 1108; **R v Bow Street Metroploitan Magistrate ex p Pinochet Ugarte** [2000] 1 AC 147, 286
[16] **Kuwait Airways Corporation v Iraqui Airways Co** (supra)
[17] (ibid); **R v Bow Street Metropolitan Magistrate ex p Pinochet Ugarte** (supra)
[18] **Berezovsky v Abramovitch** [2011] EWCA Civ 153 at paragraph 94
[19] **Oetjen v Central Leather Company** (supra)

outcome turns upon the effect of official action of a foreign sovereign;[20] that the Court cannot interfere with a sovereign power, either directly or by moving against others alleged to be accessory to the acts of the foreign sovereign;[21] and that the Court of one country will not question the acts of a recognised foreign government.[22] It has also been held that the act of state doctrine applies if the Court would be otherwise required to question the refusal of a foreign state to grant an export licence by holding the refusal to have been a breach of contract.[23] I shall have to return to this last authority later.

[16] There is both English and United States authority to the effect that the act of state doctrine is not in play where the issues between the parties before the Court do not require it to engage in the exercise variously described in paragraph [15] above. In **A Ltd v B Bank**,[24] for example, the act of state rule was held not to apply because the Court was not asked and did not need to decide whether the foreign government in question had acted unlawfully in printing certain banknotes. The sole question was whether there had been an infringement of the claimant's patent by a bank which held some of the infringing notes for its private commercial purposes in England. In **Berezovsky v Abramovitch**[25] there was similarly no need for the Court to inquire as to the 'validity' of alleged acts of intimidation by the relevant foreign head of state. In **Yukos v Rosneft**[26] Hamblen J ultimately held[27] that it was unnecessary to decide whether alleged executive interference in a foreign legal process was, as he put it, valid or invalid or lawful or unlawful.

[17] All three courts considered that they were applying the principles set out in a decision of the Supreme Court of the United States in **Kirkpatrick & Co, Inc v Environmental Tectonics Corporation, International**[28] decided in 1990. In that case it was held that the act of state doctrine did not apply because nothing in the suit required the Court to declare invalid (and thus ineffective as a rule or decision for the Court of the United States) the official act of a foreign

[20] **Kirkpatrick v Environmental Tectonics Corporation** US 400, 110 Sup Ct. Rptr 701
[21] **Gladstone v Ottoman Bank** (supra); **Luther v Sagor** (supra) at 555, 556
[22] **Princess Paley Olga v Weisz** (supra) at 729; **Kuwait Airways Corporation v Iraqui Airways Co** (supra)
[23] **World Wide Minerals Ltd v Republic of Kazakhstan** 296 FF.3rd 1154, 353 U.S.App.D.C. 147
[24] (supra)
[25] (supra)
[26] (supra)
[27] at paragraph 181
[28] (supra)

sovereign. In the course of his judgment Scalia J said that in every case where it had been held that the act of state doctrine applied, the relief sought or the defence interposed would have required a court in the United States to declare invalid the official acts of a foreign sovereign performed within its own territory. He went on to refer to **Underhill v Hernandez**[29] where, as he put it, for the Court to have held the defendant's detention of the plaintiff to be tortious would have required denying legal effect to 'acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States.' **Kirkpatrick** itself was actually decided on the basis that whatever the legality of the relevant contract which had been entered into by the Nigerian Government, that was not an issue to be decided in the instant suit.

[18] It was common ground that if a claim does not require the Court to inquire into the acts of a foreign state at all, then the rule has no application. But Mr Girolami QC, who appeared together with Mr Andrew Willins for CMD, claimed to identify from the decision of Hamblen J in **Yukos v Rosneft**[30] an additional refinement. In that case Hamblen J held (obiter) that the act of state principle applied only where the Court would otherwise be required to inquire into the 'validity' of an act of state. At paragraph 135 of his judgment he said that

> 'as a general rule 'validity' in this context means determining that the act [of state] is of no legal validity or effect and that challenges to such validity means that it is an issue which the Court must decide in order to reach its decision . . .'

[19] Hamblen J cited a number of English and United States authorities. In deciding as he did, Hamblen J held himself bound by the decision of the English Court of Appeal in **Berezovsky v Abramovich**[31], which had in turn considered itself bound by the earlier decision of the Court of Appeal in **A Ltd v B Bank**[32].

[29] 168 U.S. 250, 254, 18 SCt 83, 85 42 L.Ed. 456 (1897)
[30] (supra)
[31] (supra)
[32] (supra)

[20] In my judgment, the line of authority, both English and United States, going back respectively to **Duke of Brunswick v King of Hanover**[33] and **Underhill v Hernandez**[34], sets out a policy pursuant to which the Courts decline jurisdiction in any case which requires the Court to entertain a challenge to any act of state done by a recognised foreign sovereign or government. The challenge may be to an appointment of receivers,[35] the grant of a concession to issue currency in what would otherwise be a breach of contract,[36] expropriatory legislation,[37] acts of seizure and confiscation,[38] false imprisonment,[39] military levies upon property,[40] and (perhaps) a breach of contract by refusal of an export licence.[41] In a general sense, therefore, it is not an abuse of language in such cases to say that the Court refuses to question the validity of a foreign act of state. But it is evident from the great variety of acts which the Court shrinks from inquiring into that jurisdiction is not declined only when the choice is between upholding the act of a foreign state or declaring that it is a nullity and I do not understand the English Court of Appeal to have been saying as much in **A Ltd v B Bank**[42] or in **Berezovsky v Abramovich**.[43] To the extent that Hamblen J meant to say that it was, then I respectfully disagree with him.

[21] There is a separate and distinct rule (or rules) that the Court will not adjudicate upon a matter if to do so would embarrass it because it might involve making adverse comment on the conduct of a foreign sovereign or government or involve determining matters of public international law which are the province of courts set up by international treaty[44]. I need not deal with a further rule which may preclude a home Court from adjudicating on a matter involving a foreign state on the grounds that to do so would embarrass the home government.

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[33] (supra)
[34] (supra)
[35] **Duke of Brunswick v King of Hanover** (supra)
[36] **Gladstone v Ottoman Bank** (supra)
[37] **Luther v Sagor** (supra); **Princess Paley Olga v Wiesz** (supra),
[38] **Kuwait Airways v Iraqui Airways Corp** (supra)
[39] **Underhill v Fernandez** (supra)
[40] **Oetjen v Central Leather** (supra)
[41] **World Wide Minerals, Ltd v Republic of Kazakhstan** (supra)
[42] (supra)
[43] (supra)
[44] **Buttes Gas v Hammer** [1982] AC 888.

The parties' submissions

[22] The primary submission of Mr Kenneth MacLean QC, who appeared together with Mr James Nadin for the defendants on their applications, is that the present claim cannot or should not be entertained by the Court because it infringes the act of state rule.

[23] Mr MacLean QC submits that this case turns upon and would involve this Court sitting in judgment upon acts of state because it concerns the oversight by the government of the DRC of the exploitation of the national mineral wealth and the determination by that government of how and by whom that mineral wealth is to be exploited. He submits that that is something which is not within the province of a private individual but can be done only by government.

[24] Mr MacLean QC relies upon the letter of the 12 August 2009 to which I have referred above.[45] It is clear that the instruction by the Minister of Mines to Gécamines to put an end to the CMD contract and transfer Permit 652 to Metalkol came from the heart of government - a decision of the Council of Ministers of the DRC. Permit 652 was revoked on 25 August 2009 and on 7 January 2010 Gécamines purported to terminate the CMD contract. These are the central, although not the only acts upon which CMD's claim is founded. The principal question is whether these (and other, related acts) amount to an act of state for the purposes of the rule. Mr MacLean QC relies upon **Gladstone v Ottoman Bank**[46] to show that the Court will not inquire into the conduct of accessories to a foreign act of state in any case in which it would not inquire into the act itself.

[25] Mr MacLean QC further relies upon the seizure of the offices of KMT and of KMT's property at the site on 15 and 16 September 2009 by government officials and armed police. Neither event determined the CMD contract but they appear to have been clear breaches of what amount to covenants for quiet enjoyment contained in the CMD contract and represented a drastic indirect interference with CMD's economic interests. It is true that the pleading of the defendants' accessory liability in relation to these acts may be defective, but I do not think that I am concerned

[45] see paragraph [8]
[46] (supra)

at this point in the argument as to whether all the particulars of knowledge and intention have been slotted into their correct pigeonholes – the burden of the complaint is clear.

[26] Mr Girolami QC, for CMD, submits that a determination whether an act qualifies as an act of state is fact sensitive and that the Court should be slow to identify such an act on the basis of little more than a statement of claim to which no defence has been pleaded.

[27] He submits that no act of state is involved in the present case. He says that no law, decree or exercise of prerogative power is in issue. Gécamines itself, he says, is not an organ of the state or, alternatively, that I cannot determine as a matter of fact that it is on the present application. He submits that everything which was done in the present case could have been done by a private individual – a private landowner may grant a licence to exploit deposits situated on his land as well as can a sovereign government. Merely because a government is the contractual party breaking a commercial contract to which it is party does not turn the breach into an act of state. A breach of a commercial contract cannot, says Mr Girolami QC, be classified as being, or not being, an act of state depending upon whether the party in breach is a state or a private person. He submits that this was a purely commercial contract and so falls within the **Playa Larga**[47] exception. He says that the DRC cannot rely upon act of state to defeat a liability to which, he submits, it is clearly exposed pursuant to the State Immunity Act of 1978[48] and that the defendants certainly cannot do so since they are not states and cannot hide behind the skirts of the DRC in order to defeat a claim brought against them personally.

[28] So far as the seizures of 15 and 16 September 2009 are concerned, he submits that the fact that there were government officials present adds nothing, since the contract in question was a commercial contract to which the DRC was party and the presence of police does not turn the seizure into an act of state any more than the presence of police at a football match turns it into a state occasion.[49]

[47] (supra)
[48] which extends to this jurisdiction (s.23 Overseas Territories Order (No 458 of 1979))
[49] Mr Girolami QC did not use this example in his own submissions and is, of course, free to disassociate himself from it

[29] Finally on the act of state point, Mr Girolami QC relied upon the decision of Hamblen J to which I have referred above and submitted that the act of state rule comes into play, or should come into play, only when some act capable of being declared a nullity is relied upon as giving rise to the complaint. He says that in the present case all that is complained of on the part of the DRC are breaches of contract and its being part of a combination to commit those breaches. He says that the question is whether those acts were done, not whether they are nullities and that they therefore fall outside the rule. I agree with him that trial of this action will involve deciding the question whether the pleaded acts were as a matter of fact done by the DRC or by Gécamines, but for the reasons given earlier in this judgment, I do not regard the act of state rule as restricted to cases where the only question is whether or not the identified act of state is a nullity.

Discussion

[30] While it may be correct as a matter of fact in this case that the DRC entered into the CMD contract in furtherance of its role as supervisor and promoter of the mining industry in the DRC, the act of state rule is not, in my judgment, brought into play by appeals to the general background against which events are played out or by reference to the motives which may induce a state to enter into a contract and Mr MacLean QC has not referred me to any authority to that effect. Indeed, it seems to me that this submission is inconsistent with what was said by Lord Bridge in **Playa Larga v I Congreso del Partido**.[50]

[31] In my judgment, formed necessarily by reference only to the statement of claim and the limited amount of evidence to which I have been referred, it is not possible, at any rate at this very early stage of the proceedings, to say that in becoming a party to the CMD contract the DRC was performing an act of state. The CMD contract itself was designed to ensure that mineral deposits under the direct or indirect control of the DRC (1) were professionally exploited by persons other than organs of the government of the DRC and using expertise not available internally to that government (2) in reliance upon externally sourced finance rather than the financial resources of the DRC itself with the object (3) of ensuring that the DRC received an appropriate share of the ensuing profits. The fact that the government of the DRC felt the need to enter into such

[50] (supra) at pages 278, 279

arrangements with strangers seems to me to be inconsistent with the suggestion that by entering into the CMD contract the DRC was performing an act of state. Furthermore, the fact that the DRC felt it necessary to limit its liability to the Highwind JVA parties in the event of a claim against them by the parties to the CMD contract[51] seems to sit badly with the suggestion that in entering into and then breaking[52] the CMD contract the DRC was engaged in an act of state.

[32] Apart from that, what must be identified in order for the rule to come into play is a specific governmental act, or perhaps omission,[53] which will have to be considered and pronounced upon if the claim is to be entertained. Further, it must be that act (or perhaps omission) which causes the injury. CMD does not complain about the entry by either the DRC or Gécamines into the CMD contract. No inquiry into that act of state, if that is what it was, will therefore be necessary if this case should go to trial.

[33] Had a claim been made directly against the DRC for breach of contract, the DRC would appear, from my perspective at this stage of the proceedings, to have no act of state defence.[54] That is because it cannot be a defence to a claim for breach of contract for the other contracting party to assert merely that it is a foreign sovereign state. Its position is not improved by an additional assertion that it broke the contract by way of act of state, because a breach of a contract by which a sovereign state admits that it is bound and in respect of which (so it is pleaded) it has waived any immunity from jurisdiction or execution cannot be an act of state. The DRC could not argue, for example, that failure to pay its civil servants in breach of their employment contracts was an act of state. In my judgment, the position is no different in respect of the CMD contract. Of course, if the DRC had passed a decree providing that it was not to be liable on any contract to which it is party, or on the CMD contract in particular, the position would have been quite different, but that is not this case.

[34] It seems to me that these considerations draw the sting from the Ministry of Mines letter of 12 August 2009, because although it is clear that the instruction came, as I have said, from the heart

[51] see paragraph 47(14) of the statement of claim
[52] the assumption upon which the indemnity must have been hypothesised
[53] **World Wide Minerals Ltd v Republic of Kazakhstan** (supra)
[54] I am not, of course, finally determining the point

of government, the instruction was to terminate the CMD contract on what would appear to be pure contractual grounds. Whether those grounds would turn out to be good ones is another question, but it seems to me, on the meagre evidence I have, that there is nothing in that letter to justify me from departing from my conclusion that if the DRC did indeed break the contract, its doing so was not an act of state.

[35] Mr MacLean QC relied upon the United States authority of **World Wide Minerals, Ltd v Republic of Kazakhstan**[55] a decision of the United States Court of Appeals, District of Columbia Circuit. In that case a claim was made against the Government of Kazakhstan for breach of contract in failing to provide an export licence. The Court of Appeals struck the claim out on act of state grounds because, so it held, it would otherwise be required to question the 'legality' of the denial of the export licence by ruling that the denial was a breach of contract. But the court went on to hold that the policies underlying the act of state doctrine justified its application because questioning the export control policies of another state would disrupt international comity and interfere with the conduct of foreign relations by the executive branch. The present case will not require the Court to inquire into or to sit in judgment upon any policy of the DRC.

[36] There were clearly special factors relied upon by the Court of Appeals to justify its decision in that particular instance, but if (which I do not think that it intended to) it decided that the act of state rule precludes a Court from making a finding that a recognised sovereign government has broken a commercial contract, I cannot accept it as representing the law on this topic.

[37] Thus, with the exception which I go on to mention below, it does not seem to me that CMD's claim comes within the act of state principle.

[38] Different considerations arise with respect to the seizure of KMT's premises and plant on 15 and 16 September 2009. It does not seem to me that what is pleaded in paragraphs 40 and 41 of the statement of claim is an allegation of mere trespass, such as might have been carried out by squatters acting in a private capacity. What is pleaded is a state seizure. It is no use saying that any landlord may repossess and that police are sometimes present at repossessions in case

[55] (supra)

violence results. The seizure is pleaded as a governmental act with no basis in law, rather than a mere assertion of a right to possession. So far as they are relied upon by CMD in paragraph 76 of the statement of claim as breaches of the CMD contract procured by the defendants, the only specifically pleaded term which these acts would have broken would seem to be the warranty for quiet enjoyment pleaded at paragraph 19(13) of the statement of claim. Looked at from one perspective, a claim for procuring that breach would not involve questioning an act of state (if it is correct that that is what the dispossession amounted to) on the part of the DRC. The question would be whether as a matter of fact KMT had been dispossessed (it being irrelevant for the purposes of the warranty by whom) and whether that amounted to a breach of the warranty. It seems to me, however, that **Gladstone v Ottoman Bank**[56] is clear authority that where a breach of contract is grounded in an act of state the Court cannot inquire into it.

[39] Further, paragraph 76 of the statement of claim includes extremely broad allegations of economic torts other than procurement of a breach of contract. These are presently defectively pleaded, but it seems to me that an inquiry into the dispossession of KMT as (speaking generally) an act of wrongful interference would involve the Court sitting in judgment upon the acts of a foreign state acting as such. I think that the proportionate response is to strike out paragraph 60(1) of the statement of claim. In discussion preceding the formal handing down of this judgment I heard argument upon the need for certain consequential deletions to be made to the statement of claim and my decision upon the extent of the consequential amendments required is reflected in the order.

The conspiracy claim

[40] Little was said about this at the hearing, but in my view it stands in a different position from the claims made in paragraph 76 of the statement of claim. Leaving aside whether it is embarrassing or not justiciable within the principles of **Buttes Gas v Hammer**,[57] I do not think that it is right to allege a conspiracy against non parties, and certainly not when one of them is a sovereign state. I do not propose to make findings that a sovereign state (or, for that matter, an organ of a sovereign

[56] (supra)
[57] (supra)

state), neither of which is a party to these proceedings, has engaged in a tortious conspiracy. I shall therefore strike out paragraph 77 of the statement of claim and paragraph 6(4) of the prayer. Again, this involves certain consequential amendments, the need for which is reflected in the order.

[41] These determinations make it unnecessary for me to consider the impact upon these proceedings of the so-called **Moçambiqe**[58] principle.

[42] That leaves, I think, the question of the relief sought in these proceedings. Mr Girolami QC said that the injunctions sought in the prayer would be asked for only in aid of an order for specific performance if such was made in the ICC arbitration. I have the gravest doubts whether it would be right in any circumstances for this Court to grant injunctions which would interfere, if obeyed, with the contracts of a foreign state and I said as much in **Tullow v Caprikat**.[59] I do not, however, propose to say anything more upon the point at this stage.

Conclusion

[43] This application therefore succeeds to the extent that paragraphs 60(1) and 77 of the statement of claim[60], together with paragraph 6(4) of the prayer are struck out. I will hear the parties on the question of costs and as to any consequential directions that may need to be made.

Commercial Court Judge

16 September 2011

[58] [1893] AC 602
[59] 19 November 2010
[60] together with the consequential allegations referred to in the order