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SHORTER ARTICLES

STATE-OWNED COMPANIES ARE NOT THE STATE

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The article examines an important decision of the Judicial Committee of the Privy Council on appeal from the Court of Appeal of Jersey as to the position of state-owned corporations and the circumstances in which they and their assets may be equated with the state and its assets.

1 On 26 July 2012, the Board of the Judicial Committee of the Privy Council (the "Board") handed down judgment in the case of *FG Hemisphere Assocs LLC v La Générale des Carrières et des Mines SARL*.[1]

2 Gécamines is a mining company which is 100% owned by the Democratic Republic of Congo (the "DRC") (formerly known as Zaire and, prior to 1960, as the Belgian Congo). The case concerned an attempt by a distressed sovereign debt or "vulture" fund, FG Hemisphere Associates LLC ("FGH"), to enforce directly against the assets of Gécamines in Jersey certain arbitration awards issued by the International Chamber of Commerce ("ICC") against the DRC. FGH claimed that Gécamines was an "organ of the state" and therefore part of the Congolese state.

Background

3 The story began in the early 1980s when Zaire, as the DRC was then known, under the notoriously corrupt rule of President Mobutu, entered into agreements with a Yugoslavian company called Energoinvest for the construction of a dam for the generation of hydro-electric power. In the early 1990s, Zaire began to become politically

[1] http://www.jcpc.gov.uk/decided-cases/docs/JCPC_2011_0061_Judgment.pdf

unstable and it fell into default on the payments due under the agreements. In 2001, Energoinvest, with the backing of FGH, commenced ICC arbitration proceedings. In 2003, it obtained the arbitration awards and shortly thereafter these were assigned to FGH.

4 In March 2009, FGH commenced proceedings to enforce the arbitration awards against Gécamines and the DRC in Jersey. The DRC had no assets in Jersey but Gécamines had an interest in and a revenue stream from a Jersey joint venture vehicle called Groupement pour le Traitement du Terril de Lubumbashi Ltd ("GTL"). FGH obtained an interim *arrêt entre mains* and *Mareva* injunction against Gécamines' shares in GTL and current and future payments due to it from GTL.

5 The DRC had no assets in Jersey and did not appear. The battle therefore quickly became one between FGH and Gécamines as to whether Gécamines was responsible for the debts of the DRC. FGH claimed that it was an "organ of the state".

6 At first instance, the Royal Court (Page, Commr), held that Gécamines was an "organ of the state" both at the time that the interim *arrêt* was obtained in March 2009 and at the time that the judgment was handed down.[2]

7 On appeal, the Court of Appeal upheld the Royal Court's decision by a 2:1 majority (McNeill and Bennett, JJA, Pleming, JA dissenting).[3] The Court of Appeal gave Gécamines leave to appeal to the Privy Council.

8 On 26 July 2012, the Privy Council allowed Gécamines' appeal and overturned the decisions of the Royal Court and Court of Appeal.

Sovereign immunity

9 The "organ of the state" doctrine in the enforcement context originates from two English first instance decisions, *Kensington Intl Ltd*[4] *v Republic of Congo* and *Walker Intl Holdings Ltd v Republique Populaire du Congo*.[5] These decisions concerned the enforcement by other distressed debt funds of awards or judgments against the state-owned oil company of the Republic of Congo (the former French Congo or Congo-Brazzaville and not the DRC), Société Nationale des Pétroles du Congo or SNPC.

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[2] 2010 JLR524.
[3] 2011 JLR 486.
[4] [2003] EWHC 2331 (Comm).
[5] [2005] EWHC 2813 (Comm).

10 In both cases, serious allegations were made that the Republic of Congo and SNPC had arranged their affairs so as to prevent the state's creditors from intercepting the state's oil sales through the setting up of a number of sham intermediary companies. It was also alleged that SNPC itself had no true independent existence, that there was little if any delineation of its assets and those of the state and that the state dipped into SNPC's assets if it chose to do so.

11 In both cases, the courts purported to apply the doctrine of the English Court of Appeal in *Trendtex Trading Corp v Central Bank of Nigeria*.[6] Neither decision dealt with the rationale for applying *Trendtex*. Both decisions turned very much on their facts and both decisions could probably have been justified on the basis that SNPC and the other entities were shams.

12 But the issue with *Trendtex* was that it was a decision on sovereign immunity and a decision which pre-dated the introduction of the State Immunity Act 1978 ("the 1978 Act") (which was subsequently introduced into Jersey law by the State Immunity (Jersey) Order 1985).

13 Up until that point, English law had applied the doctrine of absolute immunity. The *Trendtex* decision swept away the concept of absolute immunity and replaced it with the concept of restrictive immunity so that states were no longer immune in all respects, in particular with regard to commercial dealings.

14 In *Trendtex*, the principal question was whether the Central Bank of Nigeria was part of the state and therefore entitled to sovereign immunity. The three Court of Appeal judges appeared to accept that merely because an entity might have separate legal personality was not necessarily determinative of the question.

15 Lord Denning, MR approached the issue on the basis that the entity would be entitled to immunity if it were under governmental control and performed governmental functions. Earlier in his judgment, Lord Denning had referred to the doctrine of restrictive immunity as giving immunity to acts of a governmental nature or "*acta jure imperii*".

16 Stephenson and Shaw, LJJ asked themselves whether the Central Bank of Nigeria was a bank to which certain aspects of government policy had been delegated or whether it was in reality a government ministry. This required consideration of its constitution, its powers, duties and its activities. Shaw, LJ also made the important point that an

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[6] (1977) 1 QB 529.

entity could not have "hybrid status". It could not be a government department for some purposes and a separate entity for others.

17 *Kensington* and *Walker* effectively applied *Trendtex* in reverse. The rationale was clearly based on Shaw, LJ's statement that an entity could not have "hybrid status". However, in neither case was any real consideration given as to whether Shaw, LJ had intended this to extend beyond the field of sovereign immunity or whether applying *Trendtex* in reverse was justified or even workable. The position was complicated by the fact that, following the introduction of restrictive immunity, sovereign immunity and enforcement were no longer mirror images of each other.

18 *Kensington* and *Walker* did not deal specifically with the 1978 Act. Section 14(1) recognized specifically the distinction between the state on the one hand (which comprised the sovereign or head of state in his public capacity, the government of the state and any department of that government) and a separate entity (which was an entity distinct from the executive organs of the government of the State and capable of suing or being sued). Under s 14(2), the latter would only be immune if the proceedings related to something done by it in exercise of sovereign authority.

19 There is also the distinction between immunity and enforcement. Under s 14(2) anyone exercising any sovereign function was entitled to immunity in respect of the exercise of that function. But the question of enforcement against the assets of an entity exercising state functions does not necessarily involve the same considerations.

20 The difference between these concepts was recognised by the House of Lords in the case of *I Congreso del Partido*,[7] notwithstanding that this was a case in relation to events that took place prior to the introduction of the 1978 Act. The case turned on the categorisation of certain acts of the Cuban state and whether the acts were in exercise of sovereign authority, and thereby fell within the *jure imperii* and attracted immunity, or whether they were commercial and thereby fell within the *jure gestionis* and did not attract immunity. However, Lord Wilberforce also recognised the difference between state-controlled enterprises with legal personality acting on government directions on the one hand, and a state exercising sovereign functions on the other.

21 The *Trendtex* test was also applied in two subsequent English first instance cases on sovereign immunity, *Tsaviliris Salvage (Intl) Ltd v*

[7] (1983) AC 244.

Grain Board of Iraq[8] and *Wilhelm Finance Inc v Ente Administrador del Astillero Rio Santiago*.[9]

Issues for the Privy Council

22 Two principal arguments were advanced before the Privy Council. The first was that Gécamines' separate corporate personality was determinative of the matter unless it could be shown that this was one of those rare occasions when the corporate veil could be lifted. The second was that Gécamines was not a department of government under either s 14(1) of the 1978 Act or under the *Trendtex* test (to the extent that the two differed) and was not under governmental control and did not exercise governmental functions.

Lifting the corporate veil

23 It had never been asserted in the proceedings that Gécamines was a sham. In fact, it was accepted that Gécamines had existed since 1967 and its predecessor, Union Minière de Haut Katanga, a former Belgian colonial company which was nationalised to form Gécamines, had been in existence since 1904. It was therefore argued that Gécamines should not be treated any differently from any other company or corporation and that the principles recognised in *Salomon v A Salomon & Co Ltd*[10] and internationally in *Case concerning Barcelona Traction, Light and Power Company Ltd*[11] should be applied.

24 The Board rejected this argument on two grounds. The first was that the question of legal personality was not determinative of whether a body was an organ of the state. Section 14(1) of the 1978 Act specifically contemplated this. Furthermore, a state could not detach itself from what Lord Denning had described in *Trendtex* as the "traditional functions of a sovereign", such as maintaining law and order, conducting foreign affairs and defending the realm. Thus, the question of functions would always be important.

25 Secondly, the concept of an organ of the state in international law would not necessarily be identical to the principles established in domestic law.

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[8] (2008) EWHC 612.
[9] (2009) EWHC 1074.
[10] (1897) AC 22.
[11] (1970) ICJ 3.

The test for an organ of the state

26 The Board decided that a new test should be set out for the purposes of determining whether an entity was an organ of the state. However, the new test has its roots firmly in the doctrine of sovereign immunity and *Trendtex*. Indeed, Lord Mance said quite specifically that—

> "It is now appropriate in both contexts to have regard to the formulation of the more nuanced principles governing immunity in current international and national law."[12]

27 Clearly, the new test would have to take into account the introduction of s 14(1) of the 1978 Act and the fact that entities that were not organs could still have immunity in respect of exercises of sovereign functions.

28 The Board decided that separate juridical status was not conclusive. However, constitutional and factual control and the exercise of sovereign functions did not, without more, convert a separate entity into an organ of the state. Particularly where an entity was created for commercial purposes, the strong presumption was that its separate corporate status should be respected. The presumption would only be displaced if the entity had no effective separate existence. An examination of the entity's constitutional provisions, the state's control over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the state and of the entity were so closely intertwined and confused that the entity could not properly be regarded as separate.

29 The Board said that it saw particular value in propositions set out in *State Immunity, Selected Materials and Commentary* by Dickinson, Lindsay and Loonam that the existence of state control was not a sufficient criterion, that the possession of a range of functions coupled with independence in their exercise would militate against a conclusion that an entity was an organ and that caution was required before finding that an entity with separate legal personality was an organ of the state.[13]

International authority

30 In considering the test, the Board had regard to authorities from other jurisdictions and, in particular, the US Supreme Court case of *First National City Bank v Banco para el Comercio Exterior de Cuba*

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[12] *Ibid* at para 28.
[13] See para 33 *et seq*.

("Bancec")[14] the Canadian case of *Roxford Enterprises SA v Cuba*,[15] two French *Cour de Cassation* cases concerning SNPC and a Cameroon entity called SNH, and two South African cases: *Banco do Mocambique v Inter-Science Research and Development Servs (Pty) Ltd*[16] and *Shipping Corp of India Ltd v Evdomon Corp and President of India*.[17]

31 The cases approached the question in different ways but there were consistent themes.

32 In *First National*, the US Supreme Court stated the basic presumption that a state-owned corporation's assets should be treated as separate from those of the state. It then set out two situations where the veil could be lifted. These were situations where control was so extensive that it amounted to a relationship of principal and agent or where strict adherence to the separateness of corporations would work fraud or injustice. The Board regarded the former as more likely to be relevant where the claim was to hold the state liable for its corporation's activities. It regarded the latter as a carefully tailored remedy to an extreme factual situation where the US party had been expropriated of its Cuban assets.

33 In *Roxford*, the Canadian Federal Court said that a liability of a state could only be enforced against a state-owned entity in circumstances where there was a *de facto* and *de jure* assimilation of the state-owned entity to the state.

34 The French cases considered whether the respective entities were "*émanations de l'Etat*". SNPC, which was the company under consideration in the *Kensington* and *Walker* cases in England, was found to be an "*émanation*" as was SNH. In both cases, the *Cour de Cassation* found that neither company had any existence separate from their respective states. Although the Board did not expressly say so, the French concept of "*émanation*" is closely related to the French concept of "*confusion de patrimoine*".

35 The South African cases did not speak with one voice. In *Banco do Mocambique*, the court applied the organ of the state concept and followed a similar line to that of *Trendtex*. In *Shipping Corp*, the South African Supreme Court applied the strict *Salomon* test and said that it was purely a question of whether the corporate veil could be lifted.

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[14] (1983) 462 US 611.
[15] (2003) FCT 763.
[16] (1982) (3) SA 330 (T).
[17] (1994) (1) SA 550 (AD).

36 The central themes that emerged from these cases were the presumption that state-owned corporations were separate entities, that corporate form should generally be respected and that it would require some quite extreme circumstances to displace it. These cases clearly informed the test set out by the Board.

The application of the test

37 The Board found that both the Royal Court and the majority of the Court of Appeal had treated the *Trendtex* test as introducing a too general and too easily established exception to the circumstances in which the courts would respect the separate legal personality of a state-owned corporation.

38 The Royal Court had decided that Gécamines was under state control. As regards functions, it effectively decided that because Gécamines was engaged in an area of activity of critical importance to the DRC economy and constituted in such a way so as to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operated, it could be seen as carrying out government policy in the way that a department of state did. It therefore assumed the position of a department of government.

39 The majority of the Court of Appeal set an apparently high test in accepting that the performance of some governmental functions would not be sufficient but then diluted this by saying that it was not necessary that the entity perform any sovereign acts. The majority espoused a broad vision of government which it said could embrace activities which would in other circumstances amount to ordinary trading activities.

40 These tests gave rise to a significant practical difficulty which was identified by Pleming, JA in his dissenting judgment in the Court of Appeal and noted with approval by the Board. If all that was required was for a state-owned corporation to be engaged in an activity of importance to the national economy, how could any such corporation avoid being an organ? And, if this were the case, what was the purpose of the *Trendtex* governmental functions test? Essentially, the test for being an organ would simply be a control test which virtually every state-owned corporation would meet.

41 This is why the performance of sovereign acts (or *acta jure imperii*) by the entity is critical to the test.

The performance of *acta jure imperii*

42 The first question was what constituted "*acta jure imperii*". The position of the Royal Court and of the majority of the Court of Appeal appeared to be that the motive or purpose of the government in

constituting the entity was relevant to the question. In other words, activities, such as mining, could be sovereign acts if they were in furtherance of a broad goal of governmental policy, such as economic development.

43 However, Pleming, JA and the Board disagreed with this. First, it was not consistent with existing authority. In *Trendtex*, the Central Bank of Nigeria was being sued on a letter of credit which related to the importation of cement. An argument that the cement contracts were for the purposes of constructing military barracks and therefore sovereign in nature was rejected by Lord Denning on the basis that it was the nature and not the purpose of the act that mattered.

44 In *I Congreso del Partido*, Lord Wilberforce, while acknowledging that the dividing line between *acta jure gestionis* (or acts of private law) and *acta jure imperii* (or sovereign acts) was not always easy to discern, said that the existence of a governmental purpose or motive would not convert what would otherwise be an act of private law into a sovereign act. The act had to be, of its own character, a governmental act, as opposed to an act that any private citizen could perform.

45 The second question was the extent to which sovereign acts had to be performed. In his dissenting judgment in the Court of Appeal, Pleming, JA said that the functions test would only be satisfied where the entity was performing predominantly or entirely *acta jure imperii* such that they were the essence of its being and it had no other existence. While Pleming, JA's test was formulated slightly differently, it is very similar in practical terms to the test set out by the Board which requires the activities of state and entity to be so entwined and confused that the entity could not properly be regarded as separate.

46 Ultimately, this all leads back to the question in s 14(1) of the SIA and to *Trendtex* as to whether an entity is a department of government. A department of government inevitably predominantly undertakes acts of a sovereign nature. It can engage in private law acts (*eg* a Police Authority purchasing uniforms) but such acts are not what Pleming, JA described as "predominant" or "the essence of what the entity does so that it has no other existence". This is what distinguishes a department of government from a separate entity.

The position of creditors

47 Another important factor in favour of a very restrictive application of the principle is the position of creditors of the entity. Virtually all trading businesses have their own creditors. The effect of declaring a state-owned corporation to be an organ of the state is to make its assets available for execution in satisfaction of the state's debts. Effectively,

the state's liabilities are dumped on to the balance sheet of the state-owned corporation. Clearly, this is highly prejudicial to the existing creditors of the business. Where a state is highly indebted, as many states are, the effect is likely to be catastrophic to the commercial viability of the corporation.

The position of Gécamines

48 On the basis that the Royal Court and the majority of the Court of Appeal had applied the wrong legal test, the Privy Council regarded it as incumbent upon it to form its own view of the facts. Naturally, the facts will differ from case to case but there are some themes that can be drawn from the judgment of the Privy Council and from the dissenting judgment of Pleming, JA, with whom the Privy Council largely agreed.

49 The first is that a significant amount of governmental control is to be expected in the operations of any state-owned corporation. Neither Pleming, JA nor the Privy Council regarded Gécamines' constitution and, in particular, the DRC government's ability to veto certain board decisions (the "*Tutelle*"), as decisive or even particularly surprising. Nor did they appear to find surprising the fact that the DRC government was closely involved in a different ways in Gécamines.

50 Although they did not say so in express terms, it is respectfully submitted that the Board viewed governmental control of the entity, or at least extensive governmental involvement, as being of limited importance. Clearly, if an entity meets the organ test as set down by the Privy Council, governmental control will be a given because the entity and the state are so intertwined as to make them indistinguishable. However, governmental control is not, in and of itself, sufficient for an entity to be an organ of the state.

51 The second is that, although again they do not say so in express terms, the Board and, to some extent, Pleming, JA, clearly thought that the Royal Court and the majority of the Court of Appeal had become involved in a forensic investigation of a number of isolated matters to determine the involvement of the state in the operations of Gécamines. Finding state involvement had become an end in itself so that if some notional level of involvement were reached, Gécamines would be an organ of the state. It is clear from the judgments of Pleming, JA and of the Privy Council that they did not believe that this was the correct approach.

52 The third is that the judgments of the Royal Court and of the majority of the Court of Appeal turned on consideration of four isolated matters which were the fact that the DRC government had appropriated some of Gécamines' revenue during the Congolese war

between 1997 and 2003, the fact that the mining contracts into which it had entered during that period were subsequently re-negotiated under the auspices of a commission established by the DRC government, the involvement of the government in a significant joint mining joint venture, and the taking by the DRC government of certain entry fee payments due by mining counterparties to Gécamines.

53 Neither Pleming, JA nor the Privy Council thought that any of these factors, either individually or collectively, were sufficient to justify a finding that Gécamines was an organ of the state. In fact, the Privy Council expressly said that the Royal Court and the majority of the Court of Appeal had failed to a significant degree to look at the functions and activities of Gécamines in the round. In particular, those courts had failed to give proper consideration to the fact that Gécamines was a substantial mining company with a long history.

54 Correctly, it is respectfully submitted, Pleming, JA and the Board regarded Gécamines' accounts as an important document. They demonstrated that it had a significant turnover, that it was party to a large number of joint venture agreements, that documented financial obligations ran between it and the state, and that it had its own assets and creditors.

55 It is respectfully submitted that both Pleming, JA and the Board were acutely aware of the fact that FGH's case was being built around a series of isolated incidents. It was, however, vital to keep in mind Gécamines' day-to-day existence as a mining company. This was the most critical factor.

56 The Board also went on to remark that, even if one of the four matters had amounted to a sovereign act or the exercising of sovereign authority, this would not have been sufficient on its own for Gécamines to be classified as an organ of the state. Section 14(2) of the 1978 Act envisaged that a separate entity could have immunity in circumstances where it exercised sovereign authority. This would not justify a finding that Gécamines was assimilated with the state for all purposes.

57 Both Pleming, JA and the Privy Council drew a comparison between Gécamines' activities as a mining company, which was required to buy licences for mining concessions, and the activities of the Cadastre Minier, which was the agency of the Ministry of Mines that administered the system of concessions. In many ways, that comparison summed up the distinction between departments of government and separate entities, focusing as it did on the different nature of the commercial acts undertaken by Gécamines and the administrative and regulatory acts undertaken by the Cadastre.

Conclusion

58 The Board has set out a test that starts with a presumption that a state-owned corporation incorporated for commercial purposes is a separate entity. The party claiming otherwise will need to produce extremely persuasive evidence that the entity has no existence separate from that of the state and is, in effect, a government ministry. Governmental control over the corporation will not be enough. The party claiming that the corporation is an organ of the state will have to show that the corporation predominantly performs acts that are, by their nature, sovereign acts, such that they are the essence of its being. Motive or purpose are not relevant to the classification of acts.

59 The test is undoubtedly a strict one. It is not impossible to meet. SNPC, on the basis of the evidence in the *Kensington* and *Walker* cases, would probably have qualified. However, it will require clear and cogent evidence that goes to the heart and essence of the entity and its being. The cherry-picking of particular events in a bid to find governmental control of the corporation will not be sufficient. In effect, the Board has set down a test which, although it has its roots firmly in *Trendtex*, is, if anything, stricter. It is virtually that of sham albeit without the fraud. Given the widespread sovereign debt problems throughout the world, the Board's test will be welcomed by state-owned corporations and states alike.

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