Neutral Citation Number: [2023] EWCA Civ 886

Case No: CA-2022-002042

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
HIS HONOUR JUDGE PELLING KC
[2022] EWHC 2266 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2023

Before:

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE PHILLIPS

PARAGRAPHS - 35
42
64
72

Between:

(1) CRANE BANK LIMITED **(2) SUDHIR RUPARELIA** **(3) JYOTSNA RUPARELIA** **(4) MEERA RUPARELIA** **(5) RAJIV RUPARELIA** **(6) TOM MUGENGA** **(7) SHEENA RUPARELIA**	**Appellants/ Claimants**
- and -	
(1) DFCU BANK LIMITED **(2) DFCU LIMITED** **(3) JIMMY MUGERWA** **(4) JUMA KISAAME** **(5) WILLIAM SEKABEMBE**	**Respondents/ Defendants**
(6) CDC GROUP PLC **(7) NORFINANCE AS** **(8) RABO PARTNERSHIPS B.V.** **(9) ARISE BV** **(10) STEPHEN CALEY** **(11) MICHAEL ALAN TURNER** **(12) ALBERT JONKERGOUW** **(13) WILLEM CRAMER** **(14) OLA RINNAN**	

(15) DEEPAK MALIK **Defendants**

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Lord Pannick KC, Hannah Brown KC, David Caplan and Ben Lewy
(instructed by **Greenberg Traurig LLP**) for the **Appellants**

Joe Smouha KC, Jackie McArthur and Sean Aughey
(instructed by **Freshfields Bruckhaus Deringer LLP**)
for the **First and Second Respondents**

Georges Chalfoun (instructed by **Jenner & Block London LLP**) for the **Third, Fourth and Fifth Respondents**

Hearing dates: 3, 4 & 5 April 2023
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Approved Judgment

This judgment was handed down remotely at 11.00am on Wednesday 26 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Phillips:

1. This appeal raises issues as to the scope and application of the foreign act of state rule and of the limitations and exceptions to which it is subject.

2. The first appellant, Crane Bank Limited ("CBL"), was formerly a major commercial bank in Uganda. The second to seventh appellants are shareholders in CBL. In these proceedings the appellants assert that from about Spring 2016 senior Ugandan government officials and officials of the Bank of Uganda ("the BoU") engaged in a corrupt scheme to take control of CBL, making improper use of statutory and regulatory powers to do so, and then to sell its assets for the benefit of the parties to the scheme. The appellants allege that the first respondent ("DFCU Bank"), another Ugandan commercial bank, joined the corrupt scheme as purchaser of CBL's assets from the BoU (acting as receiver of CBL), that purchase being at a gross undervalue. DFCU Bank's holding company (the second respondent) and certain current and former executives and directors of DFCU Bank (the third to fifth respondents) are also alleged to have joined the scheme.[1]

3. As a consequence, the appellants claim damages in excess of £170 million for conspiracy to injure by unlawful means and/or an account of profits alleged to have been made by the respondents (and all other defendants) by their dishonest assistance of the corrupt scheme or equitable compensation. The appellants further claim that DFCU Bank is liable to account for sums received on the basis of knowing receipt of assets transferred in breach of fiduciary duty. It is common ground that all these claims are governed by Ugandan law.

4. On 19 October 2022, on the respondents' application under CPR Part 11 on the ground that there was no serious issue to be tried, HH Judge Pelling KC ("the Judge") made an order declaring that the Court has no jurisdiction to try the appellants' claims against the respondents and setting aside service of the Claim Form on them. That order gave effect to a reserved judgment handed down by the Judge on 7 October 2022 in which the Judge held that, as the appellants' claims would require the Court to adjudicate on the lawfulness of executive acts of a foreign state (Uganda), under the laws of that state and performed within its territory, the claims fell within the foreign act of state rule and that the Court, accordingly, had no jurisdiction to try them. The Judge rejected the appellants' arguments that their claims, or some of them, fell (or arguably fell) within one or more of the exceptions to the foreign act of state rule.

5. The appellants appeal that decision with permission granted by Males LJ, contending that the Judge should have found that there was at least a serious issue to be tried (for the purpose of founding jurisdiction) that:

    i) the sale by the BoU (as receiver) to DFCU Bank was commercial rather than sovereign in character, therefore falling outside the foreign act of state rule ("the Commercial Activity Exception"); and/or

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[1] The appellants also allege that the sixth to ninth defendants (current or former shareholders in the second respondent) and the tenth to fifteenth defendants (non-executive directors of DFCU Bank) joined the corrupt scheme, but those defendants did not dispute the jurisdiction of the English courts on the basis of the foreign act of state rule or otherwise (although they do pleaded act of state by way of a defence).

ii) all of the executive acts in question engaged the English public policy of combatting and not giving legal protection to bribery and corruption, therefore falling outside the foreign act of state rule ("the Public Policy Exception"); and/or

iii) investigating the acts of bribery and corruption alleged against DFCU Bank in paragraph 69(m) of the Amended Particulars of Claim ("the APoC") did not require the Court to inquire into or adjudicate on the legality of executive acts of the Ugandan state, and so would not infringe the foreign act of state rule ("the Kirkpatrick Exception"); and/or

iv) the application of the foreign act of state rule in this case would be incompatible with Article 6 of the European Convention on Human Rights and therefore contrary to s.6 of the Human Rights Act 1998 ("the Article 6 issue").

6. As a separate ground of appeal, the appellants contended that, contrary to the Judge's finding, the scope of the limitations of and exceptions to the foreign act of state doctrine is not settled, but is a controversial question in a developing area, and accordingly was not suitable for determination on a summary basis: see *Altimo Holdings and Investments Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 per Lord Collins at [84]. At the hearing of the appeal Lord Pannick KC, for the appellants, advanced that contention only in relation to the Public Policy Exception.

The factual background

7. It was common ground that the Judge was right to determine the respondents' application on the basis of the APoC, even though the amendment post-dated the grant of permission to serve out of the jurisdiction, and on the basis that the appellants' factual case set out in the APoC should be treated as correct.

8. That factual case can be summarised as follows.

i) Until 2016 CBL was Uganda's largest locally owned bank and its fourth largest lender, licensed under the Ugandan Financial Institutions Act 2004 ("the FIA"). At the end of 2015 it had a strong balance sheet, showing total equity of about US$83m and was highly profitable, with net operating income of about US$43m. Its financial statements were audited by KPMG and approved by the BoU as CBL's regulator.

ii) In Spring 2016 senior government officials, including officials at the BoU, formulated a corrupt scheme to seize control of a major Ugandan bank and to sell it or its assets for their personal benefit. This initially involved a Chinese diplomat, Dr Patrick Ho, who sought preferential access for CEFC China Energy ("CEFC") in Uganda by bribing various government officials, including the Foreign Minister and the Deputy Governor of the BoU, in respect of which Dr Ho was subsequently convicted by the US District Court, Southern District of New York, a conviction upheld on appeal in 2020.

iii) Dr Ho identified to the Foreign Minister that acquisition of a local bank in Uganda was CEFC's top priority. In or about June or July 2016 CBL was identified as the target.

iv) Pursuant to the corrupt scheme, and notwithstanding its previous approval of CBL's audited accounts, on 1 July 2016 the BoU adjusted CBL's capital position by about US$76.5m and ordered CBL to raise additional capital of about US$46.4m by 31 July 2016. Further, the BoU withdrew CBL's authorisation to conduct most financial business and placed a lien over about US$50m of Treasury Bills held by CBL, seriously inhibiting CBL's ability to raise the additional capital. In August 2016 the BoU ordered CBL to raise further capital in the sum of about US$26m.

v) On 18 September 2016 the Governor of the BoU issued a press statement falsely blaming CBL's problems on weak loan performance and depositor flight. This triggered a run on CBL.

vi) Between July and September 2016 CBL's shareholders raised about US$8.2m to recapitalise CBL, but the BoU refused to allow that sum to be injected and required that it be held on deposit at the BoU. The BoU also took steps to thwart investment in CBL by independent financial institutions.

vii) On 13 October 2016 the Deputy Governor of the BoU, through the Foreign Minister's wife, privately informed Dr Ho of the possible acquisition of CBL. At their request the next day CEFC sent an email to the Deputy Governor's private email expressing such interest.

viii) On 16 October 2016 CBL requested emergency liquidity assistance from the BoU in the sum of US$115m, offering prime real estate held by a company owned by the second appellant, worth more than US$115m, as collateral. The BoU refused the request, offering only US$22.8m on terms which were impossible for CBL to meet.

ix) On 20 October 2016 the BoU placed CBL into statutory management under provisions of the FIA.

x) Between 21 October 2016 and 9 January 2017 the BoU purported to inject about US$135m into CBL by way of liquidity support, for which CBL is purportedly liable, but the use of about US$79.5m of that sum is unaccounted for by the BoU.

xi) CEFC's interest in acquiring CBL ceased in late October 2016. In November 2016 at the latest the BoU privately approached DFCU Bank with a proposal to acquire CBL as a going concern, but the transaction then transformed into an acquisition of CBL's assets, subject to its liabilities.

xii) On 9 December 2016 the BoU sent invitations to 13 parties to bid for CBL's assets and liabilities, but had given DFCU Bank preferential terms and early access to information. DFCU's bid, despite being non-compliant and contemplating a breach of the FIA, was accepted by the BoU on 23 December 2016.

xiii) On 24 January 2017 the BoU placed CBL into receivership under section 95(1)(b) of the FIA, with the BoU as receiver.

xiv) On 25 January 2017 the BoU (in its capacity as receiver of CBL) and DFCU Bank executed a Purchase of Assets and Assumption of Liabilities Agreement ("the Agreement") whereby the BoU sold CBL's assets to DFCU Bank (other than specified excluded assets, comprising claims and tax credits) in consideration of DFCU Bank assuming CBL's liabilities (other than specified excluded liabilities, which included sums due to the BoU under the liquidity facilities in excess of UGX 200bn (c. US$58m)).

xv) Also on 25 January 2017 the BoU and DFCU Bank entered a facility agreement, permitting DFCU Bank to repay the UGX 200bn liability over a period of 30 months, but on an interest free basis. DFCU Bank recognised that interest-free arrangement as creating a liability of only UGX 149bn. The BoU subsequently sought to recover interest on the UGX 200bn from the appellants.

xvi) By a letter to DFCU Bank, also dated 25 January 2017 ("the Side Letter"), the BoU agreed (a) to give DFCU Bank 11 months to bring itself into compliance with FIA capital adequacy and prudential requirements (b) that DFCU Bank's non-performing loan and advances would be managed off-balance sheet for at least 12 months and (c) that fully provisional loans and advances acquired by DFCU Bank would not be part of its loan portfolio for reporting purposes until rehabilitated. The effect of the Side Letter was to reduce substantially the amount of additional capital required to be injected into DFCU Bank as a result of the acquisition of CBL's assets and libabilities.

xvii) Due to the terms of the Agreement and the Side Letter, DFCU Bank acquired assets of CBL with a value far exceeding the liabilities DFCU Bank assumed and the costs it incurred. DFCU Bank (or its group) recorded in its annual report for 2017 that it had made an immediate windfall gain of about US$33.4m.

xviii) A portfolio of loans valued at UGX 100bn (about US$27.5m) was not reflected in the Agreement nor shown in any accounts. The appellants allege that that sum was transferred to the BoU and/or its officers secretly as a quid pro quo (or part of it) for the sale of CBL's assets and to DFCU Bank at an undervalue.

xix) On 7 August 2020 the Ugandan Court of Appeal declared that the receivership of CBL had ended on 20 January 2018. The BoU thereafter purported to place CBL into liquidation, but that action was held to be illegal and in manifest bad faith by the Supreme Court of Uganda on 4 October 2021 and the Court of Appeal's declaration was affirmed.

9. The appellants commenced these proceedings on 23 December 2020 and obtained permission to serve them on the respondents out of the jurisdiction. There is no dispute that the claims fall within one or more of the gateways under CPR PD 6B 3.1 for such service and that England and Wales would be the proper place to try the claims, but by separate applications, both dated 26 October 2021, the first and second respondents and the third to fifth respondents challenged the jurisdiction of the court on the basis that the claims were debarred by the foreign act of state rule so that there was no serious issue to be tried.

The claims

10. The core assertion in the APoC, contained in paragraph 8(c), is that:

> "The Defendants were, together with the BoU and/or its officials and/or agents…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").

11. The cause of action pleaded at paragraph 68 on the basis of that allegation is that, by joining the Corrupt Scheme in or about November 2016, the defendants became parties to a conspiracy (or formed a new conspiracy) with each other and the BoU and/or its officers to injure the appellants by unlawful means. The alleged unlawful means by which the conspiracy was effected after the defendants allegedly joined the conspiracy are set out in considerable detail in paragraph 69, but may be summarised as follows:

    i) abuse of office by the BoU and/or its officers, including crimes of corruption, receiving bribes and offences under the Ugandan Anti-Corruption Act and breach of fiduciary duty in relation to the statutory management of CBL;

    ii) breach of trust and/or fiduciary and/or equitable duties by the BoU as receiver of CBL, including a breach of duties under the FIA to undertake a valuation of CBL's assets;

    iii) crimes of corruption, bribery, causing financial loss and dealing with suspect property against DFCU Bank.

12. The only other causes of action pleaded, on the basis of the same allegations, are dishonest assistance in breaches of trust and/or fiduciary duty by the BoU or its officers (against all the defendants) and knowing receipt of CBL's assets as against DFCU Bank. Although there is a clear allegation that DFCU Bank bribed the BoU and/or its officials to sell CBL's assets to it at a gross undervalue, there is no claim pleaded in the tort of bribery.

The foreign act of state rule

13. The existence of the rule, that 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, was recently and authoritatively recognised by the Supreme Court in *"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2023] AC 156. Lord Lloyd-Jones JSC, with whom all the other Justices agreed, explained at [135]:

> "The rule…has a sound basis in principle. It is founded on the respect due to the sovereignty and independence of foreign states and is intended to promote comity in inter-state relations. While the same rationale underpins state immunity, the rule is distinct from state immunity and is not required by international law. It is not founded on the personal immunity of a party directly or indirectly impleaded but upon the subject matter of the proceedings. The rule does not turn on a conventional application of choice of law rules in private international law nor does it depend on the lawfulness of the conduct under the law

> of the state in question. On the contrary it is an exclusionary rule, limiting the power of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings…The fact that executive acts may lack any legal basis does not prevent the application of the rule. In my view, we should now acknowledge the existence of such a rule."

14. At [136] Lord Lloyd-Jones summarised the various limitations and exceptions to which the foreign act of state rule is undoubtedly subject, as considered by Rix LJ in *Yukos Capital (No. 2)* [2014] QB 458 at [68]-[115]. For the purposes of the appeal, the following are relevant:

(i) the Public Policy Exception:

> ""[T]he doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights". (*Oppenheimer v Cattermole* [1976] AC 249, 277–278, per Lord Cross; *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883; *Yukos Capital (No 2),* paras 69-72.)"

(ii) the Commercial Activity Exception:

> "The doctrine does not apply where the conduct of the foreign state is of a commercial as opposed to a sovereign character. (*Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171; *Korea National Insurance Corpn v Allianz Global Corporate & Specialty AG* [2008] EWCA Civ 1355; [2008] 2 CLC 837; *Yukos Capital (No 2),* paras 92-94.)"

(iii) the Kirkpatrick Exception:

> "The doctrine does not apply where the only issue is whether certain acts have occurred, as opposed to where the court is asked to inquire into them for the purpose of adjudicating on their legal effectiveness. (*Kirkpatrick* (1990) 493 US 400; *Yukos Capital (No 2)*, paras 95-104.)"

The Commercial Activity Exception

The issue

15. The appellants accepted that the alleged Corrupt Scheme involved the BoU and its officials exercising powers as part of the executive of the Ugandan state in Uganda and subject to the law of Uganda, resulting in CBL being placed in statutory management and then receivership. The appellants asserted, however, that the final (and crucial) unlawful act in carrying out the conspiracy was the BoU's commercial act of selling CBL's assets in its capacity not as central bank but as receiver (and therefore agent) of CBL. The claim is that, pursuant to the Corrupt Scheme, DFCU Bank procured that

commercial act by bribing the BoU and/or its officials to effect that sale, as receiver, at an undervalue. The appellants therefore contended that, whatever may be the position in relation to earlier stages of the Corrupt Scheme, its final acts (and the claims in relation to those acts) fall within the Commercial Activity Exception.

16. The Judge rejected that argument in a single paragraph, stating at [30] as follows:

> "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 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 2017 is held to be unlawful that this claim can succeed."

17. The appellants contended that, in so finding, the Judge failed to consider and properly apply the principles to be found in relevant case law, as set out below, to the facts of the case.

The detailed facts relating to the BoU's sale to DFCU Bank

18. In putting CBL into receivership on 24 January 2017 the BoU exercised the power to do so granted to the Central Bank by s.94 of the FIA. S.94(3) which provides that, if a financial institution is put into receivership, the BoU shall become the receiver of that institution.

19. S.95 of the FIA sets out the options available to the BoU when acting as a receiver of a financial institution:

> "(1) The Central Bank shall, within twelve months from the date of taking over as a receiver, consider and implement any or all of the following options either singly or in combination -
>
> (a) arrange a merger with another financial institution;
>
> (b) arrange for the purchase of assets and assumption of all or some of the liabilities by other financial institutions;
>
> (c) arrange to sell the financial institution;

(d) liquidate the assets of the financial institution.

(2) The Central Bank shall take the action described in subsection (1) which in the opinion of the Central Bank –

(a) is most likely to result in marshalling the greatest amount of the financial institution's assets; or

(b) protects the interests of depositors including their interest in the protected deposit amounts;

(c) minimises costs to the Deposit Protection Fund and losses to other creditors; or

(d) ensures stability of the financial sector.

(3) In determining the amount of assets that is likely to be realised from the financial institution's assets, the receiver shall -

(a) evaluate the alternatives on a present value basis, using a realistic discount rate; or

(b) document the evaluation and the assumptions on which the evaluation is based, including any assumptions with regard to interest rates, asset recovery rates, inflation, asset holding and other costs."

20. The Agreement, executed the next day, stated that the BoU was acting in its capacity as receiver of CBL under the FIA and included in its recitals that "it is in the interest of the public, the depositors and creditors of CBL and of the financial sector in Uganda, that the Assets…be transferred to and the Liabilities…be assumed by another financial institution", indicating that the BoU was taking the action described in s. 95(1)(b) for the reasons set out in s.95(2)(b),(c) and (d).

21. Otherwise, the Agreement was in form and content a standard commercial sale and purchase agreement, containing usual commercial terms. In clause 8 the BoU gave warranties, in particular as to the properties being purchased by DFCU Bank, and in clause 9 gave indemnities. Clause 19 provided for Further Assurance, clause 14 contained an Entire Agreement provision, clauses 17 and 18 dealt with Variation and Waiver, clause 21 provided for Severability and clause 24 for UNCITRAL arbitration. All were in recognised boilerplate terms. Of particular note is clause 1.4, which provided that:

> "The parties hereby agree that this Agreement is a complex commercial contract that has been negotiated and drafted jointly by sophisticated commercial parties represented by advocates and, accordingly, that no rule of contract, construction or interpretation pursuant to which ambiguities are construed against the party who drafted the contract shall be applied to the construction or interpretation of this agreement."

22. The Side Letter was sent to DFCU Bank by the Executive Director Supervision of the BoU. After referencing the Agreement, which the BoU had entered as receiver of CBL, the BoU acknowledged that "certain accommodations are necessary to be given to DFCU in relation to compliance with the prudential requirements and [anti-money laundering/know-your client] Compliance". The letter relaxed certain of DFCU Bank's reporting obligations and further provided that:

    i) "DFCU will be allowed time to bring its combined assets and liabilities position in line with the FIA and prudential requirements within a period not exceeding 11 (11) months…".

    ii) "All fully provisioned loans and advances acquired by DFCU will be ring-fenced and managed separately and will not be part of DFCU's loan portfolio for reporting purposes until rehabilitated in conformity with [relevant regulations]."

The law

23. In *The Playa Larga* the House of Lords considered the distinction between a "private act" and "a sovereign or public act" in the context of a claim by a state (the Republic of Cuba) to sovereign immunity in relation to instructions given as owner for the disposition of a vessel and the denial of its cargo to the purchasers. Lord Wilberforce, at 267B, stated that:

> "…the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

24. The House of Lords recognised that the giving of the instructions was a political decision taken by the government of the Republic of Cuba for political and non-commercial reasons, but held that, as everything done in relation to the ship was done as owners and not by way of the exercise of sovereign powers, the relevant actions were commercial and therefore actionable. At p.269B Lord Wilberforce approved the following formulation of the ultimate test:

> "…it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform."

25. In *Kuwait Airways* Lord Goff of Chieveley endorsed Lord Wilberforce's statement of principle, adding at p.1160A that:

> "…the ultimate test of what constitutes an act jure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform. It follows that,

> in the case of acts done by a separate entity, it is not enough that the entity should have acted on the directions of the state, because such an act need not possess the character of a governmental act… [I]n the absence of such character, the mere fact that the purpose or motive of that act was to serve the purposes of the state will not be sufficient to enable the separate entity to claim immunity…"

26. From the above, it is clear that the relevant act must be scrutinised to determine its character. The fact that it was carried out in the context or for the purpose of broader (and undoubtedly sovereign) governmental activities is not determinative. Thus in *Trendtex Trading v Bank of Nigeria* [1977] QB 529 the Court of Appeal rejected the Bank of Nigeria's contention that it had immunity in respect of claims on a letter of credit it had issued on the ground that the underlying contracts were purchases of cement by the Ministry of Defence for use in the building of barracks for the army. Lord Denning MR stated at p.558D:

> "On this account it was said that the contracts of purchase were acts of a governmental nature, jure imperii, and not of a commercial nature, jure gestionis. They were like a contract of purchase of boots for the army. But I do not think this should affect the question of immunity. If a government department goes into the market places of the world and buys boots or cement - as a commercial transaction - that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods."

27. It is also established that a course of conduct that is initially sovereign in character can subsequently involve private acts. In *Kuwait Airways*, following the invasion and occupation of Kuwait by Iraq, the plaintiff's aircraft were seized by Iraqi Airways (I.A.C) at the direction of the government of Iraq and taken to Iraq. Thereafter a resolution of the government of Iraq purported to dissolve the plaintiff and vest the aircraft in I.A.C. The House of Lords held that I.A.C had immunity in relation to the initial seizure and removal of the aircraft, but that, once the aircraft were purportedly vested in I.A.C, their continued retention (a fresh act of conversion) was not in the exercise of sovereign authority. Lord Goff of Chieveley explained as follows at p.1163C:

> "But, as I see the position, the situation changed after R.C.C. Resolution 369 came into effect. Thereafter, as I see it, it cannot be said that I.A.C.'s retention and use of the aircraft as its own constituted acts done in the exercise of sovereign authority. They were acts done by it in consequence of the vesting or purported vesting of the aircraft in it by the legislative decree. Certainly…the fact that Resolution 369 was itself a governmental act by the State of Iraq could not itself render I.A.C.'s consequent retention and use of the aircraft a governmental act. Plainly, a separate entity of a state which receives nationalised property from the state cannot ipso facto claim sovereign immunity in respect of a claim by the former owner, though it may well be able to plead, by way of defence, that its actions were not unlawful……Then,

> does it make any difference that, in the present case, the state entity was at the earlier stage involved in the seizure of the property from the former owner in the exercise of sovereign authority? I for my part cannot see that the characterisation as an act jure imperii of the earlier involvement by the entity in the act of seizure can, on the facts of the present case, be determinative of the characterisation of the subsequent retention and use of the property by the state entity following the formal vesting of the property in the entity by a legislative act of the state… For the fact remains that I.A.C, in treating the aircraft as its own, was doing so pursuant to the Iraqi legislation which vested the aircraft in I.A.C.; and by doing so it cannot be said to have acted in the exercise of sovereign authority."

Analysis

28. There is no doubt that the sale of assets to a commercial third party by the receiver of a company is a quintessentially commercial act, one which can perfectly well be performed by any private person duly appointed as such receiver (the test for a commercial act as recognised in *The Playa Larga* and *Kuwait Airways*). In the present case, whilst the receiver was the central bank of Uganda, which had placed CBL in receivership and become receiver pursuant to its statutory powers, the BoU, in acting as receiver, must be taken to have owed the usual common law and equitable duties to its principal (CBL) to act in good faith and to obtain a proper price for property under receivership (as pleaded in paragraph 40A of the APoC). Further, the sale to DFCU Bank, as set out in the Agreement, was a straightforward commercial transaction on standard commercial terms: indeed the parties expressly declared that it was a commercial contract.

29. The first counter-argument advanced by the respondents, and the one which caused the Judge to reject the applicability of the Commercial Activity Exception, was that the appellants' pleaded case is entirely based on a Corrupt Scheme whereby the BoU used its statutory and regulatory powers to take-over and asset strip a Ugandan bank: the sale of CBL's assets pursuant to the Agreement was part and parcel of that Corrupt Scheme, brought about by a series of executive acts. Indeed, there is no separate or distinct cause of action (whether in bribery or otherwise) based on the alleged sale of CBL's assets at an undervalue.

30. In so far as such counter-argument amounts to a pleading point, I consider that it lacks merit. I agree that it is difficult to understand why the appellants have not pleaded specific causes of action in relation to the alleged bribery of the BoU and its officers to sell CBL's assets at an undervalue, but such factual allegations are pleaded and would, in my judgment, permit a finding of a conspiracy to injure by those unlawful means alone. A larger conspiracy is pleaded, but the greater must include the lesser: if not all unlawful acts are proved (or are justiciable in this jurisdiction), the court may find a conspiracy only in relation to the unlawful acts that it is able to adjudicate on and does find to be proved.

31. To the extent that the first counter-argument addresses the substance of the matter, it fails to reflect the principles to be found in the authorities set out above. First, whilst it is important to consider the overall context, it is also necessary to focus on the character of each act in respect of which the foreign act of state rule is sought to be applied (or in

respect of which immunity is sought). Thus, whilst (as the Judge observed), the overall character of the Corrupt Scheme was the wrongful exercise of executive powers, it is necessary to consider the character of the specific act of selling CBL's assets ostensibly in an arm's length sale, just as (in *Trendtex*) a ministry running an army may go into the market to buy boots or cement. Second, it is established by *Kuwait Airways* that a course of conduct that is initially sovereign may become commercial in nature. In particular, and directly relevant in the present case, the fact that assets have been seized as part of an act of sovereign authority cannot be determinative of whether the subsequent use of those assets (in this case their sale) is also sovereign.

32. It follows, in my judgment, that the fact that the sale by the BoU as receiver was the culmination of a corrupt scheme which was essentially sovereign in character, does not entail that such sale cannot be found to be commercial. Indeed, it is clear that the BoU's decision to move from statutory management of CBL to receivership effected a significant change in the BoU's role: it became an agent of CBL and it was in that capacity that it sold CBL's assets. I consider that the Judge, who did not consider either *Trendtex* or *Kuwait Airways* in this context, was wrong to exclude the realistic possibility that, even in the context of the overall scheme, the sale of CBL's assets was commercial activity.

33. The second counter-argument was that, properly analysed, the sale by the BoU was itself a sovereign act, not a commercial one. The respondents pointed out that the Agreement itself recognises that the BoU was entering the sale in the interests of the public and the financial system generally, doing so because of its statutory powers and obligations as the Central Bank under s. 95 of the FIA. Further, the Side Letter, sent the same day as the Agreement and plainly forming part of the overall "bargain" with DFCU Bank, was an executive act, giving dispensations that only the Central Bank could provide. Overall, the argument was that this was not in truth a commercial sale, but the managed transfer by the Central Bank of the assets and liabilities of one Ugandan bank to another in the public interest.

34. I see the force of those arguments and accept that they may raise a question as to whether the sale of CBL's assets was a truly commercial act, but they are not decisive, particularly in view of Lord Wilberforce's emphasis in *The Playa Larga* that the question is not one of purpose or motive, but the character of the act itself. I am of the view that it is well arguable, at the very least, that the sale by the BoU as the receiver was commercial activity, regardless of the purpose of the BoU in entering it and giving associated dispensations. It is therefore arguable that the claim is not barred by the foreign act of state doctrine and the jurisdiction challenge should therefore have been dismissed.

35. I would accordingly allow the appeal on this aspect.

The Kirkpatrick Exception

36. In *Kirkpatrick* a disappointed bidder made a claim for damages against a successful bidder, alleging that the latter had obtained a contract by paying bribes to government officials in Nigeria. The US Supreme Court held that the claim was not barred by the foreign act of state doctrine: although the claim involved imputing unlawful motivations to foreign officials in the performance of an official act, the legal

consequences of bribery in Nigeria were no part of the plaintiff's case. The Supreme Court held that:

> "…[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue".

37. The Kirkpatrick Exception was summarised by Lord Lloyd-Jones as set out at [14] above. In *Belhaj v Straw* [2017] AC 964, Lord Sumption, referencing the decision in *Kirkpatrick*, stated at [240] that the doctrine "*applies only where the invalidity or unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it.*"

38. The appellants contended that their allegations, but in particular those of bribery and corruption made against DFCU Bank in paragraph 69(m) of the APoC, were of a similar nature to those considered in *Kirkpatrick*: they assert that the claim that DFCU Bank bribed the BoU and/or its officials can be determined as a matter of fact as regards the BoU, without adjudicating on the effect of such bribery on the executive acts of the officials in Uganda.

39. The Judge rejected that contention at [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."

40. The appellants contended that the Judge erred by addressing only the claim as a whole, rather than considering separately the claim against DFCU Bank (primarily set out in paragraph 69(m)), which they contended could meet the Kirkpatrick Exception.

41. I have to say that I see no merit whatsoever in this ground of appeal. The appellants' principal cause of action is that DFCU Bank joined in a conspiracy with the BoU to

dispossess CBL of its assets by misuse of the BoU's statutory and regulatory powers, a claim which requires proof that the BoU was party to, and continued to be party to, an unlawful means conspiracy. That requires proof that the means used were unlawful. The knowing receipt cause of action requires proving that the BoU was acting in breach of fiduciary duty. Even in relation to the sale of the assets of CBL by the BoU as receiver, the claim is that the BoU was bribed to sell the assets at an undervalue, and damages are claimed on the basis of such wrongful act by the BoU. I can see no part of the claim which does not require the court to adjudicate on the validity and lawfulness (in Uganda and under Ugandan law) of the actions of the BoU and its officials.

42. I would not allow the appeal on this ground.

The Public Policy Exception

The issue

43. The appellants' contention is that it is English public policy to combat and not to give legal protection to corrupt practices, a policy which is fully engaged on the facts alleged in the present case, placing the claims within the Public Policy Exception to the foreign act of state rule.

44. The Judge held that there was no such public policy in this context, stating as follows:

> "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 infringement 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:
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> > "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 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 Nicolls 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 not 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 [the foreign act of state rule] 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.

45. The appellants contended that the Judge failed to have regard to material that demonstrated the existence, or at least the arguable emergence, of an English public policy requiring the courts to combat corruption, including foreign corruption. They argued that the Judge instead wrongly treated the case as one of expropriation without compensation, and addressed the existence of a policy in that regard.

The law

46. Lord Lloyd-Jones' summary of the Public Policy Exception is set out at [14] above. It is apparent that he made no attempt to formulate or limit the public policies in question; precisely what policies qualify is undoubtedly an open-textured issue, with the authorities providing no more than general guidance and specific examples. Indeed the inherently uncertain and potentially changing nature of the Public Policy Exception is clear from *Kuwait Airways*, where Lord Nicholls stated that:

> "17. This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo that the court will exclude the foreign decree only when it "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal..
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> 18. Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle…The leading example in this country, always cited in this context, is the 1941 decree of the National Socialist Government of Germany depriving Jewish emigres of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it at all: *Oppenheimer v Cattermole* [1976] AC 249, 277-278. When deciding an issue by reference to foreign law, the courts of this country must have residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws…"

Lord Nicholls further stated at [28]:

> "The acceptability of a provision of foreign law must be judged by contemporary standards. Lord Wilberforce, in a different context, noted that conceptions of public policy should move with the times…In *Oppenheimer*…Lord Cross said that the courts of this country should give effect to clearly established rules of international law. This is increasingly true today. As nations become ever more interdependent, the need to recognise and adhere to standard of conduct set by international law becomes ever more important. 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 as a separate state. An expropriatory decree made in these circumstances and this purpose is simply not acceptable today."

47. Despite the emphasis on rules of international law in the above passage, it is clear that it is ultimately a matter of domestic law as to whether a relevant public policy is recognised. In *Belhaj* Lord Neuberger, for the majority, explained as follows:

> "154. The circumstances in which this exception to the Doctrine should apply appear to me to depend ultimately on domestic law considerations, although generally accepted norms of international law are plainly capable of playing a decisive role. In his opinion in *Kuwait Airways*, paras 28 and 29, Lord Nicholls emphasised "the need to recognise and adhere to standards of conduct set by international law" and held that recognition of the "fundamental breach of international law" manifested by the Iraqi decree in that case "would be manifestly contrary to the public policy of English law", like the Nazi German confiscatory decree in *Oppenheimer*. However, there is nothing in what Lord Nicholls said which suggests that it is only breaches of international law norms which would justify disapplication of the Doctrine. On the contrary: his reference to "the public policy of English law" supports the notion that the issue is ultimately to be judged by domestic rule of law considerations.
>
> 155. The point is also apparent from the opinion of Lord Hope. At para 139, he said that "the public policy exception" is not limited to cases where "there is a grave infringement of human rights", but is "founded upon the public policy of this country" - plainly a domestic standard.
>
> 156. The exception to the Doctrine based on public policy has only been considered by the courts in relation to the first of the four rules set out above. However, I cannot see grounds for saying that it does not apply similarly to the second rule, executive acts within the territory of the state concerned."

48. Lord Sumption, at [266] of *Belhaj*, considered the public policy to be drawn from treaty obligations under the UN Convention against Torture, stating:

> "It is no answer…that these Treaty provisions are concerned with criminal law and jurisdiction. So they are. But the criminal law reflects the moral values of our society and may inform the content of its public policy. Torture is contrary to both a peremptory norm of international law and a fundamental value of domestic law. Indeed, it was contrary to domestic public policy in England long before the development of any peremptory norm of international law…"

49. Whilst the flexible and developing nature of the Public Policy Exception is recognised, it has also been emphasised that the exception is exceptional and narrow: for example in *Kuwait Airways* by Lord Nicholls at [17], set out above, and by Lord Hope at [138]. In *Koza Ltd v Koza Altin* [2022] EWCA Civ 1284 Sir Julian Flaux C stated at [151] in relation to the Public Policy Exception that:

> "…Both *Oppenheimer* and *Kuwait Airways* demonstrate that something very flagrant must have occurred before the exception is engaged: in the case of *Oppenheimer* a so-called law constituting so grave an infringement of human rights as not to be a law at all, in the case of *Kuwait Airways* a gross violation of international law amounting to piracy. Rix LJ pointed out in *Yukos Capital (No 2)* the exception is a narrow one as Lord Hope recognised in *Kuwait Airways* and, in *Yukos Capital (No 2)*, this Court refused to extend it to expropriation without compensation..."

50. Finally, it is worth drawing attention to two observations made at first instance:

i) In *High Commissioner for Pakistan v Jah* [2019] EWHC 2552 Ch Marcus Smith J stated as follows in relation to the Public Policy Exception:

> "312…Quite how this exception works is a matter yet to be explored: it may be that the exception involves a balancing exercise, whereby a "strong" engagement of [the foreign act of state rule] can defeat a "weak" public policy exception… Or it may be that when once the [rule] is engaged, the question of non-justiciability is a given that can only be off-set by some form of public interest exception which, once established, does not need to be weighed in the balance…"

ii) In *Federal Republic of Nigeria v JPMorgan Chase Bank, NA* [2022] EWHC 1447 (Comm) Cockerill J tentatively considered at [198] that, had the foreign act of state rule applied to the acts in question, the Public Policy Exception would have applied where those acts were brought about by or had the object of facilitating fraud or corruption (see [177]).

Evidence of the alleged public policy

51. The appellants referred to a raft of international and domestic materials emphasising the scourge of corruption and the imperative to combat it, in particular by way of criminal sanctions, civil remedies and international cooperation. The following is a summary of the most pertinent of those materials.

52. The Council of Europe's Civil Law Convention on Corruption (1999) emphasises that corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies. It contains, at Article 3, a requirement that each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. The United Kingdom is a signatory to that convention, but has not to date ratified it. The appellants point to Article 18 of the Vienna Convention on the Law of Treaties (1969), which provides that a state which has signed

but not ratified a treaty "is obliged to refrain from acts which would defeat the object and purpose of a treaty" unless it has indicated its intention not to become a party. The appellants could find no evidence that the United Kingdom has given such an indication.

53. The United Kingdom has, however, ratified the 2003 UN Convention Against Corruption ("the UNCAC"), adopted by the UN General Assembly by resolution 58/4. It has been ratified by 188 other states, including Uganda. The recitals to the UNCAC record concern "about the seriousness of problems and threats posed by corruption to the stability and security of societies" and that "the prevention and eradication of corruption is a responsibility of all States…".

54. The UNCAC includes the following:

i) by Article 16, a requirement that each State Party shall adopt measures to establish as criminal offences, when committed intentionally (1) bribing a foreign public official to act or refrain from acting in the exercise of their official duties in order to obtain business or other undue advantage and (2) acceptance of a bribe by a foreign official in such circumstances;

ii) by Article 26: a requirement that each State Party adopt measures to establish the liability of legal persons for participation in the offences established in accordance with the Convention;

iii) by Article 35: "Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation."

55. In the context of a review of the United Kingdom's implementation of the UNCAC, and in particular the requirement in Article 35, it was noted that:

> "On the question of whether a remedy is available where a public authority is alleged to have been complicit in a corrupt process which can be shown to have resulted in damage to the claimant, the UK confirmed that this would be capable of falling within one of the economic torts previously identified (deceit, conspiracy, intimidation, and intentionally harming trade or economic interests…), and that this would allow for damages to be claimed from the public authority if they were found to be complicit."

56. The Bribery Act 2010 s.6 introduced an offence of bribery of foreign public officials consistent with the above Convention obligations, s.12 providing that it is unnecessary that any act or omission which forms part of such an offence take place in the United Kingdom, provided that the person giving the bribe has a close connection with the United Kingdom (such as a British citizen, ordinary resident or body incorporated in the United Kingdom).

The respondents' response

57. The respondents contend that it is not sufficient to identify general policies to combat "bad behaviour" such as bribery or corruption (or more generally, fraud, as exemplified by the maxim "fraud unravels all"). What must be shown is that it would be contrary to English public policy for the English courts to decline to determine the legality of a foreign executive act because of such policy: there must be a constitutional requirement that the courts determine the claim. They point out that Article 14 of the UN Convention Against Torture requires a State Party to ensure that a victim of torture has an enforceable right to fair and adequate compensation, but that the UNCAC expressly provides that a State Party shall ensure victims of corruption shall have a right to initiate legal proceedings "in accordance with principles of its domestic law". The reference to domestic law recognises, the respondents contend, that rights to compensation may be subject to the English foreign act of state doctrine, and that to enforce that rule does not infringe any policy derived from the UNCAC. They assert that Parliament has given effect to the United Kingdom's obligations under the UNCAC by enacting the Bribery Act, providing for criminal offences and sanctions. But no offence under that Act is apparent in this case, the allegations of bribery not being against persons associated with the United Kingdom.

58. The respondents further argue that, far from keeping the exception within very narrow limits as required by *Kuwait* and *Koza*, recognising bribery and corruption would lead to a massive and unprincipled expansion which would risk the exception consuming the rule or the rule becoming incoherent (see Lord Sumption in *Belhaj* at [253]). They point to the refusal of the courts to extend the Public Policy Exception to expropriation cases, querying the basis for distinguishing between the wrongful appropriation of property and the obtaining of property by corruption, particularly where the appropriation may involve some degree of corrupt motivation.

59. Relatedly, the respondents contend that the exception must be considered as against the pleaded acts of state, in the present case the alleged abuse of public office by the BoU. It cannot and should not be possible to take such acts out of the foreign act of state rule simply by alleging that they were procured by bribery.

Analysis and conclusion

60. The Public Policy Exception, as summarised by Lord Lloyd-Jones in *Maduro,* applies where the relevant foreign act of state is contrary to public policy, and is not (contrary to the respondents' submissions) expressed to be limited to situations where the courts are constitutionally required to determine the legality of the foreign act. The exception is narrow, but is flexible and open to development (as per *Kuwait*), demonstrating that it cannot be read as being constrained by "constitutional" requirements. I see no basis for reading the broad description of the exception as being subject to the tight restriction for which the respondents contend.

61. I see force in the submission that recognising an exception based on a policy of combatting corruption might significantly reduce the scope of the foreign act of state doctrine, or at least weaken its effectiveness as an answer to the English court assuming jurisdiction. It may also be opening the door to an ever-widening range of arguments as to bad behaviour which is said to be contrary to a policy derived from the criminal law or international treaty. But "floodgates" arguments must always be treated with some circumspection, certainly when used to support a summary application that the gates should not be opened.

62. In my judgment it is at least arguable, not least from the criminal law as framed in the Bribery Act 2010, that corruption of foreign public officials is contrary to English public policy or that such a policy is developing, the view tentatively expressed in *Federal Bank of Nigeria*. It may be that, in order to disapply the foreign act of state rule, such corruption must be of a particularly egregious nature, or must be a central or important feature of the illegality alleged in relation to the act of state (rather than incidental). It may be that some balancing exercise is appropriate (as referenced in *Jah*). But those questions, and the precise formulation of the policy, if it is found to exist, seem to me (applying the principle stated by Lord Collins in *Altimo,* referred to in [6] above) to be matters for trial rather than determination on a summary basis on an application under CPR 11.

63. In the present case the BoU and its officials are alleged to have abused their public office and duties in numerous respects, but the gist of the allegation is that all such matters were for the corrupt purpose of obtaining undue advantage in the form of huge financial inducements from a third party purchaser of CBL or its assets, in the event DFCU Bank. I consider that it is arguable that DFCU Bank cannot rely on the foreign act of state rule due to its alleged role in corrupting the BoU.

64. I would therefore allow the appeal on the ground of the Public Policy Exception.

The Article 6 Issue

65. The appellants contended that the application of the foreign act of state rule is, at least arguably, a disproportionate interference with their rights under Article 6 to a hearing to determine their civil rights. They argued that the rule is an impermissible procedural bar rather than a substantive law defence to the claim.

66. The Judge rejected the argument in robust terms as follows:

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

67. On this appeal the appellants renewed their argument that Lord Mance and Lord Sumption (with whom Lord Hughes agreed) in *Belhaj* were simply wrong to have categorised (albeit *obiter*) the foreign act of state rule as a substantive defence rather than a procedural bar. The argument was based on Lord Sumption's subsequent analysis of the relevant distinction in *Benkharbouche* at [16]:

> "The dichotomy between procedural and substantive rules is not always as straightforward as it sounds, partly because the categories are not wholly distinct and partly because they do not exhaust the field. There may be rules of law, such as limitation, which are procedural in the sense that they bar the remedy, not the right, but which operate as a defence. There may be rules of law which require proceedings to be dismissed without consideration of the merits. These may be substantive rules, such as the foreign act of state doctrine, or procedural rules such as state immunity. There may be rules, whether substantive or procedural, which limit the territorial or subject-matter jurisdiction of the domestic courts, and which they have no discretion to transgress. Or the claimant's right may be circumscribed by a substantive defence, such as privilege in the law of defamation. Or he may simply have no legal right to assert under the domestic law, for example because the law is that no relevant duty is owed by a particular class of defendants although it would be by defendants generally. But these are not refinements with which the Strasbourg court has traditionally been concerned. What the Strasbourg court means by a procedural rule is a rule which, whether technically procedural or substantive in character, has the effect of barring a claim for reasons which do not go to its legal merits; that is to say, rules which do not define the existence or extent of any legal obligation."

68. Lord Pannick contended that, applying Lord Sumption's test, the foreign act of state rule was a rule which barred a claim for reasons which do not go to its legal merits: it prevents the court deciding a claim irrespective of the existence and extent of the rights and obligations in question, just as does state immunity. It follows that Lord Pannick was suggesting that Lord Sumption's unequivocal statement, in the very same paragraph, that the foreign act of state rule is a substantive defence, was wrong.

69. However, Lord Sumption (and Lords Mance and Hughes in *Belhaj*) regarded the foreign act of state rule as a domestic defence, which does go to the legal merits of the

claim, rather than an immunity. Whereas immunity bars an otherwise good legal claim against a specific person, the foreign act of state rule provides that a claim which falls within it is not a good claim at all as a matter of English law, no matter the identity of the defendant. Another example of a substantive defence which bars what would otherwise be a good claim is, perhaps, the absolute privilege against claims in defamation for what is said in court or in parliament.

70. Lords Mance and Sumption emphasised that the distinction between domestic laws which excluded liability (which do not engage Article 6) and procedural bars (which do) had been established and applied by the European Court of Human Rights in *Roche* and *Markovic*.

i) In *Roche* a serviceman was deprived of the right to sue the Crown for personal injuries as the Government issued a certificate under s.10 of the Crown Proceedings Act 1947. The ECHR held that Article 6 did not guarantee any particular content for civil rights, and that the effect of a s.10 certificate was to create a substantive domestic defence, not to create a procedural bar.

ii) At [283] of *Belhaj*, Lord Sumption summarised *Markovic* as follows:

> "The applicants in this case were relatives of persons who had been killed in the NATO air-raid on Belgrade in 1999. The raid was said to be an act of war in violation of international law. It had been launched from bases in Italy. The Corte de Cassazione had held that by a rule of substantive law the Italian courts had no jurisdiction over acts of war or indeed over any acts of the Italian state which were impugned on the sole ground that they violated international law. The Strasbourg court applied the distinction between substance and procedure that they had formulated in *Roche*. They agreed that the limitation on the jurisdiction of the Italian court was substantive. It followed (para 114) that the decision of the Corte de Cassazione, "does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war."

71. Lord Pannick argued that the decisions in both *Roche* and *Markovic* proceeded on the basis that domestic law provided no substantive right, rather than barring the bringing of a claim in respect of an accepted right. But that, as I understand it, was precisely Lord Sumption's point: the foreign act of state rule entails that there is no substantive right to bring a claim in respect of the executive acts of a foreign state, just as a s.10 certificate means that a serviceman has no right to bring what would otherwise be good claims in tort. In both cases domestic law provides a complete defence to what would otherwise be an actionable claim.

72. I therefore consider that there is no merit in the appellants' attempt to introduce an Article 6 proportionality test in the application of the foreign act of state rule. I would add that, if such a test was to be imported, it would have a major impact on the rule and its applications: it is also noteworthy that Article 6 was not mentioned by Lord Lloyd-Jones in his comprehensive summary of the foreign act of state doctrine in *Maduro*.

Conclusion

73. I would allow the appeal on the ground that there are serious issues to be tried as to whether part or all of appellants' claims fall within the Commercial Activity Exception and/or the Public Policy Exception. I do not consider that serious issues arise in relation to the Kirkpatrick Exception or the applicability of Article 6.

Lord Justice Popplewell:

74. I agree.

Sir Julian Flaux, Chancellor of the High Court:

75. I also agree.