

JERSEY / JUDGMENT

Botas -v- Tepe [2016] JCA 199D (04 November 2016)

[2016] JCA 199D

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Court of Appeal 4 November 2016 Before : Sir David Calvert-Smith, President; Robert Logan Martin, Q. C.; and David Anderson, Q. C. Between Boru Hatlari Ile Petrol Taşıma AŞ (also known as Botaş Petroleum Pipeline Corporation Limited) First Appellant Turkish Petroleum International Limited Second Appellant Botaş International Limited Third Appellant And Tepe İnşaat Sanayii AŞ Respondent And Nacap BV Party Cited Advocate P. G. Nicholls for the Appellants. Advocate E. Moran for the Respondent.

judgment

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Introduction

1. This judgment relates to applications made by the appellants and the respondent following the substantive judgment of the Court dated 8 August 2016 (Botas -v- Tepe

[2016] JCA 135) on the appeal by the appellants and cross appeal by the respondent ("the substantive judgment"). 2. The first appellant is Boru Hatlari Ile Petrol Taşıma AŞ, also known as Botaş Petroleum Pipeline Corporation Limited (" Botaş ") which is a company registered in Turkey and wholly owned by the Republic of Turkey ("the Republic"). The second appellant is Turkish Petroleum International Limited ("TPIC") which is a company registered in Jersey. The third appellant is Botaş International Limited ("BIL") which is also a company registered in Jersey. TPIC and BIL are both wholly-owned subsidiaries of Botaş . The respondent is Tepe İnşaat Sanayii AŞ (" Tepe ") which is a company registered in Turkey. The party cited is Nacap BV which has taken no part in these proceedings. 3. The circumstances are set out in the substantive judgment and we do not repeat these. In summary, Tepe is seeking to enforce two international arbitration awards made against Botaş ("the Awards") by means of enforcement pursuant to the Arbitration (Jersey) Law 1998 and against assets belonging to Botaş . By the time of the appeal, the assets in question comprised shares held by Botaş in TPIC and BIL (together "the Shares"), and debts due by BIL to Botaş . 4. Tepe presented two Representations to the Royal Court seeking leave to enforce the Awards and was granted ex parte an interim arrêt entre mains in respect of the shares held by Botaş in TPIC, and this was subsequently extended to

cover the shares held by Botaş in BIL and the debts due by BIL to Botaş . With respect to what was in issue before this Court, Botaş filed pleadings in the Royal Court disputing the entitlement of Tepe to enforce the Awards in two respects. The first was that the Royal Court had no jurisdiction to make any order in respect of the Shares because the Republic has an interest in and/or control of the Shares such as to engage the principle of sovereign immunity by reference to the State Immunity Act 1978 of the United Kingdom ("the Act") which was extended to the Bailiwick by the State Immunity (Jersey) Order 1985 . The second was that the Royal Court had no jurisdiction in respect of the debts due by BIL to Botaş on several grounds. Tepe contended that leave to enforce the Awards should be granted and the interim arrêt confirmed. In reply, Botaş contended that the Representations should be dismissed and the interim arrêt lifted. After a hearing on the Representations before Sir Michael Birt, Commissioner, sitting with Jurats, the Royal Court gave judgment on 19 January 2016 ("the Royal Court judgment") (Tepe -v- Botas

[2016] JRC 012A) in which it rejected the claim of sovereign immunity in respect of the Shares and confirmed the arrêt in that respect, but refused to confirm the arrêt in respect of the debts due by BIL to Botaş . 5. The appellants appealed against the Royal Court judgment in respect of its confirmation of the arrêt in respect of the Shares and the respondent cross appealed in respect of the refusal of the Royal Court to confirm the arrêt in respect of the debts due by BIL to Botaş . We do not repeat the respective grounds of appeal. For the reasons given in the substantive judgment, the appeal by the appellants was refused (albeit that this Court differed from the Royal Court on the section of the Act which was applicable), and the cross appeal by the respondent was also refused. As a result, the arrêt in respect of the Shares was confirmed and the arrêt in respect of the debts due by BIL to Botaş was refused. 6. This judgment concerns a number of matters consequent upon the substantive judgment. The appellants have filed two Summonses. The first Summons is dated 19 August 2016 and it seeks a continuation of the stay of execution granted initially by the Royal Court pending the final determination of any appeal to the Privy Council. The second Summons is dated 26 August 2016 and in it the appellants seek the leave of this Court to appeal to Her Majesty in Council pursuant to art 14(a) of the Court of Appeal (Jersey) Law 1961 ("the 1961 Law"). The respondent has also filed two Summonses. The first Summons for the respondent is dated 5 September and it seeks payment by Botaş , as the first appellant, to Tepe , as the respondent, of 80% of the costs of and incidental to the appeal and cross appeal, including the costs of incidental preliminary hearings before the Commissioner and before McNeill JA sitting as a single judge of this Court, for a payment on account to the respondent, and for the sum of £100,000 which was paid into Court by Botaş as security for the costs of the appeal to be paid forthwith to the respondent. The second is an Amended Summons dated 16 September and it seeks the refusal of the appellants' application for leave or, if that application were to be granted, that the giving of leave should be subject to conditions: namely (a) that the first appellant, Botaş , should provide security by way of a bank guarantee for the full sum of the judgment debt payable in respect of the Awards which currently stands at circa US\$100 million; and (b) that Botaş

should take no steps to migrate the offices of TPIC and BIL to another jurisdiction or dilute the shareholding of Botaş in TPIC or BIL without the permission of the Viscount or the Court; and further that if leave to appeal is granted to Botaş as the first appellant, Botaş should make a payment into Court of an unidentified sum as security for the costs of the appeal. 7. These matters were the subject of contentions for the appellants supported by a second and third affidavit sworn by Ms Jayne Gabrielle Bentham, the London solicitor representing the appellants, together with related exhibits, and supplemented by a skeleton argument and supplementary skeleton argument, and of contentions for the respondent supported by an affidavit sworn by Ms Lynne Calder, an associate solicitor representing the respondent, together with related exhibits. Given the potential significance in particular of the application by the appellants for leave to appeal to the Privy Council, these written submissions were the subject of an oral hearing on 3 November 2016 before all members of the Court which gave the substantive judgment. We deal with each of the matters in turn. Leave to appeal 8. Both parties presented their positions on this topic at some length initially in their contentions and then in skeleton argument and in oral submissions. In order to explain our decision on the application for leave, we summarise these as follows. The parties' contentions 9. In their contentions, the appellants proceed upon the basis that this Court has the power to grant permission to appeal pursuant to article 14 of the 1961 Law. The appellants refer to the standard which is adopted by the Judicial Committee of the Privy Council itself pursuant to paragraph 3.3.3(a) of its Practice Direction 3 ("the JCPC Practice Direction") which provides that permission to appeal to the Privy Council is granted: "in civil cases for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal; an application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground". The appellants also refer to the decision of this Court in *Crociani v Crociani*

[2014] JCA 089, the judgment of Beloff JA at paragraphs 50 to 53, but that decision was concerned with the granting of leave to appeal from the Royal Court to the Court of Appeal pursuant to Art 13 of the 1961 Law and it was not referred to otherwise by either party. 10. The appellants begin by reviewing the substantive judgment, and then put forward a number of grounds which are said to disclose errors of law in the substantive judgment which amount to arguable points of law and upon which the appellants have a real prospect of succeeding on appeal such as to justify the granting of leave by this Court. First, it is submitted that this Court misinterpreted and misapplied the reasoning of Lord Mance in the decision of the Privy Council in *La Generale des Carrières et des Mines v F G Hemisphere*

[2012] 2 CLC 709 ("Hemisphere") by concluding that the Board had held in that case that a State is not entitled to assert immunity in relation to any asset that could not be the subject of enforcement of a judgment obtained against the State itself. The appellants contend that this is a mischaracterisation of the reasoning in Hemisphere which was concerned with the test for determining whether a body or company is an "organ" of the State and the Board in Hemisphere was not addressing the question which arises in the present case, namely where a separate entity is not an organ of the State and has its own interest in an asset but the State itself has some separate interest in or control over particular assets of the entity going beyond its mere ownership of the separate entity. A State's immunity in public international law, as incorporated into section 13(2)(b) of the Act, cannot fluctuate by reference to the vagaries of a particular jurisdiction's enforcement powers. Secondly, the appellants submit that the substantive judgment is inherently contradictory because having held that a State cannot invoke immunity in relation to an asset unless a judgment against the State could be enforced against that asset by reference to Hemisphere, the Court then held that the immunity provided by section 13(2)(b) extended beyond assets which the State owns and includes asset which it does not own but which are in its possession or control. Further, there is no basis for treating a state-owned company any differently to a non-state-owned company because, in Hemisphere, Lord Mance held that separate juridical entities established by States were to be given "full and appropriate recognition". Thirdly, this Court expressly concluded that the Republic's interest in the Shares was equivalent to that of a 100% shareholder and derived from legislative and administrative sources in Turkish law and, in Ms Bentham's affidavit, reference is made to paras 126, 137 and 132 of the substantive judgment. If the Republic had been in fact the 100% shareholder of TPIC and BIL, it would be entitled to immunity, and having concluded that in substance the Republic's interest was the same as that of a 100% shareholder, the Court should have concluded that the Republic's immunity was engaged. The principle of sovereign immunity is not founded on fine distinctions or technical rules of law and the appellants refer to paras 89 and 93 of the substantive judgment in support of this where we discussed in particular the speeches of Earl Jowitt and Lord Radcliffe in Republic of France v Dollfus Mieg et Cie SA and the Bank of England

[1952] AC 582 ("Dollfus Mieg"). 11. Fourthly, the appellants contend that there was no basis for this Court to conclude that it was necessary for the Republic to have "day-to-day control" of the Shares for its immunity to be engaged. The critical question is whether the Republic controls the disposal of the Shares, and the Republic controls both disposal of the Shares and the appointment of directors pursuant to the Shares. Fifthly, this Court was wrong to conclude that the present case was not analogous to the requisition cases. The Court appears to have concluded that in a requisition case it is necessary for the State actively to have taken steps, beyond the passage of the requisition law, to control further the use of the particular asset on a day-to-day basis. That is said to be contrary to the approach adopted by the House of Lords in Dollfus Mieg in which, endorsing Compania Naviera Vascongado v Steamship "Cristina" and others

[1938] AC 485 ("The Cristina"), Earl Jowitt emphasised that immunity would be engaged where a State had requisitioned a ship or had directed a ship without depriving the owners of their possession. The correct position is that in a requisition case it is not necessary for the State to have given any further directions pursuant to the power given by requisition law and requisition and direction are treated disjunctively. It is submitted that the substantive judgment does not deal with what "requisition" actually means. Furthermore, in this particular case, the Republic has by way of the provisions of Turkish law issued directions in relation to the Shares and exercised its powers to control their use. It has prohibited their disposal without its consent and it has given directions to the directors of TPIC and BIL. Sixthly, there was no basis for this Court to distinguish the reasoning of the House of Lords in *Dollfus Mieg*. The fact that the gold bars in that case were owned by the States concerned was not to the point. There is no basis for distinguishing between a State that owns property, or a State that controls property, or a State that has property in its possession, each of which engages the State's immunity. The decision in *Dollfus Mieg* demonstrates that it is sufficient to engage immunity for a State to have an existing power under law to direct the disposal of the asset, even although it has not actually exercised that power at the time of the proceedings. 12. Seventhly, this Court was wrong to reject the analogy between the Republic's powers over the Shares and the rights that one contractual counterparty would have in relation to assets owned by the other. It is suggested that this Court concluded that the Republic's interest in the Shares is the same as the interest it would have had in any other asset owned by Botaş. As the Court accepted, there are specific provisions of Turkish law that restrict the use and disposal of the Shares and if those provisions were not to be complied with, Botaş would be in breach of Turkish law and would be at risk of action being taken against it. The position is analogous to one in which Botaş had promised to the Republic that it would not dispose of the Shares without the Republic's consent. Eighthly, it has been recognised throughout these proceedings that this case raises novel and important questions of State immunity law. For example, it was said by the Royal Court that it had "not found it easy to fit the facts into the scheme of the Act": see the Royal Court judgment at para 96. In his judgment on consequential issues dated 22 February 2016, the Commissioner (Birt) referred to that observation and concluded that "I do not consider that the appeal on this aspect has no realistic chance of success, nor do I conclude that the appeal is not bona fide". And in continuing the stay of execution on the realisation of the Shares pending this Court's decision, McNeill JA said in his judgment dated 18 March 2016 (*Botas -v- Tepe*

[2016] JCA 067C) that "sovereign immunity arguments are invariably of considerable complexity and open to different views: witness the judgments in this court and the decision of the Privy Council in [*Hemisphere*]", and the appellants note that in that case the Privy Council reversed decisions of the Royal Court and Court of Appeal. The appellants also note that this Court, despite refusing the appellants' appeal on sovereign immunity, applied a different section of the Act to determine the Republic's immunity than the one applied by the Royal Court and this demonstrates the wide scope for debate and dispute in

this area of law. Finally, it is submitted that the novelty of the arguments raised by the proposed appeal has been recognised and publicised in press releases issued by the respondent's Jersey counsel after both the decision of the Royal Court and the decision of this Court and which were exhibited in the second affidavit of Ms Bentham. 13. The appellants then address the issue of general public importance. They submit that the questions raised are plainly of general public importance which affect the relationship of the United Kingdom and Jersey with the Republic which is a friendly foreign state. It is submitted that, if this Court has erred, it would place the United Kingdom and Jersey in breach of public international law and potentially imperil the foreign relations of the United Kingdom and Jersey. This Court purported to interpret the comments of Lord Mance in *Hemisphere* in what we said in the substantive judgment at paragraph 138. For this reason, this Court's judgment is likely to have a significant impact on relations with all foreign States when questions of immunity arise for determination, whether in the Jersey courts, the courts of England and Wales, or elsewhere, and this creates a real point of public importance. With reference to the fact that an appeal to the Privy Council would be a second appeal, that does not render a further appeal unnecessary or inappropriate. This Court has purported to interpret and apply the decision of the Privy Council in *Hemisphere* in a manner which the appellants contend is fundamentally incorrect and it is important that the issue be considered by the Privy Council itself. 14. In the contentions for the respondent, it is submitted that there is no arguable point of law sufficient to justify the granting of leave. With reference to the first ground put forward by the appellants, the position of the respondent is that this Court was correct to find that the comments of Lord Mance in *Hemisphere* were clearly not restricted to the facts of that case but equally applicable to the current circumstances. But even if this Court had been wrong in that respect, it nevertheless went on to consider the position by reference to section 13(2)(b) of the Act against the background of the common law and found in favour of the respondent on this alternative basis. There is nothing in the substantive judgment to suggest that this Court proceeded with its analysis of section 13(2)(b) and the common law on the basis of some sort of presumption against immunity as the appellants appear to allege. This means that even if this Court's approach to the applicability of *Hemisphere* was in error, it would make no difference to the outcome which depends upon our findings on section 13(2)(b). With respect to the second ground, it is disputed that there is any inherent contradiction in the substantive judgment. It is not said in the substantive judgment that an asset must be owned by or belong to the State for a judgment against the State to be enforceable against that asset. Once again, even if this Court had been wrong in that respect, it would make no difference to the outcome of the appeal for the same reason suggested in relation to the first ground. The third ground proceeds upon a misreading of the substantive judgment. The reference to a 100% shareholder in the substantive judgment at paragraph 126 is a reference to the Republic as the 100% owner of Botaş, not to the Republic being a 100% shareholder in TPIC and BIL. This is consistent with the Royal Court judgment at paragraph 152 and this ground of appeal is factually incorrect. 15. The fourth ground for the appellants is suggested by the respondent to be an appeal on the facts dressed up as a

point of law. The appellants suggest that the Republic controls all powers arising from the ownership of the Shares and exercises "absolute control" over them and the evidence for this submitted by the appellants was Decree Law 233, the principle of parallelism, the law on privatisation, the power of direction and appointment of directors and the law of public procurement, all as referred to in the substantive

judgment.

The respondent submits that these aspects were considered by the Royal Court which found as a matter of fact that the level of control (including the power of the Republic to control the disposal of the Shares) fell short of absolute control and that the day-to-day control of the Shares rests with Botaş which is the legal and beneficial owner of the Shares: see the Royal Court judgment at paras 179-181. In the substantive judgment, this Court had agreed with those factual findings which are unlikely to be overturned by the Privy Council. The fifth ground, which is that the power of the Republic to direct Botaş to transfer the Shares is analogous to the requisition cases, is not supportable. If it were to be correct, it would enable any State to claim immunity over any asset that it had the power to requisition, even if the asset had not actually been requisitioned. This Court was correct to find that until the power to require transfer of the Shares had been exercised by the Republic, the test for control had not been met. It was also incorrect to suggest that, by reference to the judgment of Earl Jowitt in *Dollfus Mieg*, the power to direct is sufficient to establish immunity. The most that can be extrapolated from the obiter comments of Earl Jowitt is that there may be cases short of actual requisition which demonstrate a sufficient level of control for immunity to arise but as a minimum the State must have actually directed the ship in question. In the current case, there had been no direction in relation to the Shares, simply the existence of a power to direct, and this ground amounts to another attempt to overturn a finding of fact that the Republic lacks sufficient control to engage section 13(2)(b). The sixth ground put forward by the appellants is based upon a misreading of the decision in *Dollfus Mieg*. That case is not authority for the proposition that an un-exercised power to direct the disposal of an asset is sufficient to give rise to immunity. This Court was correct to state that *Dollfus Mieg* was a case in which the State had a right to immediate possession of the property in question under a contract of bailment. There is no right of immediate possession in the current case and no bailment. In order to obtain possession of the Shares under the law of Jersey, the Republic would first have to pass a governmental decree directing Botaş to transfer the Shares to the Republic, and the directors of Botaş in conformity with that decree would have to execute the appropriate share transfer and register it with the Jersey companies' registry. Until such steps had been taken, the Republic has no right to possession of the Shares and that situation would pertain only if the Republic had already issued a governmental decree and the directors had already executed the relevant share transfer. 16. The seventh ground relates to the suggested analogy with a contractual right. This Court was correct to find that there was no substance to the contract analogy in paragraph 133 of the substantive

judgment.

The Royal Court and this Court had considered the relevant provisions of Turkish law and the articles of TPIC and BIL and concluded that the level of control derived from these measures was insufficient to engage immunity. It makes no difference to the outcome if the source of control were to be a contract instead of Turkish law and/or the articles; the level of control remains the same. 17. With reference to the general public importance of the proposed grounds of appeal, the respondent submits that, first, whether it is section 6(4) of the Act or section 13(2)(b) which applies, and, secondly, the test for what constitutes "the property of a State" in terms of section 13(2)(b), have both been determined by this Court and do not form part of the proposed appeal to the Privy Council, the appellants having won on both points. The purpose of the appeal would be to overturn the findings of fact of the Royal Court accepted by this Court that the various Turkish law provisions as to the ability of Botaş to transfer the Shares (parallelism, law on privatisation, etc) do not give to the Republic sufficient possession, interest or control over the Shares so as to engage section 13(2)(b). This case is fact specific and it is unlikely that a judgment of the Privy Council would have any wider application. Further, there is no lacuna in the law that needs to be filled and no lack of judicial direction. This Court has held that the test for possession, interest or control under section 13(2)(b) is synonymous with the test under section 6(4) and that both sections are to be interpreted in accordance with common law principles on state immunity which predate the introduction of the Act in 1978. The proposed appeal does not raise any new issues of law but is an appeal on the application of existing case law. There is no risk of the case having a detrimental impact on international relations. All that the Republic has to do to avoid the sale of the Shares is to direct Botaş to comply with its obligations under the Awards, Jersey law, French law and Turkish law which it is well able to do, and pay the undisputed debt owed to the respondent. It does not sit well for the Republic to raise arguments based on international law when its own wholly-owned subsidiary is ignoring the judgment of the Jersey court and its obligations under the Awards, Jersey law, French law and Turkish law. Finally, both the Royal Court and this Court have come to the same conclusion, namely that the Republic does not have sufficient interest in or control over the Shares to give rise to a claim of state immunity. The relevant points of law have already been determined and are not being appealed, namely which section of the Act applies and the meaning of the expression "the property of a State". . It is highly unlikely that the Privy Council will overturn the factual findings of the Royal Court and the Court of Appeal as to the level of interest in or control that the Republic has over the Shares. 18. Before the hearing, the Advocates were advised that this Court had noted the following statement made by Lord Reed in the United Kingdom Supreme Court in the case of *Uprichard v Scottish Ministers*

[2013] UKSC 21 , 2013 SC (UKSC) 219 at para [59] where he said: "Appeals against any order or judgment of the Court of Appeal in England and Wales or in Northern Ireland can be brought only with the permission of the Court of Appeal or of this court. In practice, the Court of Appeal normally refuses permission so as to enable an appeal panel of this court to select, from the applications before it for permission to appeal, the cases raising the most important issues." Although that was said in the context of an appeal from the Court

of Session (which did not require leave or permission at that time) and may therefore be regarded as obiter, it nevertheless appears to be a statement of more general significance. It was said in the context of the criteria applied by the Appeal Panel of the Supreme Court when considering the grant of permission to appeal by reference to paragraph 3.3.3 of the Supreme Court Practice Direction 3 ("the Supreme Court Practice Direction") which states that: "Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal..." The formulation of "an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time" is the same as that applied to an application for permission to appeal to the Judicial Committee of the Privy Council which is set out in paragraph 3.3.3(a) of the JCPC Practice Direction. As a result of this, the Court indicated to the parties that it would be grateful for any assistance at the hearing of this matter in relation to the practice referred to by Lord Reed both as it may be observed from the rulings of appellate courts in the United Kingdom and whether the same practice applies in the Court of Appeal of Jersey. The parties' skeleton arguments and oral submissions 19. In the skeleton arguments and oral submissions for the appellants, Advocate Nicholls began by suggesting that this Court applies a less prescriptive test in considering applications for leave to appeal to the Privy Council than that which is applied by the Privy Council itself, and he referred to what had been said by McNeill JA in *Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2012]

- (2) JLR 330 at para 30. Following our bringing the decision in *Uprichard* to the notice of the parties, he referred to the decision of this Court in *La Generale des Carrières et des Mines v F G Hemisphere Associates LLC v Democratic Republic of Congo*

[2011] JCA 141B (that is to say, the case of *Hemisphere* at the stage when leave to appeal to the Privy Council was granted), the judgment of McNeill JA at para 4, the decision of this Court in *Syvret v AG*

[2015] JCA 020, the judgment of Martin JA at para 29, and the decision of the Court of Appeal of Guernsey in *Investec Trust (Guernsey) Limited and another v Glenalla Properties Limited and others* [2015] GCA 467, my own judgment at paras 20 and 24. Insofar as *Uprichard* itself is concerned, Advocate Nicholls accepted that what was said by Lord Reed represented an accurate statement of the practice in England and Wales. 20. Advocate Nicholls then referred to the position of the appellants on control. He submitted that this was not concerned with the application of settled law. With reference to the requisition cases, he accepted that there is a distinction between a power of requisition and an exercise of the power of requisition; the position of the appellants is that in this case what had been done in respect of the Shares amounted to actual requisition. This Court had been wrong to reject the argument of an analogy with the rights and obligations of contractual counterparties. In this case, actual steps had been taken in relation to the

Shares and he referred to the Decision of the Council of Ministers, Decision number 2012/4152, by which the shares in TPIC were transferred free of charge from the Turkish Petroleum Corporation to Botaş . Advocate Nicholls then referred to what had been said by Lord Mance at para 50 of the judgment in *Hemisphere* and repeated the criticism that the substantive judgment was contradictory, although Advocate Nicholls did acknowledge that what was said by Lord Mance as quoted in para 124 of the substantive judgment, where he referred to section 13(4), might be said to imply that the principle which he was describing applied beyond section 14 and into the regime of section 13. Advocate Nicholls submitted that the fact that this Court had purported to characterise the Privy Council's judgment in a particular way was a reason for the matter to be considered by the Privy Council. 21. The Court invited Advocate Nicholls to identify what were the points of law which he said should be the subject of appeal to the Privy Council, and he set these out as a series of four questions: (i) Is a prohibition under law imposed by a State on the sale of an asset without State consent sufficient to constitute "control" or "interest" for the purposes of State immunity from enforcement? (ii) Does it make any difference if the State also has the power to require transfer of the asset free of charge to any person (including itself), which it has exercised in the past? (iii) Does it make any difference, specifically in relation to shares, that the State has power under law to appoint the directors and has exercised that power? (iv) Is it right to say that an asset cannot be immune from enforcement unless it could also be enforced against if there were a judgment against the State? 22. In her reply for the respondent, Advocate Moran submitted that the formulation of these questions demonstrated that they were just a summary of the facts and did not raise any point of law. She noted that the first question appeared to apply to any asset of a state-owned enterprise and not just the Shares as was the position of the appellants in this case. She said that the principle in issue was that there must be a sufficient level of interest or control before sovereign immunity could become engaged. That principle is not in dispute; this case concerns an application of the principle. With reference to the role of an appeal court in relation to matters of fact, in *Biogen Inc v Medeva PLC* [1997 RPC 1 , at p 45, Lord Hoffman said that "Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation." In relation to the decision of this Court to grant leave to appeal to the Privy Council in *Hemisphere* , leave was only given on one issue in respect of which the Court of Appeal had been divided. In relation to the second of the appellants' questions, that should refer to the need for the Republic to pass secondary legislation, but it had not done so. In relation to the third question, the power to appoint directors applies only to one of the companies (BIL) and is fact specific. The possibility of this issue arising again is very unlikely. In relation to the fourth question, that cannot be said to raise any point of general public importance. With reference to the granting of leave to appeal to the Privy Council by the Court of Appeal of Guernsey in *Investec* , the point in issue involved an important point of Jersey trust law which had been decided for the first time by the Court of Appeal and was of considerable interest to trustees generally. The point had been the subject of much commentary.

Discussion on leave to appeal 23. We begin by observing by reference to paragraph 3.3.3(a) of the JCPC Practice Direction that permission to appeal (or "leave" as it is in Art 14(a) of the 1961 Law) will only be granted by the Appeal Panel of the Judicial Committee of the Privy Council "in civil cases for applications that... raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time". As that is the threshold which the Appeal Panel will apply in the event that we refuse leave and an application is made to the Privy Council for special leave, it appears to this Court that we would not be permitted to adopt a lower threshold. Indeed, it may be said that a court of appeal in such a situation should actually adopt a stricter threshold simply because the Appeal Panel of the Judicial Committee can permit an appeal to proceed even where leave or permission has not been given by the court of appeal below, whereas the Judicial Committee cannot prevent the pursuing before it of an appeal where leave or permission should not have been given by that court of appeal. 24. This approach appears to be consistent with what was said by Lord Reed in his judgment at para [59] in *Uprichard*. His Lordship further explained his reasoning at para [60] where he went on to say: "The public interest is served, in relation to appeals from England and Wales and Northern Ireland, by the rule that permission to appeal is granted only for applications that, in the opinion of the appeal panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the appeal panel does not raise such a point of law is refused on that ground (Supreme Court Practice Direction 3.3.3). The reasons for adopting that approach were explained by Lord Bingham of Cornhill, at the time when the final court of appeal was the House of Lords, in *R v Secretary of State for Trade and Industry, ex p Eastaway* [

[2000] 1 WLR 2222] (p 2228): 'In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.'" 25. Given that the formulation adopted in paragraph 3.3.3(a) of the JCPC Practice Direction is the same as that adopted in paragraph 3.3.3 of the Supreme Court Direction, the question is whether this Court should apply the same practice as that of the Court of Appeal in England and Wales and, in doing so, should follow the approach described by Lord Reed. So far as the authorities cited to us are concerned, this does not appear to have been the subject of any direct consideration either by this Court or by the Judicial Committee. In *FG Hemisphere Associates LLC v DRC and La Generale de Carrieres et des Mines*

- [2011] JCA 141B (which is, as we have noted before, the case of Hemisphere at the stage when an application for leave to appeal to the Privy Council was before the Court of Appeal), McNeill JA said in the judgment of the Court: "4. In relation to this matter we do not intend to set out a prescriptive test to be followed. We note from the advice of the Board of the Privy Council in *Daily Telegraph Newspaper Company Ltd-v- McLaughain*
- [1904] AC 776 that, both in relation to what is said on page 779 in that decision and in what is said on page 778 under reference to advice of the Board delivered by Lord Watson in *La Cité de Montréal-v-Les Ecclésiastiques de St Sulpice de Montréal*
- (1889) 14 App Cas 660 the matter is one which really has to be approached on a case by case basis. For our own part, sitting as only three of the members of the Court of Appeal of Jersey we would not wish to say anything at this stage which would necessarily bind those other members sitting in relation to other applications. 5. However, adopting the approach set out for the Privy Council in its own decision in the *Daily Telegraph* case, where there was reference to matters of gravity, matter of public interest, important questions of Law or public importance of a very substantial character, we consider in relation to the Gécamines appeal that this is a matter in respect of which we are prepared to grant leave to make appeal to the Privy Council. The issues which it raises are undoubtedly important questions of Law, as seen both by the fact that there was a divided decision of this Court and, as I think all those present are aware, by the nature of the debate which took place when we heard the matter in May." The Court then proceeded to refuse leave to appeal on other aspects. 26. In *Trilogy Management Limited v YT Charitable Foundation (International) Limited*
- [2012] (2) JLR 330, McNeill JA said in the judgment of the Court at para 30: "30. In the recent litigation in these courts in *FG Hemisphere Associates LLC v DRC and Gecamines*
- [2011] JLR 486 , a differently constituted Court of Appeal was asked to consider an application for leave to appeal with specific reference to the decision in *Daily Telegraph Newspaper Company v McLaughlin* [1984] AC 776 where the Privy Council gave consideration as to the practice which it would adopt in respect of the granting of special leave. When granting leave in respect of one of the *FG Hemisphere* appeals this Court noted the *Daily Telegraph* decision, indicated that it did not intend to set out a prescriptive test to be followed by this Court and observed that the matter was one which really had to be approached on a case by case basis. 31. As we have set out above, we agree that the proper characterization of the matter before us is as a question arising in respect of the proper administration of a trust established under and in terms of the law of Jersey. In addition, JY is a company incorporated under and by virtue of the laws of this jurisdiction. Trust litigation is often necessary: it is always expensive. Where an issue properly arises as to the appropriate administration of the trust and as part of friendly as opposed to adversarial litigation, the main weight of the costs incurred by parties will be borne by the trust and, in consequence, by its beneficiaries. Where such litigation has to take place, it should ordinarily be perfectly sufficient for parties to accept the determination of this appellate

court. For our part, we consider that it would only be in exceptional circumstances that we would burden the trust funds with the additional costs of litigation before the Judicial Committee. On this basis, we discern no compelling reason to grant leave to appeal and the application is refused." 27. In *Syvret*, in which McNeill JA was a member of the Court, Martin JA gave the leading judgment and said: "32. In *Wilson v Jaymarke Estates Ltd*

- [2007] SC (HL) 135 at [17], Lord Hope of Craighead observed:- 'It is contrary to the public interest that the time of the House should be taken up with appeals which do not raise an arguable question of general public importance, as this is liable to cause delay in the disposal of appeals which merit its attention.' 33. Similar considerations apply in the Supreme Court: *Uprichard v Scottish Ministers*
- [2013] UKSC 21 . In common with the Guernsey Court of Appeal (*Emerald Bay Worldwide Limited -v- Barclays Wealth Directors (Guernsey) Limited* , Guernsey Judgment No 2/2014), I consider that these considerations are relevant to appeals to the Privy Council and should inform the disposal in this jurisdiction of applications for leave to appeal from this court. 34. There being no question of general public importance in the present case, leave should be refused. Mr Syvret is, of course, able to apply to the Privy Council for leave to appeal those parts of our decision that do not fall within Article 14(2) if he wishes to do so." 28. The effect of these decisions of this Court may be summarised as follows. In *Hemisphere and Trilogy Management Limited* , the Court followed the approach set out in *Daily Telegraph Newspaper Company* and in doing so considered the applications for leave against the importance of the questions of law and public importance. In *Syvret* , the Court referred to the formulation of "an arguable question of general public importance" which had been described by Lord Hope in *Jaymarke* , and it also referred to *Uprichard* . Each of these cases therefore applied in effect the formulation provided in paragraph 3.3.3(a) of the JCPC Practice Direction although did not refer directly to it. In *Syvret* , the Court said that it regarded the considerations in particular in *Uprichard* as relevant to appeals to the Privy Council. 29. This Court is satisfied that having regard to the formulation provided in the JCPC Practice Direction and its equivalence to that in the Supreme Court Practice Direction, and the resulting relevance of the practice described by Lord Reed in *Uprichard* (which is a decision already noted in this Court), this Court ought also to follow the same practice. This means that we should only grant leave to appeal to the Privy Council if we are satisfied that the arguable point or points of law which have been identified are of such clear public importance that they merit consideration by the Privy Council now. In approaching the issue in this way, we are conscious that the phrase used in paragraph 3.3.3(a) is "which ought to be considered by the Judicial Committee at that time". That obviously encompasses a consideration as to the immediacy of the need to address the point of law which can really only be judged by the Appeal Panel of the Privy Council. The result is that even where it can be said that there may exist an arguable point of law, we would also need to be sure both as to the existence of that point of law and of its importance, as well of its need for determination at this time, before we should grant leave. That is the result of the practice described by Lord Reed in *Uprichard* and the

reasons for which were described by Lord Bingham in *Eastaway*. The practice has been adopted in relation to applications for permission to appeal to the Supreme Court, and given that the respective Practice Directions are identical in this respect we can see no reason why this Court should not follow the same practice. 30. In expressing this opinion, we should say that we make no reference to the decision of the Court of Appeal of Guernsey in *Investec Trust (Guernsey) Limited* although we note that it did apply what was said by Lord Hope in *Jaymarke*. It will be a matter for that Court to consider for itself the issues discussed in this judgment should it choose to do so in an appropriate case. 31. By way of introduction to the individual grounds put forward by the appellants in their contentions, we observe that what may be said to be the principal issue of law which was before us, and which was the subject of appeal against the Royal Court judgment, was whether it was section 6(4) or section 13(2)(b) of the Act which applied in respect of the Shares. The Royal Court had found that it was section 6(4) but that was challenged by the appellants who were successful before this Court. To the extent that this issue may be said to be a matter of law, it is nevertheless not one which is the subject of any potential ground of appeal to the Privy Council. The decision and reasoning of this Court that it is section 13(2)(b) which is applicable is not challenged. This means that we proceed in this judgment upon the basis that the applicability of section 13(2)(b) has been settled and is not an issue for any further consideration, whether by us in the context of the present application or by the Privy Council. 32. Similarly, our decision on what is the meaning of section 13(2)(b) and what would constitute "the property of a State" is not challenged. In reaching our decision, we accepted the submissions for the appellants that the expression "the property of a State" encompasses not only direct ownership but also sufficient interest, possession or control, and this was not least in order to comply with the recognised principle of international law that the threshold for enforcement proceedings should at least be no less than the threshold for establishing jurisdiction in adjudicative proceedings: see the substantive judgment at paras 115-122. This aspect therefore does not give rise to any point of law which might be the subject of appeal before the Privy Council. 33. We now turn to the individual grounds put forward by the appellants. With regard to the first ground, this Court adopted the principle set out by Lord Mance in *Hemisphere* in circumstances which we regarded as analogous. In doing so, we set out our reasoning in the substantive judgment at paras 124-125. We did, however, make it clear that this was not determinative and we proceeded to consider the application of section 13(2)(b). Having done so, and having reached the conclusion that the Shares were not to be regarded as "the property of a State", we stated that this was a conclusion which was consistent with the approach in *Hemisphere* but it was not the reason for the conclusion: see the substantive judgment at paras 125 and 138. Nor did it, contrary to what the respondent has suggested may be implied, raise a presumption in our reasoning against the application of sovereign immunity. Thus, it may reasonably be said that what we decided about the applicability of *Hemisphere* is not critical to our reasoning and does not raise any point of law in the circumstances of our decision on sovereign immunity. We therefore agree with the respondent that this ground does not raise any arguable point of law sufficient to

justify leave being given to appeal to the Privy Council. As a result, we also agree that the second ground for the appellants does not provide any basis for the granting of leave. We did not hold as a critical part of our decision that a State cannot invoke immunity in relation to an asset unless a judgment against the State could be enforced against that asset by reference to Hemisphere , but rather we observed that what was said by Lord Mance was consistent with what we had found upon our consideration of the effect of section 13(2)(b). It does not appear to us that this demonstrates a contradiction in the substantive judgment. Nor does it appear to us to compromise the requirement of Lord Mance that separate juridical entities established by States should be given "full and appropriate recognition". We considered the nature of the relationship between the Republic and the Shares in deciding the effect of section 13(2)(b) and we observed that the outcome was the result of the Republic deciding to set up TPIC and BIL as overseas subsidiaries of Botaş : see the substantive judgment at para 140. 34. In relation to the third ground, we cannot see that this raises any arguable point of law. The appellants suggest that we found that the interest of the Republic was the equivalent of a 100% shareholding in TPIC and BIL. The appellants have referred to paras 126, 127 and 132 of the substantive judgment. In response, the respondent contends that it is a misreading and also refers to para 126 of the substantive judgment which is said to relate to para 152 of the Royal Court judgment where the Royal Court was dealing with a submission that the level of control of the Republic over Botaş "went beyond that of a 100% shareholder", which was a submission advanced by Advocate Nicholls when he appeared for the appellants before the Royal Court, and was being made because as a matter of ownership Botaş is wholly-owned by the Republic. That was not a submission that the Republic should be treated as if it were a 100% shareholder in TPIC and BIL and that is not what the Royal Court was dealing with. We do not rehearse precisely what was said by the Royal Court but, having considered the Royal Court judgment at paras 152-154, we are satisfied that the Royal Court was considering whether the control exercised by the Republic over Botaş was equivalent to, or greater than, a 100% shareholder in Botaş , not TPIC or BIL. In the substantive judgment at para 126, we agreed with what the Royal Court had said in the context of a 100% shareholder and that is a reference to its consideration of whether the interest of the Republic in Botaş was the same or more than that of 100% shareholder. In para 127, we addressed that further by reference to the receipt by Botaş of the proceeds of sale of the Shares upon the direction of the Republic. In para 132, we concluded by saying that "We have already said that the powers which the Republic has in respect of Botaş are no different in character to those of a 100% shareholder..." Having considered what was said in each of the paragraphs referred to, we are satisfied that this ground is unjustified. Further, it does not appear to us to raise any point of law. 35. With regard to the fourth, fifth and sixth grounds advanced by the appellants, we are satisfied that these may be considered together. In essence, the appellants contend that this Court was not entitled to conclude that the level of control which the Republic has over the Shares is not sufficient to engage sovereign immunity. It is suggested that the critical question is whether the Republic controls the disposal of the Shares, and it is said that it does so as well as controlling the appointment of directors

pursuant to the Shares. We were wrong to conclude that the present case is not analogous to the requisition cases such as *Dollfus Mieg* and *The Cristina*. The appellants refer to the statement by Earl Jowitt in *Dollfus Mieg* that requisition and direction are to be treated disjunctively, and they submit that that case demonstrates that it is sufficient to engage sovereign immunity for a State to have an existing power under law to direct the disposal of an asset even although it has not exercised that power at the time of proceedings. 36. This judgment is not the place to revisit our reasoning on this matter but it does appear to us once again that the requisition cases demonstrate that there needs to be a level of immediate and direct control beyond the ability to control in the future before sovereign immunity can be said to have become engaged. We do not regard that as uncertain because it is based upon existing and established law. With regard to what are the principal common law cases, we refer to para 89 of the substantive judgment where we quoted what Earl Jowitt said in *Dollfus Mieg* about the use of the expression "control" by Lord Atkin in *The Cristina*. The suggestion by the appellants that merely the ability to control, rather than an exercise of control, is sufficient to engage sovereign immunity appears to be ill-founded although we would not go so far as to say that that it is not arguable. 37. With regard to the four questions set out by the appellants, the first three of these relate to the issue of control. As the respondent has pointed out, they are concerned with the particular factual aspects which were considered by the Royal Court, and its findings were not disturbed by this Court. As we have already observed, we differed from the Royal Court as to which section of the Act was applicable, but there is no criticism in any ground for the appellants that we were wrong in deciding that it was section 13(2)(b) which applied, nor of our conclusion that the expression "the property of a State" encompasses a sufficient level of control, interest or possession beyond direct ownership based upon a consideration of the common law and the international obligations of the United Kingdom and Jersey. The respondent submits that there is therefore no suggested error of law in relation to these questions. 38. On the other hand, it may be said that in assessing the factual matters which might be sufficient to demonstrate control, the nature of what is "control" requires to be ascertained and, in the context of section 13(2)(b), that is a matter of law. We do not consider that the evaluation of what is control is a straightforward and discrete issue of fact such as described by Lord Hoffman in *Biogen*. As a result, and as indicated above, we are satisfied that the issues raised in connection with the control which the Republic can exercise in respect of the Shares may be characterised as raising an arguable point or points of law, or at least mixed questions of fact and law. 39. In that situation, we consider that on these grounds the first condition that must be satisfied before this Court may grant leave to appeal to the Privy Council, namely that there is an arguable point of law, has been made out. But having regard to the practice described by Lord Reed in *Uprichard*, we have concluded that leave should not be granted. We are not certain that the point or points of law raised can be said to be of sufficient public importance given what may be regarded as the unusual or unique features of this case described by Advocate Moran. We are also not satisfied that they would need to be resolved at this time. In that situation, we consider it to be appropriate in

this case to follow the practice of the Court of Appeal in England and to decline to grant leave. It will be for the Appeal Panel of the Privy Council to decide whether we are correct to adopt this approach and, on the merits, to decide for itself whether to grant special leave. 40. The seventh ground for the appellants is that this Court was wrong to reject the analogy between the power of the Republic over the Shares and the rights which one contractual counterparty would have in relation to assets owned by the other. The response for the respondent is that the level of control which was found by the Royal Court and adopted by this Court is not sufficient to engage sovereign immunity, and it would make no difference if that level of control had been derived from contractual obligations rather than Turkish law and the articles of TPIC and BIL. We agree and conclude that this ground does not identify any arguable point of law. It was the level of control which was critical not the underlying legal relationship which gave rise to that control. 41. The eighth and final grounds put forward by the appellants do not actually identify any arguable point of law but rather seek to rely on statements made in the course of these proceedings and by the respondent's counsel to emphasise the significance of the issues with which this Court has been engaged. As we have found no basis for the granting of leave by this Court, we need say no more about these final grounds. 42. The fact that we are not going to grant leave on any ground means that we do not need to consider separately the issue of general public importance. Nevertheless, we note that in terms of paragraph 3.3.3(a) of the JCPC Practice Direction it is the "arguable point of law" which is to be of "general public importance" and not the circumstances of the case more generally. In this regard, the appellants have contended that the present proceedings are ones of considerable general public importance. It is submitted that if this Court has erred and the claim by the appellants to sovereign immunity in respect of the Shares should have been upheld, then that will place Jersey and the United Kingdom in breach of public international law because Jersey would have failed to respect the proper interests of the Republic which is a friendly foreign state. Such a situation could potentially imperil the foreign relations of Jersey and the UK. 43. Whilst acknowledging the potential significance of a decision which may adversely affect the interests of the Republic, we do not consider that it advances the position of the appellants in favour of our granting leave. In a situation where it is found that there is no arguable point of law, then in terms of paragraph 3.3.3(a) of the JCPC Practice Direction the issue of general public importance would not arise. As we have already said, it is not the general public importance of the circumstances of the case which may justify our granting leave. Whilst we recognise the seriousness of the possible consequences which are referred to by the appellants, it appears to us that what this amounts to is a proposition that unless and until the highest judicial body, in this case the Privy Council, has ruled upon the correctness or otherwise of a decision on sovereign immunity such as ours, then international law obligations and foreign relations may be imperilled. This seems to amount to an assertion that in any such case where there is the possibility of an appeal to the Privy Council, the decision of the intermediate court of appeal is essentially academic because, unless both parties were to agree that it was correct, a further appeal will be essential to resolve the issue finally where such important

international obligations are at stake. We cannot agree that this would justify our granting leave to appeal because that must only be justified where there is a proper basis for leave based upon the individual merits of the case in question and an application of paragraph 3.3.3(a) of the JCPC Practice Direction. This contention therefore adds nothing to the strength or otherwise of the grounds relied upon by the appellants which we have already discussed. Or to put it another way, we do not consider that it should be for this Court to make a judgment in favour of this contention: if the Appeal Panel of the Judicial Committee is satisfied that a further appeal is justified in order to resolve what may be a matter of importance to international relations, then the Appeal Panel of the Judicial Committee is able to grant special leave, but we are satisfied that it could not be a reason for this Court doing so. Decision on leave to appeal 44. We are therefore not satisfied that it would be appropriate for this Court to grant leave to the appellants to appeal to the Privy Council against the confirmation of the *arrêt* in respect of the Shares and their application for leave is refused. Stay of execution 45. By their Summons dated 19 August 2016, the appellants have sought an order that "paragraphs 3 and 8 of the Act of the Royal Court dated 22 January 2016 be further stayed pending final determination of any appeal by the Respondents [sic] to the Judicial Committee of the Privy Council." The Act being referred to is that of the Commissioner and was actually dated 22 February 2016. The effect of paragraphs 3 and 8 was to permit the Viscount to realise the Shares by sale or auction, and to require TPIC and BIL to co-operate in the effecting of such a realisation, but by paragraph 12, the Act also stayed paragraphs 3 and 8 for a period of twenty-eight days. By an Act dated 18 March 2016, McNeill JA, sitting as a single judge of this Court, ordered that paragraphs 3 and 8 be stayed pending final determination of the appellants' appeal and the respondent's cross appeal. In light of the Summonses which are before us, and our decision that the parties should be heard on the matters raised, we decided on the papers and by Act dated 22 September that the stay of execution should remain in place until the hearing before us on 3 November. 46. Though the appellants' application for leave to appeal to the Privy Council has been refused, it is their intention to petition the Privy Council for permission to appeal. They continue, accordingly, to seek a continuation of the stay until such time as that appeal is finally determined, either by the refusal of permission by the Privy Council or by the substantive determination of their appeal. 47. Whilst we have some sympathy for the position of the respondent in the event of yet a further delay in its ability to enforce the Awards against the Shares, we consider that the appellants' application for a stay should be granted. The entitlement of a disappointed party to seek permission to appeal from the Privy Council is an inherent part of the procedure in a case where that party has been unsuccessful in an appeal and permission to appeal has been refused by this Court. In this case, the ability to realise the value of the Shares which was the result of the decision of the Royal Court has been stayed consistently throughout these appeal proceedings and, in our judgment, it would be illogical if that stay were not to be continued until what will be the final outcome of those proceedings. If the stay were discontinued, there would be nothing to stop the shares being sold and the appeal being rendered nugatory. 48. We therefore accede in principle to the appellants'

application that paragraphs 3 and 8 of the Act of the Royal Court dated 22 February 2016 should be further stayed pending the final determination of any appeal made by the appellants to the Privy Council. Conditions on the stay 49. The question then arises of whether conditions should be attached to that stay. By the amended Summons dated 16 September 2016, the respondent sought an order that if we granted permission to appeal, that permission should be made subject to two conditions: (a) the provision of security by way of bank guarantee in appropriate terms for the full sum of the judgment debt owed by the first appellant to the respondent pursuant to paragraph 2.1 of the Act of Court dated 22 February 2016, such guarantee not to be called upon or enforced against without the permission of this Court; and (b) that the first appellant take no steps to (i) migrate the offices of the second and third respondents to another jurisdiction or (ii) dilute the first appellant's shareholding in the second and third appellant without the prior permission of the Viscount or the Court. 50. It was submitted to us by the respondent, without procedural objection being taken by the appellants, that the same conditions as had been requested in relation to permission to appeal should be attached to any stay of execution ordered by this Court, notwithstanding that this was not expressly requested in the respondent's amended Summons. 51. We turn first to the proposed condition relating to the provision of security for the amount of the judgment debt (approximately \$100 million) by way of bank guarantee. 52. This is not the first time that the courts considering this matter have been faced with a similar application. Thus: (i) In its judgment of 22 February 2016, at paragraphs 35-45, the Commissioner considered the respondent's argument that any stay on the arrêt of the Shares pending appeal should be granted only on condition that the respondent be paid the entire sum due under the Awards, or alternatively that such sum be paid into Court. The alternative condition put forward on that occasion has strong similarities to the condition relating to the provision of security that was sought at the hearing before us. The respondent's arguments were rejected with reluctance, and a stay was ordered for a fixed period of 28 days with the stated intention of ensuring that a single judge of the Court of Appeal should have the opportunity to review the Commissioner's decision. (ii) In the judgment of the Court of Appeal of 18 March 2016, McNeill JA sitting as a single Judge heard similar arguments but was also not persuaded (at paragraphs 10-11) that an order for stay should be made conditional on payment into court of the sums due under the Awards. 53. We can understand why the Commissioner described himself as "sorely tempted" to impose a condition on the stay of the arrêt on the Shares similar to the condition that was sought before us. A very large sum of money is indisputably due under the Awards, challenges to the Awards having definitively failed both in France and in Jersey. Consequent prejudice to the respondent may readily be presumed, as both the Commissioner and McNeill JA noted. The appellants do not deny that they can afford to pay their debt. But though PricewaterhouseCoopers have been appointed to value the shares, the respondent submits that the arrêt over the Shares will not be an easy form of security to realise. Nor is there any guarantee as to the amount which will be realised, as the Commissioner pointed out at para 87 of his judgment of 22 February. The respondent further submits that enforcement in Turkey is not likely to be

straightforward, particularly in circumstances where the appellants (as they told the Royal Court in June 2015) do not regard the Awards as binding and enforceable. 54. Advocate Moran for the respondent drew our attention to the recent English decision of Clarke LJ in *Merchant International Company Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy*

- [2016] EWCA Civ 710 ("*Naftogaz*"), in which permission to appeal to the Court of Appeal was made conditional on the provision by the appellant of security for the full amount of the unpaid judgment debt plus interest, historic unpaid costs and the estimated costs of the appeal, amounting in total to \$28,500,000. Having carefully reviewed the authorities, Clarke LJ described the essential question as being whether there is a compelling reason to make what he described as a "security payment order". He explained at paragraph 37(e) that: "Whilst every case depends on its particular facts the court is likely to find there to be a compelling reason to make a security payment order which has that effect if the judgment debtor has in the past ... or is likely in the future ... to take steps to denude itself of assets or to put its assets beyond the reach of normal enforcement processes". He added at paragraph 40 that there may also be a compelling reason to make such an order if there are considerable practical difficulties in effecting execution. 55. Advocate Moran sought further support from comments of Clarke LJ relating to the distinction between "liability appeals" (appeals against orders holding the appellant liable to the respondent) and "execution appeals" (appeals against orders made as part of the process of execution). That case, like this one, was an execution appeal. Clarke LJ commented at paragraph 40: "The potential distinction arises in this way. If a security payment order is made in a liability appeal and the appeal succeeds the money paid into court will go back to the appellant. In the execution appeal, if the appeal succeeds, the court will have to decide what is to happen to the monies paid in. The unsuccessful respondent will seek to have the money paid to him and the court may well so order, unless it can be persuaded that since the appeal against execution has succeeded, the appellant should be put back into the position in which it was before the monies were paid into court." 56. Having found that there were compelling reasons for requiring Naftogaz to make payment into court of the amounts requested, as a condition of pursuing its appeal, Clarke LJ added (at paragraph 50(g)): "The fact that this is an execution appeal does not justify taking a different stance. If this was a liability appeal there would be compelling reason to make the order; and in an execution appeal, where liability is a given, that is so a fortiori. Naftogaz is perfectly entitled to appeal on an execution point but its so doing cannot disguise or alter the fact that it owes the judgment sum now and will continue to do so whatever the upshot of the appeal." He concluded that the court was entitled to deal robustly with an appellant which sought to invoke its appellate jurisdiction whilst at the same time failing to comply with a judgment pronounced against it, and which was doing whatever it could to avoid having to satisfy the judgment and interest. 57. Despite the powerful submissions of Advocate Moran, we do not impose the condition relating to the provision of security, for two reasons. 58. First, having decided not to grant permission to appeal, it is impossible for us to attach a

condition that security be provided to the further progress of this litigation, as was the case in Naftogaz and as was requested in the respondent's amended summons. The respondent seeks, in the alternative, to attach the condition instead to the stay of execution. But as we have noted above, the stay of execution is a logical necessity if the appellants' right to petition the Privy Council for a further appeal is to be a meaningful one. In the words of the Commissioner, it would be a perverse decision to refuse it. Our decision to grant a stay cannot therefore be realistically said to depend on the satisfaction of a condition which, were it to be complied with, would place the respondent in a materially better position than it has been to date. The real purpose of such a condition would be to improve the ability of the respondent to recover the debt owed to it under the Awards. However satisfactory or convenient that may appear in the broader context of this dispute, we are not satisfied that it is a proper condition to attach to a stay that justice effectively compels us to order in any event. 59. Secondly, there is only limited evidence before us relating to the circumstances identified by Clarke LJ as most likely to constitute "compelling reasons". We address below the issue of steps taken or likely to be taken to denude the debtor of assets or put them beyond the reach of enforcement processes, and conclude that there are other means by which that risk, such as it is, can at least be mitigated. As to practical difficulties in enforcement, we could scarcely avoid taking judicial notice of the fact that recent events in Turkey have caused grave difficulties to the judicial system. But we have no up-to-date evidence from the respondent on the specific prospects for enforcement of its debt. We discount for these purposes a general briefing paper from the International Commission of Jurists which was presented as an authority on the eve of the hearing before us, and to which the appellants had no opportunity to respond. 60. We turn now to the other conditions that the respondent invites us to place on the stay: that the first appellant take no steps to migrate the offices of the second and third appellants to another jurisdiction or to dilute the first appellant's shareholding in the second and third appellants without the prior permission of the Viscount or the Court. 61. As to the first of those conditions, the respondent refers to correspondence demonstrating that the second and third appellants have been without a registered office in Jersey for a period of some two months, a circumstance that was said (without contradiction by the appellants) to constitute a criminal offence. Though a letter of 3 November was provided to the Court, indicating that this situation is explicable by a change of service company in Jersey rather than any intention to migrate the registered offices of the second and third appellants out of the jurisdiction, it was submitted that the risk of migration was a real one and that the condition sought would be a reasonable one. 62. As to the second of those conditions, it is common ground that the share capital of the second appellant has twice (in March 2015 and March 2016) been increased without the permission of the Viscount and in breach of the *arrêt*. The shares were on both occasions allocated to the first appellant, so that the value of the respondent's security was not diluted. Nonetheless, the respondent submits that in circumstances where the *arrêt* has already been breached, there can be no guarantee that the appellants will not take steps to undermine the security of the *arrêt* by causing the issue and allocation of new shares in the second or third

appellant to another State-owned entity. 63. Advocate Nicholls for the appellants did not take issue with the primary facts relied upon by the respondent. He submitted that they do not amount to evidence either of an intention to dilute the shareholding or of an intention to leave the jurisdiction, but was not in a position to give any undertakings to the Court on behalf of his clients. 64. Whilst we accept that there is no evidence to date of deliberate attempts to migrate registered offices or dilute share capital, the irregularities referred to above demonstrate that the appellants have been less than punctilious about their obligations as regards both maintaining a registered office in Jersey and increasing share capital. More broadly, and in contrast to the proposed guarantee condition which we have refused, these conditions would not give the respondent superior assets against which to enforce, but are aimed simply at holding the ring for the respondent, in much the same way as the stay itself performs that function from the point of view of the appellants. For these reasons we consider that both the conditions sought by the respondent under this head are appropriate, and we order them to be attached to the stay of execution. Costs of the appeal 65. The application for costs is made by the respondent in its Summons dated 5 September 2016 in the following terms: "that the First Appellant shall pay 80% of the Respondent's costs of and incidental to the Appeal and Cross-Appeal (including for the avoidance of doubt the hearings before Commissioner Birt on 20 January and 22 February 2016 and the hearing before Mr McNeill QC sitting as a single judge of the Court of Appeal on 18 March 2016) on the standard basis such costs to be taxed if not agreed." Both parties were in agreement, in oral submissions before us, that it was appropriate for us to proceed (as did the Commissioner at first instance) by way of a single costs order in relation to the appeal and cross appeal. They also agreed that whilst the respondent should recover the bulk of its costs, a suitable percentage deduction should be made to reflect the fact that the respondent was unsuccessful on its cross appeal. We agree and proceed on this basis. 66. The only question that remains to be resolved is what the percentage deduction should be. Having heard the submissions of both parties, which were based principally on the time and space devoted to the respective issues in written and oral submissions before the Court of Appeal and in the substantive judgment, we allow the respondent's application for costs but with the substitution of the figure of 75% for the figure of 80% claimed in the application. Interim payment on account 67. The respondent in its Summons of 5 September 2016 seeks an interim payment on account of 50% of the costs awarded on the appeal, on the basis set out in the Commissioner's judgment of 22 February 2016 at paragraph 75. The total costs incurred by the respondent in relation to the appeal were £365,075: 75% of that sum is £273,806. Applying the principle that justice is served by the payment of some lesser amount which the successful party will almost certainly be entitled to collect, we order the interim payment within 14 days of 50% of this 75% figure, which amounts to £136,903. We further authorise the sum of £100,000 plus interest paid into court by the first appellant as security for costs of the appeal to be paid out to the respondent in partial satisfaction of this interim payment. *Authorities Botas -v- Tepe*

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