

JERSEY / JUDGMENT

FG Hemisphere Associates

[2011] JCA 141 (14 July 2011)

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in the name of Hemisphere or causing the shares to be sold or otherwise realised to the benefit of Hemisphere; (e) ordered disclosure by the First Respondent and Gécamines of all assets outside the geographical limits of the DRC together with documents and information and relating to various agreements, correspondence relating to payments, bank accounts and other related matters; and (f) as regards GTL, made certain ancillary injunctions, ordered disclosure of documents and information on the same matters and made further ancillary provisions. 4. By its appeal Gécamines contends, in essence, (i) that it was not as at 19 March, 2009, or as at 27 October, 2010, and is not at the present time, an organ of State, in the relevant sense, of the DRC, (ii) that in reaching the contrary view the Royal Court misconstrued the requisite legal test for identifying an organ of State, (iii) that the Royal Court failed to apply the test required, and (iv) that upon the assumption that it had applied the correct test, the Royal Court's determination was not supported by the facts. 5. By its separate appeal GTL contends (i) that the relevant Gécamines' assets were not situated within the jurisdiction of the Royal Court, (ii) that the interim arrêt entre mains was not properly made, (iii) that the interim arrêt entre mains did not create an immediate proprietary interest in favour of Hemisphere and (iv) that certain of the ancillary orders affecting GTL were oppressive, in particular the restraint from GTL changing its domicile, registered office or place of business and the extent of the disclosure provisions affecting it. 6. The following narration of salient matters is taken from the judgment in the court below where the Commissioner (H. W. B. Page QC) has set out the factual findings of the Royal Court with clarity and precision. Parties 7. Hemisphere is a limited liability company organised in accordance with the laws of the State of Delaware, USA, and having its principal place of business at 60 East 42 nd Street, New York, USA. It is the assignee of the benefit of two ICC arbitration awards made against the DRC and a Congolese company Société National D'Electricité in April 2003 ("the Awards"). The validity of the assignment in November 2004 is not an issue. Despite world-wide efforts to recover on the awards, it is said that, over six years later, in excess of US\$ 100,000,000 is still outstanding, together with daily accruing interest. 8. Gécamines is a limited liability company incorporated and organised in accordance with the laws of DRC, and having its principal place of business at Blvd Kamanyola, Lubumbashi, DRC. It is a substantial mining company incorporated in the DRC. It is wholly owned by the DRC. 9. GTL is a company incorporated in this jurisdiction on 8 April, 1998, and having its registered office at 26 New Street, St. Helier. It is a joint venture company. Gécamines is one of the partners in the joint venture, holds shares in GTL and has a long-running

contractual relationship with it, generating considerable income for Gécamines. Technically, the "joint venture" here is a contractual arrangement between OMG BV (a Netherlands company), Groupe George Forrest SA (a Luxembourg company) and Gécamines entitled "Joint Venture Agreement", the object of which is the commercial exploitation of cobalt-rich slag produced by Gécamines from its mining operations in the DRC. Under that agreement the parties agreed to establish "a Joint Venture Company" to be named Groupement du Terril de Lumbashi (i.e. GTL) - referred to thereafter in the agreement as "the J. V." The principal objects of GTL were to establish a processing company in the DRC to be named Société de Traitement du Terril de Lubumbashi ("STL") in which the shares were to be primarily owned by GTL; to conclude certain agreements, including "the Agreement of the Parties concerning the Capital contributions, the loans and other finance of the project as well as optimising and distributing profits"; and "to organise the management and follow-up of the Project". In due course GTL was incorporated in Jersey and STL in the DRC and GTL entered into (a) an agreement with Gécamines for the purchase of cobalt-rich slag (the "Long Term Slag Sales Agreement"), the Slag Sales Payments being the price payable to Gécamines by GTL for the slag; (b) an agreement with STL for the conversion of the slag into cobalt alloy, by STL at its plant in the DRC (the "Tolling Agreement"); and (c) an agreement with OMG Kokkola OY for the purchase by that company from GTL of the processed alloy the "Long Term Cobalt Alloy Sales Agreement". The Proceedings in Jersey 10. Hemisphere commenced proceedings in Jersey by way of a Representation dated 12 March, 2009, against the State of the Democratic Republic of Congo, Blvd du 30 Juin Kinshasa, République Démocratique du Congo and Gécamines. In addition it cited GTL. 11. The apparent purposes of those proceedings were

- (i) to endeavour to recover at least a large portion of the amounts due under the Awards, still unpaid, by way of obtaining leave to enforce the Awards (as New York Convention awards) as a judgment of the Royal Court against the DRC and Gécamines, (ii) to execute that judgment against certain assets of Gécamines (being, it is contended, assets of the DRC) said to be situated in Jersey and (iii) to proceed to execution under the authority of the Royal Court. 12. By virtue of that Representation, Hemisphere obtained, on 19 March, 2009, an Order of the Royal Court (Clyde-Smith, Commissioner, together with Jurats JL Le Breton and CM Newcombe). By that Order the Court granted interim conservatory relief to the effect that service of the Order on the Party Cited was to operate both as an immediate injunction and immediate restraint ("arrêt entre mains") from making certain payments to the DRC and Gécamines and, among other matters, as an injunction from disposing or dealing with or diminishing the value of any assets of the DRC and Gécamines within Jersey, including the relevant shares and the payments under the Slag Sales Agreement. 13. By that Order, the Royal Court also granted leave to Hemisphere to enforce the Awards in the same manner as a judgment against the DRC and Gécamines in Jersey, subject to leave to apply by those parties; and also granted leave to Hemisphere to effect execution of the Awards by way of distraint upon the shares and the Slag Sales Payments by means of arrêt entre mains confirmée, subject again to the two Respondents and GTL being at liberty to apply to set aside or vary that part of the order. 14. The DRC has neither entered appearance nor taken

part in the proceedings before these courts. Gécamines and GTL, however, issued summonses challenging the orders. The active parties agreed by consent to certain variations and also agreed that the issues raised should be decided:- "by way of an inter partes hearing to review the ex parte applications as to whether assets are available to satisfy the arbitration awards against [the DRC] in particular but not limited to the issues (1) as to whether [Gécamines] is an organ of [the DRC] and (2) if so, whether the Respondents have sovereign immunity to [Hemisphere's] claims". 15. In the event, the claim to sovereign immunity was not maintained and the hearing became the definitive determination of the substantive issues raised by Hemisphere's Representation, as to whether Gécamines was to be regarded, at the relevant time, as an organ of state and, if so, (i) whether the location of a debt owed by GTL to Gécamines was Jersey, (ii) whether relief should be refused on the ground that there was a risk that GTL could be required to pay twice and (iii) whether the Jersey courts should refuse, as a matter of discretion, to confirm the interim orders if there was, in reality, no scope for the Viscount to collect the payments. Separately, questions arose as to the extent to which it was appropriate to make the disclosure orders sought by Hemisphere. 16. Thus the principal issues of substance were whether the relationship between Gécamines and the DRC was such that Gécamines should properly be regarded as an organ of state, and whether the orders in respect of the relevant assets were permissible: the first being an issue between Hemisphere and Gécamines and the second an issue between Hemisphere, Gécamines and GTL. 17. The relevant assets are, first, the shareholding in GTL of which Gécamines is the registered owner and, second, the right of Gécamines to receive payments from GTL in respect of the supply of cobalt under the Slag Sales Agreement. On behalf of Hemisphere it was suggested that payments accruing due under that agreement are likely to be in the order of US\$ 30-45 million in each year for the next eight years or so. 18. No party required formal pleadings, apart from Hemisphere's Representation, and the trial took the form of a hearing on the basis of documentary and affidavit evidence, without discovery and without any witness appearing in person.

Background

19. As is set out in greater detail in the judgment below, between gaining independence in 1960 and the conclusion of UN-sponsored peace talks in April 2003, the DRC (formerly a Belgian colony, and for some time known as Zaire) was in an almost continuous state of political unrest, suffering extreme devastation and a collapse in per capita income. The plight of this, the second largest country in sub-Saharan Africa, is identified in a series of World Bank reports. Following a transitional period, a new government was elected at the end of 2006. 20. Successive World Bank reports identified not only the need for political stability and restoration of the rule of law but also, specifically, structural reform of public enterprises (sometimes referred to as "PEs") and the mining sector. According to a 2004 report, state enterprises of one kind and another, of which there were said to be over one hundred (fifty eight of which, including Gécamines, were wholly owned by the state) had come to dominate the country's economy to the increasing exclusion of the private sector, but

presiding over a marked, in some cases dramatic, decline in productivity. 21. The DRC is potentially one of Africa's richest states, endowed with vast mineral resources: for example, the Katanga region alone is estimated to be the second richest copper region in the world, after Chile. But a 2003 report had noted that copper production from Gécamines had declined from a peak of 475,000 tonnes in 1986 to about 15,000 in 2002. 22. Prior to 2002 Gécamines had held exclusive mining concessions over some 60,000 square kilometres, including some 32,000 square kilometres in the province of Katanga; but a new Mining Code promulgated in 2002 sought to establish transparent procedures in order to attract inward investment and, to that end, to put to an end the historic system of large concessions which could be held practically indefinitely without being developed. Even so, a World Bank report of 2008 identified that a positive economic outcome for Congo was hampered by dysfunction in the mining sector, handicapped by, among other matters, continuing political instability, corruption and differences in governance. Seeking to address this problem, a new Governance Contract had been adopted in February 2007 together with a commission to re-examine a large number of contracts and partnerships between state mining companies and the private sector. Another major development was the signing in 2007 and 2008 of agreements between the government of the DRC and a group of Chinese enterprises providing for a massive programme of investment in the country's infrastructure in return for access to mineral deposits. Gécamines 23. The origins of Gécamines lie in a company established in 1906 under Belgian colonial law. By the mid 1960's it was one of the largest mining companies in the world but it was nationalised in 1967 and has continued, ever since, to be wholly owned by State. The now commonly used name Gécamines dates from about 1972. 24. After the mid 1970s the fortunes of Gécamines declined drastically. Revenue streams dried up, funding from the World Bank was lost and by the mid 1990s, it lacked the capital to exploit its vast mining concessions. It therefore started to enter joint venture deals in the mid 1990s, but with the adoption of the new Mining Code in 2002 had to relinquish many of its historic concessions. 25. As from 2003 efforts were made to restructure Gécamines with the assistance of "COPIREP" (an agency of the DRC, funded by the World Bank, and charged with responsibility for steering the process of reform). The payroll was reduced by two-thirds. In September 2005 a contract with a French company, SOFRECO SA, produced external management to work alongside the existing team. By state decree of 30 December, 2005, the Board of Gécamines was reconstituted, six being appointed by name (three of whom had been recommended by SOFRECO) and five being filled by representatives of the Cabinet of the President of DRC. One of those named was Mr. Mukasa, who became Managing Director in September 2009 and who has sworn affidavits in the proceedings. 26. By late 2007 the arrangements with SOFRECO had come to an end but the World Bank, through COPIREP, continued its activities in relation to the public sector enterprises in general and Gécamines in particular. One proposal was the conversion or transformation of Gécamines into a commercial company. In his first affidavit, dated 1 March, 2010, Mr. Mukasa indicated that he understood that the ultimate objective of the Congolese government and the World Bank was to privatise Gécamines. However, as noted by the court below (in paragraph 52) responsibility for implementing the reforms lay, as it

always had done, with the Congolese government of the day, and its agency COPIREP. 27. On a point still controversial as far as the appeals are concerned, the court below considered the degree of control exercised by the state over Gécamines as at 19 March, 2009, the date of the original ex parte order of the court: see paragraphs 60 to 69 of the judgment below. 28. Put simply, the argument for Hemisphere was that, in addition to being wholly owned by the state, the import of what in other jurisdictions might be called the Articles of Association from 1995 onwards, coupled with the law of 1978 governing all public enterprises, conferred upon the State a degree of power and potential control which was intrusive and incompatible with the concept of independence in any real sense. 29. Whilst the court below accepted that the financial statements of Gécamines appeared to be the subject of annual audit and that Gécamines appeared to have been treated in many respects as a separate entity by the tax authorities, it found that the powers of the Board of Directors were circumscribed and qualified and that the exceptional degree of power accorded to the state over the affairs of the company, at all levels, was such that the company was no more, in truth, than an arm of the state. 30. The court below then considered recent legislative steps towards the reform of Gécamines: see paragraphs 71 to 83 in the judgment below. The court concluded, in paragraph 84, that the position at the end of the trial in mid June 2010 was that the transformation process was far from maturity, that the terms of any new constitution which might eventually be conferred on the company remained unknown and that no real transformation in the nature of Gécamines had occurred. The Form of the Trial Below 31. As noted above, the issues were defined by the parties. This was effected through a consent order embodied in the Act of Court of 29 September, 2009, setting out that the relief sought in the summonses of Gécamines and of GTL were to be decided by reference to the specified, but not exclusive,

issues.

It appeared to the Court below that there was no controversy between parties as to the foundations for the legal principles to be applied in determining whether Gécamines is to be regarded as an "organ of the state" of the DRC in the relevant sense. The issue had not previously been subject matter of consideration in the courts of this jurisdiction and it appeared that the parties were content to apply the views expressed in certain authorities from England, namely *Trendtex Trading Corp-v-Central Bank of Nigeria*

[1977] 1 QB 529, CA, *Kensington International Limited-v-Republic of Congo*

[2005] EWHC 2684 (Comm) and *Walker International Holdings-v-Congo*

[2005] EWHC 2813 (Comm) . 32. In paragraph 12 of the judgment below the learned Commissioner, under reference to the criteria propounded by Lord Denning MR in *Trendtex* , indicated that the test as to whether Gécamines was to be regarded as an organ of state, so as to render its assets liable to execution by creditors of the DRC, was whether at the relevant point in time Gécamines was under the control of the government of the DRC and exercised governmental functions. 33. Thus, as Advocate Harvey-Hills for

Gécamines accepted in terms before this court, this test is an exception to a principal concomitant of incorporation that the incorporated entity has a separate personality and that the veil of incorporation will be pierced only if the incorporation can be shown to have been sham or façade - the exception being that enforcement may be available to a creditor of a State against the assets of a company controlled by that State if the requirements of the relevant test have been met. The Appeal by Gécamines 34. Advocate Harvey-Hills contended first that, whilst the Royal Court had recorded the correct legal test, at paragraph 12 of its Judgment, it had shown that it failed to appreciate the underlying centrality of the separate corporate personality of the incorporated entity and that this infected the whole of the judgment. Second, it had misconstrued the test in *Trendtex*, in failing to identify separately that the entity had not only to be under government control but also to exercise governmental functions. Third, even if it had not misconstrued the test it had failed to apply the test and identify whether or not the entity was carrying out truly governmental functions. Finally, there was insufficient evidence to support the requirement of governmental control of the entity. Failure to appreciate the centrality of corporate personality 35. Advocate Harvey-Hills submitted that the court appeared to have an underlying antipathy to the doctrine of corporate personality in matters of attempt to enforce state liabilities which necessarily would have infected the remainder of its approach. 36. The particular basis of his submissions on this point was paragraph 16 of the judgment of the court below which is in the following terms:- "Other principles suggested by Mr Harvey-Hills as flowing from these cases and of particular relevance to the present litigation were that there can be "no intermediate or hybrid status" for an entity for present purposes (per Shaw LJ in *Trendtex*); that the burden is on Hemisphere to prove its case; and that the requirements of control by the government and performance of governmental functions by Gécamines are cumulative and not alternative. None of these was seriously challenged by Miss Lawrence. For our own part, however, while it is easy to understand why performance of governmental functions should be a necessary element of enjoying the privilege in international law of immunity from suit or execution, it is less obvious why (hypothetically) property held in the name of an entity which is engaged in activities that would not by any stretch of imagination normally be described as "governmental" but which is wholly owned and controlled by the state (and, by any other standard one cares to think of, is nothing more than an instrument of the state), should not be available to creditors of the state to the same extent as any other state property. It may be that the matter will need to be explored on some future occasion: for the present we are content to proceed on the basis that both limbs of the test need to be satisfied if Hemisphere is to succeed, noting in passing that the exploitation of the nation's oil reserves by SMPC was clearly regarded by both Cooke J and Morison J as a governmental function." 37. For Hemisphere, Advocate Lawrence contended that it was clear from the terms of paragraph 16, taken together with paragraphs 13 and 140, that the expressions of view upon which Advocate Harvey-Hills had laid emphasis were merely a short obiter reflection by the court on the nature of the organ of state test, which the court then expressly set to one side before proceeding to assess, on the basis of *Trendtex*,

whether Gécamines was an organ of state of the DRC. Discussion 38. This ground of appeal is not made out. In addition to the passages referred to above, reference can be made to paragraphs 17, 133, 138 and 140 for an indication of the court's appreciation of the need to consider the two elements of control and function. As set out by the court below in paragraph 16, the views expressed in the latter part of the paragraph were obiter and not part of the court's reasoning. Further, in paragraph 12 the court had not only identified the need for the two criteria as set out by Lord Denning MR but also, in paragraph 13, noted the several alternative formulations used in the other judgments in *Trendtex*. In paragraph 15 the court further observed that Cooke J, in *Kensington*, cited above, had expressly adopted the test as set down by Lord Denning MR, as well as noting the formulation of Shaw LJ that: "whether or not a particular organisation is to be accorded the status of a department of government or not must depend upon its constitution, its powers and duties and its activities". 39. It follows that there is no doubt but that the court below understood the substantial agreement between Advocate Lawrence and Advocate Harvey-Hills as to the importance of the *Trendtex* judgments and there is no indication, in the essential reasoning, that it considered it other than necessary to identify, in the relevant entity, both governmental control and the exercise of governmental functions or activities. The Proper Approach to the Functions Requirement 40. In his written contentions for his appeal, and in oral argument, Advocate Harvey-Hills took certain of his grounds together under the broad heading of the Royal Court's failure to engage with the functions requirement. It seems helpful to divide this part of the Gécamines appeal into three sections: (a) the basic test by which a separate entity may be liable for the debt of a sovereign state, (b) the required characteristics of the functions part of the test and

- (c) whether, on the facts as found, the test was satisfied. The required characteristics of the control part of the test and whether, on the facts as found, the test was satisfied are dealt with separately. The basic test by which a separate entity may be liable for the debt of a sovereign state 41. In dealing with this issue Advocate Harvey-Hills again emphasised the importance to be attached to the fact that this was a very specific exception to the usual respect paid to incorporation; requiring a principled and strictly monitored approach. In searching for this approach he referred to the following particular sections of those parts of the judgments in *Trendtex* dealing with absolute immunity: "If we are still bound to apply the doctrine of absolute immunity, there is, even so, an important question arising upon it. The doctrine grants immunity to a foreign government or its Department of State, or any body which can be regarded as an "alter ego or organ" of the government. But how are we to discover whether a body is an "alter ego or organ" of the government? The cases on this subject are difficult to follow, even in this country: let alone those in other countries. And yet, we have to find what is the rule of international law for all of them. It is particularly difficult because different countries have different ways of arranging internal affairs. In some countries the government departments conduct all their business through their own offices - even ordinary commercial dealings - without setting up separate corporations or

legal entities. In other countries they set up separate corporations or legal entities which are under the complete control of the department, but which enter into commercial transactions, buying and selling goods, owning and chartering ships, just like any ordinary trading concern. This difference in internal arrangements ought not to affect the availability of immunity in international law. A foreign department of state ought not to lose its immunity simply because it conducts some of its activities by means of a separate legal entity. It was so held by this court in *Baccus SRL-v-Servicio Nacional Del Trigo*

- [1957] 1 QB 438. I confess that I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions. That is the way in which we looked at it in *Mellenger v. New Brunswick Development Corporation*
- [1971] 1 W. L. R. 604, when I said, at p. 609: "The corporation has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does." (Lord Denning MR, 559C - 560D). ... I should not differ from these authoritative opinions if I were satisfied that their authors had asked themselves what Mr. Neill for *Trendtex* has convinced me are the right questions: what was the legislative intention of the Government of Nigeria in creating this bank by the statute which we have examined, and in tightening control over it by the subsequent decrees to which we have been referred? and, is the bank, controlled as it now is by the Government of Nigeria, the sort of body which the law of nations, or if it differs, the law of this country, recognises as entitled to the immunity which it accords to a sovereign state? (Stephenson LJ, dissenting on other matters, 564A - B) ... It is clear enough that the bank was the subserving agent of the government in a variety of activities but this is not in my judgment adequate to constitute it as an organ or department of government. I cannot find in the constitution of the bank or in the functions it performs or in the activities it pursues or in all those matters looked at together any compelling or indeed satisfactory basis for the conclusion that it is so related to the Government of Nigeria as to form part of it. (Shaw LJ 575 F - G) 42. These views, Advocate Harvey-Hills submitted, made clear first that the relevant issues were as to control and function, second that those were separate and cumulative and, third, that the test looked to the functions of the entity rather than the use made of that entity by the state. 43. He then turned to the decision in *Kensington* (dealing with the state of Congo-Brazzaville, not the DRC), which appears to be the first decision in which the principles in *Trendtex*, as to sovereign immunity, have been applied to the different issue as to whether a separate entity should be liable for the debt of a state. Advocate Harvey-Hills noted that much of the legal discussion concerned whether the court was obliged to recognise apparent rights of a chain of companies or should disregard that chain as a fiction. In the present case, as Advocate Harvey-Hills observed, there is no claim that *Gécamines* and the DRC have deployed sham corporate structures in an attempt to defraud or defeat the claims of anyone. Looking at those parts of the judgment which appeared to him to be relevant for the purpose of identifying the correct

test, he observed that Cooke J had indicated that he would follow Trendtex. In doing so the judge had focused his attention on the constitutional provisions of the relevant entity, SNPC. It seemed that those set out its purposes and identified that SNPC was to engage on behalf of Congo, to undertake operations on behalf of Congo and to represent the interests of Congo. Cooke J had also founded his decision on a Convention entered into between the government and SNPC, providing that SNPC carry out policy and strategic orientations defined by the government and carry out missions entrusted to it. The judge's principal observations on these matters were the following:- "52. The decision of the Court of Appeal in Trendtex Trading Corporation v Central Bank of Nigeria

[1977] 1 QB 529 is the prime authority in relation to the principles which apply when determining whether any given entity is or is not part of the State. At page 560 Lord Denning MR stated that it was necessary to look to all the evidence to see whether the organisation in question was under government control and exercised governmental functions in order to determine whether it was part of the State. Shaw U stated, at page 573, that whether a particular organisation is to be accorded the status of a department of government or not must depend upon its constitution, its powers and duties and its activities. In that decision, the court was concerned with ascertaining whether or not the Central Bank of Nigeria was entitled to immunity from suit, a matter now governed by statute with particular provisions where commercial activities are undertaken by a State or a part of it. The Third Parties say that the issue which arises in the present case, which is whether a particular body should be held liable for the debt of the State is a different question from that which was explored in Trendtex for the purpose of determining whether or not a body was entitled to immunity from suit.

53. Whilst the questions are different, it appears to me that the answers will turn on the self same factors. In Trendtex, Shaw U said that there could be no intermediate hybrid status occupied by the bank where it was regarded as a government department for certain purposes and as an ordinary commercial or financial institution for different purposes. It had to be one or the other. Since a state can be involved in commercial activities and there are many state organisations which are so involved, the simple question here is whether or not SNPC and/or Cotrade are to be equated with the State of the Congo. The fact that a body is, on its face, a separately constituted legal entity with a separate corporate personality is plainly not decisive because of the number of State organisations which exist and which are part of the apparatus of the State and carry out governmental activity or functions. The Trendtex decision establishes that the key questions are those of "governmental control" and "governmental functions" and that these are to be determined as a matter of English law, although the English courts may have regard to the position under the law where the body is incorporated and account can be taken of the view of the government concerned. An entity which is constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates, can be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of an organ of government (see

Mellenger -v- New Brunswick Development Board

- [1971] 1 WLR 604 (CA) at page 609, although in that case the entity had never pursued any ordinary trade or commerce at all and was equivalent to the Board of Trade in England, as it then was).
54. Here the founding statute, the byelaws and the convention to which I have already made reference reveal the State's involvement in SNPC and its control of the board of directors. Mr Gokana's own position as Special Adviser to the President of the Congo as well as being President and DG of SNPC speaks for itself.
55. On the materials available to me, I agree with paragraph 32 of the judgment of Tomlinson J where he found that SNPC is simply part of the Congolese State and has no existence separate from the State. The Congolese legislation and SNPC's byelaws do demonstrate "that its purposes are to undertake the exploitation of Congo's oil reserve on behalf of the Congo, to hold that State's oil related assets on its behalf and to represent the State on oil related matters. It is financed by the State, its function is to act on behalf of the State and it is under the financial and economic control of the State with its officers being government appointees." Whilst it previously traded through SNPC UK and now trades itself or through its subsidiary Cotrade, it acts as the trading arm of the State and is controlled by it, whilst putting into effect Government policy in relation to oil and oil products. The two decisions of the French Court of Appeal to which I have referred earlier, are to the same effect." 44. Advocate Harvey-Hills then turned to Walker where Morison J. had been faced with issues similar to those in Kensington and had also followed Trendtex in the following way:- "
93. The question here is not whether SNPC is a governmental or non governmental organisation, although that may be part of the answer, the question is whether it is to be regarded either as an organ of the State or, on the other hand, as a State owned commercial company. If it is an organ of the State, as I understand that expression, then it would not be regarded as a separate and distinct commercial organisation owned by the State, and for Convention purposes, which do not apply, would either be regarded as the State itself or as a governmental organisation.
94. Mr Flaux QC has persuaded me that the test is more akin to the test of whether a State owned company is, for immunity reasons, to be regarded as a department of State or as a separate entity [see section 14 of the State Immunity Act 1978]. If that is correct, then the decisions in Trendtex v Central Bank of Nigeria
- [1977] QB 529, Czarnikow v Rolimpex
- [1979] AC 351 and Kuwait Airways v Iraq Airways [1995] 1 WLR 1147 are relevant. It follows that the question whether SNPC is an 'emanation of the State', which was the issue before the French Courts, is not the relevant question in this jurisdiction. Therefore, pace the estoppel argument [for which see below], I am not concerned with the question whether SNPC is an emanation of the State as that phrase is understood in English law; still less

with the question whether I consider that the French Court has correctly applied its own law and whether the appeal to the Court of Cassation will or will not succeed. " 45. Advocate Lawrence in reply observed that, in respect of the appellants' emphasis on the weight to be attached to corporate identity, it was important to recollect that the creditor of an ordinary wealthy individual would expect to be able to have recourse to courts and the rule of law in order to gain satisfaction. On the other hand, the ability of creditors of a sovereign state to obtain satisfaction from a defaulting state actively seeking to evade payment of its commercial debts, was likely, in practical terms, to be much more precarious. 46. In her submission, the references to control and to functions or activities in *Trendtex* were not necessarily separate tests but operated together, in a blended analysis of the totality of the circumstances. What mattered was whether the entity, viewed fairly and objectively, appeared to be a genuinely separate, independent enterprise or whether it was simply a tool or device of the state. This was not to suggest that it had to be shown that the incorporated entity was a sham or subterfuge to evade liability, but merely that it was, on a proper analysis, to be characterised as part of the particular state's governmental apparatus, effecting its policies concerning such matters as the economy or industry within its territory. 47. The *Walker* and *Kensington* cases were informative as they were rather closer to home than the sovereign immunity cases. In *Walker*, Morison J focused his assessment on behavioural and factual elements whereas in *Kensington*, Cooke J focused more on legal documentation. Neither provided a box-ticking exercise but each was helpful in identifying possible indicators of governmental control and functions. Discussion 48. It appears that this may be the first occasion on which an appellate court has had to consider the application, to the issue as to the liability of a separate, but wholly owned, entity for the debt of a state, of the principles in *Trendtex*, as to sovereign immunity. At the outset it has to be said that at first sight it might not be thought immediately to be obvious that the test by which an incorporated entity is or is not to be accorded sovereign immunity should also be the test by which such an entity, wholly owned by the state, is to be found an alter ego of the state for the purpose of satisfying the otherwise unattainable satisfaction of the debt of a defaulting state. In the context of sovereign immunity it is readily understandable that, when considering whether the act of an incorporated body is to be entitled to immunity, the body must be identified as an organ of government carrying out governmental functions. Doubtless those functions might involve ancillary activities, such as the purchase of desks, chairs, computers or even chartering ships; but there can be no hybrids. If the body is exercising governmental functions it is entitled to sovereign immunity. The policy, as Lord Denning MR indicates at 559G, quoted above, is that a foreign department of state ought not to lose its immunity simply because it conducts some of its activities by means of a separate legal entity. 49. But applying those principles to a question of sovereign debt permits a result that the state, through its wholly owned entity, is forced to sustain the payment its own debt - howsoever that debt has arisen - only where the claim is made against a wholly owned entity properly characterised as an organ of the state and not against one whose activities are properly seen as commercial. However as Advocate Harvey-Hills sought repeatedly to emphasise

before this court, separate corporate personality was the guiding principle. Those transacting with the commercial entity were entitled, whilst knowing that it was wholly owned by the state, to the usual protection of incorporation that the incorporated entity would be liable for its own debts only (which would of course include commercial, financial, guarantees etc.). That submission is open to the response that the reality could well be that an individual trader - but not of course a potential creditor such as an employee - would in fact seek additional security such as parent company or state guarantees; but Advocate Harvey-Hills was resolute that entities and their creditors were, in general, entitled to expect a similar, strictly policed, approach to that in respect of sovereign immunity. 50. In the event, before this court, as was the case below, the parties were agreed that the Trendtex principles should apply, although in debate this court observed first, that in Kensington the position was accepted without the court entering into detailed reasoning and second, that in Walker a different judge expresses himself as persuaded but again does not enter into reasoning. If the point is ever the subject of detailed debate it may be that a more refined or bespoke approach will be capable of being discerned; but this court must, in this case, proceed upon the basis that the test is to be the same as that in Trendtex in respect of each of these somewhat different issues. 51. Turning therefore to Trendtex, it would seem appropriate to commence by noting the following points. The first question posed by the Court of Appeal was whether the separate entity, the Central Bank of Nigeria, was entitled to state immunity by reason of being entitled to be considered as a "department" of state (Lord Denning at 560G, Stephenson LJ at 565F and 572C), an "emanation, arm, alter ego" of state (Lord Denning MR at 559D, Stephenson LJ at 563D-F and 572C or "an organ or department of government" (Denning MR at 559D, Shaw LJ at 575F). Each judge found that it was not. Lord Denning MR appears to be the only of the three members of the court specifically to express his approach by reference to a test: "looking to the functions and control of the organisation" (560C). At 560E-H it is tolerably clear that his lordship considered the constitutional arrangements, the facts relating to control and the actual functions and activities. Stephenson LJ said that the appropriate questions were as to the legislative intention of the state in creating the bank and in tightening control over it (564A). Shaw LJ was of the view that the fact that the bank was the subservient agent of government in a variety of activities was not sufficient in itself. He could not find "in the constitution of the bank, or in the functions it performs or in the activities it pursues or in all these matters looked at together any compelling or indeed satisfactory basis for the conclusion that it is so related to the Government of Nigeria as to form part of it" (575F-G). 52. From these passages we take it that the appropriate tests whereby a separate entity is entitled to be considered as a department of state, and which we would adopt in Jersey, is (i) whether by reason of its constitutional documents the entity ought to be considered as such or (ii) whether it should be so considered having regard to (a) the degree of control exercised by the state taken together with either or both (b) the functions which the entity was performing or required to perform and (c) the activities which it was pursuing or required to pursue. It seems to us more difficult to discern from the judgments in Trendtex the extent to which control and function are to be

considered separately. Subject to what we say later as to the proper nature of relevant functions, we consider that, as a matter of theory, it could be argued that an exceptional degree of control might be an indicator that a function was being treated by a state as a governmental function and, on the other hand, that a lack of governmental control over the wholly owned entity was a counter-indicator of governmental function. For the present, however, it seems to us preferable simply to state that each element must be present. The required characteristics of the functions part of the test 53. In a detailed line of argument (albeit neither advanced in the court below nor mentioned specifically in the notice of appeal), Advocate Harvey-Hills submitted that a firm distinction was to be drawn between on the one hand sovereign public acts and, on the other, private acts such as a private citizen might have entered into. Where the relevant functions of the entity were properly to be characterised as the latter, there was no sovereign immunity and it therefore followed that the entity was not to be treated as a department of state with consequent liability for state debt. Lord Denning MR had drawn this very distinction - in the context of restrictive immunity - in *Trendtex* : see for example 555F-G. Constructing and operating mines, as had been submitted below, were not governmental functions. 54. The first authority in this line of argument was *I Congreso del Partido* [1983] 1 AC 244, and, in particular, the speech of Lord Wilberforce at 258F - 269C. 55. In concluding after his exegesis his Lordship said this, in the context of restrictive immunity, at 268H - 269C, the other members of the Judicial Committee of the House of Lords being in agreement with his exposition of principles:- "But these consequences follow inevitably from the entry of states into the trading field. If immunity were to be granted the moment that any decision taken by the trading state were shown to be not commercially, but politically, inspired, the "restrictive" theory would almost cease to have any content and trading relations as to state-owned ships would become impossible. It is precisely to protect private traders against politically inspired breaches, or wrongs, that the restrictive theory allows states to be brought before a municipal court. It may be too stark to say of a state "once a trader always a trader ": but, in order to withdraw its action from the sphere of acts done *jure gestionis*, a state must be able to point to some act clearly done *jure imperii*. Though, with much hesitation, I feel obliged to differ on this issue from the conclusion of the learned judge, I respectfully think that he well put this ultimate test [1978] Q. B. 500, 528: "...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." 56. To these views of Lord Wilberforce Advocate Harvey-Hills suggested that, in questions as to liability for state debt, the relevant test should be whether or not the functions of the entity fell "generally" within the scope of a "sovereign or public act" . 57. Advocate Harvey-Hills referred next to the decision of the House of Lords in *Kuwait Airways Corp-v-Iraqi Airways Co*

[1995] 1 WLR 1147 (HL) where the Judicial Committee had to deal by that stage not with common law approaches but with the application of the State Immunity Act 1978 . In particular, the Committee had to deal with section 14 which sets out the operative provisions when

proceedings are instituted against the legal entities of Contracting States, the entities being distinct from the state but which may have been entrusted with public functions. Section 14(2) provides that such proceedings may not be entertained in respect of acts performed by the entity in the exercise of sovereign authority. Lord Goff of Chieveley, with whom the other members of the Judicial Committee effectively agreed, said (at 1160) under reference to *I Congreso* :- "It is apparent from Lord Wilberforce's statement of principle that the ultimate test of what constitutes an act *jure imperii* is whether the act in question is of its own character a government 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. To attract immunity under Section 14(2), therefore, what is done by the separate entity must be something which possesses that character. An example of such an act performed by a separate entity is to be found in *Arango-v-Guzman Travel Advisers Corporation*

- [1980] 621 F 2d 1371 in which *Dominicana* (the national airline of the Dominican Republic), faced with a claim by a passenger in respect of inconvenience suffered in "involuntary rerouting" was held entitled to plead sovereign immunity under the United States Foreign Sovereign Immunities Act 1976, on the ground that it was impressed into service, by Dominican immigration officials acting pursuant to the country's laws, to perform the functions which led to the rerouting of the plaintiff ... but where an act done by a separate entity of the state on the directions of the state does not possess the character of a government act, the entity will not be entitled to state immunity, though it may be able to invoke a substantive defence such as *force majeure* despite the fact that it is an entity of the state: see, e.g., *Czarnikow Limited-v-Centrala Handlu Zagranicznego Rolimpex*
- [1979] AC 351. Likewise, in the absence of such character, the mere fact that the purpose or motive of the act was to serve the purposes of the state will not be sufficient to enable the separate entity to claim immunity under Section 14(2) of the Act." 58. Advocate Harvey-Hills then referred to the decision of the Court of Appeal in *Propend Finance Pty Ltd v Sing and Anr*
- [1997] EWCA Civ 1433 where the relevant appellant, the Commissioner of the Australian Federal Police Force, was sued in that capacity and not personally. There the court (Leggatt LJ, Pill L. J. and Mance J.) had again emphasised the distinction between governmental and private acts. 59. His last authorities under this head were *Tsavliris Salvage (International) Limited-v-Grain Board of Iraq*
- [2008] EWHC 612 (Comm) and *Wilhelm Finance-v-Astillero Rio Santiago*
- [2009] EWHC 1074 (Comm) . 60. In the former, one of the issues before the court was whether by reference to s. 14(1) of the 1978 Act, the Grain Board of Iraq was to be viewed as a department of the Ministry of Trade of the Iraqi government or as a separate entity. Gross J., was of the opinion that there was no single test, but relied on the authorities of

Trendtex , I Congreso and Czarnikow, 61. In Wilhelm Finance , the issue was whether the defendant, an Argentine shipyard, could set aside an order for substituted service on the basis that it could only properly be served through diplomatic channels. Teare J. considered that the question for the court was whether the defendant was a 'State' or a 'separate entity' for the purpose of the 1978 Act. He noted that the Act referred to two requisite qualities, that of being distinct from executive organs and of being capable of suing and being sued. He thought it appropriate to seek guidance from the section 14 authorities and reviewed Trendtex, I Congreso , Kuwait Airways and Propend . At paragraph 47 he had adopted Lord Goff's rehearsal of Lord Wilberforce's test, set out above, which excluded from sovereign acts an act which any private citizen can perform. At paragraph 51 he had reached the view that having merely functions or activities which a private company might have in trade or commerce was determinative against the entity being part of the state. 62. Advocate Harvey-Hills submitted that these various authorities showed a consistent approach to the emphasis on the distinction between sovereign and private acts; a distinction which should be adopted in respect of a sovereign debt claim such as the present, thus protecting a separate - albeit wholly government-owned - corporate entity and its creditors. 63. Advocate Lawrence for Hemisphere observed that the foregoing arguments, so specifically based upon the distinctions drawn in I Congreso , Kuwait Airways , and related cases, were neither advanced in the court below nor mentioned specifically in the notice of appeal. Further, in neither Kensington nor Walker , upon which the appellants relied for their separation of tests, did the judges consider themselves restricted to considering whether, for the purpose of deciding those cases, the entity SNPC undertook acts constituting sovereign or public acts. For example, Cooke J in Kensington set out what, in his opinion, constituted "governmental functions" without any reference to sovereign or public acts (at paragraph 53):- "... an entity which is constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates, can be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of an organ of government ...". 64. She submitted that the majority of day to day functions of a government are ones which, at least in theory, a private person could perform. It was for each government to decide what its own functions and roles were to be and that, in turn, would depend upon the economic and political philosophy of the state. 65. In practice the assets of a State, situated outside its borders, would be held, almost inevitably, within companies created by the State. To hold that the entity whose assets had been located could never be considered an organ of the state because the functions it performed were commercial in nature, and could be carried out by a private citizen, would constitute the practical reintroduction of absolute immunity for States contracting directly with third parties. 66. The line of cases set out above was dealing with the issue as to whether or not the particular activity which was the subject matter of the action was a truly sovereign act. The cases did not assist in identifying how one should approach the issue of separation of an entity from a state. Discussion 67. The views in Kensington at paragraphs 43 to 55 and

in Walker at paragraphs 93 to 100 do not include discussion as to any policy for applying the same test as for sovereign immunity, or as to the vice which it is sought to avoid, or as to the nature of the sovereign functions which engage the liability of the entity. But this case proceeds upon agreement as to the adoption of the Trendtex test. 68. From the opinions in *I Congreso*, *Kuwait Airways*, *Tsavliris*, *Wilhelm*, and to an extent *Trendtex*, it can be seen that in England the distinction, for restrictive sovereign immunity purposes both at common law and under the 1978 Act, is as to whether the act in question is properly characterised as a sovereign act or an act which a private person can perform. As indicated in *Kuwait Airways* by Lord Goff of Chieveley, in the absence of the character of a governmental act the mere fact that the purpose or motive was to serve the purposes of the state will not be sufficient to enable a claim of immunity. In such a case, even although the entity is a state entity, directed by the state, and therefore considered to be one with the state, the character of the act is the conclusive factor. 69. That is perfectly understandable in respect of the issue of restrictive sovereign immunity. But characterisation of a single act of the entity will not be sufficient for the proper appraisal of the entity as an emanation, alter ego, or organ or department: hence the Trendtex test for the purpose of absolute immunity at, among others 559C-560D. And, as we have noted above, Advocate Harvey-Hills at the very least offered the necessary qualification that, in cases of alleged liability for state debt, the relevant test should be whether or not the functions of the entity fell "generally" within the scope of a "sovereign or public act". At first blush we do not find that to be a helpful formulation particularly where, as Advocate Harvey-Hills was at pains to point out, there was a requirement for rigour. 70. Once it has been accepted, as this appellant has done, that there is, in circumstances such as the present, a particular exception to the rule of respect for separate incorporation, and that it is not necessary to identify a sham or façade, the issues have been shown to be outwith the context of ordinary corporate and commercial considerations and a special rule has been created in respect of sovereign states and their wholly owned entities. It seems to us that a necessary implication is that persons such as those lending to the relevant entities, or doing business with them and becoming creditors, may be taken to have recognised that the separate legal entity is not necessarily immune, solely through its separate corporate status, from the claims of creditors of the state. By ordinary diligence they would become aware of the entity being wholly owned. If firm state control is apparent, it is only reasonable to infer therefore that the third party will be aware that there is a prospect that the entity ought to be considered as part of the governmental organisation. 71. It seems to us therefore that the appropriate test ought to lead to an objectively sound result that the entity is properly to be viewed as a department of the state. With such a goal in mind, and recollecting that the requirement as to functions is additional to the control part of the test, it is our view that the requirement as to functions will be met where the principal functions and activities of the entity are properly to be viewed as governmental; thus making due allowance for ancillary activities which are either non-core functions or are functions which are merely supportive, such as provision of offices and equipment, staff support, facilities management and the like. As we have indicated,

we reject the use of the qualification 'generally'. We have also noted that in argument in *Trendtex* the concept of preponderance was suggested: see 540G-H. In our view the concept of principal functions gives rigour and certainty. With the concept of preponderance we would, for our own part, be concerned that greater doubt might emerge by way of attempted comparisons of the economic value of activities and the number and frequency of transactions or operations. In our view the concept of principal functions provides an objectively sound result. In any event, the decision as to what are to be considered the principal functions will be a matter of fact and degree, to be determined after reviewing all relevant information. 72. As to what functions might properly be considered governmental, we start with the intuition that it would not be wise to attempt to set out a proscriptive list. Such functions are likely to vary from state to state and from era to era, but it does seem that some guidance can be gleaned from the authorities to which we have been referred. 73. In *Trendtex* at 559H - 560D Lord Denning had noted that a state's internal view as to which departments were entitled to immunity could be so elastic as not to form an acceptable guide for international dealings. However, having identified his test, the example to which his Lordship refers at 560D appears to draw a distinction as between the ordinary pursuit of trade or commerce and the promotion of the development of that commerce. 74. Similarly, in *I Congreso* Lord Wilberforce observes at 264D - 265B that the activities of states cannot always be compartmentalised into trading and governmental. His Lordship continues by quoting the decision in *Empire of Iran*, that the distinction cannot be drawn according to the purpose of the state because "ultimately, activities of state, if not wholly then to the widest degree, serve sovereign purposes and duties, and stand in a still recognizable relationship to them. Neither should the distinction depend on whether the state has acted commercially. Commercial activities of states are not different in their nature from other non-sovereign state activities." His Lordship concludes that, looking to the restrictive theory, "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." (emphasis added) 75. Those words appear to emphasise that the identification of sovereign function is not a matter of brightest identifiable line but, rather of the area of finer nuance as to which the court of first instance must be astute to consider the detail of the evidence before it. 76. The discussion in *Kuwait Airways* is also instructive. Lord Goff, at 1160A-F uses, as an example of the sort of situation which allows to the entity the immunity of the state, the re-routing of service by the state airline on the grounds that it was 'impressed into service'. Again therefore there is emphasis on the importance of considering not only the act in question (running a commercial airline) but also the 'whole context' (how the act came about, or, the nature of the act in context). In *I Congreso* the 'whole context' was important for Lord Wilberforce:- "The question is whether the acts which gave rise to an alleged cause of

action were done in the context of the trading relationship, or were done by the government of the Republic of Cuba acting wholly outside the trading relationship and in exercise of the power of the state. That this is not an easy question to answer is shown by the difference of judicial view, Robert Goff J. and Wailer L. J. holding that Cuba's acts were governmental, Lord Denning M. R. that they were not. In my opinion it must be answered on a broad view of the facts as a whole and not upon narrow issues as to Cuba's possible contractual liability." 77. Following these approaches it would seem appropriate therefore, in sovereign debt cases, to consider the 'whole context' in which the entity was operating. 78. A different approach can be discerned in *Propend and Kensington*. In the former the Court of Appeal emphasised, at page 12, second paragraph, that the determination as to what bodies were part of the state or government should not be confined otherwise than under a broad scope of governmental or sovereign activity: thus including police functions. But in *Kensington*, Cooke J., dealing with a sovereign debt claim, indicated that governmental functions could be identified without any need to find actual sovereign acts, as distinct from the acts which any individual could perform: see paragraph 53 (quoted at paragraph 63 above). 79. From all of these authorities we consider that as far as the law of Jersey is concerned the following propositions can be stated as to the manner in which the test of governmental functions is to be applied. 80. First, the fact that the entity engages in trade or commerce is not determinative. In matters of restrictive immunity it is appropriate to consider the whole context within which the act is carried out to identify whether the act attracts immunity. In a sovereign debt claim the whole context surrounding the identified functions should be examined in order to determine whether the principal functions of the entity have a governmental rather than private quality. 81. Second, what is a governmental quality is not to be appraised merely by reference to some or other list but, rather, by reference to a broad concept of government. 82. Third, the whole context might show that whilst the entity engaged in what, in other circumstances, would merely be viewed as ordinary trading activities, those activities, albeit significant in economic or numeric terms were ancillary to a principal function or functions such as the carrying out of the policies of the Government: see *Kensington* at paragraph 53 and *Mellenger v New Brunswick Development Corp*

[1971] 1 WLR 604, 609F-G. 83. Fourth, the onus will be on the party seeking to establish the liability of the entity for sovereign debt to prove, on the balance of probabilities, that the entity performs governmental acts or functions to such a degree that it is properly to be considered as an arm of the government. 84. This in our view provides an objective approach and as rigorous a one as can be achieved consonant with the interests of justice for all involved. *Gécamines and the Functions Test* 85. Advocate Harvey-Hills submitted that the Court failed entirely to have regard to, or even to consider, the functions limb of the test but, rather, focused on what it regarded as the requisites of the control limb of the test. The court below had considered the DRC's periods of war, the activities of the Mining Commission set up after the war period and the massive Sicomines project entered into between Gécamines and various Chinese state owned enterprises. In Advocate Harvey-

Hills' submission, nothing within these matters could properly have led the court to the conclusion that Gécamines' functions were within a sovereign or public character or rendered it part of the executive organs of the state, or meant that it had performed relevant governmental functions. But insofar as a rehearsal of underlying facts is contained within the judgment below, Advocate Harvey-Hills did not suggest that there was no basis in evidence upon which the court below could have made those findings as to underlying facts. 86. As to activities in time of war, his contention was that it was wrong and unprincipled for the court to conclude that a government's actions in defence of its country in a period of total war should be regarded as of "substantial significance for present purposes". In his submission, such was the extraordinary extent of the conflict that it could only be properly regarded as *sui generis*. It could not be regarded as illuminating the wholly different, peacetime issues now before the court. Further, government requisitioning of resources during a war did not mean that Gécamines performed governmental functions then or at any other time. 87. As regards the Mining Commission, appointed in 2007 with the task of reviewing mining contracts entered into by Gécamines, Advocate Harvey-Hills contended that the section of the Royal Court's judgment, at paragraphs 93 to 108, dealt with two aspects (a) a consideration of the role and work of the Commission and (b) the government's obtaining of "entry fee" or *pas de porte* premiums from private sector partners entering into renegotiated contracts. 88. In respect of the former, the court below did not make any specific finding as to how this impacted on the proper characterisation of the functions of Gécamines except, perhaps, to note in paragraph 101 that, whilst ensuing negotiations were carried out between Gécamines and its various contractual partners, Gécamines would have had little scope for departure very far from certain Terms of Reference issued in 2008 by the Minister of Mines. The points here may be of importance in relation to governmental control, as opposed to function and will be dealt with later. 89. As to entry fees, Advocate Harvey-Hills noted that the court below had recorded Gécamines disagreement with the government's stance that such bonuses belonged to the state (paragraph 107) but submitted that nothing in relation to entry fees properly went to the functions limb of the test. 90. Turning to Sicomin, he accepted that the sums involved in the deal were massive but contended that that did not alter the principle at issue and did not provide a basis for removing the usual rigorous respect paid to a company's incorporated personality even where there was a sole shareholder. The DRC was doing no more than directing matters as a sole shareholder might. Gécamines, in his submission, simply never was carrying out governmental functions in the sense of sovereign public acts. 91. Advocate Lawrence in reply noted that the court below had regarded evidence in relation to governments making use of Gécamines' assets to fund military operations to be of significance. In respect of the Mining Commission review, the re-negotiation of the mining contracts was an example both of governmental control, and the use by the state of Gécamines, its property and revenues, for governmental purposes. As far as entry fees were concerned, the commandeering of the fees for the public treasury was another straightforward example of an entity and its property in practice being made the instrument of the State, for state

purposes. 92. Turning to the Sicomines project, Advocate Lawrence submitted, among other matters, that the analogy with the sole shareholder was inept. Even a sole shareholder did not have power, unilaterally, to commit the assets of the company to third parties and treat the company's property as his own. Discussion 93. In our opinion this ground of appeal is not well founded. The ultimate finding of the Royal Court as to function was in the following terms:- "And, as regards the second limb, the performance of "governmental function", we concur with the words of Cooke J in Kensington : "An entity which is constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates, can be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of an organ of government" (at paragraph 53). It is only necessary to add that, in our view, the same necessarily applies, irrespective of its formal constitution, where an entity or its property is in practice made the instrument of the state for such purposes." 94. In that and the ensuing paragraphs the court is found referring to the Trendtex test and it seems to us that the final sentence of paragraph 140, properly construed, is a reflection on the views which it had expressed in relation to the acting of a state in time of war, in respect of the entry fees resulting from the Mining Commission process, and in respect of the Sicomines project. The Royal Court therefore can be seen to have been engaging in the issue as to whether or not there was evidence to support the governmental function limb of the test. It is rarely the function of an appellate court to review the entirety of the evidence adduced unless something has clearly gone wrong in the court below. We approach the remainder of this section of this judgment with that in mind. 95. At the outset we observe that the finding in paragraph 140 is not only of a nature consistent with the tests which we have outlined above, it is also of a nature consistent with those in certain of the authorities to which we have referred. There was the wide approach to government in Propend which could embrace a police authority. In Kensington the finding of liability of the Congo-Brazzaville state-owned oil company engaging in "all operations of production, treatment, transformation, value adding and transportation of liquid or gaseous oil" (paragraph 45 (ix)) as to which it was found that "it acts as the trading arm of the State and is controlled by it, whilst putting into effect Government policy in relation to oil and oil products." (paragraph 55). In Walker : "The State uses SNPC as a vehicle for doing the Government's business. It is properly to be regarded as a governmental organisation." (paragraph 99). We do not require at this point to deal with Tsavliris and Wilhelm which appear to have been decided by reference to independence from a relevant degree of control. 96. In considering the use of Gécamines' assets in time of war, the Royal Court itself states, in paragraph 92, that taken in isolation the subject might be regarded as one to which not too much weight should be accorded for present purposes, but takes on substantial significance as one piece in the larger jigsaw. The court had accepted, in paragraph 91, that successive governments had made use of Gécamines assets to fund military operations, not just of the DRC but also of neighbouring allies and, during one period, took at least one third of the profits of Gécamines to finance the war effort, creating joint ventures between Gécamines and Zimbabwean companies to

serve the same purpose for its ally. One of the functions or purposes of Gécamines, therefore, was to provide war finance. In our opinion it cannot, contrary to Advocate Harvey-Hills' submissions, be regarded simply as a matter sui generis. Whilst the findings do not necessarily mean that Gécamines performed governmental functions at any other time, they are indications that Gécamines was viewed as being part of the general function of government. 97. In our opinion, the findings in relation to entry fees are to the same effect. The Royal Court dealt in detail with this issue in paragraphs 103 to 108 of the judgment below. They laid particular emphasis on a letter written by the then managing director and another director to the relevant ministers which is in the following terms:- "In the circumstances, it would appear that the payment of Gécamines key money and key money supplements into DGRAD [Treasury] accounts arises from a government measure which is no doubt motivated by the superior interests of the State, and Gécamines has no option but to be happy to contribute, once again, to the solution of national problems. Nevertheless, in proper consideration of the logistics of managing a commercial company, and in our capacity as agents of the state in relation to a public enterprise which is prey to difficulties which threaten its survival, we should, on the one hand, ensure that the most pressing operational needs of Gécamines are met and, on the other hand, guarantee that the transfer of its key monies, which constitute part of its assets, to the state are balanced, "compensated", if not by means of an income, then at the very least by the extinguishment of our company's debts to the transferor." 98. As the Royal Court suggests, this is a telling passage. It is a view from those charged with the operation of Gécamines indicating their understanding as to how the state used Gécamines. It was clear to it that Gécamines was used as a vehicle for the creation of wealth to solve national problems; and that such was its function or purpose. 99. Turning to the Sicomines project, this, again, is covered in considerable detail by the court below. After a narration of the history, the Court, at paragraph 128, indicated that the nature and scale of the new venture, the terms of the Protocole and other agreements, and other matters, left little room for doubt on three fundamental points. First, at a strategic level, the project was essentially an inter-state one. Second, Gécamines' mining rights and the mortgaging of them as security for loan finance were just as critical to the infrastructure aspects of the project as to the mining operations. Third, Gécamines' own particular interests were plainly subordinated to those of the state and, as the Royal Court said, at paragraph 131 "It is wholly improbable in reality that the Board of Gécamines had much option but to fulfil the role allotted to it by the government." 100. The Royal Court concluded, in relation to Sicomines, that it was a striking example of the state using Gécamines as an instrument of state economic and social policy: see paragraph 132. 101. All these considerations lead to the final sentence of paragraph 140. In our opinion that ultimate finding appears to be adequately vouched and the findings upon which it is based themselves are relevant findings for the purpose of the functions part of the Trendtex test. In our view it has not been shown that there is any proper basis upon which this appellate court should or could interfere. It cannot be said that the finding below was one which, upon the facts found, no tribunal properly instructed in fact and law could have reached. The required characteristics of the control part of the test 102.

Advocate Harvey-Hills submitted that, whether as at 19 March, 2009, or following 24 April, 2009, a claimant such as Hemisphere had to prove exceptional control. There must be something in addition to the position of the state as having whole ownership. This could be seen from the decisions in Kensington , Walker , Czarnikow, Wilhelm and Tsaviris . Even the most egregious control was not sufficient. The fact that an entity exhibited some features consistent with being an organ of state was insufficient to found a declaration that it was such an organ. The requisite extent of control was that the company had no meaningful independent existence. 103. He made particular reference to the decision of the House of Lords in Czarnikow Limited-v-Rolimpex

[1979] AC 351. There, Viscount Dilhorne had said (at 367C - F):- "... The respondents [Rolimpex] are an organisation of the state. Under Polish law they have a legal personality. Though subject to directions by the appropriate minister who can tell them "what to do and how to do it", as a state enterprise they make their own decisions about their commercial activities. They decide with whom they will do business and on what terms and they have considerable freedom in their day to day activities. They are managed on the basis of economic accountability and are expected to make a profit. The arbitrators ... rightly found as a fact that the respondents were not so closely connected with the government of Poland as to be precluded from relying on the ban imposed by the decree as government intervention. The appellants also asserted that the respondents bought and sold for the state. This while no doubt true, does not ... help the appellants. The facts found by the arbitrators ... show that they were not a department of the government but have a separate identity. They were, it was found as a fact, employed as "a commission merchant" to sell sugar intended for export on behalf of Sugar Industry Enterprises which were also state enterprises." 104. Reference could also be made to similar views as expressed by Lord Salmon at 369G. 105. In Wilhelm, Teare J. considered the shipyard's constitutional provisions and business activities and concluded (at paragraph 51):- "I have not overlooked the facts that the Defendant is owned by the state, that the government nominates the board of directors, that the Chief of Cabinet of the Province of Buenos Aires was assigned the responsibilities of the President of the board, that the Defendant is responsible to the government through the Ministry of Production or that financial support is provided by the government. These factors show that the entity is "of the state" but the English authorities to which I have referred make clear that such characteristics are insufficient to make the Defendant a department of government or an entity which is not distinct from the executive organs of government of the state in circumstances where its functions or activities are those which a private company might have in trade or commerce." 106. In response Advocate Lawrence observed that in those and the other authorities relied upon by this Appellant, the courts finding entities to be independent had tended to rely on clearly identifiable freedom of action. She emphasised the situation in Czarnikow where, as Viscount Dilhorne commented (at 367D):- "... As a State enterprise they make their own decisions about their commercial activities. They decide with whom they will do business and on what terms and they have considerable freedom in their day to day activities. They

are managed on the basis of economic accountability and are expected to make a profit."

107. In *Tsavliris*, it was precisely the apparent administrative and financial independence of the Grain Board that was relied upon by the court: see paragraph 67 of that decision.

Discussion 108. We do not find that the answer to this issue is immediately apparent from the authorities to which we have been referred, each of which turns on its own particular facts. It is obvious that something more than the fact of being wholly owned is required. In practical terms a wholly owned company may well have to adhere to the wishes of its beneficial owner: there have been many - sometimes unfortunate - examples in the public domain. But in ordinary course, corporate personality is respected unless there is a sham or subterfuge. In matters such as the present what is required is more than a controlling shareholding but less than sham. In addressing this issue in the context of liability for sovereign debt it is not clear to us that the use of the term 'egregious control' assists: each individual case will turn on its facts. Nor are we immediately convinced that the test should be set as high as the company having no meaningful independent existence. That latter test appears so close to sham - even without subterfuge - as to make a requirement that, in practice, must be highly unusual where a non-sham independent corporate structure has been determined upon. What we think can be seen from the authorities is a careful balancing by each court (and, it would seem, by the arbitrators in *Czarnikow*) of the respective elements of control and freedom in the context of the particular company and the particular act or function. In consequence, whilst we consider that it will be a matter of fact and degree in each case, we have reached the opinion that it is the manner in which the specific types of control are exercised which is the relevant consideration. In our opinion, where the result is that strategic control is not left to the entity - such as, to take Viscount Dilhorne's example, decisions as to with whom and on what terms to do business - even although there is a measure of freedom in day to day activities, the test will be met. It seems to us that such circumstances are a tolerably clear indicator that the company is in truth an arm of the state as far as control is concerned; and in many cases those indicators will be obvious to major parties contracting with the company. *Gécamines* and the Control Test 109. The court below clearly considered that the "tutelle" regime, exercised by the Ministry of Mines over *Gécamines* in the period up to 24 April, 2009, was of considerable importance: see paragraphs 64, 74, 76 and, of course, 142. Whilst disavowing that the "tutelle" was fatal to his case, Advocate Harvey-Hills accepted that it was one aspect of the constitutional framework which took the situation beyond the usual control of a sole shareholder of the company in, for example, the United Kingdom or Jersey. He accepted that it had the effects identified at paragraph 66(i) and (iv) of the judgment. 110. But in his submission the court below was wrong to conclude that the control was so exceptional as to find that the control test was met. In particular, the "tutelle" was not empowered to direct the board but had merely negative powers. The form of control was less than that of the relevant minister in *Czarnikow*. The factors in paragraph 66(i), (iii) and (v) were no more than the attributes of a wholly owned subsidiary and the matters identified in sub paragraphs (ii) and (iv) were merely part of the operation of the "tutelle". 111. In response Advocate Lawrence observed that the court below had

emphasised the need for close examination of the constitution of Gécamines (paragraph 67), and its finding had been based upon an overall analysis (paragraph 69). The Royal Court had noted the particular importance of Law No. 78-002 of 1978 and its features (paragraphs 61 and 64-65). Those made it clear just how little freedom the board of Gécamines had in day to day running of the company. Under that Act the Board was not free to dispose of its capital, contract loans, increase or decrease its assets, acquire or dispose of immovable property, enter into contracts for services or goods in an amount equal to or greater than the equivalent of US\$ 20,000 or to purchase or dispose of shares. Deliberations and decisions of the board or management committee had to be copied to the supervising authority who could object either that the decision was contrary to law or not in the enterprise's interests. What in this jurisdiction would be referred to as the articles of association were entirely subservient to the 1978 law. Such a situation was quite in contrast to the situation in Czarnikow where, as Viscount Dilhorne commented (at 161D):- "... As a State enterprise they make their own decisions about their commercial activities. They decide with whom they will do business and on what terms and they have considerable freedom in their day to day activities. They are managed on the basis of economic accountability and are expected to make a profit." 112. And in Tsaviris, it was precisely the apparent administrative and financial independence of the Grain Board that was relied upon by the court: see paragraph 67 of that decision. A further striking contrast is that the complete control over Gécamines lay in the President of the Republic, the supreme instance of executive power, thus lessening the likelihood of the company enjoying, or presenting the appearance of, a meaningful and independent existence. 113. Advocate Harvey-Hills also submitted that the court below fell into error in its treatment of the Sicomines deal when it concluded (at paragraph 132) that the manner in which the deal had been negotiated and concluded appeared "to fully vindicate Hemisphere's contention that the Sicomines saga is a striking example of the government using Gécamines as an instrument of state economic and social policy and doing so on a grand scale ...". 114. In reaching this conclusion the Royal Court appeared to have relied on three matters, set out at paragraphs 129 - 131, but had fallen into analytical error. 115. The first two factors, at paragraphs 129 and 130, were overall direction and control of the government at the strategic level for the project and, secondly, the mortgaging of Gécamines' mining rights. It was only improper for a board to be influenced by its 100% shareholder where it would be improper to do so. It was not as if the Sicomines deal was going to push the company into insolvency; rather it could well represent Gécamines' best present hope of reinvigorating its business. He referred to Mr. Mukasa's first affidavit at paragraphs 146 - 162. The Royal Court, on the other hand, appeared simply to have fallen into a pattern of thought by which it regarded the exercise of influence over a board by a sole shareholder as somehow objectionable and evincing an unusual and exceptional form of control. 116. The third aspect focused on by the Royal Court, at paragraph 131, was that "in the greater scheme of things ... it is wholly improbable in reality that the Board of Gécamines had much option but to fulfil the role allotted to it by the government". Advocate Harvey-Hills' response was similar to that in respect of the first two matters,

namely, that boards of companies with a 100% shareholder rarely if ever had much option but to do what that shareholder wanted. That circumstance would only be relevant in a case where a board acted in breach of the duties the directors owed to the company. Here it was in Gécamines' interests to accede to the deal. 117. In response, Advocate Lawrence pointed out that, contrary to the contentions on behalf of Gécamines, and as the court below had found, the board of directors continued to be controlled by the executive of the state. As the court found, at paragraph 77, of the eleven board members supposed to be in office as a matter of law, five were, and were supposed to be, representatives of government departments. The remaining six were supposed not to be such representatives, thus taking control away from the government. However, at the time of trial, only three of the non-government directors were in office and it followed that the government remained in control. Further, the power to appoint and remove the directors and management of Gécamines remained, as noted by the Royal Court in paragraph 77, with the President of the Republic. They remained state agents and were required to sign a contract of mandate with the state. Indeed Mr. Mukasa's first affidavit, at paragraph 52, confirmed that after 24 April, 2009, the acts of management of Gécamines remained subject to the approval not only of Gécamines' board but also of its general assembly. 118. Moreover, as shown in minutes of a board meeting of Gécamines dated 9 April, 2010, which had become available to Hemisphere since the June 2010 hearing, and to which Advocate Lawrence wished to refer by way of a further affidavit of Peter Grossman, it could be seen to be recorded that the government was dissatisfied with the progress of Gécamines in reviving its cement production activities and that, given the importance of cement production to the reconstruction of the country, the President of the General Assembly was to take over direct responsibility on this matter, and when the government had approved the situation, Gécamines was instructed to sign relevant partnership agreements. This refuted the suggestion of Gécamines that the General Assembly acted in a far more limited capacity than its previous incarnation; the "tutelle". Paragraph 11 of the minutes also indicated clear continuing financial control of Gécamines by the government. Gécamines had sold an asset and utilised the funds for other purposes, it being noted that it had only done so because it had not previously been told by the state to pass the money over to it. Nonetheless, Gécamines was instructed to provide proposals to transfer the sum involved to the government "taking into account the primary interest of the country" . 119. As regards the Sicomines project, the Royal Court had been taken through all of the evidence at the hearing and did not find the evidence and views of Mr. Mukasa a reliable reflection of matters. Discussion 120. Again, this section of the appeal, to our minds, is not made out. The court below looked at this matter from the standpoint of constitutional provision. We consider that it was well founded in doing so because, properly approached, the element of control ought to be addressed, in the first instance, by reference to control according to the rule of law. As with the court below, it seems to us that the 1995 Articles, taken together with the 1978 law, shows not only a striking overlay of state control mechanisms external to the company but also an almost complete lack of independence in relation to the day to day operation of a major corporation. It appears to

be an almost complete control of day to day issues and not, for example, merely control over major elements or strategic plans such as might be expected from a sole shareholder or a parent company. 121. As regards the Sicomines project, we do not repeat here the detailed, careful and analytical rehearsal of evidence set out at paragraphs 109 to 132 below. It seems to us sufficient to quote the concluding paragraphs:- "129. First, at the strategic level, the project was essentially an inter-state one between the DRC and the People's Republic of China and could not have come about, on the Congolese side, without the overall direction and control of the Government. Apart from the factors already mentioned, specific indicators of this appear in references at various points in the 22nd April, 2008, Cooperation Agreement to the need for the approval of the Chinese government and the setting up of a "Steering and Coordination Committee" with the job, among others of "interfacing between the Chinese Government, the DRC, and the Mining JV" (Article 16).

130. Secondly, Gécamines' mining rights and the mortgaging of them as security for loan finance was every bit as critical to the infrastructure aspects of the project as to the mining operations side of things - the two being inextricably linked.
131. Thirdly, in the greater scheme of things, Gécamines' own particular interests, though important, were plainly subordinated to those of Congolese State and it is wholly improbable in reality that the Board of Gécamines had much option but to fulfil the role allotted to it by the Government. Apart from the wider considerations already mentioned, specific pointers to this also include the following:-
 - (i) Gécamines may have had various joint venture agreements of its own with Chinese entities as early as 2005 and 2006, but the Preamble to the September 2007 Protocole shows that the DRC had cooperation agreements with the Peoples' Republic of China dating back to 2001.
 - (ii) Gécamines was evidently not a party to the August 2007 agreements referred to in the Preamble between the Congolese Government and the several Chinese enterprises mentioned there (there is no mention there of Gécamines being a party and Mr Mukasa would almost certainly have mentioned the matter had that been the case).
 - (iii) Gécamines was not a party to the September 2007 Protocole. Nor was it even mentioned as such: the partners in the proposed Joint Venture Company were to be "the Chinese enterprises comprising the Consortium and certain Congolese companies designated by the Government" (Article 2).
 - (iv) In the event, as the 22nd April, 2008, Cooperation Agreement makes clear, the DRC "designated" Gécamines to be the Congolese partner in the Joint Venture Company (Article 1.4).
 - (v) By that same agreement the DRC undertook to cooperate in forming a Mining Joint Venture and "to transfer [to that company], through and with the participation of its state-owned company GECAMINES, the specified rights and licences" (Article 3.1); and (somewhat repetitiously) "that its state-owned company GECAMINES" would transfer the mining rights specified in the Agreement (Article 4).

132. These considerations, coupled with the way in which entry fees payable by the participating Chinese companies were allocated by the Government and have, as to the greater part been paid to or ear-marked for the Public Treasury, appear to us to fully vindicate Hemisphere's contention that the Sicomines saga is a striking example of the Government actively using Gécamines as an instrument of state economic and social policy and doing so on a grand scale: and all the more so given that the events took place in the run-up to the enactment in July 2008 of the Law (No. 08/007) which was designed to be the first stage in the process of the transformation of Gécamines into a commercial company." 122. The conclusions of the Royal Court in those paragraphs appear to us to be amply supported by the earlier primary findings in fact. In our opinion they show that on almost any test apart from sham, the control element would be met. We cannot agree with Advocate Harvey-Hills that the level of control was merely what might be expected of a fully controlling shareholder. The control was extraordinary and entirely for the purpose of the country's wider social and economic interests. Nothing of importance was being left to the entity. Accordingly we do not discern any basis upon which we could, in all propriety, interfere with those conclusions and suggest that the requisite element of control was not present. The position after 24 April 2009 123. Advocate Harvey-Hills accepted the narration by the Royal Court, in paragraphs 71 - 75, of the constitutional changes but submitted that the court was wrong, as it expressed matters in paragraph 76, to accede to the submission on behalf of Hemisphere that all that had happened, in practice, was for one particular mechanism of control to have been superseded by another equally potent one in the shape of the Committee of the General Assembly. In his submission, the Royal Court was misled. The General Assembly did not have any of the reserve, negative powers with which the "tutelle" had been invested. As from 24 April, 2009, the Board was not required to submit significant decisions to the General Assembly and the General Assembly had no power to override those decisions. The General Assembly merely had the usual powers of a company in general meeting. 124. Further, when the Royal Court turned to consider matters after 24 April, 2009, and the fact that the process of transformation was taking longer than originally intended and timetabled, the suggestion of scepticism in the mind of the court at paragraphs 84 and 142 had been shown to be misplaced as the process had now been completed. Since 23 December, 2010, Gécamines had been a Société Commerciale and is now, accordingly, incorporated as a Sarl. As to these matters he wished to produce new affidavits; but for the reasons which we set out separately below, we refuse that application. Discussion 125. In our view this ground of appeal does not succeed. As regards corporate control, it seems to us that the situation, at time of trial, in respect of appointment to the Board of Directors is a stark indication of fundamental control at the hand of the government and, in our opinion, justified the view of the Royal Court that nothing had changed. The unexplained delay in the process of transformation taken together with absolute direction in relation to the Sicomines project merely served to emphasise that no material change had occurred. New Evidence 126. On behalf of Gécamines, Advocate Harvey-Hills sought to put forward three new affidavits dealing with the completion of the transformation process and with Gécamines' negotiations with the government, since the trial, in relation to signature payments. He submitted that, in

accordance with the principles applied in *Mayo Associates-v-Cantrade Private Bank*

[1998] JLR 173 the Court should admit the new evidence. 127. Of the three deponents, M Yuma and M Kalej were new to the board of Gécamines since the trial, as part of the process of transformation towards privatisation. Each discussed their respective professional backgrounds and appointments in the lead up to the completion of the transformation process, M Yuma was able to speak to the manner in which the transformation process had been completed and was able to speak to having secured acknowledgement from the government that Gécamines should receive the value of the signature bonus payments historically received by the state and was in discussion with the government as to the implementation of that acknowledgement. 128. M Zongwe, a longstanding senior manager at Gécamines, was able to explain the complexities of the transformation process. It was submitted that the Court of Appeal ought to receive this evidence. The tenor of the judgment below was very sceptical as to the seriousness with which the government of the DRC was pursuing the transformation process and as to Gécamines' attempts to recover the value of the signature bonus payments. The subsequent events to which these witnesses were able to speak were significant in being able to demonstrate that those suspicions in the mind of the Royal Court were not well founded. 129. Advocate Lawrence observed that, in accordance with the rules applied in *Mayo Associates SA*, (a) it had to be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, and (b) the evidence, though not necessarily decisive, would probably have had an important influence on the result and must be apparently credible, though not necessarily incontrovertible. 130. She further submitted that where the evidence related to matters occurring after the trial, the new evidence must demonstrate that a basic assumption made at the trial as to what would be the state of affairs in the future has been materially falsified by events subsequent to trial. On the other hand, where the new evidence related to matters falling within a field or area of uncertainty taken into account by the trial judge, fresh evidence was not admitted; the guiding principle being that there should be finality in litigation. She referred us to *Murphy-v-Stone Wallwock (Charleton) Limited*

[1969] 2 All ER 949 and *Mulholland-v-Mitchell*

[1971] 1 All ER 307. 131. The burden of the proposed evidence in relation to transformation merely amounted to a case that the conversion process was said to be complete. But some of the material related to matters occurring prior to the hearing below, could have been placed before the Royal Court and, accordingly, ought not to be accepted by this Court. As to the remainder, it could not be suggested that the court below based its finding that Gécamines remained an organ of state after 24 April, 2009, on an assumption that the transformation process would not be complete by the new target date of 31 December, 2010. Indeed, paragraph 23 of the Act of Court of 15 November, 2010, gave Gécamines liberty to apply for a determination as to whether it remained an organ of state. Any such application would involve, as before, a detailed consideration not only of the legal position,

but also of the way in which Gécamines was, as a matter of fact, being treated by the government. 132. As regards the possible introduction of fresh evidence as to the apparent recent change of stance of the government in respect of signature bonuses, the proposed evidence was irrelevant. The Royal Court had to consider whether Gécamines was an organ of the state at the time of the *ex parte* application and, if so, whether its nature had changed at any point between that date and the date of the trial. Only by analysing evidence as to control, functions and purposes at those times could the Royal Court reach appropriate conclusions. There were no challengeable "assumptions" to be made by the Royal Court in respect of these matters. It was able to reach its conclusions on the basis of the evidence of behaviour at the relevant times on the basis of what had happened and how the government had behaved. 133. Advocate Lawrence further observed that, as appeared to be indicated in the affidavit of Mr Zongwe, having done nothing demonstrable for twenty two months, Gécamines raised the issue of signature bonuses with Copirep two weeks after the draft judgment below was circulated. Discussion 134. In our opinion Advocate Lawrence's submissions are well founded. 135. As far as transformation was concerned, the court below made its position quite clear in paragraph 84 where it concluded that, as at the end of the trial in mid-June 2010, the process of transformation was far from maturity and nothing in the state of affairs amounted to any real transformation in the nature of Gécamines within the timescale of events with which the Royal Court was concerned. Unlike the cases of *Murphy* and *Mulholland*, knowledge that subsequent events would include some form of completion of the process was not relevant to the issue as to the nature of Gécamines as at the time of the *ex parte* hearing or as at the time of trial. 136. The same is the case in relation to entry fees. The outcome of negotiations subsequent to the trial, whatever the proper characterisation of that outcome, does not alter the approach of the court below in relation to the evidence before it. Unlike the circumstances in *Murphy* and *Mulholland*, cited above, the Royal Court's impression, at paragraph 108, that Mr Mukasa's hopes of persuading the government to change its decision were merely fanciful, does not constitute a fundamental assumption going to the heart of its decision. Whatever the basis upon which the apparent negotiation was reached, any such settlement does nothing to disturb the evidence that the state, at the relevant times, considered itself entitled to take these monies to its own use. 137. The application to be allowed to adduce fresh evidence should, in our view, be refused.

Conclusion

in respect of the Gécamines' Appeal 138. Subject to one matter, in our opinion the appeal should be refused. That additional matter is raised by Advocate Harvey-Hills in his sixth Ground of Appeal whereby he sought to challenge the determination of the Royal Court, in paragraph 11 of the Act of 15 November 2010, as to the limit placed on the amount recovered by Hemisphere from the monies being paid into court. The amount set reflected Hemisphere's calculation of interest on the Awards on a compound basis, but Gécamines was to challenge the power to apply interest on that basis. We considered this issue by way of written submissions and in her response

Advocate Lawrence suggested a potential compromise pending the Interest Hearing. Advocate Harvey-Hills indicated, in response to a request from us, that a determination along such lines was acceptable. We therefore propose to order that, pending the Interest Hearing, and subject to any ancillary orders which might be pronounced upon these judgments being given, the amounts which Hemisphere is entitled to recover from monies paid into court are to be assessed on the basis of simple interest and upon an equal splitting of the parties' respective simple interest calculations. THE APPEAL BY GTL Whether an arrêt entre mains creates a right in rem 139. Advocate Robinson, in the written contentions to this court for GTL, sought to refute the Royal Court's acceptance that the effect of an interim arrêt entre mains was to seize assets through an appropriation by the court: see paragraphs 148(i) and 149 of the judgment below. It might give a right in personam against the possessor of the asset, but not a right in rem . 140. This had not been a contentious issue below. It is recorded that Advocate Harvey-Hills, for Gécamines, indicated that he had researched the matter carefully and reached the view that the remedy created in rem rights: transcript, day 2, page 47. From the transcript it appears that Advocate Robinson also had submitted to the learned Commissioner and the Jurats that the arrêt entre mains gave the creditor some security over the asset, impressed the asset with the claim of the creditor and actually attached an asset: see day 4, pages 52 and 53. This point is not raised by Gécamines, but Advocate Robinson was entitled to depart from his concession below. Whilst the written contentions before this Court contain detailed submissions on this matter, the lack of challenge below meant that, on a matter potentially of no small importance in respect of this Island and its customary laws, this Court does not have the benefit of the detailed views of a court of first instance. 141. In oral argument however, whilst Advocate Robinson accepted that the arrêt entre mains gave the creditor some security it was not clear to what extent he departed from his written contentions. We therefore consider the preferable course to deal, as succinctly as is possible, with the argument as set out in those contentions, as it probably has a bearing on at least one of the issues covered in the remainder of the GTL appeal. 142. After a review of the old authoritative sources, Advocate Robinson submitted that, from Terrien's commentary down to the end of the 19th century, it was possible to identify a well developed but relatively circumscribed procedure of arrêt entre mains which was essentially conservatory: freezing monies or objects in the hands of the third party debtor until further order of the court, but not otherwise conferring on the arresting party any property in the goods arrested. It thus created rights in personam only. Further, the English law of garnishment should not be referred to as an aid to deciding cases on arrêt entre mains . 143. Advocate Lawrence, in a careful review of the older sources, submitted that the Royal Court was correct to rely upon both Pothier and English case law as authority when considering the nature and effect of the arrêt entre mains. Whilst the two remedies of arrêt entre mains and the English garnishment order were not absolutely identical - the former appearing a little wider and more flexible in ambit - there were sufficient similarities for the Royal Court to be entitled to have regard to modern English authority for assistance. In any event, the Customary Law sources which had been identified showed a remedy which took effect not just as a personal order as against and between the third party debtor and the creditor, but which had an effect on the debt itself as against the world. The analysis in relevant English case law was entirely consistent with those sources. Discussion 144. The earliest

reference in the Customary Law sources to a mode of arrest "entre les mains" of the debtor to a judgment debtor is found in Terrien, Droit civil (1574) where, under the title "D'Arrest, & Deliverances" it is written [in translation]:- "There are two kinds of arrest. One is by way of execution the other is pursuant to the privilege of bourgeois. One may employ the first to procure payment of what is due to him against the debt due to his debtor or to his judgment debtor ... which arrest is made by the Sergeant "entre les mains de celui qui doit la dette" forbidding him to empty his hands of it or part with possession thereof without the authority of the Court ... and summoning him to appear before Court to confirm what moneys he owes. And if he defaults he is constrained to come and make the said affirmation and after this has been done he is ordered to deliver the sum due by him or it is left in his hands as depository for the Court to be delivered when and to whom it shall be due and it is ordered to the arresting party to summon his debtor or judgment debtor to agree or cause the delivery of the said sum. And if there are several arresting parties, or opponents to the said delivery, preference is to be given according to the priority and posteriority of their obligations ... And while such arrest continues one may not pay the debt to the creditor ... one may not be condemned to pay more than once also and one cannot be constrained to pay to the said creditor until and unless he causes the arrest to be raised ... and the Sergeant [Viscount] shall not himself alone cause the sums to be paid and delivered without the authority of the Court. There are many cities in Normandy, where by special privilege, the bourgeoisie of such cities by leave of the Court can arrest any foreigner for debt, even if there is no obligation or judgment. Such arrest is a simple action and is only to force the foreigner to plead in the location where the arrest was made if he wants to defend against the debt. Also, the foreigner if he wishes to defend must furnish security..... And in this case the parties must furnish security. These arrests are generally made by the Sergeant without a mandate from the Court. In case the person arrested wishes to defend against the arrest, summons is made to the parties at the present time so as to expedite promptly, if possible, otherwise it is ordered that the arrested assets will be delivered upon payment of a security equal to their value and the election of a domicile. Sometimes the security is limited according to the quality of the case. Such a security relates only to the costs of the proceedings." 145. It had been submitted for GTL that this text made clear that the arrest created rights against the debtor and third party in personam only. In our opinion that is not a proper construction of the writing. Not only is the third party forbidden to part with possession, he is forbidden to part with possession without the authority of the court. He is summoned to appear before the court to confirm what monies he owes and, if in default of that obligation, he is constrained to appear. Thereafter he is either ordered to deliver the sum to the court or it is left in his hands as depository for the court. Thus, the obligation created by the arrest is not merely a personal one as between the arresting creditor and the subsidiary debtor, failure to fulfill which would give the arresting creditor a claim in damages; rather it brings the sum due into the direct control of the court. It puts into abeyance the obligation to pay the judgment debtor and replaces it with the obligation either to make payment into court or to act as depository for the court. Further, although there may be only one arresting creditor, there may need to be a judicial process to determine the rights of competing claimants. 146. Turning to the era of the Coutume Reformée, that is the period after 1583, it is clear that the remedy of arrêt continued. Advocate Robinson referred to Le Geyt Sur la Constitution Les Lois et

Les Usages de Jersey (1847 edition), Book 2, pages 13 - 14, where it is stated (in translation):- "It is an error to imagine as some do, that it is a form of insult not to arrest the movables of a debtor before arresting a debt due to him. It is supposed that this is to treat him as an insolvent person. It is true that it is in effect to treat him so by arresting his movables or active debts when he has no other asset available for execution. That is to begin the process where it should finish. However, an arrest legitimately made on a third party is of all ways of execution that which appears to offer the least assurance. It must, of course, be understood that one has first demanded payment of the debt before making an arrest". 147. He had submitted that by indicating a remedy which "appears to offer the least assurance" the views of the learned author should be construed as indicating a remedy that was conservatory only. We do not agree. It seems to us that the learned author is making a comparison between the arrestment of the debtor's movables and the arrestment of his active debts. The arrestment of movables give some degree of certainty as, doubtless, the fact of possession by the judgment debtor leads to a presumption of ownership and the nature of the asset can be appraised and valued. On the other hand, where a debt is owed by a third party to the judgment debtor, the precise value of the debt may not be immediately obvious - as suggested by Terrien

- and the third party might even have defences which could have been pled against the judgment debtor had he claimed payment. 148. We should record at this stage that Advocate Robinson had also sought to emphasise that LeGeyt was describing the formalities of a procedure, in existence significantly before the writings of Pothier . But, as we set out below at paragraph 152, we agree with Advocate Lawrence that the remedy described by Terrien , Routier and Pothier is the same remedy. 149. Routier is an authority on the law of Normandy under the Coutume Reformée . In his work Principaux Generaux du droit civil et coutumier de la province de Normandie (1742), (second edition) published in 1748, Book VIII, Section VI under the heading Des Saisies & Arrêts he writes (in translation):- "I On distrains and arrests
- in nominibus debitorum Another kind of execution is the distraint and arrest that the creditor makes on the money owed to his debtor; but as every arrest is equivalent to distraint and execution, it can only be made by virtue of a good title or executory document, or at least without convoking justice/a subpoena. II There are two kinds of distrains and arrests; the simple one which is done by the office of a Sergent, by virtue of executory documents without assignation, and it only lasts for one year, after which it remains nul and out-of-date for the reason that every arrest is equivalent to distraint and every distraint is annual. Article III of the Court. III The other (is) judicial, which is done in the hands of the collector or debtor of our debtor with assignation in order to state his affirmation of whatever money he is liable with regard to our debtor; and when as a consequence there has been a sentence, carrying upholding arrest and defence from paying, it lasts thirty years, and therefore the debtor of our debtor can only pay others after thirty years. I On procedure for Distrains and Arrests The procedure which is observed, is that the debtor who is assigned must state his affirmation of the money for which he is liable and to swear that it is true, and to communicate to this effect his Lease and receipts, if it is a farmer collector or tenant and if

he does not appear, the arrestor obtains a default and for profit makes him declare himself liable for the sum requested, with costs. II After the debtor, farmer collector or tenant has given his affirmation and has communicated satisfactorily, the arrestor will consent to his leaving the court with costs as privilege with regard to the money arrested and distrained, whereupon he will have his debtor, whose money is arrested, assigned before the Judge in his area, in order to consent and contradict the arrest: if his debtor does not appear, he takes default and for profit has had him adjudged on the money, with costs as privilege with regard to the arrested money. III But if there are several arrestors with regard to the same money, their arrests are converted into opposition and the money is adjudged to the privileged creditor although later/subsequent in hypothec; and if there is no privileged creditor, to the longest standing creditor; because in the Discussion of movables, money is always distributed in Normandy, according to the order of priority or of time/posteriority and the first arrestor only has his costs and expenses of his diligence/haste to take as a privilege." 150. We agree with Advocate Lawrence that, whilst using the terminology "saisies & arrêts", Routier's description of the judicial act would appear to be the same procedure as the first type of arrest referred to by Terrien. It seems to us that, whilst the word saisies, or dstraint, is used, the procedure does not appear significantly different from that set out in Terrien where, because the debt owed by the third party is changed to an obligation to make over or hold to the order of the Court, there has indeed been a dstraint or seizure. 151. Pothier, writing in his *Traité de la Procédure Civile* at Part IV, c. II, Section III and IV deals with, among other matters, the procedure and effect of what he refers to as "la saisie-arrêt". We do not need, at this point, to quote at length his description of the procedure of saisie-arrêt. Whilst the writing is slightly more detailed, it is clear that he is writing on the same subject as Routier and Terrien. The writings are expressed in the sense of general principles by contrast to certain other parts of Pothier's writings where specific Coutumes, such as that of Orleans, are identified. 152. What Pothier makes particularly clear, in Section IV, in the passage quoted by the learned Commissioner at paragraph 148(iii), is that the juristic act of saisie-arrêt precludes the common debtor from discharging the subsidiary debtor from his obligation. It is therefore an act which affects the debt itself and creates more than a mere personal obligation as between the arrestee and the arresting creditor. We therefore agree with Advocate Lawrence that the remedy described by Terrien, Routier and Pothier is the same remedy and is one which takes effect not just as a personal order but has an effect on the debt itself as against the world. 153. Were it not to be so, the result would be surprising: the third party would have a personal liability towards the arresting creditor but would also be liable to the judgment debtor. Logic and justice seem to us to demand that the arrestment have effect on the debt itself and the customary sources to which we have referred indicate that it comes within the control of the court. 154. Advocate Robinson referred this court to the statements made in 1789 by Hemery and Dumaresq in response to an order of the Privy Council, describing the procedure for recovery of debt (at pages 6-9). This procedure, however, appears to be a pre-judgment procedure as it refers to the Officer having with him the plaintiff's demand in writing for payment of the debt as opposed to there being in existence a judgment being enforced. 155. Other sources referred to by Advocate Robinson

appear to relate to provisional ordres (Ordres Provisoires); but it was of interest that one source - pages from a manuscript prepared, it would appear, by an advocate called to the Jersey Bar in 1888 - showed a form then in use for obtaining arrest entre mains in virtue of an ordre de Justice which specifically provided for the surrender by the arrestee of the goods. For our own part we would see no reason in principle to distinguish between an arrêt entre mains of certain specified goods "belonging to" the arresting creditor and an arrêt in respect of a liquidated sum to which the arresting creditor had been found entitled. If the court could order the former to be surrendered, the same should be the position as regards the latter. 156. If the foregoing analysis is correct, the position in this Island would appear to be to the same effect as that in England and Wales as expounded by Lord Millett in *Société Eram Limited-v-Cie Intrenationale*

- [2004] 1 AC 260 , as referred to in the court below. In particular we refer to paragraphs 83-97 to the effect that a third party debt order is not an in personam order against the third party, but has proprietary consequences and takes effect as an order in rem as against the debt owed by the third party to the judgment debtor. Reference may also be made to *Galbraith-v-Grimshaw and Baxter*
- [1909] 1 KB 339, 343 (Farwell LJ). In that opinion the learned Lord Justice indicates that the garnishee order nisi did not in itself operate as a transfer of the property of the debt but created an equitable charge and the garnishee could not pay the debt to anyone but the garnishor without incurring the risk of having to pay it over again to the creditor. 157. We should record that Advocate Robinson also referred this court to a 1995 French judicial dictionary under the name Dalloz. Given that this does not bear in any way to reflect the law of this Island, we do not consider it further. No Arrest Made 158. In another argument which does not appear to have been made below, Advocate Robinson on behalf of GTL submitted that the court below was in error in appearing to proceed on the basis (i) that an arrêt had been effected by the simple process of a declaration and (ii) that the funds were, by that fact, trapped in GTL's account. In his submission, however, there was a substantial requirement that the arresting officer actually carried out an arrest and identified the matters subject to the process. In the present case the arrest was simply "declared" in the order. 159. The procedure of distraint was covered by Rule 11/3(1) of the Royal Court Rules which provided that the judgment was to be "taken to authorise the Plaintiff to cause the moveables of the Defendant to be distrained ...". There was, therefore, not an automatic distraint but rather an authority to make one. 160. Advocate Lawrence pointed out that GTL could not dispute that the arrêt had been made by the Viscount personally serving the ex parte order upon GTL. That order contained all the necessary information that GTL required to show which property (that is the shares and the debts) were the subject of the arrêt entre mains . Discussion 161. In our opinion this point is of no substance. The order is a judicial act, as is made clear by Rule 20/5(1) which provides that "an interim injunction, arrêt entre mains or other judicial act ... shall be signed by the bailiff." It seems to us, therefore, that the Order operated as an arrêt entre mains upon being signed. It authorized the distraint and, having been served on GTL there is no difficulty for the latter

in being aware of the ambit of the judicial act. No Attachment of Future Movables 162. Advocate Robinson submitted that an arrêt entre mains could not, as a matter of Jersey law, enable the judgment creditor to attach future movables and that the effect of the order was to attach only payments owing at the date of the order and not also future payments accruing. He made reference to the court's findings at paragraphs 144, 148(iv), 149 and 196. 163. He submitted that the only authoritative source in favour of this proposition was Pothier, as quoted at paragraph 147 of the decision below. The relevant passage is in the following terms:- "III. De la procédure de la saisie-arrêt Le sergent, à la requête du créancier arrêtant, déclare au débiteur arrêté, par un acte qui lui est signifié à sa personne, ou à domicile, qu'il saisit, arrête, et met sous la main de justice, tout ce qu'il peut devoir et devra par la suite à celui pour le fait duquel l'arrêt se fait; pour sûreté de cette somme due à l'arrêtant, l'huissier lui fait défenses de payer à d'autres, l'assigne devant le juge du débiteur pour le fait duquel l'arrêt est fait, pour faire la déclaration de ce qu'il doit, et pour en faire paiement à l'arrêtant, jusqu'à concurrence de ce qui lui est du IV. De l'effet de la saisie-arrêt L'effet de la saisie-arrêt est que, des qu'elle est fait, la créance arrêlée étant mise sous la main de justice, celui à qui elle appartient, et pour le fait duquel elle est arrêlée, n'en peut plus disposer; il ne peut donc pas la transporter au préjudice du droit de l'arrêtant, il ne peut la recevoir; et l'arrêté qui, au préjudice de l'arrêt, paieroit à son créancier, seroit à la vérité bien libéré envers son créancier, mais il ne seroit envers l'arrêtant, qui peut le faire condamner à lui faire délivrance de la somme qu'il devoit lors de l'arrêt, sans avoir égard au paiement qu'il a fait depuis, sauf son recours en répétition contre son créancier, à qui il a mal-à-propos payé depuis l'arrêt." [III. On the procedure for the distraint- arrest At the request of the arresting creditor, the Officer declares to the arrested debtor [i.e. third party], by an act which is notified to him in person, or at his home, that he is distraining, arresting and putting into the hands of justice, all that he can owe and will owe in the course of time, to the one for whose act the arrest is being made [i.e. the primary debtor]; as security for the sum owed to the arrestor, the officer forbids him to pay others, summons him in front of the judge of the debtor by whose act the arrest is made, to make the declaration of what he owes and to make payment to the arrestor up to the limit of what is owed to him. IV. On the effect of distraint-arrest The effect of the distraint-arrest is that, as soon as it is made, the arrested letter of credit/ debt being put into the hands of justice, the one to whom it belongs, and for whose act it is arrested [ie the primary debtor], can no longer dispose of it; therefore he cannot transfer it to the prejudice of the right of the arrestor, he cannot receive it; and the arrestee who, to the prejudice of the arrest, would pay his creditor, would be, in truth, really released from his creditor, but he would not be so with regard to the arrestor, who can have him sentenced to deliver to him the sum that he owed at the time of the arrest, without regard to the payment he has since made, except his repeated pleas against his creditor, to whom he has paid at the wrong time since the arrest....."]. 164. The translation used below had been put forward on behalf of Hemisphere and had not been the subject of debate. Before this Court, however, Advocate Robinson at one stage suggested that in place of the words

"all that he can owe and will owe in the course of time", the proper translation should be "all that he may owe or may in the future owe" . 165. It is clear, to our mind, that the words "all that he may owe" is a reasonable translation of the words "tout ce qu'il peut devoir" . What seems less clear is whether the use of the verb "pouvoir" is intended to attach to "devra". If, instead of "devra" the infinitive had been used, it might more readily have been assumed that "peut" attached to both; but a fair translation of "devra" on its own is "will owe". We shall return to this point in discussion. 166. Advocate Robinson further submitted that, whilst English law permitted execution against future payments and income from a defined asset, it did not do so by way of third party debt / garnishee order but through the appointment of a receiver by way of equitable execution. He referred to *Masri-v-Consolidated Contractors International Company SAL*

- [2008] EWCA Civ 303 at paragraphs 136 - 172 and 184. In that decision, after a detailed analysis, Lawrence Collins LJ, with whom the other members of the Court of Appeal agreed, concluded in the following terms:- " 172. Consequently, in my judgment the position on the older authorities is, as I have suggested, that in none of them is the ratio that a receiver cannot be appointed in respect of future debts or future income. There are strong statements in *Webb v Stenton*
- (1883) 11 QBD 518 that future income from a trust could be the subject of an order. I accept that the remarks are obiter, but it would be surprising if these judges could express themselves so clearly in this sense in 1883 if there had been an established practice in Chancery prior to 1873 that a receiver by way of equitable execution could not be appointed in respect of future income. If there had been such a rule *Holmes v Millage* could have been decided very simply on that ground. There would have been no need for the extensive reasoning devoted to the special position of a man's salary. Lindley LJ identified the question of general importance as being whether a judgment creditor was entitled to a receiver of future earnings. He said that the common law writs of execution did not extend to future income; that charging orders did not apply to wages or other remuneration for personal services; the Court of Chancery did not have the power to restrain a man from earning his living or receiving his earnings. Apart from the passage in Lindley LJ's judgment referred to above (para 154) there is nothing to support such a rule. I agree with Millett J's conclusion in *Maclaine Watson & Co Ltd v International Tin Council (No 1)* [1988] Ch 1, at 19, that the ratio of *Holmes v Millage* was that a man's salary was not attachable at law or in equity, and that the passage from Lindley LJ's judgment was not part of the ratio.
173. To the extent that these cases support a principle that equitable execution is only available in relation to assets which are liable to legal execution, they are undermined by the second group of authorities, including *Bourne v Colodense*, which is binding on this court, and which establish that a receiver may be appointed in respect of a claim to an indemnity and that consequently the jurisdiction is not limited to choses in action which are available for legal execution. 174. In my judgment, therefore, there is no authority binding this court to hold that the jurisdiction is not available in relation to future income from a defined asset.

In any event, even if the jurisdiction had not been exercised before 1873, I do not think that this court is bound by pre-1873 practice to abstain from incremental change. " 167. In response, Advocate Lawrence contended that it was proper to have regard to Pothier . She referred also to Routier and the fact that the arrêt lasts for thirty years. In her submission, there would be no point in the imposition of such a timescale were there not the ability to attach future debts in order that the judgment creditor could continue to receive payments due in the future until such time as the debt to it from the primary debtor had been paid. 168. She also submitted that the most obvious example of an arrêt entre mains in respect of a future debt was an arrest on wages and that the judge at the ex parte hearing had been content with the concept of distraint against future payments because of the analogy of an arrest on wages. She referred this court also to Dessain & Wilkins, Jersey Insolvency and Asset Tracing (3rd edition) at page 60 where the possibility of an arrestment of wages by way of an arrêt entre mains is noted. We were informed, however, that in practice an application for such an arrestment is granted automatically only for an amount up to £80 per week. Applications seeking greater amounts required special grounds. Advocate Lawrence observed that she had also referred below to two potentially relevant cases *Eloury-v-JW Huelin Limited*

(1935) 238 Ex 326 and *Falle-v-Pocock*

(1949) 244 Ex 361, although these had not been relied on in the judgment below. Discussion 169. The issue raised under this head does not appear to have been the subject of any - or at least any focused - debate in any Jersey authority. It is clear from the transcript that the judge at the ex parte hearing had been immediately content with the concept of distraint against future payments because of the analogy of an arrest on wages and did not require particular argument on the point. The passage in Dessain & Wilkins at page 60 states without qualification that wages are susceptible to arrest by arrêt entre mains . Although reflecting on possible uncertainties, the ability to attach wages is not queried by the authors. There is no definitive guidance in the two cases referred to by Advocate Lawrence and in *Eloury-v-JW Huelin* the arrestment was not of a future debt but of an amount already owed under a building contract, the precise amount payable, however, being yet to be determined. 170. Nor is there any detailed discussion of the issue in the judgment below. What is stated at paragraph 148(iv) is that an arrêt entre mains "appears wider and more flexible in its ambit (applying for example to ... future as well as present debts)." But, whilst Advocate Robinson suggested that the only authoritative source in favour of this proposition was the passage in Pothier quoted above at paragraph above, it seems to us that the passage quoted in the court below at paragraph 148(iii) is also relevant. In the translated version it states:- "For the same reason, the creditor [of the third party] for whose act the arrest is made, cannot, to the prejudice of the arrestors, discharge his arrested debtor from his obligation; from where it ensues that, if a creditor has arrested rents outstanding or to fall due, on the tenants of his debtors, this debtor cannot, to the prejudice of the arrestor, annul the lease for the future, by an agreement between him and his debtor; for that would be to discharge the tenants from their obligations for the years

to expire, and these years being arrested, he cannot, to the prejudice of the arrestor, dispose of them." 171. What is immediately obvious from that passage is that Pothier has in mind the possibility of an arrestment attaching not only to an instalment of rent under a lease, currently due and payable, but that all the instalments of rent for the years to expire would have been arrested. 172. Nor is Pothier the only pertinent source on this issue. As Advocate Lawrence pointed out, Routier , in the third paragraph of the first section quoted at paragraph 149 above, specifically records that the arrestment endures for thirty years. In addition to that provision we also note that, in the first paragraph of the second section, reference is made to the third party producing a Lease for confirmation of the amounts due. Whilst not as precisely stated as by Pothier, we take these passages as an indication that in Normandy something more than an instalment of rent under a lease, currently due and payable, was attached upon an arrestment in the hands of a tenant. If all that could be attached was the instalment currently due and payable, there would seem little need for the lease to be supplied to the court: the tenant could simply depone to the amount owing and in his hands. The requirement for the lease to be produced, on the other hand, would tend to suggest that the court, the arrestor, the arrestee and, doubtless, the judgment debtor would wish to be clear as to the amounts in the future and the exact timeframe. 173. Returning to the passage in Pothier, quoted in paragraph 163 above, it is, in our view impossible, with any reasonable degree of certainty, to determine whether the proper construction of the second part of the passage should be translated as "may in the future owe" or "will in the future owe" if regard is had merely to the words used in that sub clause. Either is possible. That said, the use of the wording "may owe" in the first part of the sub clause is rational in that at the time of notification to the third party the exact amount owed is not clear and is to be the subject of a subsequent part of the procedure. 174. There are two possibilities as regards the proper construction of the second portion. Either it is to be construed as covering anything whatsoever that may be owed by the third party to the judgment debtor at any time during the thirty year period and for whatever reason (that is, the "may" construction) or it is something certain, for example an ascertained debt for which the date of payment has not yet arrived, a debt owed but the amount payable yet to be ascertained (as in *Eloury-v-JW Huelin*), or wages where, so long as the contract of employment continues, there is an obligation to pay a set or ascertainable amount each week or month (the "will" construction). 175. In our opinion, the solution to this apparent dilemma is found in the remainder of Section III of Pothier, where the subsidiary debtor is summoned to make the declaration of that which he owes and, thereafter, to make the appropriate payment. This is consistent with Terrien and Routier . In other words, that which can be arrested must be something capable of identification and solemn declaration. It is also consistent with Section 4 of Pothier where he identifies that the arrestee who, contrary to the arrest, pays his creditor is liable to sentence to deliver to the arrestor "the sum that he owed at the time of the arrest" . Without a declaration or affirmation there could be no precision as to that amount (whether ascertained or to be ascertained). And without knowledge of the transaction and the debt arising, there could be no declaration. 176. This approach would be consistent

with the apparent and undisputed acceptance in this Island, of the ability to attach wages. It seems to us that the underlying requirement is that the debt in question can be deponed to, with precision, by the third party debtor. Were it otherwise as regards wages or rent it would, to our mind, be a pettifogging approach to procedure to require a new arrestment each week, month or quarter; not to mention an unnecessary drain on the resources of arrestor and debtor. We would observe that, when dealing with arrestment of movables what is certain is that present movables can be identified. As regards the debt arising out of a continuing contract, why is there not certainty, for arresting creditor, arrestee and the Court in being able to identify the obligations under the contract, just as one might the rent due under a lease? With wages and a rent it is surely a reasonable premise that the contract will continue until terminated according to its provisions or by some extraneous event. So long as it does, a sum - either specified or for the identification of which a mechanism is set - is payable as the counterpart for the service or occupation. The sum payable will, almost certainly, be payable by reason of the individual contractual relationship and not by reference to a wholly unconnected event or agreement. In our opinion the test of certainty is satisfied where there is a contract, the obligations under which are continuing and under which there is a stipulated mechanism for identifying the financial obligation. 177. It therefore follows, in our view, that future payments under the Slag Sales Agreement are not, when that agreement is properly characterized and construed, future payments so uncertain that they could not be the subject of a deposition. The contract covers the whole of the slag deposits at the Gecamines site. GTL will either purchase all deposits or have a right of pre-emption once a certain quantity has been reached. Whilst there are provisions allowing for termination on mutual agreement, it is provided that insolvency, receivership and winding up are not to terminate the purchaser's rights; but there are limited provisions for the purchaser to terminate and for review in the event of forms of economic hardship. Accordingly the contract puts GTL into the position, not of an entity which may or may not engage in transactions with Gecamines in the future, but rather into the position where, being under an obligation to take deliveries, and in the event of deliveries being made by Gecamines and accepted by GTL, to pay a quantifiable amount. As all these future debts can be traced to obligations under the present contract, we are of opinion that to seek to arrest 'payments which....should in the future become payable....in terms of the Slag Sales Agreement...' does not offend against what we discern as the principle of certainty which underlies the arrest : a principle of importance for the arresting creditor, the arrestee and the Courts. The proper test as to the place where the Debt is situated 178. As indicated by the court below, the focus of dispute under this head is whether the fact of GTL's having been incorporated in this jurisdiction and having its registered office here has the effect that the location of the debt can be said to be within the jurisdiction of the courts of this Island. 179. Advocate Robinson submitted that the court below fell into error in treating the decision of the Privy Council in *Kwok Chi Leung Karl-v-Commissioner of Estate Duty*

- [1988] 1 WLR 1035 as authority for a proposition that some minimal physical presence of a corporation, by reason of the country in question being the place of incorporation or location of registered office, could, without more, be a foundation for residence. The court below had misinterpreted that decision and had taken the test further than the rules laid down in *New York Life Insurance Co-v-Public Trustee*
- [1994] 2 Ch 101. In his submission, there was, ordinarily, a need to show a place of jurisdiction consistent with carrying on business in order to identify the location of the debt. He submitted that, if the task of locating a debt was to be a serious and well balanced process, the court had to strive to localise the debt insofar as possible, an example being the treatment of banks with branch offices abroad where the country of the account was found to be the location of the debt. He referred to *Kuwait Oil Tanker Co SAK and Another-v-Quabazard*
- [2004] 1 AC 300 at paragraph 13; *R-v-Lovitt*
- [1912] AC 212 . He referred also to the insurance cases of *F & K Jabbour-v-Custodian of Israeli Absentee Property*
- [1954] 1 WLR 139 and *Cambridge Credit Corporation-v-Lissenden*
- (1987) NSWLR 411. GTL had far closer connection with the DRC than with Jersey. 180. For Hemisphere, Advocate Lawrence contended that nothing in the submissions on behalf of GTL undermined the soundness of the analysis set out by the Royal Court. Discussion 181. The starting point is the decision of the Court of Appeal in *New York Life Insurance Co-v-Public Trustee* . In that case, the question was whether certain sums due and payable by the plaintiffs to various German nationals under policies of assurance, issued in the United Kingdom before the outbreak of war, were "property rights and interests within His Majesty's Dominions" . The plaintiff company was incorporated in New York and had its central office and the bulk of its assets in New York. It had a branch in London and in most of the capitals of Europe, the branch in Paris being its head office for Europe. The policy monies were expressed to be payable in London, but all premiums were payable either at the central office in New York or at the office where the insurance was payable. An endorsement on the policies provided that they should be construed according to English law. The issue, therefore, was whether some form of carrying on of business in London meant that the plaintiff should be treated as resident or present in England and Wales and subject to the jurisdiction of those courts. 182. Among other matters, Pollock MR quoted the views of Lord Halsbury LC in *Compagnie Générale Transatlantique-v-Thomas Law & Co*
- [1899] AC 431 , 433 where he said:- "It appears to me that as a consequence of these facts [the carrying on of business in this country] the appellants are resident here in the only sense in which a corporation can be resident - to use the phrase which Mr Joseph Walton has so constantly referred to, they are 'here'; and if they are here, they may be served". The Master of the Rolls went on to identify that there was clear evidence that the plaintiffs

were resident both in New York and in London, in both places they carried on a business and in both places they were subject to the jurisdiction of the courts. To resolve that issue his Lordship looked at the terms of the contract. 183. Warrington LJ, at 114 - 115, having indicated that there was no difficulty in applying the rule of residence in the case of a physical person because he could not be resident in more than once place at the same time, was of the view that there was serious difficulty arising in the case of a corporation which could have two residencies, each as much its residence as another for the purpose of legal jurisdiction at all events. Where there was an office in London, carrying on an English business the corporation was resident in London for the purposes of jurisdiction and could be sued "in just as effectual a manner as such steps could be taken against a physical person, physically resident in this country." 184. Atkin LJ, at 119 - 120 said:- "Now, one knows that, ordinarily speaking, according to our law, a debtor has to seek out his creditor and pay him; but it seems plain that the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt. I think that is a very material consideration. The result is that in the case of an ordinary individual by that rule for a long time the situation of a simple contract debt under ordinary circumstances has been held to be where the debtor resides; that being the place where under ordinary circumstances the debt is enforceable, because it is only by bringing suit against the debtor that the amount can be recovered. It appears to me that the true view is that the corporation resides for the purposes of suit in as many places as it carries on business, and it is to be noticed that in ordinary cases where an obligation is entered into by the corporation without any particular limits of the place where it is payable inasmuch as that obligation is an ordinary personal obligation which follows the person, you have in each jurisdiction a right to sue the corporation there; the corporation is resident there, and the obligation is enforceable there. Under ordinary circumstances the debt would be situate in each place where the corporation can be found." 185. Whilst these opinions emphasise, for the purposes of that case, the importance to be attached to carrying on business in a jurisdiction, the opinions do not seem, to our minds, to indicate that carrying on business is a necessary criterion for jurisdiction. All that the court was identifying was that certain circumstances had come to pass which resulted in the courts of a particular country having jurisdiction over the corporation just as, with an individual, he might on one day be found within a particular country and could, therefore, be taken before the courts of that country. 186. In *Kwok*, the judgment of a very strongly constituted Privy Council was delivered by Lord Oliver of Aylmerton. The facts of the case were that, shortly before the death in Hong Kong of the testator, a Hong Kong resident, a company had been incorporated in Liberia, where a registered agent for service of process had been appointed. The only activity engaged in by the company was the acquisition of assets from the testator, and the day before his death the company entered into an agreement with him for the purchase from him of certain Hong Kong shares, as part of which agreement the company executed a promissory note payable on demand after sixty days in Monrovia. The issue was whether, at the date of death, the debt contained in the

promissory note was property situated outside Hong Kong. 187. The views of the Privy Council could not be clearer. At page 1041, after quoting the passage from the judgment of Atkin LJ in *New York Life Insurance Co*, which we have quoted above, Lord Oliver continues:- "The critical question, therefore, is where Tolu Ltd is resident or can be found for purposes of service. The concession made before the judge that its central management and control were in Hong Kong, whilst no doubt of relevance in determining the residence of a company for the purposes of its liability to local taxation, does not really assist very much in answering the only material question for the purposes of the present appeal for, as the Court of Appeal rightly held, the line of authority concerned with the residence of a corporation for purposes of income tax is of no relevance in this context. Where the question to be determined is the whereabouts of a company for purposes of service, the inquiry is normally directed to ascertaining where it carries on its business or where it is incorporated and has its registered office. In the instant case, the company has, so far as the evidence goes, no office in Hong Kong nor has it any place from which it carries on business. Its sole activities appear to have been the holding of directors' meetings, all of which took place outside Hong Kong, and the entry into the agreements referred to with the testator, an activity which seems to have taken place in the office of a notary public. It is, therefore, in their Lordships view, at least open to doubt whether service of process on the company could properly be effected in Hong Kong at all. Their Lordships are, however, prepared to assume for present purposes that it could. What is beyond doubt is that the company is incorporated in Liberia, where presumably it has a registered office and where certainly it has a registered address for service of process. At least, therefore, it is resident in Liberia and accordingly, making the above assumption, has two places of residence. In that situation it is clearly established that the locality of the chose in action falls to be determined by reference to the place - assuming it to be also a place where the company is resident - where, under the contract creating the chose in action, the primary obligation is expressed to be performed: ...". (emphasis added) 188. This view is clear and determinative for present purposes. The jurisdiction of the place of incorporation or of the place where the registered office is located constitutes residence for the purposes of service and, accordingly, identifies the location of the debt unless there is some competing place of residence. The Board of the Privy Council did not consider such a view to require explanation and it is only with the utmost diffidence that we proceed to do so. Under systems of corporate law such as exist in the United Kingdom and in Jersey a corporation, a non-natural person, must have a registered office, in other words, a place where it can be "found". Further, it is the law of the country of incorporation which settles how a company is to be operated, how its directors are to act and, ultimately, the bases upon which it might be wound up or otherwise taken into judicial control. The courts of that country can control it, just as they can control an individual within their territory. 189. There is a further reason for attaching this degree of importance to the country of incorporation and place of registered office: it is particularly apt in the present day and age. Little may readily be ascertainable as regards a company and its operations other than the formal details held on the register. A company may have

no factories, no offices: merely employees who, with telephones or electronic means of communication provide services worldwide. Assume, for example, that a company purchases software, the company's registered office being given as the address for the invoice, but electronic delivery to be made to the electronic address of an employee. If required to sue on that contract, the supplier knows only one thing certain as to the location of the purchaser, namely, the registered office. Or take an individual to whom that company provides services and wishes to claim for defective performance. Must the claimant find the physical location of the employee who was carrying out the electronic services? Why should the company not be able to be sued for the debt in question at its formal location? It may be the case that the company in question has no assets physically located in that jurisdiction. But it will have control over those assets, wherever situated, and the courts of the place of incorporation can determine that the company should be wound up, or otherwise taken into judicial control, and the assets distributed. 190. For all these reasons we consider that the court below was correct to determine that the place of incorporation and registered office is sufficient to make a company resident irrespective of where its daily business activities are conducted or where its directors happen to live or where its bank accounts are located. We do not find any assistance in the cases dealing with banks and their branch offices or underwriting syndicates. The Evidence as to a place of business in the DRC 191. Advocate Robinson submitted that, contrary to the Royal Court's findings at paragraphs 166 - 173, GTL did carry on business in the DRC and so was resident there for present purposes. The Royal Court was wrong to require evidence of a physical presence such as an office and wrong not to find the contractual arrangements and ownership of minerals to be sufficient. Discussion 192. In the first place, we agree with the Royal Court that the proper test of residence for an incorporated entity is an identifiable place with a degree of permanence: see paragraph 171 of the judgment below. So much seems little more than commonsense in following views such as those of Lord Atkin set out at paragraph 184 above. The creditor must be able to bring suit against his debtor. He therefore has to find him to bring him before the court of competent jurisdiction. How is the ordinary creditor to know where the company has contracts or where it might own some asset or other? How is he to serve his summons for the courts of that jurisdiction? 193. As to the Royal Court's findings in respect of the activities of GTL, these were findings of fact with which an appellate court will be slow to interfere and, in our opinion, there is no basis for doing so here. As Atkin LJ said in *New York Life Insurance Co*, at page 120, the criterion of carrying on business which leads to deemed residence is constituted not just by holding assets and having contractual interests but "where it carries on business in its own name". The evidence rehearsed by the Royal Court was manifestly of a nature and content which entitled the court below to reach the view that such a test was not met. 194. In any event, as the court below noted in paragraphs 161 and 165, and as was accepted by GTL in the proceedings before this court, there is no stipulated place of payment for the slag sales. It therefore follows that, even if there were some form of residence in the DRC, the jurisdiction of the courts in this Island would not be excluded. Advocate Robinson had attempted to draw from the decision in

New York Life Insurance Co a proposition that the courts would strive to localise the debt in the event of competing jurisdictions. Not only is that contrary to the views expressed by Lord Atkin, set out at paragraph 184 above, it is clear that, on the facts of that case, it was of the utmost importance to identify a single location because of the question as to whether the policy moneys were subject to a charge by virtue of the 1919 Treaty of Peace Order. Inutility 195. In submissions which formed a significant part of his oral presentation, Advocate Robinson took issue with the views of the Royal Court as set out in paragraphs 189 to 192 of the judgment below. He put forward numerous lines of argument. In written submission he had contended that there was no authority as a matter of Jersey Law that non-compliance with an *arrêt entre mains* would render the arrestee potentially subject to an order to pay money to the arresting party. We disagree. The passages from Terrien, Routier and Pothier quoted above at paragraphs 144, 149 and 163 respectively are ample support for the proposition and show that the order is not merely conservatory. It therefore follows that Hemisphere, with such an order, would indeed be in a position to proceed to obtain judgment against GTL, and, in the event of non-compliance, proceed to seek GTL declared *en desastre*, with the effect that GTL's assets would be vested in the Viscount. 196. Further, the court should not make an order that could not be enforced and Advocate Robinson submitted that the court had no power make an order such as the order for payment in Jersey set out in paragraph 8(a) of the Act of 15 November 2010. Upon the assumption that GTL had no assets in Jersey, this was to order a resident to bring in assets from abroad; and the court had no power to do so. The importance of this line of argument may be elided by our response to the argument set out in the preceding paragraph. In any event, we do not agree with the submission. A court, in general, has power over those within its jurisdiction. Often that will be exercised to ordain an individual to carry out an act, where the act is, for example, a contractual stipulation. So, if a contract stipulated for delivery of movables to another, the court would in general, order delivery at such place, if any, as was specified. If none were specified we see no reason why the person making the claim should not ask the court to make the order for delivery at a place within its jurisdiction, even if the assets were currently situated outside the jurisdiction. Undoubtedly a court might not make such an order if, to do so, would place the defender in breach of the laws of a friendly state. There is no indication that GTL would be in breach of such laws in respect of the moneys currently trapped by the interim *arrêt entre mains*, wherever they happen to be situated; as to which, as the Royal Court recorded at paragraph 168 of its judgment, GTL was not prepared to inform anyone. 197. In our view, the Royal Court, having available to it the remedy of *arrêt entre mains*, was perfectly entitled to exercise its discretion to grant such an order to an appropriate Representor in appropriate circumstances, leaving it up to the Viscount (doubtless in association with the Representor) to attempt to obtain satisfaction of the order. It seems to us a moot point as to whether the order separately set out in paragraph 8(a) of the Act of 15 November was adding anything to the order *arrêt entre mains* set out in paragraph 7 of that Act. On one view of the older authorities an order *arrêt entre mains* would bring with it the obligation to pay. In any event, an order to pay being a potential part of an order

arrêt entre mains we see no reason why it could not be made in this separate way. In addition, paragraph 8(a) gave further specification in indicating the time within which payment was to be made and the identity of the payee. Discretionary Factors 198.

Advocate Robinson submitted that the Royal Court should not have exercised its discretion to grant the orders made below as (a) to do so was to exercise an exorbitant jurisdiction by interfering with foreign assets and regulating foreign conduct, (b) the orders were likely adversely to affect the rights of GTL, its shareholders and connected parties,

- (c) the orders were inequitable as Hemisphere was acting improperly in seeking enforcement of its awards against the assets of an insolvent country and (d) the orders were oppressive and unfair and an unwarranted interference in the business and affairs of GTL. Discussion 199. It is well known that this Court will consider a review of the exercise of discretion by the Royal Court only in limited circumstances, namely:- "(1) The judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) He had taken into account matters which he ought not to have done, or had failed to take into account matters which he ought to have done; or (3) His decision was plainly wrong." (United Capital Corporation Limited-v-Bender

[2006] JLR 269 , 276 - 277). 200. Despite copious written submissions, GTL's contentions do not meet any of these requirements. The suggestion that there is an exorbitant jurisdiction being exercised fails to appreciate that the orders being made are not being made over a foreigner or foreign entity: they are being made over a Jersey company: compare Mackinnon-v-Donaldson, Lufkin & Jenrette Securities Corporation

[1986] Ch 482, 493 (Hoffmann J). Nor, for the reasons given above, is this an application in relation to a foreign debt. 201. Turning to adverse effects, GTL has submitted that the orders would place it in breach of contract. However, court orders do regularly innovate on parties' rights. Here, there was no evidence to support the assertion that there would be culpable breaches, GTL is not a foreigner as far as these courts are concerned and the other party to the Slag Sales Agreement is Gécamines, which is a party to these proceedings and is therefore aware that the orders are being made in accordance with the rule of law. 202. GTL also submitted that the joint venture could not operate were Gécamines not to be a shareholder in GTL and, further, that the shares were valueless because they could not be transferred without the consent of all of the members of GTL. These points were not raised below and, accordingly, cannot form the basis of an interference by this Court in the discretionary decision below. 203. Further submissions by Advocate Robinson under this head were to the effect that there was a substantial risk, for a variety of reasons, that GTL and other parties would, sooner or later be likely commercially to be adversely affected by the court's final order. Again, these points were not raised below and, in our view, this Court cannot proceed upon them. 204. Advocate Robinson made two final points under this head, namely that the court should not have assumed that GTL would in fact comply with a court order and, secondly, that there was no authority for the court's conclusion that as a matter of Jersey law non-compliance with

the arrêt would render the arrestee liable to make payment to the arresting party. 205. As regards the first point, Advocate Lawrence pointed out that, in his opening statement at the June 2010 hearing, GTL's counsel had made it clear that GTL, by its conduct to date, had showed that it had been entirely compliant with orders made by the Royal Court so far. As regards the second, the proposition is adequately vouched by Routier and Pothier, as cited above. 206. As for the line of argument based on impropriety of Hemisphere's actions, again it was not an argument raised below and cannot form the basis of an interference by this Court in the discretionary decision below. 207. The final argument under this head was that the orders were in principle oppressive and unfair, in particular preclusion of the right to move the registered office. Again, there is no basis upon which it can be said that the decision below falls into the criteria set out in UCC-v-Bender. The issue of disclosure was addressed in submissions by all parties at a hearing on 30 September, 2010. GTL made particular contentions in relation to individual orders, making no objection to what became (a) (e) or (f). It appears that where it expressed concerns, those concerns were reflected in the terms of the final order. 208. As regards alteration of the location of the registered office, the reason for making such an order is, in the whole circumstances manifest. GTL does not suggest that, at present it wishes to change its registered office. Were those circumstances to change, GTL could make an application to the Royal Court for variation and the Royal Court could then, after full consideration of matters, decide how best to proceed and what protective mechanisms to attempt to adopt. 209. In the whole circumstances, therefore, this ground of appeal, in our opinion, is not made out. Leave to Adduce Fresh Evidence 210. GTL had sought leave to adduce fresh evidence pursuant to Rule 12(1) of the Court of Appeal (Civil) Rules 1964. These were third and fourth affidavits of Mr. Kallioinen, Group Controller of OM Group, Inc, and one of OMG's representatives on GTL's board. 211. The proposed evidence related, in essence, to two matters. The first was the collateral damage which might be caused to OMG because of dependence on GTL's supplies and the prospect that Gécamines might cease supplying cobalt. The second issue was the problem which could be caused to the joint venture if the shares in GTL were transferred to a third party. All of this information could have been presented at the hearing below and, accordingly, it is not open to this court to accede to the request. 212. The application to be allowed to adduce fresh evidence should therefore, in our opinion, be refused.

Conclusion

in respect of the GTL Appeal 213. In our opinion the appeal should be refused. pleming ja:

Introduction

214. In this judgment I will refer to the Representor/Respondent to the appeal as "Hemisphere", the First Respondent as "the DRC", the Appellant as "Gécamines", and the Party Cited as "GTL". 215. I have had the opportunity of reading in draft the judgment of McNeill and Bennett JJA, and I am in complete agreement with their analysis and rejection of the appeal

by GTL. I have nothing to add on that appeal, and agree that it should be dismissed for the reasons they give. However, save for the agreed disposal of Ground 6 (see paragraph 213 above), I am unable to agree with the analysis and dismissal of the appeal by Gécamines. I would allow that appeal on Grounds 1-4 taken compendiously (but not on Ground 5) for the reasons developed in this judgment, which would also mean that the claim against GTL falls away. In my view, the appeal should be allowed without any need to refer to new evidence, and I would also dismiss the application by Gécamines to rely on the three additional affidavits identified in the judgment of McNeill and Bennett JJA at paragraph 126 (and the application by GLT to rely on the two additional affidavits referred to at paragraph 210). 216. I am grateful to McNeill and Bennett JJA for setting out of the background in paragraphs 1-33 of their judgment, which I gratefully adopt. 217. The principal issue on the Gécamines appeal is whether or not the Royal Court erred in concluding that the relationship between Gécamines and the DRC was such that Gécamines was and remains an organ of state. The essence of the appeal on this topic, as set out in Gécamines' Notice of Appeal is that the Royal Court failed to apply, or make findings on, the "governmental functions" requirement of the appropriate test (Grounds 1-4), and in relation to the "control" requirement of the test, reached a determination that was wrong (Ground 5). 218. In order to reach a conclusion on these Grounds (particularly Grounds 1-4) it is necessary to consider the test to be applied; and the Royal Court's decision in light of the evidence in relation to the constitution of Gécamines, its powers, duties and activities. That will involve further consideration of the degree of control by the DRC and whether or not, on the facts presented to the Royal Court, there was sufficient evidence to support a conclusion that Gécamines discharged governmental functions such that it can be categorised as an organ or alter ego of the State. The appropriate test 219. As noted by the Royal Court, there was substantial agreement between the advocates for Hemisphere and Gécamines as to the test to be applied in determining whether or not Gécamines was under the control of the DRC and exercised governmental functions - see paragraph 12 of the judgment. But notwithstanding that degree of agreement, in light of the submissions made to this court, it is necessary to consider the case-law with some care, prefaced with the following, which seems to me to apply equally to lawyers over the last 50 years or so:- "The proper scope and function of the State is a topic which has engaged political philosophers for many centuries." Attorney General of Trinidad and Tobago v Smith

[2009] UKPC 50 , Lord Walker at paragraph 16. 220. It was and is common ground that in the absence of Jersey case-law directly on point, it is appropriate to turn to decisions of the Courts of England and Wales for assistance. The focus before the Royal Court, and before us, was on three English authorities - the Court of Appeal's decision in *Trendtex Trading Corp v Central Bank of Nigeria*

[1977] 1 QB 529 (" *Trendtex* "); *Kensington International Limited v Republic of Congo*

[2005] EWHC 2684 (Comm) ("Kensington"); and *Walker International Holdings v Republic of Congo*

- [2005] EWHC 2813 (Comm) ("Walker"). *Trendtex 221*. In *Trendtex*, the Court of Appeal considered a claim to immunity from suit by the Central Bank of Nigeria, an entity incorporated by statute as a central bank modelled on the Bank of England. It issued legal tender and acted as banker and financial adviser to the Government of Nigeria. It also acted as banker for other banks and its affairs were under considerable governmental control. The Central Bank issued an irrevocable letter of credit in favour of the plaintiff company, but failed to make payments claimed to be due for the price of a shipment of cement and for demurrage. (This brief summary is taken from the headnote). The Court of Appeal concluded that the Central Bank was not an emanation, arm, alter ego, or department of the State of Nigeria, and, therefore, was not entitled to immunity from suit. Lord Denning M. R. at page 558D-F concluded that the transaction - the letter of credit
- was "a straightforward commercial transaction" and "it was [not] open to the Government of Nigeria to claim sovereign immunity in respect of it". At page 559, he then turned to the question : "how are we to discover whether a body is an 'alter ego or organ' of the government?" His first response was to explain that there were difficulties:- "The cases on this subject are difficult to follow, even in this country: let alone those in other countries. And yet, we have to find what is the rule of international law for all of them. It is particularly difficult because different countries have different ways of arranging internal affairs. In some countries the government departments conduct all their business through their own offices - even ordinary commercial dealings - without setting up separate corporations or legal entities. In other countries they set up separate corporations or legal entities which are under the complete control of the department, but which enter into commercial transactions, buying and selling goods, owning and chartering ships, just like any ordinary trading concern. This difference in internal arrangements ought not to affect the availability of immunity in international law. A foreign department of state ought not to lose its immunity simply because it conducts some of its activities by means of a separate legal entity. It was so held by this court in *Baccus S. R. L. v. Servicio Nacional Del Trigo* [1957] 1 Q. B. 438." 222. Lord Denning's reasoning on absolute immunity is set out at page 560A-G (with emphasis added):- "It is often said that a certificate by the ambassador, saying whether or not an organisation is a department of state, is of much weight, though not decisive: see *Krajina v. Tass Agency* [1949] 2 All E. R. 274. But even this is not to my mind satisfactory. What is the test which the ambassador is to apply? In the absence of any test, an ambassador may apply the test of control, asking himself is the organisation under the control of a minister of state? On such a test, he might certify any nationalised undertaking to be a department of state. He might certify that a press agency or an agricultural corporation (which carried out ordinary commercial dealings) was a department of state, simply because it was under the complete control of the government. I confess that I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions. That is the way in which we looked at it in *Mellenger v. New Brunswick*

Development Corporation

[1971] 1 W. L. R. 604, when I said, at p. 609: "The corporation ... has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does." With these considerations in mind, I turn to our problem. Central Bank of Nigeria At the hearing we were taken through the Act of 1958 under which the Central Bank of Nigeria was established, and of the amendments to it by later decrees. All the relevant provisions were closely examined: and we had the benefit of expert evidence on affidavit which was most helpful. The upshot of it all may be summarised as follows. (i) The Central Bank of Nigeria is a central bank modelled on the Bank of England. (ii) It has governmental functions in that it issues legal tender; it safeguards the international value of the currency; and it acts as banker and financial adviser to the government. (iii) Its affairs are under a great deal of government control in that the Federal Executive Council may overrule the board on monetary and banking policy and on internal administrative policy. (iv) It acts as banker for other banks in Nigeria and abroad, and maintains accounts with other banks. It acts as banker for the states within the federation: but has few, if any, private customers. In these circumstances I have found it difficult to decide whether or no the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be." 223. The key sentence, underlined in the extract from the judgment, is: "I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions". These are plainly intended to be cumulative requirements: both are necessary and neither is sufficient by itself. This is clear from the analysis of the position of the Central Bank of Nigeria where there is reference to control and specific government functions such as the issuing of legal tender. Although Lord Denning emphasised that the answer to the question depended on the evidence, he appears to have reached his conclusion on the basis that the existence of some governmental functions was not determinative of the question "should the Central Bank of Nigeria be considered in international law a department of the Federation of Nigeria". The approach appears to have involved looking at the preponderant functions of the Central Bank, perhaps reflecting submissions made to the Court by counsel appearing for the Bank (see page 540C and 540G-H). 224. Lord Denning expressed some doubt about his conclusion, ending this part of the judgment as follows:- "This conclusion would be enough to decide the case, but I find it so difficult that I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department." 225. Lord Justice Stephenson also found this a difficult question (at page 564G-H), but allowed the appeal on the following basis:- "I am not satisfied that the bank was created by the Act a department of the Nigerian Government or has been changed into one by any of the eleven amending decrees which it was contended for the bank had dramatically eroded its independence. A hobbled horse is still a horse. A corporation may change its constitution by degrees, but I am not satisfied that any of the amendments of the Act incorporating the bank have

changed its constitution and turned it into an organ of the Nigerian State." (And see page 572B-C to like effect.) 226. Lord Justice Shaw's conclusions on the "personality issue" are of equal importance, and they may serve to cast some further light on the correct approach for the fact-finding court when considering control by government but also discharge of governmental functions. I draw attention, in particular, to the following extracts:- "The cardinal question is whether the Central Bank is properly to be regarded as a department of the Government of Nigeria in the guise of a bank, or whether it is in truth a bank to which the execution of specific aspects of government control of finance has been delegated. In the first case the Central Bank may be entitled to immunity from suit in the courts of this country; in the second case it can claim no such immunity. There can be no intermediate hybrid status occupied by the bank wherein it is to be regarded as a government department for certain purposes and as an ordinary commercial or financial institution for different purposes. It must be one or the other and counsel for the bank did not contend otherwise. The burden of his submission was that the bank was subordinated to and subservient of the Federal Government to such a degree that it was a mere instrument of that government and was therefore to be identified with it. The opposing argument was that the Central Bank was constituted as a bank and that the functions assigned to it in relation to the economic and financial affairs of the Nigerian State did not have the result of changing its fundamental character. There is much to be said for each of these views" (pages 572H to 573C - emphasis added) "Whether a particular organisation is to be accorded the status of a department of government or not must depend on its constitution, its powers and duties and its activities . These are the basic factors to be considered. The view of the government concerned must be taken into account but is not of itself decisive (*Krajina v. Tass Agency* [1949] 2 All E. R. 274); it does not relieve a court before which the issue of sovereign immunity arises of the responsibility of examining all the relevant circumstances." (page 573E-F - emphasis added) "As I understand the tenor of Professor Nwabueze's affidavit [witness for the Central Bank] he suggests that the bank was under the thumb of the military government and its executive councils. It is clear enough that the bank was the subserving agent of the government in a variety of activities but this is not in my judgment adequate to constitute it as an organ or department of government. I cannot find in the constitution of the bank or in the functions it performs or in the activities it pursues or in all those matters looked at together any compelling or indeed satisfactory basis for the conclusion that it is so related to the Government of Nigeria as to form part of it. Accordingly I would hold that the bank is not entitled to the immunity which it claims." 227. The two sentences I have emphasised in the first extract above are important, and in my respectful view correct. Applying this approach to Gécamines: "There can be no intermediate hybrid status occupied by Gécamines wherein it is to be regarded as a government department for certain purposes and as an ordinary commercial or financial institution for different purposes. It must be one or the other...". Although, for whatever reason, Gécamines did not persist in its application for sovereign immunity in these proceedings (and the DRC took no part) the correct question remains

- is this company "a government department for all purposes" ? 228. This narrow test for sovereign immunity (control and functions) is not to be confused with the far broader test to identify a public body for the purposes of public law, or to identify "an emanation of the State" for the purposes of European law, where again a broad view has been adopted: "organisations or bodies which were subject to the authority or control of the state, or had special powers beyond those which result from the normal rules applicable to relations between individuals" (Foster v British Gas
- [1991] ICR 84 , ECJ at paragraph 18, and [1991] 2 AC 306, House of Lords at page 312, and see also R v British Coal Corporation, ex parte Vardy
- [1993] IRLR 104, and Griffin v South West Water Services Limited
- (1995) IRLR 5). In my view the Trendtex test was intended to be, and should be treated as, tightly drawn and therefore not readily satisfied. This appears to have been accepted in Walker , at paragraphs 91 to 94 (see below), but noting there the limiting words "akin to" . The need for control and discharge of governmental or sovereign functions also appears to be a stricter requirement than in some other countries, as summarised in Brownlie Principles of Public International Law (7 th ed) at p.341:- "The general test seems to be that of effective control, and thus immunity may extend to a private corporation in which a foreign government has a controlling interest". 229. The Trendtex formulation as to what is and what is not an organ of the state (based on the theory of absolute immunity) has not been widely applied in subsequent cases, no doubt because of the subsequent enactment of the 1978 Act. The importance of the distinction between state-controlled enterprises (with legal personality) and their governing state was, however, emphasised by Lord Wilberforce in Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)
- [1983] 1 AC 244 at page 258E-G (emphasis added):- "Mambisa is a state-trading enterprise which manages and operates all Cuban state-owned ships: it is not an 'emanation' or department of the Cuban state; it has independent legal existence, and it is not claimed that it would be entitled to state immunity. It is subject however to direction and control by the Cuban government which provides all the funds necessary for its operation..... State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial: but it is an accepted distinction in the law of England and other states: see C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex [1979] A. C. 351. Quite different considerations apply to a state-controlled enterprise acting on government directions on the one hand, and a state, exercising sovereign functions, on the other . This distinction is crucial in relation to these appeals." 230. It is the second, alternative, basis for the decision in Trendtex

- the recognition of the theory of restrictive immunity - that has attracted more discussion and debate. For a recent summary of the history of the shift from absolute to restrictive immunity, see *NML Capital Ltd v Republic of Argentina*

[2011] UKSC 31, Lord Phillips at [8] to [12]. 231. *Gécamines* did not raise before the Royal Court the difficult question of the difference referred to and discussed in *Trendtex* between types or classes of State actions or activity - between *acta iure imperii* (sovereign or public acts), and *acta iure gestionis* (private or commercial acts) - and the distinction between the absolute and restrictive theories of sovereign immunity. It is now raised as a new argument, but as it is an argument of law, and there was no sustained objection by Hemisphere - see paragraphs 3.15 - 3.17 of Advocate Lawrence's contentions, and the reference there to *Pittalis* and another v *Grant* and another

[1989] 3 WLR 139, and *Yates v. Reg's Skips Limited*

[2008] JCA077B. In exercise of the Court's discretion I would allow the argument to be presented. 232. The distinction is summarised in *I Congreso del Partido* at page 267B-C (Lord Wilberforce):- "The conclusion which emerges is that in considering, under the "restrictive" theory, whether state immunity should be granted or not, 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." And by Lord Bridge at page 278D-E, and 278F-279B:- "My Lords, this is the first time the courts of this country have had to decide, applying the 'restrictive' doctrine of sovereign immunity, how the boundary is to be drawn in international law between the acts of a sovereign state that are still entitled to immunity and those that are not. Happily it is probably also the last, since the matter is now governed by the State Immunity Act 1978. The restrictive doctrine itself is a novelty in English law, having been so recently accepted as supplanting absolute immunity. But it is not only on account of its novelty that the problem of attempting to delimit the scope of the doctrine presents such difficulty for English judges. This difficulty has been very generally felt by the judges of many countries and nowhere satisfactorily resolved." "It does seem to me that two propositions can be derived from the relevant authorities which may often, and do in this case, provide a useful guide in deciding whether or not a claim to sovereign immunity can be sustained. First, if a sovereign state voluntarily assumes a purely private law obligation, it cannot, when that obligation is sought to be enforced against it, claim sovereign immunity on the ground that the reason for assuming the obligation was of a sovereign or governmental character. Example: State A orders uniforms for its army from a supplier in State B; when sued for the price in the courts of State B, State A cannot claim immunity on the ground that the maintenance of its army is a sovereign function. This is really elementary. But it leads on logically to the second

proposition that, having assumed a purely private law obligation, a sovereign state cannot justify a breach of the obligation on the ground that the reason for the breach was of a sovereign or governmental character. Example: State A, having ordered uniforms for its army from a supplier in State B, repudiates the contract; when sued in the courts of State B for damages, State A cannot claim immunity on the ground that, since the placing of the contract, a government of a new political complexion has made a sovereign decision, pursuant to a policy of total disarmament, to disband its army." See also *Kuwait Airways Corporation v Iraq Airways Co*

[1995] 1 WLR 1147, at 1156E-1160F, particularly at 1160A-F (Lord Goff):- "It is apparent from Lord Wilberforce's statement of principle that the ultimate test of what constitutes an act *iure 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. To attract immunity under s 14(2), therefore, what is done by the separate entity must be something which possesses that character. An example of such an act performed by a separate entity is to be found in *Arango v Guzman Travel Advisors Corp* (1980) 621 F 2d 1371 in which Dominicana (the national airline of the Dominican Republic), faced with a claim by a passenger in respect of inconvenience suffered in 'involuntary re-routing', was held entitled to plead sovereign immunity under the United States Foreign Sovereign Immunities Act 1976, on the ground that it was impressed into service, by Dominican immigration officials acting pursuant to the country's laws, to perform the functions which led to the re-routing of the plaintiff. Judge Reavley, delivering the judgment of the court, said (at 1379): 'Dominicana acted merely as an arm or agent of the Dominican government in carrying out this assigned role, and, as such, is entitled to the same immunity from any liability arising from that governmental function as would inure to the government, itself.' (My emphasis.) But where an act done by a separate entity of the state on the directions of the state does not possess the character of a governmental act, the entity will not be entitled to state immunity, though it may be able to invoke a substantive defence such as *force majeure* despite the fact that it is an entity of the state: see eg *C Czarnikow Ltd v Centrala Handlu Zagranicznego 'Rolimpex'* [1978] 2 All ER 1043, [1979] AC

351. Likewise, in the absence of such character, the mere fact that the purpose or motive of the act was to serve the purposes of the state will not be sufficient to enable the separate entity to claim immunity under s 14(2) of the 1978 Act." 233. The distinction between acts *iure imperii* and acts *iure gestionis* only arises where it is either accepted that the actor is a State, or it has been agreed or determined that the identified entity is an organ of (and therefore part and parcel of) the State. The distinction therefore may not need to be considered in this case, as there is no specific act of either the DFC or of Gécamines that requires identification and categorisation. The entire focus here is on whether Gécamines, as an entity, is or is not an organ of government. In deciding that question it is necessary to look at what it does, and

at least some of its acts/actions, but perhaps it is a circular exercise to categorise those acts/actions as sovereign or private (or commercial), when determining whether Gécamines is a part of the State. 234. I say "perhaps" in the previous paragraph because the distinction could be relevant had it been necessary here to consider the distinction between "sovereign" and "separate entity" in section 14 of the State Immunity Act 1978, and whether or not immunity can successfully be claimed - see Lord Justice Leggatt in *Propend Finance Property Limited v Sing* and another

(1997) 111 ILR 611, at 669

(1997) The Times 2 nd May:- "In the Kuwait Airways case, Iraqi Airways Company was held to be 'a separate entity' and at issue was whether section 14(2) of the Act applied to the activity involved. Lord Goff stated, at page 707H that the words 'in the exercise of sovereign authority' in section 14(2)(a) should be construed in accordance with the accepted meaning of *acta iure imperii*, especially as that is plainly in accordance with Article 27(2) of the Convention, which is reflected in section 14(2) of the Act. Once it is established, as it undoubtedly is, that the concept of *acta iure imperii* exists in English law, it is in our view relevant to a determination of what bodies are a part of the 'State' and the 'government' for the purposes of section 14(1). The word 'government' should not be confined to what in other contexts would in English law mean the Government of the United Kingdom. Once the broad scope of governmental or sovereign activity is, for this purpose, accepted, the performance of police functions is essentially a part of governmental activity. The concept of a 'separate entity' obviously has its place in the overall scheme but has no application in the present case. The affirmation by Lord Goff in the Kuwait Airways case of the concept of governmental or sovereign activity, though made in relation to an entity which was plainly an entity separate from the executive organs of the government, is wholly consistent with a broad definition of government in section 14(1). The protection afforded by the Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, 'functionaries') could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself." 235. But this is not a case to be determined under the SIA 1978 (as extended to Jersey under the Schedule to the State Immunity Order 1985). It is also to be borne in mind when looking at Kuwait Airways not only that it was accepted that Iraqi Airways was part of the State of Iraq, but that the definition in section 14(2) "any entity... which is distinct from the executive organs of government of the State and capable of suing or being sued" is not the same as the test for "organ of the state" in *Trendtex*. 236. It is more relevant to the determination of the central question in this appeal, to understand the reasoning and the decision in *Trendtex*. The references to "governmental functions" (Lord Denning) or "the functions of the department of commerce or finance"/"executive power" (Shaw LJ), were likely to be references to functions or activities properly described as *iure imperii* and not *iure gestionis*. In other words, even though governments could carry out commercial activities (as could private citizens), the activities

were only to be categorised as "governmental" if they fell within the term *iure imperii*. Lord Wilberforce, in *I Congreso del Partido*, when discussing the distinction between an act *iure imperii* and an act *iure gestionis* stressed that the ultimate test, as set out by Robert Goff J at first instance:- "..... 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." (See [1983] 1 AC 244 at 269B-C.) 237. See also *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania*

[2007] QB 886, at 929E-F. This is not to conclude that *acta iure imperii* is a particularly narrow category - see the extracts, above, from *Kuwait Airways* and *Propend Finance Property*

- but it remains "governmental or sovereign activity", and is to be distinguished from private activities. 238. Hemisphere argued "Clearly both the traditional *iure imperii*, such as defence of the realm and the maintenance of law and order and the commercial activities in which modern States engage, the *iure gestionis*, are in day to day reality, functions of a government"
- see Advocate Lawrence's contentions at paragraph 3.20, relying on the following passage from the judgment of Lord Denning in *Trendtex* at page 119A-119E:- "(i) The doctrine of absolute immunity. A century ago no sovereign State engaged in commercial activities. It kept to the traditional functions of a sovereign-to maintain law and order-to conduct foreign affairs and to see to the defence of the country. It was in those days that England -with most other countries-adopted the rule of absolute immunity. It was adopted because it was considered to be the rule of international law at that time. (ii) The doctrine of restrictive immunity. In the last 50 years there has been a complete transformation in the functions of a sovereign State. Nearly, every country now engages in commercial activities. It has its departments of State-or creates its own legal entities which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as *iure imperii*, but no immunity to acts of a commercial nature, *iure gestionis*." 239. Although Lord Denning here refers to "the traditional functions of a sovereign" and "a complete transformation in the functions of a sovereign state", he then refers to "acts of a governmental nature" and "acts of a commercial nature". It appears to me that he was there intending to confine immunity to entities that were controlled by the State and discharging "acts of a governmental nature" (or "governmental functions"), and not merely engaged in "acts of a commercial nature", even if on behalf of, or for the benefit of, the State. (This is also consistent with Lord Wilberforce's description of "sovereign or public acts" in *I Congreso del Partido*, at pages 262 to 267.) A degree of confusion in relation to the importance of the "functions" component of the test

may therefore arise from the fact (heavily relied on by Hemisphere as mentioned above) that a State can be involved in activities which fall within *iure imperii* and *iure gestionis*

- an important distinction when considering the restrictive theory of sovereign immunity. However, to say that a State can be involved in both (or either) activity is of no assistance when answering the prior question in this case - whether or not the entity under consideration is itself to be categorised as the State, or an alter ego or department of the State. A high level of State control together with activities which fall within *iure gestionis* is not enough. The alter ego test is a means of determining whether or not an entity is to be treated as if it is the State. Or, in this case, and to adopt and adapt the words of Shaw LJ in *Trendtex* at 572H: "The cardinal question is whether [Gécamines] is properly to be regarded as a department of the Government of [the DRC] in the guise of a [mining company], or whether it is in truth a [mining company] to which the execution of specific aspects of government control of finance has been delegated." There is some force therefore, in the submission made by Advocate Harvey Hills that the functions, or activities, of the entity must at least include acts which would fall within the category of *iure imperii*. 240. Bearing in mind Lord Justice Shaw's reference to equality of treatment, the *iure imperii/iure gestionis* distinction would tend to support the conclusion that Gécamines is not entitled to sovereign immunity, and is not therefore an organ of the State - it is a separate entity, essentially engaging in commercial activities (*iure gestionis* rather than *iure imperii*), even if for the benefit of, and heavily controlled and influenced by, the DRC, and at least occasionally as agent of the DRC. 241. We were referred to the facts and decision in *C. Czarnikow Ltd v. Central Handlu Zagranicznego Rolimpex*

[1979] A. C. 351. In that case, Rolimpex was a state trading organisation of the Polish state, but the finding by the Court of Appeal (in turn based on findings by the arbitrators) was that it was not an organ of the state even although subject to the directions of the appropriate minister who could tell it "what to do and how to do it"

- see Lord Wilberforce at 364D-F, Viscount Dilhorne at 367C-F, and Lord Salmon at 369G-H. The findings reflect the facts in that case, and to that extent are of limited assistance, but the reference by Viscount Dilhorne at page 367 "the respondents were not so closely connected with the government of Poland" may be a useful pointer when looking at the facts (and the correct approach) in this case. Recent case law 242. I turn now to the more recent case-law. The decisions where the *Trendtex* formulation of the organ of state test has been accepted appear to be cases not dissimilar to the instant case - where a person (here Hemisphere) seeks to enforce an award or judgment against a State by identifying the assets of an entity outside the State. As noted above, we were taken to two such cases decided in 2005. 243. *First, Kensington International Limited v. Republic of the Congo*

[2005] EWHC 2684 (Comm) , [2006] 2 BCLC 296, Cooke J. The background to this case is that, between 20 th December 2002 and 23 rd January 2003, Kensington obtained four judgments in the Commercial Court for over US\$110m which the Congo had ignored and which Kensington then attempted to enforce. In various proceedings, judges of the

Commercial Court found that the Congo had been taking elaborate steps to conceal its oil trading activities in order to prevent Kensington from identifying any resulting assets that might be seized in execution. The key paragraphs addressing the test to be applied are 52 to 54:- "[52] The decision of the Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria*

[1977] 1 QB 529 is the prime authority in relation to the principles which apply when determining whether any given entity is or is not part of the State. At page 560 Lord Denning MR stated that it was necessary to look to all the evidence to see whether the organisation in question was under government control and exercised governmental functions in order to determine whether it was part of the State. Shaw LJ stated, at page 573, that whether a particular organisation is to be accorded the status of a department of government or not must depend upon its constitution, its powers and duties and its activities. In that decision, the court was concerned with ascertaining whether or not the Central Bank of Nigeria was entitled to immunity from suit, a matter now governed by statute with particular provisions where commercial activities are undertaken by a State or a part of it. The Third Parties say that the issue which arises in the present case, which is whether a particular body should be held liable for the debt of the State is a different question from that which was explored in *Trendtex* for the purpose of determining whether or not a body was entitled to immunity from suit.

[53] Whilst the questions are different, it appears to me that the answers will turn on the self same factors. In *Trendtex*, Shaw LJ said that there could be no intermediate hybrid status occupied by the bank where it was regarded as a government department for certain purposes and as an ordinary commercial or financial institution for different purposes. It had to be one or the other. Since a state can be involved in commercial activities and there are many state organisations which are so involved, the simple question here is whether or not SNPC and/or Cotrade are to be equated with the State of the Congo. The fact that a body is, on its face, a separately constituted legal entity with a separate corporate personality is plainly not decisive because of the number of State organisations which exist and which are part of the apparatus of the State and carry out governmental activity or functions. The *Trendtex* decision establishes that the key questions are those of 'governmental control' and 'governmental functions' and that these are to be determined as a matter of English law, although the English courts may have regard to the position under the law where the body is incorporated and account can be taken of the view of the government concerned. An entity which is constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates, can be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of an organ of government (see *Mellenger v New Brunswick Development Board* [1971] 1 WLR 604 (CA) at page 609, although in that case the entity had never pursued any ordinary trade or commerce at all and was equivalent to the Board of Trade in England, as it then was).

[54] Here the founding statute, the byelaws and the convention to which I have already made reference reveal the State's involvement in SNPC and its control of the board of directors. Mr Gokana's own position as Special Adviser to the President of the Congo as well as being President and DG of SNPC speaks for itself." There had been prior decisions, in London and in Paris, equating SNPC with Congo. Cooke J agreed with those decisions, and at paragraph 55, held: "[55] On the materials available to me, I agree with paragraph 32 of the judgment of Tomlinson J where he found that SNPC is simply part of the Congolese State and has no existence separate from the State. The Congolese legislation and SNPC's byelaws do demonstrate "that its purposes are to undertake the exploitation of Congo's oil reserve on behalf of the Congo, to hold that State's oil related assets on its behalf and to represent the State on oil related matters. It is financed by the State, its function is to act on behalf of the State and it is under the financial and economic control of the State with its officers being government appointees." Whilst it previously traded through SNPC UK and now trades itself or through its subsidiary Cotrade, it acts as the trading arm of the State and is controlled by it, whilst putting into effect Government policy in relation to oil and oil products. The two decisions of the French Court of Appeal to which I have referred earlier, are to the same effect." (The judge reached a similar conclusion in relation to SNPC's subsidiary La Congolaise de Trading [Cotrade] - see paragraph 63.) 244. In reaching his conclusion, Cooke J was clearly heavily influenced by SNPC's expressed purposes - these are referred to in paragraph 45 of the judgment, with emphasis added:- "[45] Article 4 of law 1-98 sets out the purposes of SNPC as follows:-

- (i) "to engage on behalf of the Congo directly, through subsidiaries or in connection with foreign partners, in all operations of production, treatment, transformation, value adding and transportation of liquid or gaseous oil, in Congo or abroad; (ii) to undertake or participate in all industrial, commercial, technical operations, whether on goods or real estate or related directly or indirectly to the above described operations; (iii) to undertake on behalf of the Congo all operations of investments or management and audit in the gas and oil sector; (iv) to trade in the extracted products originating from the oil fields or the industrial facilities of treatment or transformation;
- (v) to participate, pursuant to the oil agreements, in the fixing of oil prices; (vi) to hold and manage, on behalf of the Congo , all the assets, rights, direct and indirect, whatever their nature, held originally by Congo, directly or through Hydro-Congo [SNPC's predecessor] in all activities related to research, exploitation, treatment and transformation of oil and secondary or connected products; (vii) to represent the interests of the Congo in all contractual relations with third parties in connection with exploitation of liquid or gaseous oil, secondary or connected, including in connection with the control and verification mechanisms belonging to the State; (viii) to give opinions on the government policy regarding liquid or gaseous oil." 245. This appears to be the main basis for the conclusion, together with the analysis in paragraph 53 of the judgment (set out above, but here repeated):- "An entity which is constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in

which it operates, can be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of an organ of government (see *Mellenger v New Brunswick Development Board*

[1971] 1 WLR 604 (CA) at page 609, although in that case the entity had never pursued any ordinary trade or commerce at all and was equivalent to the Board of Trade in England, as it then was.)" If Cooke J is here saying that any commercial body, with separate corporate identity, "which assists, promotes and advances the industrial development, prosperity and economic welfare of the area in which it operates" assumes the position of an organ of government, I respectfully disagree. This is not what is said at page 609 of *Mellenger*, and is inconsistent with the decision in *Trendtex*. It would also mean that countries in which there is strong State control of the economy, whether or not operating communist systems of government, would find it difficult if not impossible to create independent commercial companies. There would be other problems, for example in relation to nationalised industries in democratic countries where the very reason for that nationalisation may well be to promote and advance the industrial or commercial development, prosperity and economic welfare of the country (or an area of it). Therefore, Cooke J must have been intending to refer to "sole purpose", or some other more certain indicator, to establish that the entity being considered "is effectively carrying out government policy in the way that a government department does"

- at least standing in the shoes of a body such as the Board of Trade referred to in *Mellenger*. 246. Second, *Walker International Holdings Limited v Republique Populaire du Congo*, and others

[2005] EWHC 2813 (Comm), *Morison J.* The judge sets out the test he proposed to apply to SNPC at paragraph 94:- "Mr Flaux QC has persuaded me that the test is more akin to the test of whether a State owned company is, for immunity reasons, to be regarded as a department of State or as a separate entity [see s 14 of the State Immunity Act 1978]. If that is correct, then the decisions in *Trendtex v Central Bank of Nigeria* [1977] QB 529, [1977] 1 All ER 881, *Czarnikow v Rolimpex* [1979] AC 351, [1978] 2 All ER 1043 and *Kuwait Airways v Iraq Airways* [1995] 3 All ER 694, [1995] 1 WLR 1147 are relevant." 247. The judgment is of interest because it also sets out the decisions of the Paris Court of Appeal, at paragraph 10, ending:- "Whereas if as a rule the state's guardianship or even control of a legal entity, exercised through its directors, and the public service mission which is devolved to it, are not sufficient to enable it to be considered as an entity emanating from the state implying its assimilation with that state, in the cases in point with respect to S. N. P. C. the Congolese state has reserved to itself not a simple power of supervision but a veritable power of guidance and approval constituting true interference. This means that S. N. P. C has no real autonomy that could result from its status as a company recorded in the register of financial operators. It constitutes a legal entity which is clearly fictitious and, hence, is an emanation of the Republic of the Congo." (emphasis added) And, at paragraph 15, the judgment of *Tomlinson J* referred to earlier, which includes the following:- "..... the

evidence in the case does, in fact, go further and demonstrates that SNPC is simply part of the Congolese state and has no existence separate from the state. That is demonstrated by the Congolese legislation, which establishes SNPC and demonstrates that its purposes are to undertake the exploitation of Congo's oil reserves on behalf of Congo, to hold the state's related assets on its behalf and to represent the state in oil related matters. The by-laws of SNPC are to similar effect. It is financed by the state. Its function is to act on behalf of the state, it is under the financial and economic control of the state and its officers are government appointees." 248. Morison J's conclusions on this issue are at paragraphs 97 to 100:- "[97] The conclusions I draw from the documentation, the only source of potentially reliable evidence, is as follows: SNPC is ultimately controlled by its Chairman who is the President's representative, to whom the Board have power to delegate their functions. Mr Itoua appears to have been personally responsible for signing most if not all documents on behalf of SNPC. There are some aspects of SNPC's existence which suggests it is a company owned by the State. For example it was formally incorporated and has its own Articles. It has a Board of Directors. Its accounts are audited [to a limited extent]. On the other hand, SNPC has unaudited and unverifiable compte courants with the State; it does not declare dividends and its profits do not return to the State in cash: instead it makes expenditures normally made by Government, such as paying for elections, peace initiatives and making donations by way of humanitarian aid. This is inconsistent with SNPC being a commercial company owned by the State.

[98] There was a black hole in the accounts of SNPC in 2001 because of the relationship between it and the state. Commercial companies do not use their assets to pay for items of expenditure demanded or required by the Government. Instead, they declare dividends which the State collects, out of profits on which the company pays tax. Here, SNPC is, to an extent a tax collector on behalf of the State and an arm of the Treasury in financing Government projects. Those are not functions associated with a State owned commercial organisation. It is, therefore, essentially and fundamentally different from a State owned oil company by reason of its Articles of Association, its funding, its investments, the way its profits are dealt with and its accounting policies.

[99] The distinction which Mr Flaux QC seeks to draw between SNPC's own oil and that belonging to the State is one without substance since its accounts do not and cannot accurately differentiate between the two: it has one set of earnings and not two and oil cargoes are mixed. The oil trading cannot be verified since Congo is unwilling for SNPC's documents to be disclosed on grounds of security, not security of SNPC but of the State. The consequence of the Government causing or permitting SNPC to continue its present activities in the way it does is to cause a leak in the monies available for State purposes and to encourage corruption. It also puts SNPC firmly into the category of an organ of the State with no independent commercial existence. The State uses SNPC as a vehicle for doing the Government's business. It is properly to be regarded as a governmental organisation. This case is distinguishable from the facts in the Rolimpex case. There, the Polish company did not make disbursements out of its funds for the benefit of the Government. It was expected

to make a profit from activities which, albeit under the control of the Minister, were determined by the company itself. Here there was no dividend; the control of the Government was absolute in terms of the voting majority on the Board, even assuming that the Articles were a reality rather than just window dressing. In that case the court received extensive evidence from the company; here no-one has come to tell the court about the way its business is run.

[100] Furthermore, I am not persuaded that it would be safe to rely on the face value of the documents. Form and reality may not coincide. For example, the impossibility of separating out the oil trades made by SNPC of State oil from the trades made of what is called its own oil suggests that the distinction between the two is not in reality maintained. Further, it is clear that the state is requiring SNPC to undertake activities which fall outside its articles [see the IMF report]. Finally, the complete lack of witnesses from SNPC to explain the problems which I have identified makes it impossible for the court to accept Mr Flaux QC's submissions. The documents alone do not tell the whole truth. A combination of the factors that I have identified leads me to the conclusion that SNPC is an organ of the state." 249. The analysis in *Kensington and Walker* has not been free from criticism - see *Continental Transfert Technique Ltd v Federal Government of Nigeria* and others

[2009] EWHC 2898 (Comm) , Jonathan Hirst QC (sitting as a deputy judge of the High Court) at paragraphs 36 to 43, particularly at paragraph 42 where he treated counsel's reliance on these two decisions (and decisions in the Paris Court of Appeal) with some scepticism:- "[42] However, I have to confess that I am distinctly sceptical about the validity of Mr Lockey's arguments in English law. English rules on conflict of laws recognise the existence of foreign corporations duly created under the law of a foreign country: see *Dicey Morris & Collins on The Conflict of Laws* (14 th ed) r 161 on pp 1339 et seq. In the absence of a sham or fraud (which is not even suggested in this case), it is not obvious why the separate status of a foreign corporation should be ignored just because it is an organ of a State. Mr Lockey was not able to produce any authority or academic commentary (apart from those cited above) which suggests that there is some special rule in international law. Indeed in *JH Rayner (Mincing Lane) Ltd v DTI* [1990] 2 AC 418 at 482, [1989] 3 All ER 523, [1990] BCLC 102 (the International Tin Council litigation), the House of Lords applied the well established principles stated by Lord Halsbury LC in *Salomon v A Salomon and Co Ltd*

[1897] AC 22 , 30, [1895 - 9] All ER Rep 33, 66 LJ Ch 35 that "once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself . . .". 250. We were also referred to *Wilhelm Finance v. Ente Administrador Del Astillero Rio Santiago*

[2009] EWHC 1074 (Comm) , Teare J. The decision concerned a state operation (the Defendant) formed in 1993 to manage and administer a shipyard until it was privatised. The judge held (at paragraph 20) that whilst the Defendant was owned and to a significant extent controlled and financed by the state, "its functions and activities appear to be those of a

commercial shipyard which builds and repairs ships for both the Argentine Navy (and other governmental or public bodies) and private shipowners". This focus on function was by reference to the case-law which has considered the meaning of "a State" and "a separate entity" in section 14 of the 1978 Act - *Kuwait Airways Corporation*, and other cases, referred to below. At paragraph 9 there is a reference to *Trendtex*, and at paragraph 10 the following reference to and extract from the decision of *Gross J in Tsavlis Salvage (International) Limited v. The Grain Board of Iraq (The Altair)*

[2008] 2 Lloyd's Rep 90 :- "[10] Finally, in *The Altair*

[2008] EWHC 612 (Comm),

[2008] 2 All ER (Comm) 805,

[2008] 2 Lloyd's Rep 90 *Gross J* had to consider whether the Grain Board of Iraq was a department of the Ministry of Trade of the Republic of Iraq or was a separate entity. At para 64 he cited the following principles from *Dickson, Lindsay and Loonam, State Immunity: Selected Materials and Commentary*: "a) The characterisation of a party to proceedings as a department of the government of a foreign sovereign State depends not on any single factor, but on a consideration of all relevant circumstances.

- b) The status of the party under the law of its home state is one relevant factor but is not decisive. Nor is the presence of separate legal personality itself decisive against characterising a party as a department of government.
- c) A detailed analysis of the constitution, function, powers and activities of the party and of its relationship with the state is likely to be essential. The existence of State control is not, however, a sufficient criterion.
- d) The courts are likely to exercise caution before treating a party having separate legal personality as a department of government"

[11] *Gross J* added: "The authors go on to say that there should not be a 'judicial no-man's land'; the principles to be applied in determining whether an entity is a 'department of government' should mirror those for determining whether the entity is a 'separate entity'." 251. *Teare J's* conclusions in *Wilhelm Finance* are brought together in paragraphs 49 to 51:- "[49] It was submitted on behalf of the Defendant that the commercial nature of the specific transaction between the parties was 'completely irrelevant' because states and state entities engage in commercial activities without altering their status as sovereign entities. However, the nature of the Defendant's functions have to be examined in order to decide whether the Defendant is, within the meaning of s 14 of the State Immunity Act 1978 as explained by the English authorities to which I have referred, a department of government or an entity distinct from the executive organs of the government of the state.

[50] For these reasons I am unconvinced by Professor Citara's opinion that the Defendant is a department of government, at any rate in the sense in which that expression is used in s.14(1) of the State Immunity Act 1978. On the contrary I consider, on the balance of probabilities, that it is not a department of government and is an entity distinct from the executive organs of the government of the State, for these

reasons:

- (i) The Defendant was created with the object of managing the shipyard (or more accurately the assets transferred by the national to the provincial state) until the time when the shipyard was privatised. (ii) It determines and carries out the commercial policy of the shipyard (see art 5 of the 1993 decree). (iii) It has power "to act either in the public or private areas" (see art 2 of the 1993 decree) and does so. (iv) The Defendant is, as Professor Citara accepts (see para 57 of his first statement), "an organisation aimed at the production of goods and services".
- (v) The work the Defendant does is not work of a type associated with the executive organs of government. It is on the contrary work such as a private company might do.

[51] I have not overlooked the facts that the Defendant is owned by the state, that the government nominates the board of directors, that the Chief of Cabinet of the Province of Buenos Aires was assigned the responsibilities of the President of the board (I was, however, informed at the hearing that a president has now been appointed.), that the Defendant is responsible to the government through the Ministry of Production or that financial support is provided by the government. These factors show that the entity is "of the state" but the English authorities to which I have referred make clear that such characteristics are insufficient to make the Defendant a department of government or an entity which is not distinct from the executive organs of government of the state in circumstances where its functions or activities are those which a private company might have in trade or commerce." 252. I have also considered the recent decisions of the Court of Appeal and the Court of Final Appeal in *Hong Kong in Democratic Republic of Congo, and others v FG Hemisphere Associates LLC*

[2010] 2 HKLRD 66, and (FACV No 5/ 2010), but have concluded that they do not assist in determining the issues that arise in this appeal. 253. If the test to be applied is based on *Trendtex*, it is important to keep in mind (as noted earlier) that that decision pre-dated (and, at least in part, contributed to) the enactment of the Sovereign Immunity Act 1978. Care must therefore be taken when looking at subsequent cases which are likely to focus on the domestic statutory meaning of "any department of government" and "separate entity" in section 14 of that Act: "any entity which is distinct from the executive organs of the government of the State and capable of suing or being sued". 254. The *Trendtex* test also pre-dates the UN Convention on Jurisdictional Immunities of States and Their Property (2004), and the definitions of "State" there set out - in Article 2.1(b) - dealing with "agencies or instrumentalities of the State or other entities, to the extent that they are

entitled to perform and are actually performing acts in the exercise of sovereign authority of the State". By this time, the adoption of the restrictive doctrine of State immunity based more on the nature of the activity complained of (immunity *ratione materiae*) rather than based on status (immunity *ratione personae*), made it less important, at least in international law, to determine whether or not the entity under consideration was an organ of the State - see Part III, particularly Article 10. Discussion 255. In summary, therefore, although each case will depend on its own facts (but taking care to apply the *Trendtex* test), an entity will only be held by the courts in Jersey to be an organ, or alter ego, of the State if it is under government control and it discharges governmental functions. The test, and the answer to the question, should not change depending on whether the entity is claiming State immunity or whether (as here) it is being held responsible for the debts of the State. On this final point the Royal Court said as follows (paragraph 16):- "Other principles suggested by Mr Harvey-Hills [Advocate for Gécamines] as flowing from these cases and of particular relevance to the present litigation were that there can be "no intermediate or hybrid status" for an entity for present purposes (per Shaw LJ in *Trendtex*); that the burden is on Hemisphere to prove its case; and that the requirements of control by the Government and performance of governmental functions by Gécamines are cumulative and not alternative. None of these was seriously challenged by Miss Lawrence [for Hemisphere]. For our own part, however, while it is easy to understand why performance of governmental functions should be a necessary element of enjoying the privilege in international law of immunity from suit or execution, it is less obvious why (hypothetically) property held in the name of an entity which is engaged in activities that would not by any stretch of imagination normally be described as 'governmental' but which is wholly owned and controlled by the state (and, by any other standard one cares to think of, is nothing more than an instrument of the state), should not be available to creditors of the state to the same extent as any other state property. It may be that the matter will need to be explored on some future occasion: for the present we are content to proceed on the basis that both limbs of the test need to be satisfied if Hemisphere is to succeed, noting in passing that the exploitation of the nation's oil reserves by SNPC was clearly regarded by both Cooke J and Morison J as a governmental function." 256. Notwithstanding the reference by the Royal Court to "both tests" (control and governmental functions) in the last sentence of this paragraph, the earlier obiter remarks downplaying the need for "performance of governmental functions" may have lead the Court to concentrate too heavily on control by the DRC. 257. Drawing the case-law together - and proceeding on the basis that the Court of Appeal in Jersey should follow the reasoning of all the members of the Court of Appeal in *Trendtex* - I conclude that it was necessary for Hemisphere to have established the following on the evidence, before the Royal Court could have held that Gécamines was an organ, alter ego, emanation or arm, of the DRC: (1) That it was under the control of the DRC; and (2) That it exercised governmental functions. 258. In relation to the first of these criteria, control must mean more than a mere majority, or even 100%, share-holding in the entity (if, as here, it is a company). It is, in my view, necessary to show more (perhaps far more) than the level of

control required to identify "an emanation of the State" within cases such as *Foster v British Gas* (see above). But it is not possible to be more precise, and what is the necessary level of control will be a matter of fact and degree. 259. In relation to the second criterion, it is not sufficient to show that there is some discharge of governmental functions - if that were the test, the Central Bank of Nigeria was bound to satisfy the requirement (but did not) as not only was it under "a great deal of government control" but it also discharged (on a permanent basis), at least according to Lord Denning, the important governmental functions of issuing legal tender, safeguarding the international value of the currency, and acting as banker and adviser to the government. The discharge of "governmental functions" must be predominant, or (perhaps) the essence of what the entity does so that it has no other existence. Nor can it be sufficient, as suggested by Cooke J in *Kensington and Morison J in Walker* (and as noted by the Royal Court at paragraph 16), for the entity to be involved in "the exploitation of the nation's oil [or mineral] reserves" and therefore discharging a governmental function - if that were the correct analysis, it is difficult to see how a State owned oil or mining company could fail to be held to be discharging a government function and (thereby) entitled at common law to sovereign immunity. It was common ground in this appeal that because an industry (or sector) has been nationalised this did not mean that the wholly owned entities became organs of the State - this is consistent with case-law pre-dating *Trendtex*, such as *Tamlin v Hannaford* [1950] 1 KB 18, Denning LJ at page 24 (and referred to in *Trendtex* at page 559G). A modern democratic State may choose (and is likely only to choose) for nationalisation areas of activity which are important, probably vital, to the economic and social well-being of the nation - energy, food production or transport for goods and people (or any other similar area). But, in my view, allowing a State owned company (or companies) to exploit reserves of coal, oil or minerals, does not convert that company into an organ of the State. In contrast, assigning the ownership of all State owned oil (or similar) reserves to a company so that the company acts on behalf of the State in, for example, granting licences to exploit, may be and probably is different. 260. Although there may be some overlap between control by government and exercise of a governmental function, as already noted they are different and cumulative requirements. It follows that what was described in submissions as a finding by the Royal Court of "egregious" control of Gécamines by the DRC is not probative of "discharge of governmental functions". There may be very good reasons why a State would want to exercise a very considerable degree of control over, for example, a nationalised industry, without the entity becoming an organ of the State, or "part and parcel of the State" (Stephenson LJ in *Trendtex*) or "a mere instrument of that government", a "a mere government bureau", or "so related to the Government of Nigeria [for which read the DRC]" (Shaw LJ). 261. Finally, on both the control and functions tests, it is dangerous to take too holistic a view so that the Court looks merely at "the reality of things" without clearly identifying not only the elements of control relied on, but also what it is about "the activities it pursues" or the "functions it performs" that entitles it to be treated as an organ of the State (carrying both benefits and detriments). 262. Hemisphere invited the Court to approach the test to be applied as follows, taken from *Advocate*

Lawrence's contentions at paragraphs 2.4 - 2.6, and 2.10:- "2.4 The evidence consists of de jure elements, such as the laws generally governing public enterprises like Gecamines and any articles or by-laws specific to the company, and de facto elements, such as how much control the state exercises over Gecamines, how the State treats and uses the company, and how Gecamines itself behaves. The question is whether, on balance, the entity appears more like a truly separate and independent commercial enterprise, or more like an organ of the State, a part of the State's governing apparatus whose purpose and use by the State

- whatever the nature of its activities - is as a tool or conduit to promote or further the government's policies and to effectuate the executive's governmental functions. 2.5 Lord Denning in *Trendtex* identified the relevant criteria for making this assessment: governmental control and governmental functions. He did not, however, draw an artificial, 'bright-line' distinction between the two as Gecamines has sought to do in its appeal, nor did suggest that one element carries more importance or weight than the other. It is the overall impression that matters, taking both elements into account. 2.6 Certainly an organ of the State would be expected to be engaged in, or used by the State to accomplish, governmental functions: the more often and significant the better. But governmental control is equally important. Indeed, the more that an entity is controlled and dominated by the State, the more likely it is that the State is using the entity for its own purposes, to effectuate, or cause it to undertake on the State's behalf, the State's governmental functions rather than any independent functions or purposes of the entity. 2.10 What matters is whether the entity, viewed fairly and objectively appears to be a genuinely separate, independent enterprise or whether it is simply a tool or device of the State, part of the particular State's governing approach and apparatus to effectuate its policies concerning the economy or industry within its territory." 263. As noted above, I accept that there may be some degree of overlap between the "state control" and "state functions" requirements, but there is a danger in the last sentence in paragraph 2.6: "Indeed, the more that an entity is controlled and dominated by the State, the more likely it is that the State is using the entity for its own purposes, to effectuate, or cause it to undertake on the State's behalf, the State's governmental functions rather than any independent functions or purposes of the entity." The contrast between "governmental functions" and "any independent functions or purposes of the entity" can be misleading in that an entity which is controlled, wholly controlled, by the State may well be required to perform its commercial/industrial functions without independence, certainly without "true" independence. But, it does not follow, in my view, that a high degree of control such that "the State is using the entity for its own purposes" leads to the conclusion that it is performing "governmental functions" as that term was being used in *Trendtex*. A body, even if a separate legal entity, which is heavily controlled by the State may not be viewed, objectively, as "a genuinely separate, independent enterprise" (from paragraph 2.10 of Hemisphere's contentions set out above). 264. There can be no doubt on the evidence that Gécamines is a substantial mining company, and "Of the five or six state-owned mining companies active in recent years, Gécamines is by far the largest" (judgment of the Royal

Court - see paragraphs 3 and 44), and that it engages in commercial operations. Although some doubt was cast on the affidavit evidence of Mr Calixte Mukasa Kalembwe ("Mr Mukasa"), Interim General Manager for Gécamines in relation to recent events and reforms, his account of the history of the Belgian Congo, the DRC, and the company does not appear to be open to serious question. In paragraphs 14 to 46 of his first Affidavit Mr Mukasa sets out the "factual history". These paragraphs attract little of the criticism reserved for more recent events by Mr Grossman (for Hemisphere) in his evidence in rebuttal. It is clear from Mr Mukasa's evidence, and accepted by Hemisphere (see, for example, Mr Grossman's first affidavit at paragraph 41), that Gécamines has a separate legal personality and that, according to its Articles of Association, it has been constituted to carry out industrial and commercial purposes. 265. There can be no doubt, therefore, that on its own until the early 1990s, and thereafter through joint ventures, Gécamines indeed carried out industrial/mining and commercial operations

- see, for example, the Profit and Loss Accounts for the years 2007 and 2008, and the independent auditors' report by PricewaterhouseCoopers, produced to the Royal Court. This immediately marks it out as fundamentally different from the non-trading companies being considered at or about the time of the Trendtex decision. It will be recalled that Lord Denning referred to his judgment in *Mellenger v New Brunswick Development Corporation*

[1971] 1 WLR 604, at 609D: "The corporation ... has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does." This distinction is also emphasised by Lord Denning in *Mellenger* itself at page 610B: "I adhere to the view which I expressed in the *Rahimtoola* case ([1957] 3 All ER at 460, [1958] AC at 417) that: '... a separate legal entity which carried on commercial transactions for a state was an agent, and not an organ, of the government ...' and is not entitled to plead sovereign immunity. But that does not apply to the corporation because it did not carry on any commercial transactions. Seeing that the corporation is in the same position as a government department, it cannot be sued here." Gécamines is a very different animal

- it did and does carry on commercial transactions. It is a separate legal person. It makes contracts with others. I accept that the fact that Gécamines trades cannot be determinative in its favour - after all, SNPC (referred to in *Kensington*) was described as "an industrial and commercial public cooperation". But it is to be recalled that Cooke J (and Tomlinson J before him) held that "SNPC is simply part of the Congolese State and has no existence separate from the State" (emphasis added). This seems to me to be a strong conclusion - not a matter of control by the State, or the absence of genuine independence from the State, but "no existence separate from the State". This conclusion effectively enables the Court to "pierce the corporate veil" so as to allow the liability of the State (under its own contractual, arbitral, liabilities) to be attributed to SNPC (although a separate legal entity). 266. I do not consider that there is a need for some bright line between the "control" and "function" parts of the Trendtex test. But, in my view, there is a need for some greater degree of certainty, some

greater degree of clarity when identifying what responsibilities, what powers or duties, are or are not to fall within "governmental functions". Without that certainty and clarity, there is a danger that the requirement will extend to include all activities of the State, or all important or significant activities, even if essentially commercial, and the requirement will become meaningless. In this case, the activity is mining for a mineral centrally important to the economy of the DRC: in Kensington and Walker, oil. But it could be any economic activity where a State may want to become involved commercially, even dominant in that particular area. It does not seem to me that the subject matter of the activity (if it is exploitation and marketing of a national asset) can be determinative. If the Trendtex test is to continue to be applied, the differentiation must be between activities in such areas that are broadly regulatory (public acts) rather than broadly commercial (essentially private acts) - perhaps reflecting the subsequent reference to "executive organs of the government of the State" in section 14(1) of the SIA 1978. It may be that this leads back to *acta iure imperii* and *acta iure gestionis*, or that a new common law (international law) test needs to be devised, more suitable to the modern world - or at least more suitable to the international debt-chasing we are here considering, where there is no claim at all for sovereign immunity. 267. In their judgment, McNeill and Bennett JJA propose that the Trendtex requirement as to functions "will be met where the principal functions and activities of the entity are properly to be viewed as governmental; thus making due allowance for ancillary activities which are either non-core functions or are functions which are merely supportive, such as provision of offices and equipment, staff support, facilities management and the like"

- see paragraph 71 [check] of their judgment. I can see some attraction in that approach, although it does not chime precisely with what I see as the Trendtex requirement, but it does serve to expose the difficulties in this case when an entity (here Gécamines) has a real commercial existence, trading and making contracts in his own name, sued and being sued. Even if it could be said to be performing some governmental functions (for which see below) its non-governmental activities are far more than merely "ancillary"
- and there is no submission here (unlike in Kensington and Walker), that it is in any way a sham operation, or a mere facade for the DRC. The Royal Court's decision 268. An appellate court should be extremely reluctant to reverse the lower court's evaluation of the facts, or to interfere in matters involving the exercise of a discretion (see *Abdel Rahman v Chase Bank (C. I.) Trust Co Ltd*

[1984] JJ 127, at page 134 and *United Capital Corporation Limited v. Bender and others*

[2006] JLR 269, Beloff JA at [23] to [27]). But, we have been provided with all the documentation (and submissions) relied on below, and there was no oral evidence. In those circumstances, notwithstanding the reluctance referred to above, it will be appropriate to reach a different conclusion if (1) the wrong test has been applied, or (2) the inference drawn from the factual material is not sustainable. 269. Hemisphere's arguments as to why Gécamines was an organ of the state were broken down by the Royal Court, correctly in my view, into two main submissions (see paragraphs 60 to 89, and 90 to 137):- "(1)

Gécamines' Constitution - The legal regime under which Gécamines was until recently constituted and under which it operated for most of its life is one that is fundamentally incompatible with the concept of an entity with an identity genuinely independent of the state and that nothing in the recent attempts at reform has altered that position" - judgment paragraph 60; and "(2) Relations between Gécamines and the State - Irrespective of the constitutional formalities, Gécamines has in practice always been under the dominion of the government of the day, its internal management overridden, bypassed or subject to interference, and its property taken or otherwise used for state purposes as and when the government deems appropriate. Four areas in particular are relied on to illustrate this: (A) the use of Gécamines's property for military or other governmental purposes in times of war; (B) the 'revisitation' of mining contracts that has been going on since 2007 and the treatment of related 'entry fees'; (C) the Sicomines project, and, here too, the related entry fees; and (D) Gécamines' role in the provision of social services to the populace" - judgment paragraph 90. 270. The Royal Court's overall conclusions are set out in paragraphs 138 to 142. Gécamines' Constitution 271. I will not here attempt to reproduce the careful summary of the evidence by Commissioner Page in this section of the judgment of the Royal Court. I have read the affidavit evidence and relevant exhibits supporting the analysis. The key paragraphs are 63 and 66, here reproduced in full:- "63. At their simplest, the main planks of Hemisphere's argument are, first, that Gécamines is and always has been wholly owned by the state. And, secondly, that from 1995 onwards at least its articles, coupled with the impact of the 1978 Law, conferred on the state a degree of power and potential control over Gécamines that went beyond anything that could be regarded as merely inherent in the fact of 100% ownership - a degree of power that was intrusive and incompatible with the concept of independence in any real sense. "66. As regards Gécamines' 1995 articles, these only served to underline the subservience of the company, providing as they did:

- (i) that the composition of the board, the appointment and removal of its members, and of the management of Gécamines were to be determined by the President of the DRC; (ii) that Gécamines' budget had to be submitted to the Minister for Mines for approval; (iii) that the company's net profits were to be used to constitute reserves and/or to be remitted to the state Treasury at the discretion of the government; (iv) that Gécamines was for the most part subject to the authority of the Minister for Mines as regards the making of contracts for the supply of goods and services, the annual report, the organization of departments, the hierarchical structure, conditions of employment and salary scales, the establishment of agencies and offices, the acquisition and disposition of immovable property, borrowing and loans, the acquisition and disposition of investments, the specific accounting plan, the budget or forecast of revenues and expenditure, the end of year accounts and the balance sheet;

- (v) that Gécamines' assets ("le patrimoine") derive entirely from the state and may not be increased or decreased without acknowledgement by decree from the Prime Minister (Article 4 and 6)." 272. What the supervisory regime and the 1995 Articles clearly show is that there was a great deal of control by the DRC, indeed a "striking overlay of state-control mechanisms external to the company itself" (paragraph 67 of the judgment). But, it does not seem to me that because of the degree of control, and because Gécamines operated in an important economic area in the DRC (mining), that discharge of governmental function was also established, but this appears to be the conclusion of the Royal Court in paragraph 69:- "Overall, however, we find it impossible to avoid the conclusion that, as matter of constitutional provision prior to recent attempts at reform, the exceptional degree of power accorded to the state over the affairs of Gécamines, at all levels, was such that the company was no more, in truth, than an arm of the state with responsibility for operations in a sector of vital importance to the national economy." 273. At this point the case is essentially decided against Gécamines without any specific reference to governmental functions. Its nature or status (its personality) had been determined as "an arm of the state" , and this may explain why the "recent reforms" intended "to make provision for the transformation of public enterprises into either commercial companies with the state as sole shareholder or into public services" discussed in paragraphs 71 to 84 of the judgment were dismissed as not creating a "a state of affairs that amounted to any real transformation in the nature of Gécamines" . 274. "Immunity from execution" is discussed in paragraphs 85 to 89 of the judgment, but discounted entirely (see paragraph 89), and I do not address this topic further. Relations between Gécamines and the State 275. This section of the judgment is perhaps at the heart of the reasoning, and again, I will not here attempt to reproduce the extremely careful and detailed exposition of the facts and analysis provided by Commissioner Page. Hemisphere's case is summarised in paragraph 90, and four particular areas are identified to illustrate the contention that " Gécamines has in practice always been under the dominion of the government of the day, its internal management overridden, bypassed or subject to interference, and its property taken or otherwise used for state purposes as and when the government deems appropriate". 276. Some of the points here made by Hemisphere to the Royal Court (and repeated in submissions to this Court) go further to demonstrate control of Gécamines by the DRC, but again it is necessary to seek out and identify where the analysis takes the reader when attempting to identify the discharge of governmental functions. I will take the points referred to in the second summarised submission set out in paragraph 269 above in order: - "(A) the use of Gécamines' property for military or other governmental purposes in times of war; (B) the "revisitation" of mining contracts that has been going on since 2007 and the treatment of related "entry fees" ; (C) the Sicomines project, and, here too, the related entry fees; and (D) Gécamines' role in the provision of social services to the populace". 277. (A) In time of war - it appears to be common ground that the State did take at least a third of the profits of Gécamines to finance the war effort, and otherwise made use of Gécamines' assets to fund military operations, without compensation. The Royal Court concluded "Taken in isolation the subject might, perhaps, be regarded as one to which not too much weight should be accorded for present purposes; but as one piece in a larger jig-

saw it appears to us to be of substantial significance." I am reluctant to disagree with the Royal Court on its assessment of the evidence, but this is a finding or conclusion I find very difficult to accept. Seizure of profits and assets, with or without compensation, during a time of war seems to me to be a poor indicator of discharge of governmental functions (however identified), or perhaps even of governmental control. 278. As submitted by Advocate Harvey-Hills for Gécamines, the war here being referred to was a particularly terrible and long-running conflict. He refers to World Bank reports put before the Royal Court which record that "3.3 million (out of a total population of 58 million) died during the last round of the war"; and from the same report "On the social side, the crisis remains acute, with widespread hunger throughout the country, a collapse of social service delivery, an erosion of social capital, and the accelerating spread of the HIV/AIDS epidemic. The chances for the DRC to achieve the Millennium Development Goals (MDG5) by 2015 are seriously compromised". 279. In my view, Advocate Harvey-Hills' submission that what happened during the war "cannot properly be regarded as illuminating the wholly different peace time issues now before the courts of Jersey" is well made. The Royal Court, in my view, should have disregarded Hemisphere's contention to the contrary. 280. Hemisphere strongly relied on the use of Gécamines' assets by the DRC

- in times of war, and to support social projects (see (C) below) - to demonstrate that not only did the DRC control Gécamines, but also Gécamines itself performed or discharged governmental functions. In her June 2010 Contentions (at paragraph 2.24), Advocate Lawrence introduced the argument as follows:- "Historically, some of Gecamines' assets have been used by the DRC for governmental functions which do not form part of Gecamines' objects, such as the provision of public services and to fund the military operations of the DRC and its allies. This evidence goes to the 'governmental function' aspect of the test to determine whether an entity is an organ of the state." I find it difficult to see the basis upon which the use of Gécamines' assets by the DRC leads logically to the conclusion that Gécamines itself was engaged in performing governmental functions, and was to be categorised as an organ of the State. 281. (B) The 2007 Mining Commission - The Commission was appointed in 2007 followed earlier attempts to revisit and review mining contracts, particularly those made during the war years. The members of the Commission were all Government officials, and the process of re-visitation of Gécamines' contracts was held by the Royal Court to be "controlled by the Government from beginning to end". Although all the paragraphs (93 to 108) are relevant, paragraphs 101 to 103 appear to be at the heart of the analysis:- "101. Mr Mukasa's evidence was that the ensuing negotiations between Gécamines and its various contractual partners were conducted by Gécamines itself, without interference from the Government, and that all but two of its contracts were successfully re-negotiated. This, in itself, may be right. But it is plain that the tone of the Terms of Reference, read as a whole against a background of repeated indications of governmental oversight and the terms of the earlier February 2008 letters, would have left Gécamines with little scope for departure very far from the recommendations of the Terms of Reference.

102. By the end of 2008 the process was largely complete. On 19th December, 2008, the Council of Ministers (le Conseil des Ministres) met for the purpose, among other things, of receiving a report by the Minister of Mines on the results of the re-visitation process. In the case of Gécamines, the Council is recorded as having approved twenty revised contracts and having noted the termination of three others. But in two cases, where negotiations had evidently not been successful, the Council approved the setting up of an ad hoc governmental commission to take over and finalise negotiations, 'having regard to the various benefits that the Congolese State could derive from them' - one more indication of the limits within which parties were permitted to operate freely and the extent to which the whole process of re-visitation of mining contracts was controlled by the Government from beginning to end.
103. Nor is that, by any means, the end of the matter so far as consequences of the re-visitation of Gécamines' contracts are concerned. When it came to the fruits of that process, the Government appears to have had no compunction about treating a major component of them as state revenue rather than Gécamines' property. One of the principal features of renegotiated contracts was that the private sector partners became liable to pay substantial, or substantially increased, premiums for, in effect, the privilege of being allowed to enter into a joint venture with Gécamines (variously referred to as 'entry fees', 'key money', 'signature bonuses' or 'pas de porte') The sums involved were considerable. Mr Mukasa insisted that such payments were properly due and payable to Gécamines; but whatever the theoretical position might be, the documentary record leaves little doubt about the Government's stance." 282. The Royal Court also relied, at paragraph 105, on a "somewhat telling passage" from a letter written by the then managing director of Gécamines to the Minister of Mines:- "In the circumstances, it would appear that the payment of Gécamines key money and key money supplements into DGRAD [Treasury] accounts arises from a government measure which is no doubt motivated by the superior interests of the State, and Gécamines has no option but to be happy to contribute, once again, to the solution of national problems. Nevertheless, in proper consideration of the logistics of managing a commercial company, and in our capacity as agents of the state in relation to a public enterprise which is prey to difficulties which threaten its survival, we should on the one hand, ensure that the most pressing operational needs of Gécamines are met and, on the other hand guarantee that the transfer of its key monies, which constitute part of its assets, to the State are balanced, "compensated", if not by means of an income, then at the very least by the extinguishment of our company's debts to the transferor." (Emphasis added.) There is likely to be an element of sycophancy in such a letter to the Minister, but even if it is to be read without such a filter, it seems to me that it reveals a degree of independence, not to the contrary - there is reference to the difficulties of managing a commercial company, to "agents of the state", the "most pressing operational needs of Gécamines", the requirement for the transfer of its assets to be compensated. But, if and in so far as it adds further evidence of control by the DRC, in my view it says nothing in support of the submission that Gécamines is (or was then) discharging governmental functions. 283. Hemisphere contends that it does reveal the discharge by Gécamines of governmental functions (see paragraph 4.7

of Advocate Lawrence's contentions), largely on the basis (paragraph 4.7(e)) that in relation to the entry fees:- "This is therefore another straightforward example of an entity/its property in practice being made the instrument of the State, for State purposes. There is no practical difference between the State using the entity itself to fund State activities, or perform or fulfil governmental functions, or first commandeering the funds to the public treasury and then using them in the same manner. In that regard it is to be noted that it was not dividends or profits of Gécamines that were taken, but rather assets and revenues to which others besides the shareholder (eg. Gécamines' creditors) would, in any ordinary context, have some rights and entitlements." 284. Clearly, if what was being referred to was "dividends or profits" the point would be a bad one - it is very likely that the profits of an entity wholly owned by the government would be used for the Government's purposes. One can ask, rhetorically, if they are paid over to government, whose purposes should they be used for? Advocate Lawrence identifies the funds as "assets and revenue", but I do not consider the fact that the State diverted some of the incoming payments (here the key money, or *pas de porte*) into its own Treasury discloses that Gécamines is itself discharging governmental functions. I agree with the submission made by Advocate Harvey-Hills for Gécamines (see paragraph 77 and 78 of his contentions): "whether the government wrongfully took *pas de porte* payments that should have come to Gécamines is and can be of no assistance whatsoever to FGH in trying to show Gécamines performs governmental functions." If they were rightly taken, then the argument against Gécamines falls away. 285. In summary, I do not accept that the 2007 Mining Commission material advances Hemisphere's case on the discharge of governmental functions by Gécamines. If and in so far as the Royal Court relied on this material in relation to this topic (rather than in relation to control), in my respectful opinion it fell into error. 286. (C) Sicomines - this topic is discussed in detail by the Royal Court in paragraphs 109 to 132 of the judgment, and again I pay tribute to the careful and detailed summary there set out, which I do not attempt to repeat. This seems to me to be the high point of Hemisphere's case on discharge of functions. The Royal Court held that "at the strategic level, the project was essentially an inter-state one between the DRC and the People's Republic of China and could not have come about, on the Congolese side, without the overall direction and control of the Government", concluding at paragraph 189 that "the Sicomines saga is a striking example of the Government actively using Gécamines as an instrument of state economic and social policy, and doing so on a grand scale..." . 287. The Sicomines project has caused me the most concern, when examining the detailed evidence and submissions, particularly in light of the statement by the Minister of Infrastructure, Public Works and Reconstruction when addressing the National Assembly on 9 th May 2008

- see paragraph 118 of the judgment:- "This is a good time to point out that state-owned companies are instruments of the Government's economic and social policies, and as such the Government is free to use them as it sees fit , in the best interests of the Republic. In this case, Gécamines was intimately involved in these initiatives through its corporate bodies, with the understanding that the issue of the revival of this state-owned company was also

taken care of." (emphasis added) 288. I do not see how this passage can be disregarded, as submitted to the Royal Court (but not submitted to the Court of Appeal) and it clearly reveals a degree of control by the DRC over and above the control normally attributed to a government 100% shareholder. But, as we are reminded by Lord Denning in *Trendtex* (at page 560A-B) the views of a representative of the state have to be treated with some care. 289. *Sicomines* (La Sino-Congolaise Des Mines SARL - see paragraph 110 of the judgment) is a Congolese company formed in 2008 as a joint venture between, on the one hand, two major Chinese groups, China Railway Group Limited and Sinohydro Corporation ("the Chinese Enterprise Group") and, on the other, Gécamines. It was formed pursuant to two major agreements signed on 22 nd April, 2008: a "Cooperation Agreement" between the DRC and the Chinese Enterprise Group "For the Development of a Mining Project and Infrastructure Project in the Democratic Republic of Congo"; and a "Joint Venture Agreement" between Gécamines and the two Chinese groups together with certain designated affiliates of those groups". As so described there is nothing particularly noteworthy, in *Trendtex* terms. Clearly, the DRC can be expected to negotiate such agreements at a State level, particularly when they are on such a monumental scale. If there had been an agreement, at State level, between the DRC and the PRC it again would not have been surprising if monies (whether termed entry fees, or given some other label) were paid direct to the Treasury for subsequent expenditure on infrastructure projects. Does the fact that a joint venture was created (68% owned by the Chinese consortium and 32% by Gécamines), and the entry fees divided between the Treasury and Gécamines (with the majority going to the DRC direct) lead to the conclusion that Gécamines is now, or thereby, to be treated as an organ of the State? I say "now" or "thereby" because, at paragraph 128, the Royal Court held "there is no reason to doubt" the evidence presented for Gécamines "that there had been previous contacts and joint venture agreements between Gécamines and Chinese companies; or that, when it came to the combined mining/infrastructure venture, representatives of Gécamines' management were substantially involved in much of the detailed negotiations with their prospective counter-parties; or that the management and board of Gécamines took note of the respects in which the project was likely to be of benefit to Gécamines." It seems to me that this is unsurprising evidence, and entirely consistent with Gécamines discharging its own commercial functions acting as a mining company, even if wholly owned by the government, and entering into agreements. Paragraph 128, and the linked paragraphs 129-131, continue as follows:- "But the nature and scale of the new venture, the terms of the September 2007 Protocole and subsequent April 2008 Agreements, and the grandiose description of the venture by the Minister of Infrastructures, Public Works and Reconstruction to the National Assembly in May 2008 leave little room for doubt on three fundamental points.

129. First, at the strategic level, the project was essentially an inter-state one between the DRC and the People's Republic of China and could not have come about, on the Congolese side, without the overall direction and control of the Government. Apart from the factors already mentioned, specific indicators of this appear in references at various points in the 22nd

April, 2008, Cooperation Agreement to the need for the approval of the Chinese government and the setting up of a "Steering and Coordination Committee" with the job, among others of "interfacing between the Chinese Government, the DRC, and the Mining JV" (Article 16).

130. Secondly, Gécamines' mining rights and the mortgaging of them as security for loan finance was every bit as critical to the infrastructure aspects of the project as to the mining operations side of things - the two being inextricably linked.
131. Thirdly, in the greater scheme of things, Gécamines' own particular interests, though important, were plainly subordinated to those of Congolese State and it is wholly improbable in reality that the Board of Gécamines had much option but to fulfil the role allotted to it by the Government. Apart from the wider considerations already mentioned, specific pointers to this also include the following:
 - (i) Gécamines may have had various joint venture agreements of its own with Chinese entities as early as 2005 and 2006, but the Preamble to the September 2007 Protocole shows that the DRC had cooperation agreements with the Peoples' Republic of China dating back to 2001.
 - (ii) Gécamines was evidently not a party to the August 2007 agreements referred to in the Preamble between the Congolese Government and the several Chinese enterprises mentioned there (there is no mention there of Gécamines being a party and Mr Mukasa would almost certainly have mentioned the matter had that been the case).
 - (iii) Gécamines was not a party to the September 2007 Protocole. Nor was it even mentioned as such: the partners in the proposed Joint Venture Company were to be "the Chinese enterprises comprising the Consortium and certain Congolese companies designated by the Government" (Article 2).
 - (iv) In the event, as the 22 nd April, 2008, Cooperation Agreement makes clear, the DRC "designated" Gécamines to be the Congolese partner in the Joint Venture Company (Article 1.4).
 - (v) By that same agreement the DRC undertook to cooperate in forming a Mining Joint Venture and "to transfer [to that company], through and with the participation of its state-owned company GECAMINES, the specified rights and licences" (Article 3.1); and (somewhat repetitiously) "that its state-owned company GECAMINES" would transfer the mining rights specified in the Agreement (Article 4)." 290. In my view this analysis, which I have no reason to question, can be read in two ways - to show that Gécamines (and the mining rights it owned) was being used by the DRC as a vehicle to ensure that the inter-state agreement could go ahead, or to show that Gécamines did in fact have its own particular interests to protect and promote but they were subordinated by its 100% owner to the greater interests of the State. 291. What I do not accept (notwithstanding the Minister's statements referred to above) is the conclusion by the Royal Court that this particular use by the DRC of "Gécamines as an instrument of state economic and social policy" converts Gécamines into an organ, or arm of the State within the terms of the requirements/principles set out in *Trendtex* . What the evidence summarised in these paragraphs clearly does show is that Gécamines fulfils different roles

- it does have its own identity, and makes decisions, enters into contracts with third parties etc, but it is also subservient (when required) to the requests and demands of the State, even if it receives substantial benefits from this joint venture. 292. If my summary is correct so far (and the Royal Court was wrong), in relation to Gécamines' constitution, and the evidence and conclusions in relation to "in time of war", and "the 2007 Mining Commission", I am not convinced that the Sicomines evidence is such as to drive me to the conclusion that Gécamines is not only heavily controlled by the DRC but also, overall, discharges governmental functions. 293. (D) Public/Social services - this topic is addressed in paragraphs 133 to 137 of the judgment. It can be disposed of quite shortly as the Royal Court concludes at paragraph 137 "We are not, therefore, persuaded that this particular subject is one from which we can draw any compelling conclusion of the kind suggested by Hemisphere" , then referring back to the Sicomines project. This was an inevitable conclusion, and there was no basis upon which the Royal Court could have rejected the evidence/submission made on behalf of Gécamines and set out at paragraph 134 of the decision:- "Mr Mukasa accepts that Gécamines has indeed provided services of this kind in the regions in which it operates. But he asserts that this is quite normal: that it is no indication of Gécamines' status as an organ of state but simply reflects the need to build an infrastructure for a skilled workforce brought into an otherwise sparsely populated area." Decision 294. It is now appropriate to consider the conclusions of the Royal Court on the personality issue, and the final sentence in paragraph 142:- "Unless and until Gécamines can be seen to have been finally and convincingly reconstituted so as to be genuinely free from governmental control and interference, it can hardly complain if it is viewed as no more than an organ of state." In my opinion, this goes too far, and blurs and confuses the dual requirements of control and discharge of governmental functions. It is perhaps clear and obvious that if and when Gécamines is "reconstituted" so as to be "genuinely free from governmental control and interference" it cannot then be treated as "an organ of the state" . But this is surely to set the bar/test too high. Control by government (with or without interference) is not enough for an entity to claim to be an organ of the state (to its benefit), or to be held to be an organ of the state (to its detriment). I do not accept that Gécamines, even if controlled by the state, can properly be treated as, or held to be, an organ of the state unless it discharges governmental functions, and those governmental functions are predominant. 295. As noted above, I am concerned that the test for "an organ of government" in paragraph 53 of Kensington is too broad, and would catch too many wholly owned (perhaps nationalised) entities with the avowed purpose of "assisting, promoting and advancing the industrial development, prosperity and economic welfare in the area in which it operates" . But even if that test is correctly formulated, Gécamines seems to me to be materially different from SNPC considered in both Kensington and Walker . Advocate Lawrence, for Hemisphere, set out in her contentions (at paragraph 3.11) "useful indicators ... of governmental control and governmental functions": "(a) Features in the statute creating SNPC stating it was to perform a public function.
- (b) Similar provisions in the bye-laws.

- (c) Assets deriving from the State.
- (d) Bye-laws confirming the company was subject to the control of the State.
- (e) Bye-laws confirming the company was subject to the control of a government appointed supervisory authority.
- (f) Ultimate control was by the Minister of Oil, supervised by the Minister of Petroleum (that was the supervisory authority).
- (g) Government approval was necessary for financing transactions.
- (h) Resolutions approving financial statements, budgets, economic policy, oil exploitation, all required approval of the Council of Ministers.
- (i) The board's directors were, by majority, representatives of government ministries. (j) The Board members were government officials appointed by a Council of Ministers.
- (k) Chairman of the Board was the representative of the President, and was in effect in ultimate control.
- (l) SNPC did not declare dividends, which normal commercial companies do.
- (m) SNPC did not decide what monies to plough back into the company and so what dividends to declare.
- (n) SNPC was used by the State as a vehicle for doing government business.
- (o) SNPC undertook activities for the government which were outside the scope of its articles.
- (p) The government required and demanded that SNPC's assets be used to pay for government expenditures.
- (q) SNPC was 'an arm of the Treasury in financing Government projects.'" 296. Save for (a) and (q) it is difficult to separate out which points in this list are said to go to control, and which to discharge of governmental functions. When considering "control", Advocate Harvey-Hills for Gécamines points to various important differences between SNPC and Gécamines - as set out in paragraph 88 of his contentions. But, in my view he makes more headway when considering and contrasting the position in relation to "governmental functions". He says this in paragraph 84(3) to (8):- "(3) But it is also the case that, unlike Gécamines, its [SNPC's] functions were close to, if not quite the same as, those of a 'Board of Trade' familiar to English courts (citing *Mellenger v New Brunswick Development Corporation*

- [1971] 1 W. L. R. 604): see Kensington at [53] and then at [55], where the Court found that "The Congolese legislation and SNPCs byelaws do demonstrate "that its purposes are to undertake the exploitation of Congo's oil reserve on behalf of Congo, to hold the State's oil related assets on its behalf and to represent the State on oil related matters - its function is to act on behalf of the State - it acts as the trading arm of the State and is controlled by it, whilst putting into effect Government policy in relation to oil and oil products..."
- (4) These conclusions followed the Court's analysis of its constitution at [45] to [47], where the Court notes that its constitution provided that it was to act "on behalf of the Congo [i.e. the state of Congo-Brazzaville]" in all matters relating to Congo-Brazzaville's oil and petroleum resources, and was to "hold and manage, on behalf of the Congo, all the assets, rights, direct and indirect, whatever their nature, held originally by Congo ... in all activities related to research, exploitation, treatment and transformation of oil and secondary or connected products..."
- (5) Equivalent consideration of SNPC's constitution appears in the Walker judgment at, e.g., [73] to [75].
- (6) The Court in Kensington expressly adopted the functions and control tests as articulated in Trendtex (at [53]) and, given its findings as to SNPC's role in developing and putting into effect government policy in relation to the oil resources of the country, it is submitted that its conclusions are likely to have been correct: that SNPC was given, in effect, all the state's rights in the oil within its territory and charged with the implementation of government policy in relation to those oil resources made it legitimate to find as the Court did that it performed relevant governmental functions. It was an adjunct to that extent of the Oil Ministry of the country and hence an executive organ of the state.
- (7) As set out under Ground 5 below, Gécamines' position is, and was at 19 March 2008, very different. It had no policy remit from the government; it did not own the state's interests in the minerals within its territories; it held no national monopoly on their exploitation. It was simply a state owned, nationalised industry. As Denning MR pointed out in Trendtex at 559G the ambit of the "Crown" traditionally entitled under domestic English law to immunity from suit does not extend to "nationalised commercial undertakings". They, like Gécamines, are not executive organs of the state.
- (8) The Royal Court's analysis of the differences and similarities between SNPC and Gécamines and its conclusions in relation to the functions test at [138] to [140] of the Judgment simply failed, it is respectfully submitted, both to appreciate the essence of the functions test or to apply it properly. It quoted at [140] from Cooke J in Kensington at [53] as set out above, but did not continue that quotation to include the reference to Mellenger v New Brunswick Development Corporation and did not pick up on the essential findings in Kensington that SNPC was charged with the implementation of governmental policy in relation to the entire oil resources of the country. It was that which permitted Cooke J to draw a parallel between SNPC and a regional development agency / a Board of Trade. And it was that parallel which

justified his finding that the governmental functions test had been met. Its absence in relation to Gécamines renders the Royal Court's finding, it is respectfully submitted, illegitimate and wrong." 297. When considering the final paragraphs of the Royal Court's judgment on the personality issue, it seems to me that at least some of Gécamines' criticisms are made out, even if (which must be the case) the answer to the "organ of government" question will inevitably be a matter of fact and degree. The key paragraphs are 140 and 141:-

"140. But the main point is that there is no reason in principle to view the circumstances of SNPC as establishing a bench-mark set of conditions which have to be satisfied or matched before it can be said that an entity is in truth an organ of state. The circumstances will vary from case to case. It must in the end be a matter of fact and degree. And here, in the present case, we are satisfied that Hemisphere has amply demonstrated that both elements of the Trendtex test are satisfied. As regards the first limb, 'governmental control', the evidence speaks for itself. And, as regards the second limb, the performance of 'governmental function', we concur with the words of Cooke) in Kensington: 'An entity which is constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates, can be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of an organ of government' (at paragraph 53). It is only necessary to add that, in our view, the same necessarily applies, irrespective of its formal constitution, where an entity or its property is in practice made the instrument of the state for such purposes.

141. The picture that emerges strongly in Gécamines' case is that of an entity which has in many ways been dressed in the garb of an independent body, but whose formal constitution counts for little or nothing when the state so chooses: a creature that has sometimes been allowed a considerable autonomy but which, when it matters, can be and is unceremoniously subjected to the controlling will of the state. It might be suggested that the evidence shows no more than a truly independent entity which from time to time has been the victim of unprincipled requisition, expropriation and bullying by successive governments, or, as it was put in Gécamines' skeleton argument:- 'It cannot, it is submitted, properly be relevant to the Court's determination of whether, after it has given judgment, Gécamines' assets are to be vulnerable to claims by FGH [Hemisphere] that in the dark days of the DRC's history, whether suffering under the colonial despoliation of Leopold II, under the Mobutu regime or during its terrible civil war with its c. 6m war dead, the country had either been oppressed or had collapsed so far that the rule of law had ceased at times to operate in places in a manner intelligible to a western court and Gécamines' rights had been disregarded in such periods.' Whatever, attraction that argument might have had were we concerned only with old history, the events of the past eight years or so make the 'much put-upon independent entity' thesis untenable and compel one to a very different conclusion." 298. I am satisfied that the evidence before the Royal Court does show the necessary degree of control, and therefore Ground 5 of Gécamines' Grounds of Appeal is not made out. The evidence shows that Gécamines was subject to a considerable degree of control in relation

not only to its ownership, but also in relation to its management and decision-making - the tutelle regime, exercised by the Ministry of Mines over Gécamines in the period up to April 2009, is illustrative of the high level of control (see paragraphs 64, 74, 76 and 142 of the judgment below). But control is not enough - to borrow the words of Stephenson LJ in *Trendtex* "A hobbled horse is still a horse". Notwithstanding a considerable degree of control, Gécamines is still, in my opinion, a separate entity from the DRC - it is a commercial mining company, and in the DRC occupies a significantly different position from SNPC in the Congo. I do not accept that Hemisphere has established that Gécamines' activities/functions can be correctly categorised as governmental, such as to convert it from a commercial mining company under governmental control into an alter ego of the State. 299. In relation to Grounds 1 to 4, although finding this an extremely difficult decision, I am satisfied therefore that Gécamines is broadly correct. Although there is reference in the judgment to governmental functions the reasoning throughout the decision (based on the case as presented by Hemisphere) focuses almost exclusively on "control". In particular, in my view the complaint by Gécamines is made out that "the Court failed to appreciate the essential character of the 'governmental functions' requirement which is both different to and just as significant as the 'governmental control' limb of the test" (Ground 1(a)), that "It failed to appreciate, alternatively, to give proper weight to, the further significance of this principle, that the fact an entity exhibits some features consistent with it being an organ of a State is insufficient to found a declaration that it is such an organ and the entity must be considered in the light of all relevant factors." (Ground 1(b)), and "Insofar as the Royal Court did seek to apply the requirement that [Hemisphere] prove Gécamines performs governmental functions, it misdirected itself as to what the limb of the test requires and its conclusion in consequence that [Hemisphere] had met the governmental functions element of the test was flawed and cannot stand. On the Royal Court's analysis it was sufficient that the DRC used Gécamines' assets or resources to assist it in objectives of its own. Such determinations are relevant to the limb of governmental control over Gécamines. They do not enable [Hemisphere] to prove that Gécamines performs governmental functions." (Ground 3) 300. I am satisfied that Hemisphere has established that Gécamines is a "state-controlled enterprise, with legal personality, ability to trade and enter into contracts of private law, though wholly subject to the control of [its] state" (*I Congreso del Partido* , at page 258F-G), but I conclude it has failed to establish that it is indistinguishable from and a part, or alter ego, or mere department of that state. For all the reasons set out above, I would allow Gécamines' appeal. 301. It follows that the various orders made by the Royal Court in the Order of Court dated 15 th November 2010 against Gécamines and against GTL should be set aside. However, as set out at the beginning of this judgment if and in so far as the appeal by Gécamines falls to be dismissed by the majority membership of this Court, I agree with the judgment of McNeill and Bennett JJA that the appeal of GTL should be dismissed for the reasons they give. Authorities FG Hemisphere Associates

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