Neutral Citation Number: [2008] EWCA Civ 1355

Case No: A3/2008/2821

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QBD, COMMERCIAL COURT
Mr Justice Field
[2008] EWHC 2829 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2008

Before :

LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division

LORD JUSTICE RIX
and
LORD JUSTICE THOMAS

- -

Between :

Korea National Insurance Corporation	**Respondent**
- and -	
Allianz Global Corporate & Speciality AG (on its own behalf and on behalf of the reinsurers subscribing to Policy Number AJFM157 for the 2004 year of account)	**Appellant**

- -
- -

Bernard Eder QC and Stephen Midwinter (instructed by **Messrs Elborne Mitchell**) for the **Respondent**
Malcolm Shaw QC, Steven Berry QC and David Scorey (instructed by Messrs **Clyde & Co LLP**) for the **Appellant**

Hearing date : 2nd December 2008

- -

Judgment

Lord Justice Waller :

1. This is an application for permission to appeal two judgments of Field J given during the course of a trial, of a claim by a North Korean state-owned insurance company against its reinsurers, at present taking place in the Commercial Court. By the first judgment "the justiciability judgment" he ruled that certain allegations being made in the defence of the reinsurers to a claim under a reinsurance policy were non-justiciable and struck the same out. The reinsurers then applied for the trial to be stayed on the basis that a fair trial was no longer possible and the judge, having analysed the nature of the defence still remaining, refused that stay. The trial thus continued and is continuing. The applications for permission to appeal were thus listed urgently with appeals to follow if permission were granted.

2. The striking feature of the application relating to the justiciability issue is that both parties before the judge were arguing that the issues were justiciable (albeit in certain limited areas it seems, so far as the respondents were concerned, only just). Before this court the attitude of both parties was the same, i.e. neither seeks to uphold the judge's judgment.

3. Furthermore, although on the direction of the judge a letter was e-mailed to the State of North Korea, the State has not sought to intervene or suggest that the issues raised are non-justiciable. I would add that the claimant is a State-owned company and it seems unlikely that the fact that the allegations were being made against the State and its leader had not been made known to the upper echelons of the State long before the sending of such a letter. Thus the attitude of the claimant to the justiciability issue is unlikely to have been uninformed. That cannot be determinative but a judge should be cautious in rejecting the fully considered position on justiciability of a state-owned party such as KNIC.

4. The judge made his ruling without any information from the Foreign and Commonwealth Office as to their attitude. Indeed he thought the position so obvious that he did not need such information. With respect to the judge that, I believe, was not a proper course for reasons which will appear hereafter. Since his decision some contact has been made with that Office and an invitation made to them to make representations to the Court of Appeal. The Foreign and Commonwealth Office by letter dated 25th November 2008 have simply declined that invitation saying that "the Government would not normally make representations in court proceedings unless we were directly interested in the case, or in response to a request from the court concerned". That is understandable as a response to be dealt with in some haste but one can, I think, infer that, despite being notified of the issues that the judge has held non-justiciable, it has not struck the Foreign and Commonwealth Office that an adjudication on the issues might seriously embarrass diplomatic relations between the United Kingdom and North Korea.

5. At the commencement of the hearing today, having clarified with Mr Eder QC, who represented the respondents, that we had not misunderstood the position of his clients in relation to the justiciability judgment and that they did not seek to support the judge's judgment, we indicated that in our view the judge was wrong to rule as he did and that it was our intention to try and deliver a judgment during the day so as to enable the trial to continue without further interruption. We made clear that, because we wished to deliver the judgment at speed, and because it could not be said we had

had full (or any adversarial) argument on the precise ambits of the law on non-justiciability, our judgment would not attempt an in-depth exposition of that law and should be regarded as a decision limited to this case. Furthermore it was agreed that the judge's description of the background to the case and of the issues could be adopted for the purposes of this judgment.

The background

6. The Claimant ("KNIC") sues to enforce a judgement ("the NK judgement") in the sum of €43,454,383 given by the Court of Pyongyang ("the NK Court") in the Democratic People's Republic of Korea ("N Korea") on 11 December 2006. The defence to the claim is that: (i) the North Korean judgement was procured by a fraud instigated or approved by the State of N Korea and therefore implemented with the knowledge or participation of KNIC ("the fraud defence"); (ii) alternatively, the NK judgement is unenforceable on grounds of public policy in that the North Korean judiciary are part of, and not independent from, the entity (the state) which instigated or approved of the fraudulent procuration of the NK judgement ("the public policy defence").

7. KNIC is an insurance company incorporated in N Korea. Under a contract of insurance covering the period 1 November 2004 to 31 October 2005 KNIC insured Air Koryo, an airline incorporated in N Korea, in respect of third party liability claims up to €45 million (or 7.2 billion N Korean Won) each accident, with a nil deductible. The cover for crew and non-revenue passengers for bodily injury and death was €20,000 (NKW 3.2 million) each person.

8. By a contract of reinsurance covering the same period, KNIC was reinsured by the defendant ("Allianz") and other reinsurers represented by Allianz in this action ("the Reinsurers"). Under the reinsurance, the limit of liability for third party claims for bodily injury/property damage was €45 million each accident in respect of claims involving Mi-8 helicopters, and for other aircraft €75 million. The reinsurance contract was expressed to be subject to the laws and jurisdiction of N Korea and contained a Currency Conversion Clause which provided that claims in Euros were to be paid in Euros and claims in local currency were to be paid in Euros at an exchange rate of NKW 160 to €1.00.

9. On 9 December 2005 a Relief Centre, which operated a warehouse at Chonam-Ri in Pyongyang, obtained judgement against Air Koryo in the sum of KPW 7, 634,006,244 in respect of a claim for damage to the warehouse and its contents caused by a crash by an Air Koryo Mi-8 helicopter, No 313, on 9 July 2005. It was Air Koryo's case that the helicopter had been engaged on a mercy mission carrying a lady pregnant with triplets from Jamae Island to a hospital in Pyongyang ("the pregnant woman story"). KNIC invited the Reinsurers to exercise their right under the reinsurance contract to take control of the claim ("the underlying claim"), but they declined to do so.

10. On 23 January 2006, Air Koryo informed KNIC that it had paid the sum due to the Relief Centre and requested reimbursement under the insurance contract in the sum of NKW 7,353,600,000 (NKW 7,200,000,000 property damage; NKW 9,600,000 deceased crew; and NKW 144,000,000 costs).

11. On or about 6 March 2006 Air Koryo commenced arbitration proceedings against KNIC under the insurance contract and obtained an award in the sum of NKW 7,301,932,137, which sum KNIC paid on or about 20 July 2006. Relying on the Currency Conversion Clause, KNIC sought reimbursement from the Reinsurers in the sum of €45,657,076, but the Reinsurers refused to indemnify KNIC. KNIC accordingly brought proceedings in the Pyongyang Court against the Reinsurers which resulted in the judgement sought now to be enforced in these proceedings.

12. On the first day of the trial, Counsel for the Reinsurers, Mr Berry QC, submitted that it should be decided as a preliminary question whether the Reinsurers' defences to KNIC's claim raised issues that the court had no jurisdiction to decide, pursuant to the principles enunciated in *Buttes Gas & Oil Co v Hammer* [1982] AC 888. Mr Berry was responding to a paragraph in KNIC's Skeleton Opening Submissions where it was suggested for the first time in these proceedings that "there must be at least some concern as to whether the alleged criminality of a foreign state is a question that is even properly justiciable by the English courts - see *Buttes Gas & Oil Co v Hammer*. . . . ".

13. Mr Berry's submission was heralded in his Outline Opening Submissions.

> "Albeit now raised by KNIC on the eve of the trial, the issue of non-justiciability logically must be determined before the court progresses to hear the evidence and investigate the allegations made by Allianz. This must necessarily be the case, otherwise the court will engage in the very inquiry which, if there is non-justiciability, is prohibited."

14. Mr Eder QC, for KNIC, submitted that the judge should not decide the question of non-justiciability as a preliminary point but should hear the evidence concerning the Reinsurers' defences *de bene esse* and deal with non-justiciabilty when giving final judgement. For reasons given in a separate ruling, the judge decided that the non-justiciability question had to be decided as a preliminary issue before any further steps were taken in the trial. It was at that stage that the judge also directed that KNIC should send a letter to the Government of N Korea to the N Korean Embassy, stating that allegations of state criminality were being made against the N Korean State in the proceedings and that the question as to whether the allegations were justiciable or not had arisen. The following day the judge was informed that such a letter had been sent in accordance with his direction and he heard argument on the preliminary issue the next day.

The fraud defence

15. The judge then analysed the Reinsurers' Re-Amended Defence and Counterclaim in some detail and the following is his analysis.

16. In paragraphs 6.1, 225A and 228, it is denied that the helicopter crashed into or at the Relief Centre's warehouse, whether as alleged or at all, or that the warehouse contained the volume and value of goods which the Relief Centre asserted in the underlying claim [para 228]. And in para 230, it is alleged that the pregnant woman story was untrue.

17. (The Reinsurers refer to KNIC's claim that helicopter 313 crashed into or at the Relief Centre whilst carrying the pregnant woman, thereby causing the damage for which the Relief Centre claimed as "The Underlying Fraud".)

18. Next, the Reinsurers plead a series of alleged facts from which it is claimed it is to be inferred that KNIC knew that the underlying claim was fraudulent. In para 230A it is alleged that KNIC had a propensity to engage in insurance fraud in that it has routinely made fraudulent claims against foreign reinsurers. The only part of this section of the pleading that raises a question of non-justiciability is para 230A.3, where it is alleged that "KNIC's objective in making [these] fraudulent claims was to generate profits in foreign currency, including for the North Korean Leader, Kim Jong-il (who is known in North Korea as "the Dear Leader").

19. In paras 230B.1 – B5 it is alleged that it is to be inferred from a number of matters that neither the Relief Centre, nor Air Koryo would have embarked upon a fraud against KNIC without informing KNIC of the plans for the fraud and obtaining its approval. The matters relied on to support this inference include allegations that: (i) KNIC was at all material times controlled by the Korean Workers' Party ("the Party"); (ii) the Dear Leader regarded KNIC as being a very important organisation and source of foreign currency, this being something that is to be inferred from the facts that KNIC remitted approximately US $20 million to the Dear Leader each year, and that until 2004 KNIC was under the direct control of the Dear Leader's brother-in-law; and (iii) any person in North Korea who in any way offends the Dear Leader or his regime risks being executed or sentenced to hard labour in a prison camp.

20. In paras 231 and 231.1 to 231.3 the Reinsurers plead that it is to be inferred that: (i) the underlying fraud was either instigated by senior officials of the N Korean State and the Party or at least approved by them; and (ii) the plans for the fraud were communicated to the Party, the Relief Centre, Air Koryo and KNIC. In support of this inference, the Reinsurers rely on three further allegations. First, the Relief Centre, like all other companies and entities in N Korea, is ultimately owned by the N Korean State and controlled by members of the Party who report to the Dear Leader. Second, it is to be inferred that, since Air Koryo had no personal interest in doing so, it manufactured the pregnant woman story because it was ordered to do so. Third, the N Korean State has been extensively involved in criminal activity ("the N Korean State Criminality") for the purpose of generating foreign currency, from which it is to be inferred both that the underlying fraud is another instance of such activity and that the N Korean State communicated to all N Korean entities involved, including KNIC, the plans for the underlying fraud.

21. The Reinsurers' case on N Korean State Criminality is pleaded out in paras 234-243. Here it is alleged that: (a) in the 1970s N Korean diplomats were involved in trafficking in narcotics, an activity of which the N Korean State apparently approved in that it declined to punish any of the diplomats concerned; (b) from the late 1980s, trafficking in narcotics was co-ordinated by Bureau 39, a body within the Central Party Committee which distributed drugs through trading companies owned and controlled by the N Korean State and through security and intelligence operatives; (c) from the 1990s, Bureau 39 directed and controlled the production of opium in N Korea and its processing into heroin by N Korean pharmaceutical companies, with the heroin being sold by security agents at the Chinese border or shipped to Japan, Taiwan and Hong Kong for sale to Asian organised crime syndicates; the resulting

annual revenue of approximately US$500 million was used by Bureau 39 to procure luxury items for distribution by the Great Leader, Kim Il Sung, and the Dear Leader to party and military elites and to fund diplomatic missions and national security activity; (d) in the late 1990s there was shift from opium to methamphetamine and the quantity of drugs in cases involving N Korea increased to 1000kg in 1996, 1200 kg in 1998 and 1400kg in 2000.

22. The Reinsurers also plead that in the late 1990s the N Korean State expanded into counterfeiting United States currency, cigarettes and pharmaceuticals (para 240) and that it is to be inferred that there has been a continued expansion of North Korean Criminality as N Korea's trade deficit has increased (para 242).

23. In para 243 it is pleaded that it is to be inferred that the Underlying Fraud is another instance of N Korean State Criminality because, as in other instances of N Korean State Criminality, multiple entities owned and controlled by the N Korean State, including the Relief Centre and Air Koryo, have been involved in perpetrating the Underlying Fraud and that involvement appears to have been co-ordinated by a central guiding mind.

24. In Schedule 1 to the Reinsurers' Outline Opening Submissions particulars are given of some 62 alleged incidents where illicit goods, principally dangerous drugs, have been seized from N Korean diplomats or from N Korean ships or aircraft in the period 1976 to 2005. In order to prove these incidents, the Reinsurers rely on a wide range of hearsay material including newspaper reports, academic articles and reports to the US Congress. The Reinsurers also propose to call an expert witness on politics, culture and society in N Korea, Dr Kongdan Oh Hassig, a member of the Strategy, Forces and Resources Division of the Institute for Defence Analyses, a "think tank" based in Washington DC. Dr Oh is also Non Resident Senior Fellow at the Brookings Institute. In her report, Dr Oh deals, inter alia, with the ownership and control of N Korean entities, the N Korean State and Regime, patronage and the need for foreign currency and International criminal activity.

The public policy defence

25. The defence that the NK judgement is unenforceable on grounds of public policy in that the North Korean judiciary are part of, and not independent from, the very state which instigated or approved of the fraudulent procuration of the NK judgement is pleaded in paras 247 – 250. The Reinsurers allege that: (i) the law is a political implement to give effect to the wishes and desires of the N Korean regime, including the North Korean State Criminality (para 249); (ii) the judges are appointed on the basis of their adherence to the ideology of the State and their loyalty to the Party and the Dear Leader (para 250.2); (iii) the judiciary is not independent from the Party or the N Korean State but is accountable to the former and the Dear Leader, from which it is to be inferred that it will not make decisions which are, or are perceived to be, adverse to the interests of the Party and/or the Dear Leader (paras 250.4 and 250.5); (iv) an example of the alleged partiality of the judiciary is the attendance by the judge who handed down the North Korean judgement at a meeting with, inter alios, a representative of the Reinsurers (para 250.7); and (iv) given the amount of foreign currency claimed by KNIC against the Reinsurers, it is to be inferred that the Party desired a judgement against the Reinsurers.

The law as referred to by the judge

26. The judge having referred to certain broad statements as to the doctrine of acts of state then considered certain passages in the two key authorities *Buttes* and the Court of Appeal judgment in *Kuwait Airways Corporation v Iraqi Airways* [2001] 3 WLR 1117. He did that in these terms:-

> "27. As is well known, Lord Wilberforce went on to find that there was a general principle for judicial restraint or abstention which was inherent in the very nature of the judicial process and was to be derived not only from English authority but also from American decisions, particularly those in which *Buttes* successfully moved to dismiss claims brought by Occidental which were based on allegations similar to those made in the English proceedings. Amongst the passages in these latter cases quoted by Lord Wilberforce were:
>
> > [Occidental] necessarily ask this court to "sit in judgment" upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. That is, to establish their claim as pleaded plaintiffs must prove, inter alia, that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island of Abu Musa at the behest of the defendants. Plaintiffs say they stand ready to prove the former allegation by use of "internal documents". But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert. (District Judge Pregerson, March 17,1971)
>
> > The issue of sovereignty is political not only for its impact on the executive branch, but also because judicial or manageable standards are lacking for its determination. To decide the ownership of the concession area it would be necessary to decide (1) the sovereignty of Abu Musa, (2) the proper territorial water limit and (3) the proper allocation of the continental shelf. A judicial resolution of the dispute over Abu Musa between Iran and Sharjah is clearly impossible. (The Court of Appeals, August 9, 1978)."
>
> "28. In *Kuwait Airways Corporation v Iraqi Airways Company* [2001] 3 WLR 1117, having reviewed many authorities touching on act of state, the public policy exception thereto and non-justiciability, Brooke LJ, giving the judgement of the Court of Appeal, said:
>
> > 317. In our judgment, these authorities indicate that English law is seeking to balance (at least) three separate insights as to the appropriate role of national courts when faced with reliance on foreign legislative or executive acts by way of

defence to what might otherwise be a wrong for which those courts are called upon to provide a remedy.

318. First, there is the *prima facie* rule that a foreign sovereign is to be accorded that absolute authority which is vested in him to act within his own territory as a sovereign acts. This rule reflects concepts of both private and public international law as to territorial sovereignty. As such, we think that the rule is founded primarily on a view as to the comity of nations, rather than on concern as to giving offence to the foreign sovereign or as to the absence of judicial standards (see *Buck v Attorney-General* [1965] Ch 745 per Diplock LJ at p 770). We say this because, if the sovereign purports to act outside his territory, or even if he acts within it in a penal or discriminatory way and a claimant then seeks to found his claim on that sovereign act, the English court vindicates to itself the right in the first case not to recognise and in the second case not to enforce it. This shows that embarrassment about sitting in judgment on the acts of a foreign sovereign is not *per se* the cause of judicial restraint in this context. Rather, each sovereign says to the other: "We will respect your territorial sovereignty. But there can be no offence if we do not recognise your extra-territorial or exorbitant acts."

319. The second insight, however, is that, whether the sovereign acts within his own territory or outside it, there is a certain class of sovereign act which calls for judicial restraint on the part of our municipal courts. This is the principle of non-justiciability. It is or leads to a form of immunity *ratione materiae*. It may not be easy to generalise about such acts, and the application of the principle may be fact sensitive. Guidance, however, is to be found in such considerations as whether there are "judicial or manageable standards" by which to resolve the dispute, whether the court would be in "a judicial no-man's land", or perhaps whether there would be embarrassment in our foreign relations, at any rate if that possibility was drawn to the court's attention by the executive. Sensitive issues involving diplomacy between states, or uncertain or controversial issues of international law, may be other examples of situations calling for judicial restraint. The distinction which has been developed in the analogous area of sovereign immunity between situations where the sovereign acts by way of sovereign authority (*acta iure imperii*) and where he acts in the commercial sphere (*acta iure gestionis*) may also be of some assistance, because with the development of the restrictive theory of sovereign immunity there has come the

> realisation that it is not every impleading of a sovereign that requires judicial restraint or gives rise to a legitimate fear of giving offence. In essence, the principle of non-justiciability seeks to distinguish disputes involving sovereign authority which can only be resolved on a state to state level from disputes which can be resolved by judicial means.
>
> 320. The third insight is that the rule whereby there is a principle of judicial restraint in so far as a sovereign acts within his own territory, is only a *prima facie* rule. It is subject to certain exceptions. One exception we have already mentioned is that a penal or discriminatory act of a foreign sovereign cannot be made the basis of a claim in our courts. This is perhaps one aspect of a general exception to the effect that these courts will not recognise the act of a foreign sovereign which is contrary to English public policy. The existence of this exception is not in doubt. But how far does it extend, and what is meant by English public policy in this context? The width of the exception is uncertain both because the concept of public policy is itself not hard edged, and also because it has to take into account the abhorrence of outrageous acts on the one hand, and on the other hand the concerns which give rise to the first and second insights to which we have referred. This is the route by which it is possible to say that discriminatory breaches of fundamental human rights will not be recognised, even in a sphere which is as much a matter for individual sovereign choice as a person's nationality."

27. The important passages in the judge's judgment are then paragraphs 30 and 31 where he said this:-

> "30. As the Court of Appeal recognised in para 319 of its judgement in *Kuwait Airways*, judicial restraint may be called for where the court is asked to decide matters, the investigation into which and adjudication thereon, would embarrass this country's foreign relations. In saying this, the Court of Appeal was reflecting, inter alia, the dictum of Justice Rehnquist in *First National City Bank* cited in paragraph 25 above and the views of District Judge Pregerson and the Court of Appeals cited with approval by Lord Wilberforce in *Buttes.* Indeed, it seems to me relatively plain that it was because of the potential embarrassment for this country's foreign relations with Singapore that in *Jayaretnam v Mahood and Others* (The Times, 21 May 1992) Brooke J (as he then was) set aside an order granting leave to serve libel proceedings outside the jurisdiction on the ground that the court was precluded by principles of judicial restraint from embarking on an enquiry

> into the plaintiff's grounds for fearing that he would not receive justice in Singapore. This too was one of the reasons given by Morland J in *Skrine & Co v Euromoney Publications plc* [2001] EMLR 434 (para 15) for striking out parts of a pleading in libel contribution proceedings that alleged that: (i) the Malaysian Prime Minister had acted in a manner intended and/or calculated to interfere with the independent judiciary; (ii) Malaysian judges applied the law of defamation to penalise dissent and stifle freedom of expression; and (iii) the claimants' insurers only paid the original plaintiffs "exorbitant sums by way of ostensible damages and costs because they apprehended that the claimants would not have received a fair trial at the hands of Malaysia's internationally discredited legal system.""
>
> "31.In my opinion, the investigation into and adjudication on the Reinsurers' allegations that the N Korean State, under the guiding mind, inter alios, of the Dear Leader, fraudulently procured the N K judgement and that this was of a piece with and is to be inferred from many other criminal acts committed by the N Korean State has an obvious potential for embarrassing the foreign relations between Her Majesty's Government and the Government of N Korea. Indeed, so obvious is this potential embarrassment that the court does not need a letter from the Foreign and Commonwealth Office before coming to this view."

Discussion and conclusion

28. In my view the judge should not have ruled that any of the allegations were non-justiciable and certainly should not have done so without some indication from the Foreign and Commonwealth Office that some embarrassment might be caused to the diplomatic relations between the United Kingdom and North Korea if the court did adjudicate on the same.

29. It seems to me that in considering the question of justiciability by reference to whether the allegations have "an obvious potential for embarrassing the foreign relations between Her Majesty's Government and the government of North Korea" the judge has misunderstood what Lord Wilberforce was saying in *Buttes* and what Brooke LJ was saying in *Kuwait Airways.*

30. There is no general rule that if an allegation might embarrass a foreign sovereign it follows that that will also embarrass diplomatic relations with the United Kingdom and that thus such embarrassing issues are non-justiciable. Lord Wilberforce in *Buttes* was considering whether there exists in English Law a general principle that "the courts will not adjudicate upon the transactions of foreign sovereign states" 931G. He came to the conclusion there is such a principle but it is noteworthy that his examples relate to sovereign acts done within the sovereign territory or situations in which the issue would impinge on international relations at state level. His ultimate conclusion on the facts of that case which he pointed out "would have included establishing that the actions at least of Sharjah, and it also appears Iran and of Her Majesty's government, were at some point unlawful" and "an inquiry into the motives of the

then ruler of Sharjah in making a decree" was that "Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are . . . no judicial or manageable standards by which to judge these issues. . . .".

31. Brooke LJ in *Kuwait* accepted that it was not easy to generalise about the application of the principle of non-justiciability but said;-.

> " Guidance, however, is to be found in such considerations as whether there are "judicial or manageable standards" by which to resolve the dispute, whether the court would be in "a judicial no-man's land", or perhaps whether there would be embarrassment in our foreign relations, at any rate if that possibility was drawn to the court's attention by the executive. Sensitive issues involving diplomacy between states, or uncertain or controversial issues of international law, may be other examples of situations calling for judicial restraint. "

32. These statements give no support to the view that, where in a commercial context allegations are made against the state, not in relation to some sovereign act carried out in its own jurisdiction but in relation to acts which affect the rights of a party under a commercial contract, that the court should exercise restraint to the extent of not being prepared to decide the same, at least without some indication from the executive that a decision will embarrass the diplomatic relations between the United Kingdom and that State. If a foreign state were an insured under an insurance contract the insurers cannot be precluded from alleging a fraudulent claim simply because that might embarrass the foreign state. It cannot be any different if a state entity makes the claim and it is asserted that both the entity and the state owner were involved in the fraud.

33. But, that said, fraud is a very serious charge to make and it is a particularly serious charge to make against the leader of a State. That led me to think that it was possible that the judge might wish to consider the extent to which it was right to allow some of the allegations made in the Reinsurers' defence to be pursued, particularly as the relevance of certain of them was at best marginal. However Mr Eder QC submitted that his clients were content to allow the allegations to be made and deal with them on their merits. He submitted that to conduct an exercise of case management which might or might not have the effect of limiting issues would be likely to turn out to be a longer and more costly route than simply allowing the evidence to be given and dealing with it on its merits. That is a sensible and understandable approach with which I would not encourage interference.

34. I would accordingly grant permission to appeal the justiciability judgment and allow the appeal from that judgment. The consequences as to amendments which will now restore the aspects of the case held non-justiciable should be capable of agreement between counsel and if not agreed should be dealt with by the judge.

35. The question whether, in the light of his ruling on justiciability, a stay should have been ordered is academic and it is thus unnecessary to consider whether permission to appeal that judgment should have been granted.

36. The parties accepted that so far as costs of these applications are concerned they should be costs in the trial.

Lord Justice Rix :

37. I agree.

Lord Justice Thomas:

38. I also agree.