Trinity Term
[2012] UKSC 40
On appeal from: [2011] ECWA Civ 1256

JUDGMENT

SerVaas Incorporated (Appellant) *v* Rafidian Bank and others (Respondents)

before

Lord Phillips, President
Lady Hale
Lord Clarke
Lord Sumption
Lord Reed

JUDGMENT GIVEN ON

17 August 2012

Heard on 28 and 29 May 2012

Appellant	*Respondent*
Martin Pascoe QC Richard Fisher Charlotte Cooke (Instructed by Addleshaw Goddard LLP)	Mark Howard QC Oliver Jones Robert McCorquodale (Instructed by Cleary Gottlieb Steen & Hamilton)

LORD CLARKE (WITH WHOM LORD PHILLIPS, LADY HALE, LORD SUMPTION AND LORD REED AGREE)

Introduction

1. The question in this appeal is what is the true construction of the expression "property which is for the time being in use or intended for use for commercial purposes" in section 13(4) of the State Immunity Act 1978 ("the Act").

The facts

2. On 9 September 1988 the appellant ("SerVaas"), which is a company incorporated in Indiana, entered into an agreement ("the Agreement") with the Iraqi Ministry of Industry ("the Ministry") for the supply of equipment, machinery and related services required for the commissioning of a state owned copper and brass processing factory in Iraq. On 2 August 1990 Iraq invaded Kuwait and on 4 August 1990 the assets of Rafidain Bank ("Rafidain") in the United Kingdom were frozen in accordance with the United Nations ("UN") sanctions regime established under UN Security Council Resolution 661. On 13 August 1990 SerVaas terminated the Agreement and on 25 January 1991 it commenced proceedings in the Paris Commercial Court against the Ministry in order to recover money due to it under the Agreement. On 21 February 1991 provisional liquidators ("the Provisional Liquidators") were appointed in respect of Rafidain on a winding up petition presented by the Bank of England.

3. On 16 April 1991 the Paris Commercial Court gave judgment in default in favour of SerVaas in the sum of US$14,152,800 ("the Judgment") in respect of money due under the Agreement. On 10 July 1991 the Judgment was recognised in the Netherlands and shortly thereafter SerVaas recovered US$966,515 by partial enforcement of the Judgment in the Netherlands against Iraq's assets. On 1 October 1991 the judgment was recognised in Germany and on 2 April 1992 Mummery J ordered that the provisional liquidation be limited to those assets of Rafidain situated in England and Wales. On 4 June 1996 the Bank of England's petition was adjourned generally. In July 2002 SerVaas received US$6,736,285 from the UN Claims Commission by way of compensation for losses caused by Iraq as a result of the invasion of Kuwait.

4. In May 2003 the regime of Saddam Hussein in Iraq fell. On 22 May 2003 the Security Council passed Resolution 1483 which established the Development

Fund for Iraq ("DFI"). On 28 July 2003 Lewison J made an order permitting the Provisional Liquidators to collect the assets of Rafidain's London Branch and to agree claims against Rafidain. On 21 November 2004 Iraq made a debt cancellation agreement with government creditors comprising the Paris Club. In December 2004 Iraq began a process of debt restructuring with its commercial creditors and the creditors of other specified Iraqi entities, including Rafidain, under the auspices of the Iraq Debt Reconciliation Office ("the IDRO Scheme"). On 26 July 2005 Iraq announced an offer to repurchase claims from the commercial creditors of specified Iraqi debtors, including Rafidain, where claims arose before 6 August 1990. In May 2006 Iraq issued an invitation to tender claims for cash purchase and for exchange. Thereafter Iraq took assignments of certain debts owed to Rafidain's creditors by Rafidain in accordance with the IDRO Scheme. As was its right, SerVaas did not register an interest in and has chosen not to participate in the IDRO Scheme.

5. On 3 April 2008 Henderson J sanctioned a scheme of arrangement for the distribution of assets held by the Provisional Liquidators to Rafidain's creditors ("the Scheme"). By 18 August 2009 Iraq had submitted claims in the Scheme which were admitted in the sum of US$253.8 million ("the Admitted Claims"). The original commercial debts constituting the Admitted Claims were acquired by Iraq by way of assignment from existing creditors of Rafidain. On 4 November 2009 SerVaas obtained an order registering the Judgment in England and Wales against the Ministry and Iraq under the Civil Jurisdiction and Judgments Act 1982 ("the Registration Order"). It was served on Iraq on 2 May 2010 and became enforceable against the Ministry and Iraq in England and Wales on 2 September 2010. On 11 October 2010 Iraq's US lawyers responded to a request from the Scheme Administrators by stating that the dividend payment on the Admitted Claims should be paid to the account in the name of the DFI with the Federal Reserve Bank in New York. As at 18 November 2010, the debt due in respect of the Judgment is said to have amounted to US$34,481,200.49, inclusive of interest and allowable costs.

The proceedings

6. In the meantime on 7 October 2010 Mann J granted an application by SerVaas lifting the stay on proceedings against Rafidain and enjoining Rafidain, the Provisional Liquidators and the Scheme Administrators from making any payment to Iraq under the Scheme in respect of the Admitted Claims or recognising or giving effect to any assignment or transfer of the Admitted Claims to a third party which would have the effect of reducing the amount payable to Iraq to an amount less than the Judgment debt. On 13 October 2010 SerVaas issued an application for a Third Party Debt Order ("the TPDO Application") against Rafidain in relation to the debt payable to Iraq by Rafidain by way of dividend under the Scheme, seeking an order that Rafidain pay to SerVaas such part of the

monies otherwise payable to Iraq as was necessary to satisfy the judgment. That injunction has been variously continued until now. In the meantime on 11 November 2010 Iraq issued an application to discharge the injunction on the ground that monies due to Iraq by Rafidain were immune from execution by virtue of section 13(2)(b) of the Act and/or article 9(1) of the Iraq (United Nations Sanctions) Order 2003 (SI 2003/1519) ("the 2003 Order").

7. On 30 November 2010 the Chargé d'Affaires and Head of Mission of the Embassy of Iraq in London signed a certificate ("the Certificate") in these terms:

> "1. The Admitted Scheme Claims of Iraq under the Scheme [of arrangement in respect of Rafidain] have never been used, are not in use, and are not intended for use, by or on behalf of the State of Iraq for any commercial purpose.
>
> 2. Any assets or distributions received in respect of any Admitted Scheme Claim of Iraq under the Scheme are not intended for use by or on behalf of the State of Iraq for any commercial purpose.
>
> 3. The State of Iraq has directed the Scheme Administrators, and intends to continue to so direct the Scheme Administrators, to transfer any assets or distributions in respect of any Admitted Scheme Claim of Iraq under the Scheme to the Development Fund for Iraq."

8. Following a hearing on 3 December 2010, Arnold J dismissed the TPDO Application on 14 December 2010 holding that the Admitted Claims were immune from execution by reason of section 13(2)(b) and (4) of the Act because they were not property which was for the time being in use or intended for use for commercial purposes within the meaning of section 13(4). Iraq's submission that the provisions of the 2003 Order were engaged was dismissed. Arnold J granted both sides permission to appeal. On 18 May 2011 the Court of Appeal heard SerVaas' appeal on the section 13(2)(b) point, reserved judgment against Arnold J's decision and adjourned generally Iraq's appeal on the 2003 Order point with liberty to restore. On 3 November 2011, by a majority (Stanley Burnton and Hooper LJJ, Rix LJ dissenting), the Court of Appeal dismissed SerVaas' appeal and refused permission to appeal to this Court, which subsequently granted permission. The only party other than SerVaas to have taken an active part in the proceedings to date has been Iraq.

The issues

9. The issues in this appeal are not concerned with a state's immunity from suit, which is governed by section 3 of the Act, but (as stated in the Statement of Facts and Issues) are solely concerned with the scope of its immunity from execution of a judgment given against it, which is governed by section 13(2)(b) and 13(4). Section 13(2)(b) provides, so far as relevant:

> "(2) Subject to subsection… (4) below
>
> …
>
> (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest detention or sale."

Section 13(4) provides, so far as relevant:

> "(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; …"

Section 17, which, like section 13, is in Part I of the Act, provides so far as relevant that in Part I of the Act:

> "'commercial purposes' means purposes of such transactions or activities as are mentioned in section 3(3) above; …"

Section 3(3) defines "commercial transaction" as meaning:

> "(a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority..."

Section 13(5) provides:

> "(5) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved."

10. It is common ground: (a) that the monies payable under the Scheme to Iraq are a debt and a chose in action and as such that they are "property" within the meaning of section 13(2)(b) of the Act; (b) that Iraq's stated intention is to transfer the proceeds of the Admitted Claims to the DFI; (c) that, by virtue of section 13(5), the Certificate creates a rebuttable presumption that the Admitted Claims are not in use or intended for use for commercial purposes; (d) that the onus lies on SerVaas to show a real prospect that it can rebut that presumption; and (e) that the debts were intended for use for sovereign and not commercial purposes. These proceedings are summary proceedings, so that, as identified in the Statement of Facts and Issues, the particular issue to be resolved in the appeal is whether there is any real prospect of SerVaas rebutting the presumption created by the Certificate that Iraq's right to receive payment of dividends from the Scheme in respect of the Admitted Claims as at 13 October 2010 was property which was not for the time being in use for commercial purposes within the meaning of section 13(4) of the Act. The questions for decision are thus whether (a) the Admitted Claims were in use for the purpose of a transaction or activity in which Iraq engaged otherwise than in the exercise of its sovereign authority for the purpose of section 3(3)(c) of the Act; or (b) the Admitted Claims were (to the extent that they were acquired by Iraq in exchange for bonds) in use for the purpose of a loan or other transaction for the provision of finance or of any other financial obligation for the purpose of section 3(3)(b) of the Act.

Discussion

11. It is not in dispute that the judgment which SerVaas seeks to enforce arises from the Agreement, that it is a commercial contract and that Iraq is liable for the debts of the Ministry. Nor is it in dispute that, although incorporated in Iraq and state controlled, Rafidain conducted business as a commercial bank. It was not and is not Iraq's central bank. Moreover the Admitted Claims are all claims arising from commercial transactions between Rafidain and the third parties involved and are not claims arising from commercial transactions between Rafidain and Iraq. They are simply debts previously owed by Rafidain to their commercial creditors which have now been transferred to Iraq. Rafidain, although placed in liquidation in England in 1991, is not in liquidation elsewhere and continues to trade outside the jurisdiction of the English court. The Scheme is a mechanism for distributing

the assets of Rafidain's London branch to its creditors. The Admitted Claims in respect of which dividends are, subject to the TPDO application, payable to Iraq total US$253.8 million. But for the intervention by SerVaas, the US$253.8 million would have been transferred to the account of DFI in New York within a matter of days of that intervention in accordance with the instruction of 11 October 2010 referred to above. The dividend rate under the Scheme is 56 per cent, giving rise to a total dividend payable to Iraq of US$142.1 million.

12. In essence the case for SerVaas is that the nature of the transaction which gave rise to Rafidain's liability was entirely commercial. The Admitted Claims and the right to a dividend contribution are properly described as in use, in order either to obtain payment or to complete the underlying commercial transactions giving rise to the claim or alternatively as part of the transaction pursuant to which Iraq acquired the Admitted Claims, the nature of which was not a sovereign act. There is an issue between the parties as to whether, as SerVaas say, Iraq bought the debts in order to make a profit and as part of a commercial venture or whether, as Iraq says, they were bought in the exercise of sovereign authority as part of a huge restructuring of debts incurred in the Saddam Hussein era.

13. Arnold J did not resolve that issue. His conclusions were concisely summarised thus in para 29:

> "In my judgment SerVaas has no real prospect of successfully rebutting the presumption created by the Certificate for the reasons given by counsel for Iraq. In my view SerVaas's argument wrongly conflates the transactions by which Iraq acquired the debts that are the subject of the Admitted Claims with the intended use of those assets. Iraq is not presently using those assets, but intends to pay the dividends on them to the DFI. That property is not being used to provide finance to Iraq, and it is immaterial that that property was acquired by means of bonds in the cases where the consideration took the form of bonds. Nor is the property being used or intended to be used for transactions 'otherwise than in the exercise of sovereign authority'. Iraq has decided to transfer the distributions to the DFI in the exercise of its sovereign authority, albeit constrained in this respect by Resolution 1483, for the purposes set out in the resolution. I therefore conclude that Iraq's Admitted Claims are entitled to immunity from execution by virtue of section 13(2)(b) of the 1978 Act."

14. The majority of the Court of Appeal held that Arnold J was correct to hold that the origin of the debts was irrelevant. As Stanley Burnton LJ put it at para 32, the fact that the property, here a debt, arises from a commercial transaction does

not inform the question whether that property was, at the relevant time, used for a commercial purpose. As I read his judgment, Stanley Burnton LJ did not express a view on the question whether the origin of the debts was commercial but held that, at the relevant time, the debts were not being used at all and that it followed that SerVaas could not discharge the burden of showing that they were in use for commercial purposes. At para 39 he expressly approved the conclusions reached by Arnold J in para 29 of his judgment quoted above. Hooper LJ agreed with Stanley Burnton LJ but went further. He said at para 60 that in his view the evidence pointed overwhelmingly against the conclusion that Iraq bought the debts in order to make a profit. The debts, he said, were bought by Iraq, in the exercise of its sovereign authority, as part of a huge restructuring of debts incurred in the Saddam Hussein era. As appears below, it is not necessary to resolve this question in order to determine this appeal. Rix LJ dissented on the ground that the property in question, namely the Admitted Claims giving rise to a dividend (not the dividend itself), was (as he put it at para 83) very arguably for the time being in use for commercial purposes, so that the issue should be sent for trial.

15. As I see it, the central question in this appeal is whether the nature of the origin of the debts is relevant to the question whether the property in question was in use for commercial purposes. In my opinion it is not. This conclusion is based upon the language of section 13(4). It is also informed by the decision of the House of Lords in *Alcom Ltd v Republic of Columbia* [1984] AC 580 ("*Alcom*"). In addition we were referred to three decisions at first instance and, in particular, to a number of decisions of various courts of appeals in the United States and to a decision of the Court of Appeal in Hong Kong.

16. As to the language of section 13(4), I would accept Mr Howard QC's submission on behalf of Iraq that the expression "in use for commercial purposes" should be given its ordinary and natural meaning having regard to its context. I would further accept his submission that it would not be an ordinary use of language to say that a debt arising from a transaction is "in use" for that transaction. Parliament did not intend a retrospective analysis of all the circumstances which gave rise to property, but an assessment of the use to which the state had chosen to put the property.

17. The language of section 13(4) is to be contrasted with other parts of the Act. It is, for example, to be contrasted with section 3(1), which refers to proceedings "relating to" a commercial transaction, and section 10, which refers to claims "in connection with" a ship. In enacting section 13(4), Parliament could have referred to property that "related to" a commercial transaction, or arose "in connection with" a commercial transaction as being susceptible to enforcement. It chose not to do so, which suggests that it intended a difference in meaning. Property will only be subject to enforcement where it can be established that it is currently "in use or intended for use" for a commercial transaction. It is not sufficient that the property

"relates to" or is "connected with" a commercial transaction. I would accept Mr Howard's submission that this is consistent with the different treatment of the two categories of immunity in the Act.

18. I turn to the authorities. In *Alcom* the House of Lords held that money in a bank account used to meet the expenditure incurred in the day-to-day running of Colombia's diplomatic mission was not within the exception. Lord Diplock (with whom the other members of the House agreed) said this at pages 602F-603D and 603H-604E:

> "The crucial question of construction for your Lordships is whether a debt which has these legal characteristics falls within the description contained in section 13(4) of 'property which is for the time being in use or intended for use for commercial purposes.' To speak of a debt as 'being used or intended for use' for any purposes by the creditor to whom the debt is owed involves employing ordinary English words in what is not their natural sense, even if the phrase 'commercial purposes' is given the ordinary meaning of jure gestionis in contrast to jure imperii that is generally attributed to it in the context of rights to sovereign immunity in public international law; though it might be permissible to apply the phrase intelligibly to the credit balance in a bank account that was earmarked by the state for exclusive use for transactions into which it entered jure gestionis. What is clear beyond all question is that if the expression 'commercial purposes' in section 13(4) bore what would be its ordinary and natural meaning in the context in which it there appears, a debt representing the balance standing to the credit of a diplomatic mission in a current bank account used for meeting the day-to-day expenses of running the mission would fall outside the subsection.
>
> 'Commercial purposes,' however, is given by section 17(1) the extended meaning which takes one back to the comprehensive definition of 'commercial transaction' in section 3(3). Paragraph (a) of this tripartite definition refers to *any* contract for the supply of goods or services, without making any exception for contracts in either of these two classes that are entered into for purposes of enabling a foreign state to do things in the exercise of its sovereign authority either in the United Kingdom or elsewhere. This is to be contrasted with the other paragraph of the definition that is relevant to the instant case, paragraph (c), which on the face of it would be comprehensive enough to include all transactions into which a state might enter, were it not that it does specifically preserve immunity from adjudicative jurisdiction for transactions or activities into which a state enters or in which it engages in the exercise of sovereign

> authority, other than those transactions that are specifically referred to either in paragraph (a) or in paragraph (b), with the latter of which the instant appeal is not concerned."
>
> …
>
> "My Lords, the decisive question for your Lordships is whether in the context of the other provisions of the Act to which I have referred, and against the background of its subject matter, public international law, the words 'property which is for the time being in use or intended for use for commercial purposes,' appearing as an exception to a general immunity to the enforcement jurisdiction of United Kingdom courts accorded by section 13(2) to the property of a foreign state, are apt to describe the debt represented by the balance standing to the credit of a current account kept with a commercial banker for the purpose of meeting the expenditure incurred in the day-to-day running of the diplomatic mission of a foreign state.
>
> Such expenditure will, no doubt, include *some* moneys due under contracts for the supply of goods or services to the mission, to meet which the mission will draw upon its current bank account; but the account will also be drawn upon to meet many other items of expenditure which fall outside even the extended definition of 'commercial purposes' for which section 17(1) and section 3(3) provide. The debt owed by the bank to the foreign sovereign state and represented by the credit balance in the current account kept by the diplomatic mission of that state as a possible subject matter of the enforcement jurisdiction of the court is, however, one and indivisible; it is not susceptible of anticipatory dissection into the various uses to which moneys drawn upon it might have been put in the future if it had not been subjected to attachment by garnishee proceedings. Unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that the bank account was earmarked by the foreign state solely (save for de minimis exceptions) for being drawn upon to settle liabilities incurred in commercial transactions, as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot, in my view, be sensibly brought within the crucial words of the exception for which section 13(4) provides."

19. It seemed to me that the whole of that passage merited quoting. However, the critical point for present purposes is the proposition that the judgment creditor must show that the bank account was earmarked by the state solely for being drawn down upon to settle liabilities incurred in commercial transactions. The essential distinction is between the origin of the funds on the one hand and the use of them on the other. As Stanley Burnton LJ said in the instant case at para 34, it

was not suggested by Lord Diplock in *Alcom* that if the moneys in the bank account resulted from commercial transactions, that might be relevant to the question whether the account was used or intended for use for commercial purposes.

20. We were referred to three English decisions at first instance. They were *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB) (Stanley Burnton J), *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420 (Aikens J) and *Orascom Telecom Holding SAE v Republic of Chad* [2008] EWHC 1841 (Comm) (Burton J). They all focus on present or future use. For example, at para 92(2) of the *AIG* case Aikens J focused on whether the debts were "put to use" for the purposes of a commercial transaction within the meaning of section 3(3) of the Act.

21. I note in passing that in the *AIC* case Stanley Burnton J noted at para 56, after referring to *Alcom*, that evidence of recent use of an account wholly for commercial purposes over a significant period of time may lead to the conclusion that the account is used or intended for use wholly for commercial purposes; but the older the use in evidence, the weaker the inference that may be drawn as to the use or intended use of the account. The focus is throughout on actual use. In para 58 he noted that there was evidence that the relevant bank account had been dormant and said that, if an account was dormant for at least 18 months, it cannot be said to be presently used for any relevant purpose, and that the previous use was weak evidence of a present intention as to its use. It was an example of a case, as he concluded here, where the evidence was insufficient to disprove the statement in the Certificate.

22. It was suggested on behalf of SerVaas that there is a relevant distinction for present purposes between the current use of a debt and the current use of a bank account. For my part, I would not accept that there is such a distinction. In each case the question is the same, namely whether the relevant property is in use or is intended for use for commercial purposes.

23. The American cases draw the same distinction between the source of the property and its use. The immunity of states from execution in the United States is governed by the Foreign Sovereign Immunities Act 1976 28 USC §§1602-1611 ("the FSIA"), which was a leading precursor of the Act. §1610(a) of the FSIA provides that, where other specific conditions are satisfied, courts in the United States may execute against "property in the United States … used for a commercial activity in the United States".

24. There are a number of decisions of courts of appeals in different US states on the true construction of that provision. The leading case is perhaps *Connecticut Bank of Commerce v Republic of Congo*, 309 F 3d 240 (US Court of Appeals, 5th Cir, Texas, 2002). Connecticut Bank had acquired the rights to a valid London judgment against the Congo for defaulting on a loan agreement. It obtained a default judgment in New York in relation to the London judgment debt. The Bank then sought to attach various debts owed by a group of Texas oil companies to the Congo. The debts constituted, inter alia, royalty obligations by the oil companies for activities connected with the exploration for and the sale of the Congo's oil. The court held that the debts owed by the oil companies were not "property…used for a commercial activity" within the meaning of §1610(a).

25. The majority opinion in the 5th Circuit Court of Appeals was given by Judge Garza. He said (at p 251, paras 19-22):

> "What matters under the statute is what the property is 'used for', not how it was generated or produced. If property in the United States is used for a commercial purpose here, that property is subject to attachment and execution even if it was purchased with tax revenues or some other noncommercial source of government income. Conversely, even if a foreign state's property has been generated by commercial activity in the United States, that property is not thereby subject to execution or attachment if it is not 'used for' a commercial activity within our borders. The district court (and the litigants) have focused on the question of whether the Congo's joint venture with the garnishees, which gave rise to the royalty and tax obligations that the Bank want to garnish, was a 'commercial activity in the United States'. This was the wrong question to consider. What matters under the statute is not how the Congo made its money, but how it spends it. The amenability of these royalties and taxes to garnishment depends on what they are 'used for', not on how they were raised."

Judge Garza added (at p 254, paras 36 and 37-39):

> "The phrase 'used for' in §1610(a) is not a mere syntactical infelicity that permits courts to look beyond the 'use' of property, and instead try to find any kind of nexus or connection to a commercial activity in the United States. The statute means what it says: property of a foreign sovereign…may be executed against only if it is 'used for' a commercial activity. That the property is revenue from or otherwise generated by commercial activity in the United States does not thereby render the property amenable to execution.

…

> To use property for a commercial activity, within the ordinary meaning of 'use', would be to put the property in the service of the commercial activity, to carry out the activity by means of the property. Here, the royalty obligations in question represent the *revenue*, the *income,* from an allegedly commercial activity. In ordinary usage, we would not say that the revenue from a transaction is 'used for' that transaction."

Finally, Judge Garza referred to the Act (at p 256, para 42). He noted the distinction in the Act between the jurisdictional immunity in section 3(1), which provides that a state is not immune as respects proceedings "relating to" a commercial transaction and section 13(4), which, as he put it, makes explicit that the mere relationship to a commercial activity does not suffice to permit execution, the property must "for the time being" be "in use or intended for use for a commercial purpose". He concluded that the Act parallels the FSIA on the footing that:

> "it allows jurisdiction based on mere relationship to a commercial activity, but very clearly permits execution only depending on the 'use' of the property."

26. The distinction can clearly be seen from the different view of Judge Dennis, who dissented on this part of the case. He said (at p 264):

> "Because the Texas oil companies' obligation to pay royalties to the Congo were necessary and integral to, and therefore used for, the joint venture commercial activity conducted, in substantial part in the United States, by the Congo and the other parties to the joint venture, those royalty obligations fell within the exceptions to immunity from execution provided for by FSIA § 1610(a)(1)."

At page 254 (paras 37-39) Judge Garza, for the majority, rejected that sentence as a non sequitur for this reason:

> "The phrase 'used for' on its face denotes something different and more specific than the phrases 'integral to' or 'necessary to'. It also denotes something distinct (and narrower) than the other phrases the Bank uses in its petition, such as 'related to' or 'contemplated by.'"

27. The *Connecticut Bank* case has been followed in a number of cases in the United States. In *Af-Cap Inc v Republic of Congo* 475 F3d 1080 (US Court of Appeals 9th Circuit, California 2007) the Court of Appeals rejected a submission that the court should determine whether property was "used" for commercial activity "by examining the entire underlying activity that generated the property in question". In doing so it adopted the reasoning in the *Connecticut Bank* case, contrasting the language "used for" with the language "related to" or "connected with" in other parts of the FSIA. A differently constituted 9th Circuit Court of Appeals also adopted the same reasoning in 2007 in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems Inc* 495 F3d 1024, 2007. The case had similarities with the instant case. The Court said at pp 1036-1037 (para 6):

> "To satisfy § 1610(a), MOD must have used the Cubic judgment for a commercial activity in the United States, and this it has not done. We have recently stated that 'property is 'used for a commercial activity in the United States' when it is put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a commercial activity or *in relation* to a commercial activity.' *Af-Cap Inc*, 475 F3d at 1091 (emphasis in original). Cautioning that 'FSIA does not contemplate a strained analysis of the words 'used for' and 'commercial activity,'' we instructed courts to 'consider[ ] the use of the property in question in a straightforward manner.' *Id*. The Ministry has not used the Cubic judgment as security on a loan, as payment for goods, or in any other commercial activity. Instead, Iran intends to send the proceeds back to Iran for assimilation into MOD's general budget. Because repatriation into a ministry's budget does not constitute commercial activity, we hold that the Cubic judgment is not subject to attachment under § 1610(a)."

See also *EM Ltd v Republic of Argentina* 473 F3d 463 (2nd Circuit, 2007) at p 484 (para 5), where NML was also a claimant.

28. Those decisions are strong persuasive authority and, given the close relationship between the language in section 13(4) of the Act and § 1610(a) of the FSIA, seem to me to support the meaning of the expression "property which is for the time being in use or intended for use for commercial purposes" in section 13(4) identified in para 17 above.

29. Similar support is to be found in the decision of the majority on this point in the Court of Appeal in Hong Kong in *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] HKCA 19. See in particular per Yuen JA at

para 277 and Stock VP at para 179, where they held that at common law, applying the restrictive principle of immunity from execution, the question was whether the property was to be put to use for a private or commercial purpose. Although an appeal to the Court of Final Appeal succeeded on the basis that the Congo was entitled to absolute immunity, the reasoning of the majority of the Court of Appeal was not challenged and remains persuasive authority in cases where the restrictive principle of immunity from execution apples.

30. On the facts of the instant case SerVaas cannot show that the Admitted Claims were property in use for a commercial purpose. It does not say that Iraq intended or intends to draw them down for commercial purposes. On the contrary, it accepts that they were intended to be used for sovereign purposes. By section 13(5) of the Act, the burden is on SerVaas to prove that the Certificate that the property is not in use for commercial purposes is not correct. It cannot do so unless it can show that it is entitled to rely upon the source of the Admitted Claims and can show that the source is sovereign and not commercial. For the reasons I have given, I would hold that the source of the Admitted Claims is irrelevant. It follows that it is not necessary to express a view upon the question whether the source is sovereign or commercial.

31. In short, SerVaas cannot show that the debt is or was earmarked (or in use) for being drawn down upon in order to satisfy commercial liabilities. In para 75 Rix LJ said this:

> "...it is difficult to see that the property in question, the admitted claim, has no current use. It is in use in order to secure the scheme dividend. Of course, the dividend, when secured, might be put to any of the uses to which money funds might be put, either by being expended or by being invested. For the present, however, until the dividend is paid, the claim's obvious use and purpose, I would have thought, was to be the means by which the claim's owner, Iraq, seeks to secure its value by way of a dividend in the scheme of arrangement. That is what the commercial debt was bought for in the first place, and, until the scheme of arrangement (or, in its absence, a liquidation) has been brought to fruition, the owner holds the debt for the purpose of seeking payment of its claim. For these purposes, Iraq is just like the holder of any commercial debt. As purchaser of the debt, it merely stands in the shoes of the merchants and other commercial parties who were the original owners of the debt in question. If those parties were still holders of the debt, it would not be said that they held it for no current purpose. It seems to me to be at least highly arguable that Iraq is in the same position. On this basis, the linchpin of Iraq's argument fails."

32. For my part, I would not accept that analysis. It elides the historical origins of the Admitted Claims with their current and future use. The determinative feature, in my view, is the absence of any current or future commercial activity on the part of the state of Iraq. It is common ground that any dividends received from the administrators of Rafidain Bank will be paid to and used by the DFI, which is manifestly not a commercial purpose. The Admitted Claims are simply the means to the end of the dividends. They are nothing more than a legal mechanism by which Iraq's entitlement to receive dividend payments is secured and given effect to. In these circumstances, it is artificial and highly technical to seek to distinguish the Admitted Claims from the dividends that they secure. Neither is connected to, or destined for use in, any mercantile or profit-making activity by Iraq. It follows that neither can sensibly be described as "for the time being in use or intended for use for commercial purposes".

33. It was suggested on behalf of SerVaas that, even if it cannot succeed in relation to the entirety of the Admitted Claims, in so far as the Claims were acquired with bonds, they were in use for a commercial transaction within section 3(3)(b) of the Act, namely a "transaction for the provision of finance". The Court of Appeal unanimously rejected this part of SerVaas' submissions. As Rix LJ put it at para 81, it was mere background. Assuming the expression "in use or intended for use" in section 13(4) is given the meaning discussed above, I cannot see any basis for reaching a different conclusion in respect of the Admitted Claims acquired with bonds.

CONCLUSION

34. For these reasons, which are essentially those given by Arnold J and Stanley Burnton LJ, I would dismiss the appeal.