OUTER HOUSE, COURT OF SESSION

[2021] CSOH 126

PD120/19

OPINION OF LORD RICHARDSON

In the cause

SIMON MORRISON

Pursuer

against

MIDDLESEA INSURANCE PLC

Defender

and

AWTORITÀ GHAT-TRASPORT F'MALTA (TRANSPORT FOR MALTA)

Third Party

Pursuer: Wilson; Digby Brown LLP
Defender: Stewart QC, Harvey; Kennedys Scotland
Third Party: Dewar QC, Hawkes QC; Keoghs LLP

16 December 2021

Introduction

[1] On 9 April 2018, a bus accident occurred at Zurrieq, Malta. The bus concerned was a tour bus. The pursuer has brought the present action seeking reparation arising from injuries which he alleges were sustained by him in the course of that accident. The pursuer directs his action against the defender on the basis that he contends that the defender was the insurer of the operators of the bus, City Sightseeing Malta Limited.

[2] The defender contends that it is not liable to make reparation to the pursuer. The defender has also convened the Authority for Transport in Malta as a third party to the action. On a number of bases (which are discussed in more detail below), the defender claims relief and or apportionment against the third party.

[3] The third party pleads that the court has no jurisdiction to determine any claims made by the defender against it. The third party argues that in terms of section 14(1) and (2) of the State Immunity Act 1978, it is immune from jurisdiction. Section 14(1) and (2) are in the following terms:

> **"14.— States entitled to immunities and privileges.**
>
> (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—
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> (a) the sovereign or other head of that State in his public capacity;
>
> (b) the government of that State; and
>
> (c) any department of that government,
>
> but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued.
>
> (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—
>
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
>
> (b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune."

[4] On 26 and 27 October 2021, I heard a preliminary proof on the issue of state immunity. The oral evidence was heard by way of WebEx facility. Evidence was also submitted in the form of affidavits. I heard submissions orally on 28 and 29 October 2021.

Evidence

[5] Evidence was led by both the third party and the defender. Both the third party and the defender also relied upon affidavits which had been prepared and submitted. The pursuer, although represented throughout the hearing, led no evidence.

Evidence for the third party

[6] The third party had been ordained to lead at the proof and led evidence from two witnesses – Mr Joseph Bugeja and Professor Ian Refalo. The third party also submitted affidavits from Dr Ian Borg.

Joseph Bugeja

[7] Mr Bugeja is the Chairman and CEO of the third party. He gave evidence orally via WebEx. He also formally adopted an affidavit and a supplementary affidavit which had been lodged by the third party.

[8] Mr Bugeja explained that the third party was responsible for the transport sector in Malta incorporating maritime, aviation and land transport. He explained further that the third party had been established in terms of the Authority for Transport in Malta Act 2009 (Chapter 499). The 2009 Act was where the third party's powers and functions were set out. Mr Bugeja described how the 2009 Act created the third party as a body corporate merging three predecessor bodies – the Malta Maritime Authority, the Malta Transport Authority and Directorate of the Civil Aviation Authority.

[9] The preamble to the 2009 Act provides as follows:

> "To provide for the establishment of a body corporate to be known as the Authority for Transport in Malta which will assume the functions previously exercised by the Malta Maritime Authority, the Malta Transport Authority and the Director and

> Directorate of Civil Aviation and for the exercise by or on behalf of that Authority of functions relating to roads, to transport by air, rail, road, or sea, within ports and inland waters, and relating to merchant shipping; to provide for the transfer of certain assets to the Authority established by this Act; and to make provision with respect to matters ancillary thereto or connected therewith."

[10] Mr Bugeja explained that the Government of Malta had established the third party with the main purpose to promote and develop the transport sector in Malta by means of proper regulation and by the promotion and development of related services (see Article 3 of the 2009 Act).

[11] Article 6 of the 2009 Act sets out the functions and powers given to the third party. Article 7 makes specific provision for the powers and functions to be exercised by the third party in connection with road transport and roads. These include:

> "to regulate transport by road, the registration, licensing and use of vehicles, the licensing of all commercial operations connected with road transport, and to make provision for any matter that is provided for under this Act in connection with transport by road;" (Article 7(a))
>
> "to occupy, plan, design, construct, re-construct, administer, maintain, repair and restore roads and to provide or secure or promote the provision of the same and also to provide or secure or promote the provision of services for such purposes and to manage and control the necessary works, including the planning and programming thereof and the planning and programming for the rebuilding and restoration of the existing roads…;" (Article 7(b))
>
> "to do all such things as are necessary or expedient for the testing, registration and licensing of vehicles, owners of vehicles, commercial operators of vehicles, drivers of vehicles, or other persons connected with road transport;" (Article 7(f))
>
> "to do all such things as may be necessary for the regulation, management, safety and control of road traffic both at a national as well as at local level and for this purpose to adopt strategies and standards that are benchmarked at a European level;" (Article 7(h))

[12] Mr Bugeja gave details of the third party's duty to carry out safety inspections of the arterial and distributor roads, being the designation of the major roads in Malta, at least

every three to five years. Mr Bugeja explained that the accident which gave rise to the present proceedings took place on a "distributor" road which along with arterial roads were the principal roads in Malta. As such, it fell within the responsibility of the third party. Mr Bugeja also explained that as from September 2018, this responsibility had been passed to a different body – Infrastructure Malta.

[13] Mr Bugeja gave evidence as to the funding of the third party. He explained that the third party was required to conduct its affairs in a way that the expenditure for the proper performance of its functions should, as far as practicable, be met out of its revenue. As a regulator, the third party is entitled, in terms of the law, to levy fees and rates. These are prescribed in officially published tariffs and charges. Mr Bugeja also clarified that, notwithstanding the third party's ability to raise revenue, it required an annual contribution from central government of €13.5 million in order to be able to carry out its functions

[14] With specific reference to the circumstances of the accident which gave rise to the present proceedings, Mr Bugeja referred to the Passenger Transport Service Regulations 2009 (SI 499.56). These Regulations were promulgated under the 2009 Act and concern the regulation of passenger transport services and, in particular, sightseeing transport routes. Every bus operator within the third party's territorial jurisdiction must be authorised in terms of the Regulations. This authorisation includes the issuing of licences by the third party and the levying of fees for this purpose. Mr Bugeja gave details of the way in which the licensing fee is calculated – essentially, it is calculated based upon €210 per passenger on each vehicle for each route per year. The fee is subject to a cap of €37,000 where the number of passengers is more than 175.

[15] In conclusion, Mr Bugeja gave his opinion that in carrying out its functions including, in particular, the carrying out of inspections of the roads and the issuing of

licences to bus operators, the third party was exercising sovereign authority on the part of the Maltese Government.

[16] Objection was taken to this evidence on the part of the defender on the grounds that Mr Bugeja was seeking to usurp the function of the court. As a result, I heard the evidence under reservation of all issues of competency and relevancy. Subsequently, senior counsel expanded on the basis of his objection in the course of his submissions which I discuss further below. In essence, I understood the basis of the defender's objection to be that Mr Bugeja was by using the words "sovereign authority" offering his opinion as to the application of section 14(2)(a) of the State Immunity Act 1978.

[17] Having considered the submissions made by the defender in respect of the objection, I reject it. It seems to me that the defender mischaracterises Mr Bugeja's evidence. I did not understand him to be offering any opinion as to any issue of Scots law. Rather, I understood him simply to be explaining, as Chairman and CEO, what he understood the third party to be doing.

[18] Mr Bugeja was cross examined by the defender in relation to the relationship between the third party and the Maltese Government. Mr Bugeja's position was that the two entities work hand in hand with the Maltese Government making the policy and the third party administering and carrying it out as the authority for transport.

Dr Ian Borg

[19] The third party also relied upon two short affidavits prepared by Dr Ian Borg which it had lodged. Dr Borg is the Minister for Transport, Infrastructure and Capital Projects. In his affidavits, Dr Borg simply adopted the two affidavits prepared by Mr Bugeja.

Professor Ian Refalo

[20] Professor Refalo was an extremely experienced Maltese lawyer. He had called at the bar in 1970 and had obtained a Diploma in International Law from the University of Cambridge in 1971. From that point he had been both practising and teaching law in Malta. He was still in practice and he was also a professor at the Faculty of Laws at the University of Malta. His principal area of practice was public and administrative law.

[21] Professor Refalo had prepared a report for the third party [109/6] and gave evidence by reference to that Report. Professor Refalo had been asked to give his opinion on the extent to which it was possible to determine whether the third party enjoys state immunity as an extension of the State of Malta.

[22] Professor Refalo approached this question from the perspective of Maltese law. Albeit, in doing so, Professor Refalo highlighted that Maltese public law is based upon English public law and that, although not a party to the European Convention on State Immunity and having no equivalent of the State Immunity Act 1978, the Maltese Courts, would tend to interpret the position in light of pronouncements made by the House of Lords, the UK Supreme Court and the English courts more generally.

[23] On this basis, Professor Refalo's conclusion was that, approaching the question from Maltese law, a body in the position of the third party, would in the normal course enjoy immunity from foreign litigation. In Professor Refalo's opinion, this was for two reasons.

[24] First, he considered that the third party was, as he put it, a "*lunga manus*" or an extension of the state acting as agent for the state.

[25] In this regard, Professor Refalo pointed to the fact that the third party was a public corporation created by and deriving all its authority from the 2009 Act. He also highlighted that, notwithstanding the 2009 Act, ultimate control of all decisions of Transport Malta was

retained by the Minister of Transport who, among other things, retained the power to give directions to the third party (Article 11(3) of the 2009 Act).

[26] The second reason was that, in Professor Refalo's opinion, the present proceedings concerned acts and omissions by the third party in the exercise by it of functions – namely, the public upkeep of roads- which are governmental and public in character. In Professor Refalo's opinion, this duty was a public function and, therefore, as it had been expressly delegated to the third party by means of the 2009 Act, the discharge of this duty by the third party fell to be characterised as administrative, public law act – *jure imperii.* In this regard, Professor Refalo referred specifically to Article 7(b) of the 2009 Act.

[27] Professor Refalo explained that one way of testing his reasoning was to consider whether a private individual could have carried out the function being exercised by the third party. Approaching the issue this way, it was clear that a private individual could not do this. The creation, maintenance and upkeep of roads was governmental responsibility entrusted to the third party and private individuals could not interfere with this.

[28] Professor Refalo had also been provided with a copy of the report prepared by Dr Phyllis Aquilina, the expert Maltese lawyer instructed by the defender. He noted that there were some areas of agreement between them. For example, he agreed with Dr Aquilina that the Maltese Courts have jurisdiction to deal with claims against the Maltese State. However, he did not consider that this was the relevant issue in the present case. In essence, Professor Refalo considered that the issue about which he and Dr Aquilina disagreed was whether, in respect to what was at issue in the present proceedings, the third party was exercising sovereign authority. Professor Refalo considered that it would be extraordinary to consider that acts carried out in respect of the public upkeep of roads,

which the Maltese State had entrusted to the third party, could be regarded as anything but such an exercise.

Evidence for the defender

[29] The defender relied upon the affidavit of Mr Kim Degabriele and also led evidence from an expert, Dr Phyllis Aquilina.

Kim Degabriele

[30] Mr Degabriele is the director of City Sightseeing Malta Limited ("CSS") which was the company that operated the bus involved in the accident which forms the basis of the present litigation. He has held this position for the past five years.

[31] In his affidavit, Mr Degabriele explained that the authority for operating regular bus passenger services on sightseeing passenger routes, such as the one involved in the present proceedings, required to be obtained from the third party. This was in terms of the Passenger Transport Services Regulations 2009 (SI 499.56). On 4 December 2016, CSS had filed an application with the third party in order to be given the necessary authorisation to provide such services. By means of a letter dated 9 December 2016, the third party had authorised CSS to provide such services. Mr Degabriele explained that, in terms of the 2009 Regulations, CSS paid the third party a fee of €37,000 for the provision of this authority.

Dr Phyllis Aquilina

[32] Dr Aquilina was a qualified Maltese lawyer who had received a doctorate of laws from the University of Malta in 2004 and been in practice since 2005. She had a masters

degree in European and Comparative Law from the University of London. She was also a senior visiting lecturer teaching private law at the University of Malta.

[33] Dr Aquilina explained that her practice was in litigation and that because in Malta, given the size of the jurisdiction, lawyers generally practice as generalists, she had experience in private, commercial and public law.

[34] Dr Aquilina had prepared a report for the defender [7/4] and gave evidence by reference to that report. Dr Aquilina had also been asked to consider the issue of state immunity from the perspective of Maltese law. She had also been provided with a copy of Professor Refalo's report.

[35] Dr Aquilina began by explaining the background to the creation of the third party. She explained how, prior to the 2009 Act, road transport networks, their set up and administration had been regulated under a separate law from other areas of transport and the corresponding administrative functions were entrusted to a distinct body corporate established by law called the Authority for Transport of Malta. Following the coming into effect of the 2009 Act, the third party had been created with separate legal personality, capable, among other things, suing and being sued (Article 12(1)).

[36] However, Dr Aquilina also made clear that the powers and functions vested in the third party as a result of the 2009 Act were not absolute and unlimited. The parameters of what had been transferred were as set out in Articles 6 to 9 of the 2009 Act and remained subject to the exclusive prerogative of the competent Minister, who retained full power and authority to make policy and to determine policy matters (see Article 11).

[37] Dr Aquilina explained that the third party did enter into contracts for the carrying out of, for example, the construction and maintenance of roads. Dr Aquilina had personal experience of advising on a framework agreement in this field. Dr Aquilina explained

further that, since 2018, the third party had been divested of its powers and functions in respect of the design, building and maintenance of domestic roads. At that point, these powers and functions had been transferred to a new public entity called the Agency for Infrastructure Malta which had been established by an act of the Maltese parliament.

[38] Turning to the specific issue of state immunity, Dr Aquilina explained that if the present proceedings had been raised in a Maltese court, then the third party could have insisted on being a party to the proceedings. Dr Aquilina emphasised that, in domestic Maltese proceedings, the third party had been involved as a party to proceedings which were based on the private law of tort.

[39] To illustrate this point, Dr Aquilina referred to the case of *Carmelo Micallef* v *Direttur tax-Xoghlijiet* [an English translation of this case was lodged at 7/12]. The defendant in that case was a predecessor to the third party. It had been sued on the basis of an alleged failure properly to maintain the roads. In the case, the defendant had raised the defence of immunity on the basis that its actions were *jure imperii* and therefore immune. This defence had been rejected by the Maltese Court of Appeal.

[40] With regard to Professor Refalo's opinion, Dr Aquilina explained that she did not agree with his conclusion. In essence, Dr Aquilina's principal criticism of Professor Refalo was that he failed to take into account that, when a foreign state acted as a private individual it did not benefit from state immunity. This restrictive approach to the principle of state immunity was consistent with Dr Aquilina's understanding of the relevant English court decisions which Dr Aquilina considered that a Maltese court would follow. In Dr Aquilina's view, the present proceedings did not relate to alleged acts and omissions arising in the exercise any sovereign powers and function, but in the "ordinary administrative and commercial functions relating to public road upkeep".

[41] Dr Aquilina was asked in cross-examination about the basis for the distinction she was drawing between "ordinary administrative and commercial functions" and what she described as "sovereign powers and functions". In addressing this point, she accepted that the powers and functions of the third party were set out in Article 6 and, in respect of road transport, Article 7 of the 2009 Act.

[42] In respect of the 2009 Act, Dr Aquilina highlighted the fact that Article 11(1) of the 2009 Act makes clear that policy making and the determination of policy matters remained the exclusive prerogative of the Minister. In this regard, she noted that Article 11 also provided for what she described as the exceptional powers being: the issuing of directions to the third party by the Minister (Art 11(3)); and for the transfer of functions from the third party to the Minister in the event of a failure to comply by the third party (Art 11(5)).

[43] As I understood her evidence, for Dr Aquilina, a distinction fell to be drawn between a purpose – which might be public – and the particular act which may not be. In the present case, Dr Aquilina considered that the acts and omissions in respect of road maintenance to which the present proceedings related were, as she put it, "private law acts". She relied on what she described as the "juridical character" of the act in question. She explained that she considered that the juridical character of an act derived from the nature of the proceedings which arose from the act. It was this juridical character that was important to determining whether an act was the exercise of sovereign authority as opposed to the act's purpose. Dr Aquilina was reinforced in reaching this conclusion, on the basis that the third party could enter into contracts for the carrying out this work. For the purpose of characterising the act, she did not consider that it mattered that, in fact, there had been no such contracting out in the present case.

Submissions

[44] I was greatly assisted by the fact that counsel for both the third party and the defender prepared an outline note of submissions together with agreeing a joint bundle of authorities.

[45] Counsel for the pursuer made no submissions on the issue of sovereign immunity.

Submissions for the third party

[46] Senior counsel moved me to sustain the third party's plea of jurisdiction and to dismiss that action *quoad* the third party.

[47] At the outset of his submissions, senior counsel noted that it was a matter of agreement between the parties that the third party was, for the purposes of section 14(2) of the State Immunity Act 1978, a "separate entity". The third party was a body corporate with separate legal personality and capable of suing and being sued (Article 12(1) of the 2009 Act).

[48] He then advanced two propositions, one positive and one negative. These were:

- First, that, in terms of section 14(2) of the State Immunity Act 1978, the current proceedings relate to acts and omissions by the third party, as a separate entity, in the exercise of sovereign authority and are such that the Republic of Malta would have been so immune.
- Second, that position was not altered by a consideration of section 3 of the 1978 Act because the current proceedings did not relate to a commercial transaction.

[49] In support of his first proposition, senior counsel began by seeking to identify to what acts or omissions the current proceedings relate. To this end, he referred to the defender's pleadings at Answer 6 in which the following averment is made:

> "Further explained and averred, in the factual circumstances averred by the pursuer in relation to the accident, the cause of the accident was the overhanging branches of a large tree. [The third party],… a body corporate established pursuant to the laws of the Republic of Malta was, at the material time, responsible in law to ensure the constant safety, upkeep, maintenance and security of the arterial and distributor roads in Malta, including the road upon which the accident occurred ('Transport Malta's Duty'). Transport Malta's Duty included a duty to ensure that trees along the road side, including at the locus of the accident, did not present a danger to road users, including passengers on buses, including the pursuer." (Answer 6, p 20 B-D)

[50] The third party also recognised that, in Answer 6, the defender averred that the tour bus route had been determined by the third party and that, in order to operate on that route, a licence required to be obtained from the third party. In Answer 6, the defender characterised this licensing arrangement as "a commercial transaction". The defender founded upon this arrangement as the basis for arguments based both upon breach of contract and misrepresentation.

[51] Turning to the authorities, senior counsel began by noting the fact that there were relatively few Scottish decisions on the issue of state immunity. However, it had been noted that such authority as there was suggested that there was no material difference between the common law of Scotland and England (*Anton "Private International Law"* (3rd edition) at 6.02 citing *Grangemouth and Forth Towing Company Limited* v *Netherlands East Indies Government* 1942 SLT 228 and *Forth Tugs Limited* v *Wilmington Trust Company* 1985 SC 317).

[52] In respect of the English authorities on section 14(2), senior counsel drew attention to the very recent decision of *Surkis and others* v *Poroshenko and another* [2021] EWHC 2512 (Comm). This was a decision of Mr Justice Calver in the commercial court. It was highlighted as providing a useful summary of the leading authorities.

[53] On this basis, it was submitted further that, for present purposes, the starting point for determining whether particular acts are the exercise of sovereign authority was the speech of Lord Wilberforce in *I Congresso del Partido* ([1983] I AC 224:

> "When … a claim is brought against a state … and state immunity is claimed, it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act 'jure gestionis' or is it an act 'jure imperii': is it … a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of a private law character such as a private citizen might have entered into?" (at 262 E/G)
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> "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." (at 267B/C)

[54] My attention was drawn to Lord Goff's comment on this statement of principle in *Kuwait Airways* v *Iraqi Airways* [1995] 1 WLR 1147 (at 1160A):

> "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 governmental act, as opposed to an act which any private citizen can perform."

[55] Senior counsel also referred to the House of Lords case of *Holland* v *Lampen-Wolfe* [2000] 1 WLR 1573. This case concerned a claim by a US citizen who was a professor at a US university which was providing courses at a number of US military bases in Europe. She brought libel proceedings against the defendant in respect of statements he had made about her in a memorandum published by him in his capacity as education services officer. The House of Lords considered that the 1978 Act did not apply to the particular circumstances of the case because it related to things "done by or relation to the armed forces of a state".

Accordingly, their Lordships concluded that the case fell to be determined in accordance with the common law and their starting point was the passage (quoted above) from Lord Wilberforce's speech in *I Congresso.*

[56] In this context, Lord Hope approached the issue as follows:

> "In the present case the context is all important. The overall context was that of the provision of educational services to military personnel and their families stationed on a U.S. base overseas. The maintenance of the base itself was plainly a sovereign activity. As Hoffmann L.J. (now Lord Hoffmann) said in *Littrell* v *United States of America* (No. 2) [1995] 1 W.L.R. 82, 95, this looks about as imperial an activity as could be imagined. But that is not enough to determine the issue. At first sight, the writing of a memorandum by a civilian educational services officer in relation to an educational programme provided by civilian staff employed by a university seems far removed from the kind of act that would ordinarily be characterised as something done jure imperii. But regard must be had to the place where the programme was being provided and to the persons by whom it was being provided and who it was designed to benefit—where did it happen and whom did it involve? The provision of the programme on the base at Menwith Hill was designed to serve the needs of U.S. personnel on the base, and it was provided by U.S. citizens who were working there on behalf of a U.S. university. The whole activity was designed as part of the process of maintaining forces and associated civilians on the base by U.S. personnel to serve the needs of the U.S. military authorities. The memorandum was written on the base in response to complaints which are alleged to have been made by U.S. servicemen about the behaviour of the plaintiff, who is also a U.S. citizen, while she was working there. On these facts the acts of the defendant seem to me to fall well within the area of sovereign activity." (1157 C-G)

[57] Senior counsel also drew attention to the salutary words of Lord Clyde:

> "The solution in any particular case where the question of state immunity arises at common law has to be one of the analysis of the particular facts against the whole context in which they have occurred. There is little if anything to be gained by trying to fit the case into a particular precedent or to devise categories of situations which may or may not fall on the one side of the line or the other. It is the nature and character of the activity on which the claim is based which has to be studied, rather than the motive or purpose of it. The solution will turn upon an assessment of the particular facts. The line between sovereign and non-sovereign state activities may sometimes be clear, but in other cases may well be difficult to draw." (1580 E-G)

[58] Approaching the present case on this basis, it was submitted that the relevant context was provided by the area of activity in which it was claimed, in the current proceedings, that

the third party had acted or failed to act – namely, the powers and functions granted to the third party in terms of Article 7(b) of the 2009 Act - "to occupy, plan, design, construct, re-construct, administer, maintain, repair and restore roads…". This was not an area which could properly be considered to be a trading or commercial activity. It was not an area in which a private citizen could perform or carry out activities.

[59] It was further submitted that the fallacy in the position of the defender and its expert, Dr Aquilina, was that they confused this exercise of characterisation. Rather than seeking to identify the character of the relevant act or omission from context in which it was performed, Dr Aquilina relied upon the nature of the relationship which was created with an individual affected by the act. Thus, Dr Aquilina appeared to consider that the present case involved acts of a "private law" character because the cause of action was tortious under Maltese law. Such a "procedural" approach was not consistent with the case law and, for example, the result in the *Holland v Lampen-Wolfe* case (cited above).

[60] In relation to the context in which the act had to be considered, the third party also relied upon the statutory framework which created the third party and in which it operated. The third party was a "creature of statute" – the 2009 Act. It was the "guardian and regulator"[1] exercising sovereign authority on behalf of the Maltese Government in relation to all matters of transport. In this regard, the third party also relied upon the evidence of Joseph Bugeja in relation to its financial position – it was dependent upon the Government of Malta in order to be able to function. Furthermore, in terms of Article 24 of the 2009 Act, the Minister held the purse strings.

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[1] This phrase is taken from the judgment of Mr Justice Aikens in *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 WLR 1420 at [58] where it is used in the slightly different context of section 14(4) of the 1978 Act which concerns the position of central banks.

[61] In this regard, my attention was also drawn to the way in which the 2009 Act regulated the relationship between the third party and the Minister. It was submitted that the third party operated in a quasi-autonomous manner. Article 10 provided that, subject to the terms of the Act, the affairs and business of third party were the responsibility of the third party. However, Article 11 made clear that policy making and determination of policy matters were the exclusive prerogative of the Minister (Article 11(1)). The Minister also retained the power to give directions to the third party which the third party was obliged to give effect to (Article 11(3)). The ultimate sanction for any failure to comply by the third party was that the Prime Minister could divest the third party of any of its functions in whole or in part (Article 11(3)).

[62] Against this background, it was submitted that one could ask oneself the question – who has the authority to cut the trees down by the roadway? The Minister cannot do it himself or instruct a contractor to do it because the 2009 Act has vested this power in the third party. The Minister could issue a direction – but that would be to the third party. It was submitted that this analysis supported the third party's position that acts or omissions to which the current proceedings relate were the exercise of sovereign authority.

[63] Turning to the third party's second proposition, namely that the current proceedings did not relate to a commercial transaction, this was advanced to meet the argument made by the defender based on the fact that the third party was responsible for licensing the those operators using the bus route on which the pursuer had been travelling (see paragraph [50] above).

[64] The third party submitted that there had simply been no evidence characterising the issuing of the licence as a commercial or contractual relationship. Dr Aquilina had not touched on this point at all either in her report or in oral evidence. It was submitted that it

was apparent from the evidence of Mr Bugeja that the licence had been issued pursuant to the Passenger Transport Services Regulations 2009 (SI 499.56).

[65] In this regard, senior counsel for the third party drew my attention to what was said in *Svenska Petroleum Exploration AB* v *Government of the Republic of Lithuania and another (No 2)* [2007] QB 886 by Moore-Bick LJ at [132] in seeking to identify "commercial transactions":

> "[…] in determining whether a contract or transaction is commercial in nature reference should be made primarily to the nature of the contract or transaction itself. This accords with the existing principle of English law that it is the nature of the transaction that determines whether it is to be characterised as one entered into in the exercise of the state's sovereign authority (jure imperii) or in the exercise of a commercial function (jure gestionis): see *I Congreso del Partido* …. The distinction suggested by Lord Wilberforce in *I Congreso del Partido* between acts jure imperii and acts jure gestionis is between acts of a public law character and acts of a private law character or between a governmental act and an act that any private person can perform." (Emphasis added)

[66] On this basis, senior counsel submitted that the licensing function carried out by the third party could not properly be characterised as a commercial transaction.

Submissions for the defender

[67] Senior counsel for the defender moved me to repel the third party's preliminary plea in respect of state immunity.

[68] At the outset of his submissions, senior counsel clarified that, having reflected on matters, he no longer sought to advance a separate argument, in terms of section 3 of the 1978 Act, that founded upon characterising the third party's actions as a "commercial transaction". (Senior counsel made this clarification based on the analysis of Lord Goff of Chieveley in *Kuwait Airways* (above) at page 1159.) However, he submitted further that the basis of this part of the defender's argument was still relevant to a consideration of whether, in terms of section 14(2)(a) of the 1978 Act, the act of the third party founded upon in the

present proceedings was, truly, the exercise of sovereign authority. In this regard, senior counsel accepted that no evidence had been led in relation to the proper characterisation of the licensing arrangements. However, he submitted that it was still relevant in considering whether sovereign authority was being exercised to take into account both that the operation of the commercial bus route, where the alleged incident took place, could only happen subject to a licence issued for a fee by the third party and, further, that the 2009 Act indicated that the third party was to operate out of the revenues it generated.

[69] In making this clarification, senior counsel accepted that the arguments advanced on behalf of the third party in respect of its second proposition would, by the same logic, also be applicable in meeting this part of the defender's argument.

[70] Therefore, turning to section 14(2) of the 1978 Act, the parties were in agreement that the third party was a "separate entity".

[71] Senior counsel criticised the approach of the third party for "seeking to ride two horses" in that it appeared that it appeared to being suggested, on the basis of the evidence of Professor Refalo both that the third party was arm in arm with the Maltese State and also that it was a separate entity exercising sovereign authority. It was submitted that the third party could not maintain both of these positions. Senior counsel highlighted that the third party's pled position was that it was a separate entity.

[72] In terms of the current proceedings, the defender submitted that they related to a failure by the third party properly to maintain roadside vegetation. It was submitted that this failure had the juridical character of fault, negligence or delict which was, properly characterised, a private law character. Accordingly, given this character, it could not be said that the third party could claim immunity in these proceedings.

[73] In respect of the authorities, senior counsel for the defender founded principally on the judgment of Lord Sumption in the UK Supreme Court in *Benkharbouche* v *Embassy of Sudan* [2019] AC 777. This was a case which concerned claims made by embassy staff against the states employing them. These claims had been dismissed as a result of sections 4(2)(b) and 16(1)(a) of the 1978 Act. The issue before the court in that case was whether those two sections were incompatible with Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The question of the proper approach to section 14(2) was not before the court. However, senior counsel relied on what was said in paragraph [8] of the judgment:

> "Before 1978, state immunity was governed in the United Kingdom by the common law. Properly speaking, it comprised two immunities whose boundaries were not necessarily the same: an immunity from the adjudicative jurisdiction of the courts of the forum, and a distinct immunity from process against its property in the forum state. During the second half of the 19th century, the common law had adopted the doctrine of absolute immunity in relation to both…. -By 1978, however, the position at common law had changed as a result of the decisions of the Privy Council in *Philippine Admiral (Owners)* v *Wallem Shipping (Hong Kong) Ltd (The Philippine Admiral)* [1977] AC 373 and the Court of Appeal in *Trendtex Trading Corpn* v *Central Bank of Nigeria* [1977] QB 529. These decisions marked the adoption by the common law of the restrictive doctrine of sovereign immunity already accepted by the United States and much of Europe. The restrictive doctrine recognised state immunity only in respect of acts done by a state in the exercise of sovereign authority (jure imperii), as opposed to acts of a private law nature (jure gestionis). Moreover, and importantly, the classification of the relevant act was taken to depend on its juridical character and not on the state's purpose in doing it save in cases where that purpose threw light on its juridical character: *Playa Larga (Owners of Cargo lately laden on board)* v *I Congreso del Partido* [1983] 1 AC 244"

[74] In particular, senior counsel relied upon the reference by Lord Sumption to "juridical character" in this passage. However senior counsel also accepted that Lord Sumption was not seeking to innovate on Lord Wilberforce's statement in *I Congresso* (quoted above) to which he refers at the end of the paragraph.

[75] In respect of the earlier authorities, senior counsel highlighted how one could separate the authorities into those relating to the situation before the 1978 Act was enacted and those which followed it.

[76] In terms of the pre-1978 Act jurisprudence, senior counsel submitted that the starting point was the decision of the Court of Appeal in *Trendtex Trading Corporation* v *Central Bank of Nigeria* [1977] 1 QB 529. He emphasised that prior to this case, the common law operated on an all or nothing basis – immunity was either absolute or non-existent. However, against this background, *Trendtex* represented a development of the common law away from absolute immunity towards a more restrictive approach. He also recognised that, at that time, the governing issue was whether or not an entity had immunity depended on whether it was regarded as part of the state. In this regard, senior counsel drew attention to passages in the judgments of Lord Justices Stephenson (563D-F; 564F-G) and Shaw (573E to 574F; 574H to 575F) which highlighted the importance of looking at the wording of Act which created the entity in question together with its constitution, powers, duties and activities.

[77] Turning to *I Congresso,* senior counsel noted that, although the case was decided in the early 1980s it actually concerned matters which pre-dated the 1978 Act. However, senior counsel accepted that Lord Wilberforce's judgment has been recognised as being an authoritative statement of the principles underlying the distinction between acts which are the exercise of sovereign authority (jure imperii) and those which are not (jure gestionis). In addition to those passages to which the third party had drawn attention, senior counsel also highlighted the following:

> "Under the 'restrictive' theory the court has first to characterise the activity into which the defendant state has entered. Having done this, and (assumedly) found it to be of a commercial, or private law, character, it may take the view that contractual breaches, or torts, prima facie fall within the same sphere of activity. It should then

> be for the defendant state to make a case (cf. *Juan Ysmael*) that the act complained of is outside that sphere, and within that of sovereign action." (265B)

[78] In this regard, senior counsel also referred to the decision of the Federal Constitutional Court of the Federal Republic of Germany in the *Claim against the Empire of Iran* case (45 ILR 57) as providing context for and background to Lord Wilberforce's judgment.

[79] In respect of the cases decided after the 1978 Act, reference was also made to the speech of Lord Goff in *Kuwait Airways* case (cited above at 1160). Senior counsel noted that Lord Goff's speech emphasised that, when one was dealing with a separate entity it was not sufficient simply to point to the entity acting on the direction of the state – the act itself had to possess the character of a governmental act. Furthermore, Lord Goff also noted that, in the absence of such character, the purpose or motive of the act will not be sufficient to enable the separate entity to claim immunity under section 14(2) of the Act.

[80] It was submitted that the *Holland* case (cited above) was for present purposes only of limited value because it involved armed forces and therefore raised different issues.

[81] The final case which was referred to on behalf of the defender was *La Générale des Carrières et des Mines* v *FG Hemisphere Associates LLC* [2012] UKPC 27 in which the sole judgment of the Privy Council was given by Lord Mance. This case was not concerned with sovereign immunity directly. Instead, it concerned the related question of the extent to which the respondent could enforce claims it had against the Democratic Republic of Congo ("DRC") against the assets of the appellant, a DRC state owned corporation. As such, the critical question for the court in that case was whether the appellant was truly a separate legal entity. However, senior counsel submitted the analysis was relevant to consideration of whether the entity in question was exercising sovereign authority.

[82] On this basis, it was submitted on the behalf of the defender that, following the approach of Lord Sumption in *Benkharbouche* (cited above), it was the juridical character of the relevant act which was key to resolving the issue of whether it truly represented an exercise of sovereign authority. Senior counsel submitted that "juridical character" meant the way in which a court would characterise the act in question. When one considered the juridical character of the current proceedings, senior counsel submitted that this was a matter of private law – it was an alleged breach of duty which brought the present third party to court. This was the approach was consistent with the opinion and evidence of Dr Aquilina.

[83] It was also submitted that the act or omission upon which the present proceedings related – the proper maintenance of trees at the edges of the road – was not of sufficient importance properly to be characterised as the exercise of sovereign authority in terms of section 14(2) of the 1978 Act.

[84] Senior counsel argued that consideration of the 2009 Act also supported his position. The 2009 Act did not create a complete code for transport in Malta. Rather it created a separate entity, the third party, which was responsible for one part of the Maltese Government's strategy for transport being implementation. The formulation of policy and legislative functions – both of which clearly represented the exercise of sovereign authority – were retained by the Government. It was submitted further, as I understood it on the basis of Lord Mance's judgment in *La Générale des Carrières* (above), that the fact that the third party was a separate entity gave rise to a strong presumption that the third party was not exercising sovereign authority. As senior counsel put it, the Minister's hand remained on the tiller.

[85] Turning to the particular terms of the 2009 Act, senior counsel highlighted that it did not expressly and in terms provide for the exercise of sovereign authority. This was of significance standing what had been said by Lord Justices Stephenson and Shaw in *Trendtex* (above). He also drew my attention to provisions of the act which, he submitted both emphasised the separateness of the third party (Article 12 and the financial provisions in Part V) and showed the degree of control that was retained by the Government (Article 11; Part IV; and Article 43). Finally, he drew attention to the fact that, in terms of Article 36 and Part VI, the ownership of the roads was not transferred to the third party.

Reply for the third party

[86] Senior counsel for the third party made a number of brief points in reply.

[87] First, in response to the analysis of the 2009 Act made by the defender, it was submitted that the matter might be tested by asking, if the 2009 Act did not exist, who would be responsible for the matters relating for transport in Malta? The answer, it was suggested, was the Government of Malta. It was accepted that not every last thing done by a state would represent the exercise of sovereign authority. However, it was overly simplistic to argue, as the defender did, that setting up a separate entity raised a presumption that that entity was not exercising sovereign authority. Such an approach appeared to be at odds with the terms of section 14(2) of the 1978 Act itself.

[88] Second, in relation to paragraph [8] of Lord Sumption's judgment in *Benkharbouche* (above) which was founded upon by the defender, it was submitted that could not properly be regarded as representing a change to the approach set out by Lord Wilberforce in *I Congresso* (above). Such a reading would not be consistent with the fact that Lord Sumption specifically cited *I Congresso* at paragraph [8] of his judgment. The flaw in the defender's

approach was not to consider the character of the act in question but to focus entirely on the legal character of the consequences of that act on the pursuer. This was not consistent with the approach of Lord Wilberforce.

Analysis and decision

A legal question

[89] The issue of the third party's immunity from jurisdiction turns on the application of section 14(2) of the 1978 Act to the facts of the present proceedings. Notwithstanding the evidence I heard, it seems to me that this is a dispute about the law as opposed to a factual dispute. Furthermore, I consider that, as the arguments were focussed before me, the issue essentially became focussed on the test in 14(2)(a) namely whether or not the current proceedings relate to the exercise of sovereign authority by the third party.

[90] It did not appear to me that there was any difference between the parties in relation to the underlying facts either in respect of the circumstances of the present proceedings or in relation to the constitution, powers, duties and activities of the third party.

[91] The two Maltese lawyers who gave evidence, Professor Refalo and Dr Aquilina, did reach different conclusions as to whether, approached as a matter of Maltese law, the third party should be immune from the jurisdiction of the court. However, it seemed to me that their disagreement arose from their different opinions as to how the acts of the third party ought to be characterised as opposed to difference on any underlying issue of fact or as to the law of Malta.

[92] Both the third party and the defender contended, for various reasons, that I should prefer the opinion of its expert. However, I do not consider it necessary to reach a view on this. This is because the issue I need to decide turns on a question of Scots law not Maltese

law. As such, while I found the views of both experts to be of assistance (*cf* the judgment of Lord Wilberforce in *I Congresso* (above) at 265 C-E), I do not consider that it is necessary for present purposes to decide between them as to the Maltese legal position.

How do the current proceedings relate to the third party?

[93] Turning to section 14(2) of the 1978 Act, the first step is to determine how the current proceedings relate to the third party. In the wording of the provision, one requires to identify if the proceedings relate to "anything done" in exercise of sovereign authority. Although the formulation "anything done" might suggest an action, I consider that the wording is also broad enough to encompass an omission. For present purposes, it seems to me that what one requires to do is to identify what is said to be the connection between the current proceedings and the third party. On this point, there is no disagreement between the defender and third party. There are said to be two bases upon which the current proceedings relate to the third party.

[94] First, it is contended that the third party is in breach of what is referred to by the defenders in its pleadings as "Transport Malta's Duty" namely the third party's responsibility in law to ensure the constant safety, upkeep, maintenance and security of the arterial and distributor roads in Malta, including the road upon which the accident occurred (Answer 6, 20 B-D).

[95] Second, reference is also made by the defender to the third party's function as the licensing body for those operating the route on which the accident occurred. The defender founded upon this arrangement as the basis for arguments based both upon breach of contract and misrepresentation (Answer 6, 19A; and, 19C to 20A).

Section 14(2(a) – the correct approach to characterisation

[96] [96] The next step is to consider whether either of these bases can properly be characterised as being the exercise of sovereign authority.

[97] [97] Although, the correct approach to this characterisation was the principal area of disagreement between the defender and the third party, both took as their starting point the statement of principle given by Lord Wilberforce in *I Congresso* (above)*:*

> "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." (at 267B/C).

[98] Although this statement was not made in relation to 1978 Act, I consider that the use made of it in that context in subsequent cases of high authority (see *Kuwait Airways* (above) 1156 H to 157A; and, *Benkharbouche* (above) at [8]) mean that it should be regarded as authoritatively setting out the correct approach to be adopted.

[99] On this basis, I consider that, having identified what connects the separate entity to the proceedings, one requires to consider the context of that act or omission in order to determine whether or not it falls within the sphere of governmental or sovereign activity. In other words, the focus of the exercise of characterisation is on the context of what it is alleged had been done (or not done) by the separate entity.

[100] This focus is consistent with the way in which Lord Wilberforce's statement of principle has subsequently been applied. Thus, it is for this reason that Lord Goff, applying it in *Kuwait Airways* (above), asked the question – could what is said to have be done, have been done by a private citizen? (see *Kuwait Airways* (above) at 1160). I also consider it is also

consistent with the approach of Lord Hope in *Holland* (above) which was highlighted to me in submissions (see above at paragraph [56]).

[101] It follows that I consider that the approach urged on me by the defender and which was adopted by Dr Aquilina is in error in seeking to focus on the legal character of the proceedings arising out what has been done (or not done) by the separate entity as opposed to the context of what has been done by the separate entity. I do not consider that in his discussion setting out the background to the 1978 Act in *Benkharbouche* (above), Lord Sumption can be taken to have been innovating upon the approach in *I Congresso.* Furthermore, when one considers the judgment of Lord Wilberforce itself in *I Congresso*, it is apparent that consideration of the nature of potential wrongs – for example, torts of breaches of contract - arising from the actions in question are secondary to the principal exercise of characterisation (see *I Congresso* at 265 A-B).

Were the alleged acts and omissions of the third party "the exercise of sovereign authority"?

[102] Applying this approach, I consider that the alleged acts and omissions of the third party relied upon in the current proceedings do represent the exercise of governmental or sovereign authority.

[103] First, in respect of the "Transport Malta's Duty" (as defined by the defender) namely the duty to ensure the constant safety, upkeep, maintenance and security of the principal roads in Malta, this falls within an area of activity – road transport for goods and people - which is - to paraphrase Pleming JA in his judgment in the Court of Appeal of Jersey in *La Générale des Carrières* (above) (quoted by Lord Mance at [49]) – important and probably vital to the economic and social well-being of the Maltese state. This area or context would seem

to me to be plainly one of governmental activity. It is not, to use Lord Keith's formulation of the relevant test in *Kuwait Airways*, a duty which is incumbent on a private citizen.

[104] Having reached this view as to the context of Transport Malta's Duty and its character, I consider that much of the emphasis that was put on the fact that the "purpose" of the relevant acts and omissions by the defender flies off. While it is clear, from the case law, that the fact that an act of a commercial nature was carried out for governmental purposes will not alter the nature of the act (see Lord Clyde in *Holland* (above) at 1580 E-G; Lord Goff in *Kuwait Airways* (above) at 1160), that simply does not arise when, as in this case, what is founded upon is of governmental or sovereign nature.

[105] In this regard, I also reject the defender's argument that somehow the particular aspect of the alleged failure relied upon in the current proceedings – which apparently involved overhanging tree branches – was too insignificant for it to be characterised as the exercise of sovereign authority. I do not consider this to be relevant to the exercise of characterisation which requires to be carried out. I also do not consider that this approach is supported by the authorities cited to me.

[106] The 2009 Act and, in particular Article 7(b) thereof, make clear that this duty has been delegated by the Maltese state to the third party. As is clear from the 2009 Act – and was not in dispute - the third party is a separate legal entity (see Article 12).

[107] However, contrary to the defender's submissions, I do not consider that the fact that the third party is an admittedly separate entity impacts upon my conclusion as to the character of the relevant alleged acts and omissions of the third party which form the basis of the current proceedings so far as the third party is concerned. This part of the defender's submission was founded on passages taken from the judgments of Stephenson and Shaw LJJ

in *Trendtex* (above) together with the judgment of Lord Mance in *La Générale des Carrières* (above)

[108] In respect of *Trendtex*, I consider that the statements founded upon by the defender have to be seen in to the context of the legal issues which the court which the learned judges were addressing. As is pointed out by Lord Mance in *La Générale des Carrières* (above) (at paragraph [7]), when *Trendtex* was decided in order for a body to benefit from sovereign immunity it required to be regarded as a part of the state. Accordingly, I consider that the passages from the judgments of Stephenson and Shaw LJJ founded on by the defender need to be considered in that light. I consider them to be of limited value in addressing whether, in terms of section 14(2) of the 1978 Act, an admittedly separate entity is exercising sovereign authority.

[109] In the same way, I consider that the comments of Lord Mance in *La Générale des Carrières* founded upon by the defender as to the "strong presumption" that separate corporate status should be respected (at paragraph [29]), have to be seen in context in which they were made. That case concerned questions of substantive liability and enforcement in relation to a separate entity not, as in the present case, in relation to the issue of whether such an entity was entitled to sovereign immunity. As Lord Mance highlights earlier in his judgment (at paragraphs [11] and [12]), both the 1972 European Convention on State Immunity and the subsequent 1978 Act which took up but re-formulated the approach of the earlier Convention, represented an innovation from the preceding common law. Unlike the situation that had pertained when *Trendtex* had been decided, separate entities exercising sovereign authority were, following the coming into force of the 1978 Act, to be granted immunity. This immunity was provided by section 14(2) of that act.

[110] If anything, I consider that the relationship between the Government of Malta and the third party set out in the 2009 Act (at, in particular, Article 11) and spoken to by Mr Bugeja and Dr Borg, supports my conclusion that in fulfilling the public, governmental, function of maintaining the principal roads, the third party was exercising sovereign authority. The Maltese Government retained ultimate control over the third party. In this regard, I do not, contrary to the argument advanced by the defender, consider that there is any tension in the third party submitting both that it is exercising sovereign authority and that it is, whilst still a separate entity, acting on behalf of the Maltese State. Far from being in conflict, it seems to me that these two submissions mutually reinforce each other.

[111] Turning to the second basis upon which the defender argues the third party is connected to the current proceedings – namely, the third party's function as the licensing body – the defender's pled position is that "by accepting applications for and granting licences the [third party] was engaging in commercial transactions. By accepting applications for and granting licences the [third party] was not exercising a sovereign authority." (Answer 6, p 19-B-C). The defender goes on to aver that by accepting an application for the operator of the bus involved in the accident to which these proceedings relate, the third party was entering into a contract and, separately, making a representation concerning the route.

[112] However, notwithstanding the pleadings, it seemed to me that this part of the defender's case was only advance in a somewhat half-hearted fashion during the proof. As noted above (at paragraph [68]), by the point of submissions this part of the case was no longer deployed as a free-standing argument in terms of section 3 of the 1978 Act but, rather, as support for the defender's argument that the third party was not exercising sovereign authority in terms of section 14(2) of the 1978 Act.

[113] Furthermore, it was notable that, notwithstanding the pleadings, no evidence was led from Dr Aquilina (or anyone else) as to how the licensing arrangements are to be characterised as a matter of Maltese law.

[114] In terms of his submissions, senior counsel essentially limited his arguments on this part of his case to the facts that the licence fee was paid by the operator to the third party pursuant to Article 42 of the 2009 Act and that the third party was, so far as it was practicable, to meet its expenditure from its own revenue (Article 24). He also asserted, without providing any basis for the assertion, that the licence issued by the third party was "commercial".

[115] In these circumstances, I do not consider that this second basis advanced by the defender assists it. I consider that when the test identified by Moore Bick LJ in *Svenska Petroleum Exploration* (above at [132]) is applied to the present factual position as explained by Mr Bugeja, it is clear that the licensing arrangements operated by the third party are not commercial. These arrangements were carried out pursuant to the functions which had been transferred to the third party under the 2009 Act (Article 7(f)) and in terms of the 2009 Regulations. This was not a transaction which a private entity could have entered into in place of the third party. It is notable in this regard that the 2009 Act expressly precludes the third party from contracting out its regulatory or licensing functions (Article 10(2))

[116] Against this background, I do not consider the fact, in terms of the 2009 Act, that the third party is, so far as is practicable, to meet its expenditures from its revenues renders these licensing arrangements commercial. In any event, the reality, as Mr Bugeja explained in his evidence, was that the third party was dependent on a substantial grant to be able to operate.

Conclusion

[117] Accordingly, in the circumstances, I sustain the third party's plea of jurisdiction based on sovereign immunity and dismiss that action *quoad* the third party. I will reserve all questions of expenses meantime.