

JUDGMENT : Mr Justice Tomlinson : Commercial Court. 5th November 2008

Introduction

1. In this action the First Defendant, nominally a Bermuda corporation, has been properly served with proceedings as of right within the jurisdiction because it carries on its activities in London – CPR 6.2(1)(c) and 6.5(b). The Second and Third Defendants, nominally incorporated in the British Virgin Islands and Panama respectively, have been served with the proceedings out of the jurisdiction on the basis that they are necessary or proper parties to the claim against the First Defendant – CPR 6.20(3)(b). The First Defendant says that this court should decline to exercise its jurisdiction over it because it is clearly shown that the Democratic Republic of Congo, "DRC", is the natural and appropriate forum for the resolution of the dispute. The Claimant says that at the very least the First Defendant has its central administration in London and so is domiciled in England for the purposes of Article 60 of Council Regulation (EC) No. 44/2001, "the Judgments Regulation". If that is so, the English court cannot decline to exercise its jurisdiction over the First Defendant on the grounds of forum non-conveniens, even where the state which is said to be more appropriate is outside the European Community – *Owusu v. Jackson* [2005] QB 801, a decision of the European Court of Justice.

The Second and Third Defendants say that this is an inappropriate case in which to invoke the necessary or proper party jurisdiction because they are in reality the principal defendants to the Claimant's claim. Alternatively they say that it is not shown by the Claimant, on whom lies the burden, that the English court is clearly the natural and appropriate forum for the resolution of the dispute, and that service on them should therefore be set aside.

The Second and Third Defendants also say in their evidence, although tellingly they did not say it in their application, that the Claimant has agreed with them that the Tribunal de Grande Instance of Kolwezi in the province of Katanga in the DRC shall have exclusive jurisdiction in relation to the dispute.

2. The applications before the court therefore raise the familiar question, "where the case may be tried, 'suitably for the interests of all the parties and for the ends of justice'" see *Spiliada Maritime Corporation v. Cansulex* [1987] AC 460 at page 482 per Lord Goff of Chieveley, citing in turn Lord Kinneer in *Sim v. Robinow*, [1892] 19 R. 665 at 668. This is, as Professor Adrian Briggs has pointed out, a comparative exercise – see Briggs and Rees, *Civil Jurisdiction and Judgments*, 4th Edition at paragraph 4.58. I have unhesitatingly reached the conclusion that England is clearly and distinctly the more appropriate forum for the resolution of this dispute than is the DRC. Indeed with the greatest of respect to the judiciary of the DRC, I do not regard the DRC as an available alternative forum. Authoritative evidence before the court is to the effect that the normal infrastructure of a state does not exist in the DRC. Whilst there is a dispute on the evidence, which I cannot resolve on an application of this sort, as to the extent to which the judicial system is functioning in the DRC, this court cannot in all conscience conclude that the DRC is where the case may be tried suitably for the interests of all the parties, and for the ends of justice. Furthermore the Defendants do not in my judgment genuinely desire that the dispute should be resolved in the DRC. It is the stated position of the Claimant that in the event that this court declines to exercise its jurisdiction it will not seek relief in the courts of the DRC. The Defendants know therefore that there would in fact be no proceedings in the DRC. When in November 2007 the three Defendants made between themselves the call option agreement which has triggered the Claimant's action, tellingly they agreed to London arbitration and to English jurisdiction.

The facts

3. This is a dispute between three men. The Claimant, "Alberta", is a Canadian company wholly owned by Mr Robert Buchan, who lives in Canada. The Second Defendant, "Tain", is a BVI company wholly owned by Mr Arthur Ditto. Mr Ditto is based in London. The Third Defendant, "Wayland", is a Panama corporation wholly owned by Mr George Forrest, a Belgian who has lived all his life in what is now the DRC. His family has lived there for generations. Mr Forrest is on anyone's case a man of great prominence in the DRC. Once business associates, these three gentlemen have fallen out. Mr Buchan accuses Mr Ditto and Mr Forrest of dishonesty, and, in particular, of having attempted to dispossess him of his one-third interest in a Congolese mining company, and of attempting to dispose of their own shareholdings in that company in a manner which will defeat his right of pre-emption. Mr Ditto and Mr Forrest for their part accuse Mr Buchan of dishonesty. Mr Forrest says that Mr Buchan "has brought this claim to try to get something to which he no longer has any right because of his own turpitude".
4. The First Defendant, "Katanga", is a Bermudian company with its principal office in London in which both Mr Ditto and Mr Forrest have a substantial interest. They are both major shareholders and Directors. Mr Buchan/Alberta once also had a substantial interest in Katanga. It is common ground that disposal by Mr Buchan/Alberta of those shares in Katanga in 2007 led to acrimonious relations between the three men. By the time this action was brought Katanga was seeking listing on the London stock exchange. On 6 November 2007 it announced its intention to merge with Nikanor plc.
5. Katanga has a subsidiary, KFL, which is in a joint venture with La Générale des Carrières et des Mines ("Gécamines"), a state-owned and operated mining enterprise of the DRC. The joint venture owns Kamoto Copper Company SARL ("KCC"), with 75% held by KFL and 25% held by Gécamines. The major and extremely valuable asset of KCC is the Kamoto copper and cobalt mine, which is anticipated to produce in each year from 2010 150,000 tonnes of copper and 8,000 tonnes of cobalt.
6. The company which actually operates the Kamoto mine is Kamoto Operating Limited, hereinafter "KOL". This is a DRC company. It was established in October 2005 with three hundred issued shares to be held equally between

Alberta, Tain and Mr Forrest. KOL receives a fee of 3% of KCC's budgeted expenditure for operating and capital costs. This is already a substantial amount, which can be expected to rise even further as production increases. The shareholdings in KOL are thus extremely valuable and their value can be expected to increase.

7. KOL was set up by a Deed of Incorporation which it is common ground takes effect as a contract between the three subscribers. No copy is available of the original document, which was apparently in the French language. The original subscribers were Alberta, Tain and Mr Forrest. Tain and Wayland appear to have purported to amend the Deed in early November 2007. In the Revised Deed Wayland is named as the third subscriber rather than Mr Forrest. Since Wayland is simply the creature of Mr Forrest, I can disregard this for present purposes. The Deed and the Revised Deed are in most respects identical. There is however one significant difference.
8. Articles 5, 6 and 12 of what is said to be an English translation of the original Deed provide:

"Article Five: Capital

The capital is set at the sum of 3,000,000 Congolese francs.

It is represented by 300 company shares with voting rights, without face value, with each share representing 1/300 of the company assets. These shares are fully subscribed and fully paid-up.

Article Six: Subscription

The parties state that their share capital subscription is as follows:

1. 889457 Alberta Inc. 100 company shares
2. Tain Holdings Limited 100 company shares
3. Mr George Forrest 100 company shares

Total: 300 company shares

The aforementioned Shareholders note and declare that the number of shareholders is three, that the capital has been fully subscribed and paid up. The company thus has 3,000,000 (three million) Congolese francs available.

...

Article Twelve: Ownership - Transferability

The ownership of the shares shall be established by an entry in a register kept at the registered office. The register may only be consulted by the shareholders at the place where it is kept.

The register shall contain the following information: the precise name of the owners, the number of shares held by each of them, the dates of the transfers or conversions.

The shares may only be transferred by virtue of a special authorization from the Board of Directors, in favour of an approved transferee, insofar as all the operations specified hereinafter have been fully respected beforehand.

1. *The shares that a Shareholder proposes selling shall first be offered to the other Shareholders.*
2. *The Shareholder who wants to transfer all or some of his shares shall notify the Board of Directors of his desire to do so.*

To this end he shall send a registered letter or a letter sent by courier with acknowledgement of receipt to the Board of Directors which shall in turn notify the other Shareholders of their offer to sell.

The said letter shall stipulate:

- *The number of shares he proposes selling*
- *The transfer price*
- *The name of the acquirer who proposes taking on the shares, if the other Shareholders do not make use of their pre-emptive right.*

3. *The Shareholders shall have 15 days after notification to exercise their pre-emptive rights in proportion to the shares that they already hold.*
4. *If one or more Shareholders do not wish to make use of their pre-emptive rights, they shall go to the other acquiring Shareholders, with observance of the same proportion.*
5. *If no Shareholders make use of their pre-emptive rights, the transferor may freely sell his shares at the transfer price to the proposed transferee, who shall be approved by the General Meeting of the Shareholders."*

9. On 6 November 2007, as I have already mentioned above, Katanga announced its intention to merge with Nikanor plc and to seek listing on the London stock exchange. A Recommended Offer Document was issued by Katanga and Nikanor on 6 December 2007. At page 18 there appeared the following:

"KOL Call Option

In order to give the Merged Company the opportunity to acquire KOL, an entity owned by George Forrest and Tain Holdings Limited (an entity connected with Arthur Ditto) which is the operator of KCC's assets pursuant to the KOL Operating Agreement, George Forrest and Tain Holdings Limited have entered into a call option pursuant to which the Merged Company has an option to acquire KOL free from all encumbrances. The purchase price payable if the option is exercised will be determined by an independent investment bank agreed between the parties as the fair market value to the KOL shareholders, as at the date of the valuation, based on the Katanga standalone model as at the announcement dated 6 November 2007.

The call option shall be exercisable once the merged price is determined and has been notified to the parties, subject to the approval of the Merged Company and to such regulatory and stock exchange approval as may be required. The call option shall terminate if not exercised within 3 months from the date the purchase price is determined and notified to the parties..."

10. It thus appeared to Alberta that (a) Tain and Wayland were granting an option to sell Alberta's shares in KOL and (b) that insofar as Tain and Wayland proposed to sell their own shares, they proposed to disregard Article 12 of the Deed of incorporation and to deprive Alberta of its right of pre-emption.
11. Alberta thus begun this action seeking the following relief:
- "(1) An injunction restraining Tain and Wayland and each of them from transferring their shares in KOL to Katanga without first complying with the requirements of Article 12 of the Deed; "
- (2) An injunction restraining Katanga from taking a transfer of the shares in KOL from Wayland and/or Tain unless Wayland and Tain have each complied with their obligations under Article 12 of the Deed;
- (3) Alternatively, if before judgment Wayland and/or Tain have transferred their shares to Katanga without first complying with Article 12, an injunction requiring Katanga to re-transfer to Wayland and Tain the shares that they transferred to Katanga;
- (4) Alternatively, damages;
- (5) Costs and further or other relief."
12. In the Particulars of Claim it is alleged that Katanga, by entering into the Call Option, procured a breach of the Deed by Tain and Wayland. It is alleged that Mr Forrest's and Mr Ditto's knowledge of the terms of the Deed is to be imputed to Katanga.
13. In correspondence before action legal advisors acting for and on behalf of Katanga, Tain and Wayland did not accept that Alberta is a shareholder in KOL. However it was not until service of a Witness Statement by Mr Eastwood, a partner in Messrs Norton Rose, solicitors for Katanga, that it became apparent why the defendants maintained this denial. Mr Eastwood's witness statement was in support of Katanga's application that the action be stayed. Mr Eastwood said this:
- "19. Tain, Wayland and Katanga will dispute that Alberta has any entitlement to the relief sought on the basis that Alberta is no longer a shareholder of KOL by reason of its failure to pay the outstanding subscription for its shareholding.
20. Alberta was disqualified as a shareholder of KOL pursuant to the resolutions made at a Shareholders' Meeting on 14 January 2008. A copy of the minutes of that Shareholders' Meeting are located at pages 49-55 of SAME 1."
14. In this latter regard the purported amendment to the Deed of Incorporation becomes relevant. Article 8 of the original Deed provides:
- "Article Eight: Calls for Payment
- The Board of Directors shall make calls for payments on the shares that are not fully paid-up at the time of subscription, set the periods for payment (a payment is defined as a payment of cash, the provision of a contribution in kind or other resources), and shall set their amount in a notice sent by registered letter or by courier with acknowledgement of receipt, at least thirty days before the time set for the payment.
- Any payment not made on the date becoming payable shall automatically bear, by the sole fact of falling due, without any need for a prior demand or default notice, interest at the rate of eight percent per year, to the charge of the Shareholder in default.
- The exercise of the rights relating to the shares on which the payments have not been made shall be suspended for as long as these payments, properly called for and payable, have not been made in settlement of the principal and interest.
- After a second warning has remained without effect for one month, starting from its notification, the Board of Directors may declare the defaulting shareholder disqualified and in such a case sell his shares on which the payments have not been made, without prejudice to the right to claim the amount remaining due from the Shareholder, as well as any compensation."
- However, Article 8 of the revised Deed provides:
- "Article 8: Call for Funds
- The company shares must be fully paid up no later than 8 days following their subscription by means of a contribution (a contribution is hereby defined as meaning a payment of money, or the making available of cash contributions or making available by other means).
- The exercise of any rights arising under the company shares for which contributions have not been effectuated shall be suspended for as long a period of time as such contributions shall not have been made.
- Any contribution not made as of the date it is due shall automatically give rise to, solely by virtue of the expiration of the time period for payment, without any requirement for advance notification or formal summons, the forfeiture of the rights of the Shareholders as regards the shares not paid up.
- In the event that the Partner who has forfeited his rights were to own solely shares that have not been paid up, the forfeiture of such rights shall automatically result in his being fully disqualified.
- In the event that the Partner who has forfeited his rights were to own shares that have not been paid up, as well as shares that have been subscribed, either paid up or not paid up, the forfeiture of rights as regard the non paid up shares may be accompanied by a disqualification imposed by the simple resolution of the General Meeting of the Shareholders as well [as] a buy-back of the other Shareholders of the shares that have been subscribed and paid in, or in the event no such buy-back takes place, a repurchase by the corporation for the purpose of nullifying the subscribed and paid in shares."

The alleged meeting of 14 January 2008 had of course been a Shareholders' meeting, not a Directors' meeting. Mr Buchan was until 14 January 2008 a Director of KOL. The minutes of the alleged meeting record that he "is discharged of his mandate within the company".

15. There has also been disclosed in the exchange of evidence concerning these applications the Call Option Agreement whereby Mr Forrest and Tain granted to Katanga an option to purchase all of the shares in KOL, said to be owned as to 50% by Mr Forrest and 50% by Tain. The Call Option Agreement and the revised Deed of Incorporation seem to have been executed at about the same time in early November 2007. The Call Option Agreement contains the English arbitration and jurisdiction provision to which I referred above.
16. It is the contention of Mr Forrest and Mr Ditto that in the course of 2007, in fact in January, April and June, Mr Buchan had been sent by KOL written requests to regularise the alleged non-payment by Alberta of its subscription for its shareholding. It is also alleged that Mr Buchan was given notice of the meeting of 14 January 2008. All of these communications are said to have been sent through the postal service of the DRC. It is true that Article 12 of the Deed of Incorporation calls for the sending of a registered letter or of a letter sent by courier to the Board of Directors where a shareholder wishes to transfer some or all of his shares. Mr Buchan however says that notice of all of the Board Meetings of Katanga and KCC which he attended between 2005 and 2007, about ten in all, was given by e-mail. He says that these parties did not conduct business using the DRC postal service. He regards as laughable the suggestion that any business would be done in reliance on the DRC postal service. At all events, he denies receipt of any of the letters allegedly sent to him. Copies of the letters and what are said to be receipts therefor issued by the postal authorities in Lubumbashi have been produced by the Defendants.
17. At paragraph 30 of his witness statement of 9 June 2008 Mr Buchan says:
"When Mr Forrest, Mr Ditto and I took our shareholdings in KOL we assumed that we did not need to pay for the subscriber shares. We signed the necessary documents and carried out the necessary acts to form KOL. We were not asked to pay for the subscriber shares. The KOL Deed records that all the subscriber shares were paid up ... and this reflected the agreement between Mr Forrest, Mr Ditto and I that it was not necessary to make these minimal payments."

Mr Forrest and Mr Ditto for their part deny that there was any such assumption or agreement. They produce what are said to be receipts for their respective subscriptions dated 21 and 20 October 2005 respectively. Notwithstanding Mr Buchan, Mr Forrest and Mr Ditto were in regular contact between 2005 and 2007, Mr Forrest and Mr Ditto say that they were unaware that Mr Buchan had "failed to liberate his shares" until, respectively, August and September 2007. Mr Buchan says in paragraph 32 of his witness statement that without prejudice to his contention that Alberta's shares are paid up, Alberta will tender payment for the 100 shares in the sum of one million Congolese francs which at current exchange rates is the equivalent of about £924. Obviously on this application I cannot resolve the question whether payment for the shares was required. Whilst it might seem surprising that payment for the shares should not be required, it would also seem surprising that Mr Buchan would put at risk a valuable shareholding for want of payment of such a relatively trifling sum. It also seems surprising that, if the Company Secretary of KOL was indeed pressing Alberta/Mr Buchan for payment in January, April and June 2007, this did not come to the attention of either Mr Ditto or Mr Forrest and was not the subject of any discussion either between them or between them and Mr Buchan. Indeed if, as alleged, the unpaid shares were frozen and the owner thereof had no voting rights, it is again surprising that this did not come to light earlier.

The Article 60 Domicile of the First Defendant

18. Article 60 of the Regulation provides:
"1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
 - (a) *statutory seat, or*
 - (b) *central administration, or*
 - (c) *principal place of business."*
19. Katanga is incorporated in Bermuda but it is said to be resident in Canada for tax purposes. Katanga has produced no documentation bearing on its place of central administration or principal place of business but relies upon a witness statement of Stephen Jones, its Senior Vice President and Chief Financial Officer. He is resident in London. Katanga has ten directors only one of whom is an executive director, Mr Ditto, who is based in London. Mr Ditto is in fact President and Chief Executive Officer. One non-executive director is resident in Canada. It is said by Mr Jones that the company is centrally managed and controlled in Canada. Mr Jones says this:
"The administration of Katanga
 3. *Katanga is a company incorporated and existing under the laws of Bermuda. Its registered office is at Canon's Court, 22 Victoria Street, Hamilton HM EX, Bermuda. Katanga is a holding company for an international group of companies. The share registry of those companies is held at Katanga's registered office in Bermuda.*
 4. *Katanga's shares are listed on the Toronto Stock Exchange and it is resident for tax purposes in Canada. It is resident in Canada for tax purposes because it is centrally managed and controlled in Canada where its tax returns are filed. One of its directors, Robert Wardell, resides in Canada.*
 5. *Of the remaining 9 directors on Katanga's board:*
 - (a) *three are based in the Democratic Republic of Congo ('the DRC') (George Forrest, Malta Forrest and Jean-Claude Masangu Mulongo);*

- (b) three are based in London (Arthur Ditto, Stephen Oke and Terry Robinson);
- (c) one is based in South Africa (Hugh Stoyell);
- (d) one is based in Israel (Rafael Berber);
- (e) one is based in Switzerland (Aristotelis Mistakidis).

It can be seen that the majority of the Board are based outside the UK. Further, a majority of the Board are not tax residents of the UK.

6. The key decision making for Katanga's business (including all strategic and investment decisions) takes place at Katanga's board meetings which occur approximately once per month. Those meetings predominantly take place in Canada. Katanga's board meets by way of:
 - (a) Physical board meetings conducted at various locations; or
 - (b) Telephonic board meetings conducted through a Canadian telephone number (at these meetings, Katanga's board members dial-in from wherever they are located in the world at the relevant time).
7. Of the 32 board meetings which have taken place since 17 January 2006 (being the date on which there was a change in name of the company from Balloch Resources Limited to Katanga), 22 have taken place in Canada (17 of which were telephonic). Of the remaining 10 board meetings which have occurred during that time:
 - (a) 4 have taken place in the DRC;
 - (b) 2 have taken place in Belgium;
 - (c) 2 have taken place in the UK;
 - (d) 1 has taken place in Switzerland; and
 - (e) 1 has taken place in France.
8. Katanga UK is a service company. It provides consultancy services to the entire Katanga group; this includes not only Katanga, but also the mining operations carried on by its subsidiaries in the DRC. Katanga UK is incorporated under the laws of England and Wales (it was incorporated on 31 May 2006) and has its registered office at 15 Golden Square, London, W1F 9JG. As stated above, I am a director of Katanga UK and I am based in London to perform this role.
9. On or about 1 September 2006 Katanga UK entered into a services agreement with Katanga pursuant to which Katanga UK would provide high level operational consultancy to the group's mining operations in the DRC as well as administrative and support services required by Katanga ('the Services Agreement'). Those services include the following:
 - (a) investor relations;
 - (b) finance, treasury and taxation;
 - (c) legal (including Company Secretarial)
 - (d) human resources;
 - (e) information technology and communication;
 - (f) sustainable development;
 - (g) corporate social responsibility;
 - (h) accounting (including accounts payable and receivable; and
 - (i) the provision and maintenance of a correspondence address in London (which includes the display of Katanga's name).
10. In accordance with the Services Agreement (and to facilitate Katanga UK's performance of the other services required of it under that agreement), Katanga UK maintains a correspondence address for Katanga at Katanga UK's registered office at 15 Golden Square, London, W1F 9JG.
11. Prior to 1 September 2006, Katanga engaged the services of consultants located in Canada to provide the services currently performed by Katanga UK."
20. Katanga's actual business operations are all in the DRC. They are described as "a large scale copper-cobalt project with substantial high grade mineral reserves and integrated metallurgical operations [at various locations] in the DRC".
21. In order to succeed on this issue Alberta must show a good arguable case that the central administration or principal place of business of Katanga is in England. This means that Alberta must on this issue on the material available have a much better argument than does Katanga – *Canada Trust Company v. Stolzenberg (2)* [1998] 1 WLR 547 at 555 per Waller LJ, approved in the House of Lords by Lord Steyn at [2002] 1 AC 1 at 13.
22. Some guidance as to the proper approach to this question can be derived from the authorities, in particular (i) *The "Rewia"* [1991] 2 Lloyd's Rep. 325, which was concerned with a jurisdiction clause in a bill of lading which referred to the carrier's principal place of business; and (ii) *King v. Crown Energy Trading* [2003] EWHC 163 and *Ministry of Defence of Iran v. Faz Aviation*, [2008] 1 All ER (Comm) 372, both of which were concerned with Article 60. In *The "Rewia"* the central management and control of the company was in Germany and the question was whether that was also its principal place of business. It was held that it was, since the shareholders and officers of the shipowning company were all German, directors' meetings were held in Hamburg, contractual commitments such as vessel charters had to be authorised from Hamburg and all earnings were remitted to Hamburg. Germany was the principal place of business rather than Hong Kong. Hong Kong was the principal place of business of the vessel's managing agents. That company was in fact and not merely legal fiction a separate entity. Although in practice that company, Turbata, had a free hand in the day-to-day management of the vessel from Hong Kong, all that they did was subject to the control of the directors in Hamburg. That was the centre from which instructions

were given when necessary, and from which ultimate control was exercised – see per Leggatt LJ at page 335 and per Dillon LJ at page 336.

23. However central administration does not necessarily mean the same as central management and control, and central administration and principal place of business are plainly intended in the Regulation to be alternatives, not necessarily to be found in the same place. In *King* His Honour Judge Chambers QC pointed out that administration "has something of the back office about it", whereas Boards of Directors decide upon policy and important aspects of its implementation.

It is important not to lose sight of the purpose of the Regulation. It is as Langley J pointed out in *Faz* at page 380 "concerned to provide for jurisdiction in a location with which the potential defendant has a real connection at the relevant time". The date on which domicile must be established is the date on which the proceedings were issued: see per Langley J at page 375. Whilst it can plausibly be said that Katanga has a real connection with Canada, to my mind the connection with England is much more real. It is where the entirety of the administration takes place and it is where all known management resides – the sole executive director, the President, the Chief Executive Officer, the Senior Vice President and the Chief Financial Officer, albeit that is only two people. London must be the centre from which management instructions are given when necessary. Whilst key decisions may be made in Board meetings co-ordinated from Canada and sometimes taking place in Canada, everyone active on Katanga's behalf operates in London. I know nothing of where Katanga's earnings are remitted although it would seem likely to be Bermuda. The connection with Canada seems to me contrived rather than real. In so saying I do not suggest that there is any illegality. What I mean is that the connection with Canada is designed so as to be sufficient to establish and to maintain tax resident status, notwithstanding that so far as I know on the evidence no officer and no shareholder actually lives in Canada and only one non-executive director is resident there.

Central administration and principal place of business may well and will frequently be found in the same country – see per Langley J in *Faz* at page 380, but that will not always be so. Although I am not attracted to it, there may be a case for saying that the principal place of business is here Canada because that is where corporate authority ultimately resides, even if only for the most part by reason of a conference call being facilitated through a Canadian telephone connection. I cannot however conclude that central administration is to be found in Canada. No administration is to be found in Canada, and it is not shown that the day-to-day activities in London are subject to the control of senior management located elsewhere. The influence of Canada is at best strategic. Professor Briggs at paragraph 2.115 of *Civil Jurisdiction and Judgments* suggests that one approach to central administration in the Regulation may be to examine where those who have the serious responsibilities in the company have their place of work, and that this may also indicate the principal place of business. I agree that this is a helpful approach. Adopting it, and giving to the words in the Regulation what is I think both their natural and their intended meaning, I find that the central administration is here in London. I do not need to decide where is the principal place of business, but the principal place of business is not so obviously in Canada as to cast doubt upon my conclusion that the central administration is in England.

24. It follows that the court has no discretion to stay the action as against Katanga. I should however stress, as is already apparent from what I have said above, that even had I concluded that the court enjoys a discretion, I would not have stayed the action as against Katanga. That is because Katanga cannot satisfy the court that the DRC is a clearly more natural and appropriate forum for the resolution of the dispute than this court.

"Necessary or proper parties"

25. Since the action is to proceed against Katanga, the desirability of concentrating proceedings in one jurisdiction so as to avoid the possibility of inconsistent decisions would ordinarily tell in favour of retaining jurisdiction over Tain and Wayland. In the light of Alberta's stated position that it will not in any event bring proceedings against Tain and Wayland in the DRC, this is here an academic point. Proceedings against Katanga alone would however be incomplete. Furthermore Katanga is in any event largely if not wholly owned by Mr Forrest and by Mr Ditto. To entertain proceedings against Katanga but not against Tain and Wayland would be to ignore the reality of the dispute. Moreover as I shall discuss hereafter I do not consider that Alberta has, as against Tain and Wayland, agreed to the exclusive jurisdiction of the courts of the DRC so that considerations such as those discussed by Waller LJ in *British Aerospace v. Dee Howard Company* [1993] 1 Lloyd's Rep. 368 and by Colman J in *Konkola Copper Mines v. Coromin* [2006] EWHC 1093 (Comm) at paragraphs 30 and 35 of his judgment do not arise.
26. It follows from the foregoing that I reject the contention of Tain and Wayland that this is not a case in which they should have been joined as necessary or proper parties. The court's power to permit service on the "necessary or proper party" basis is no less wide than the court's power to add or substitute a party under CPR 19.2(2): see *United Film Distribution Limited v. Chhabria* [2001] EWCA Civ 416 at paragraphs 36-38. On this basis, it is sufficient to show that "there is an issue involving [Tain and Wayland] and [Alberta] which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue": see CPR 19.2(2)(b). There is a substantial factual overlap as between the claims brought against Tain and Wayland for breach of contract and the claim brought against Katanga for inducing such breach. The same factual investigation is required in order to resolve all three claims. In the light of these considerations it is irrelevant, if it be the case, that Tain and Wayland are in reality the principal defendants to the Claimant's claim. There is no principle pursuant to which only "secondary" defendants can be proper parties. However I would not necessarily characterise Tain and Wayland as the principal defendants to the Claimant's claim. Tain and Wayland are simply name-plate companies, albeit vehicles for Mr Ditto and Mr Forrest. Katanga is the only real commercial party amongst the Defendants, and might well prove to be the only party against whom the Claimant has any

realistic prospect of enforcing a money judgment, should one be obtained. Furthermore Katanga has its central administration in London and the activities at the centre of this dispute were all part of the process of preparing Katanga for listing in London and ultimate merger with a UK quoted company. The Call Option was drawn up by Messrs Norton Rose in London. It was signed by Mr Ditto for Tain in London, whose signature was incidentally witnessed by Mr Steven Jones of Katanga. Mr Ditto was one of two signatories also for Katanga, and I presume again that he appended this signature in London. There is something to be said for the view that the centre of gravity in relation to the alleged wrongdoing is London. In any event, the identity of interest between Katanga, Tain and Wayland is such that epithets such as the tail wagging the dog have no real application. The relief which the Claimant seeks is relief which would naturally be sought in a single action to which all three of Katanga, Tain and Wayland are party. There is nothing artificial or contrived in the Claimant using the presence of Katanga within this jurisdiction as a means of establishing jurisdiction over Tain and Wayland.

The situation in the DRC

27. There is before the court a witness statement from Dr Muzong Wanda Kodi, an Associate Fellow of the Royal Institute of International Affairs, also known as Chatham House. Dr Kodi co-ordinates the British Congo Forum at Chatham House. He has extensive experience and knowledge of issues relating to the Congo and is a respected international commentator thereon. He works regularly with the Department for International Development of the UK and co-ordinates conferences at which senior Congolese and British ministers attend. He travels regularly to the DRC for the purposes of his research work. In his evidence Dr Kodi also draws on reports of various organisations such as the Foreign and Commonwealth Office; the Border and Immigration Agency of the Home Office; Special Rapporteur to the UN General Assembly on the independence of judges and lawyers; the US Department of State; Transparency International; Global Witness and Human Rights Watch.
28. Dr Kodi and the authorities from which he cites regrettably conclude that although the theoretical underpinning for the rule of law may be present in the DRC, in the shape of the new Constitution promulgated in February 2006 in the wake of the Sun City political agreement for a government of national unity, in practice the rule of law is not respected.
29. Dr Kodi paints a bleak and depressing picture. The DRC has, he says, had a long and tragic history marked by untold violence and injustices. His report includes the following:
- "25.1 The DRC is ranked 168th out of the 177 countries classified in the 2007/2008 Human Development Index of the United Nations Development Program.*
- 25.2 It is ranked by Transparency International as one of the most corrupt countries in the world (150th out of a total of 179 countries classified, with the score of 1.9 out of 10).*
- 25.3 An estimated 5.4 million people have died over the last ten years as a direct or indirect result of the war imposed on the DRC by its neighbours, Rwanda, Burundi and Uganda. It is estimated that every day 1,200 people die of preventable diseases or as victims of the localised conflicts. In the words of Jan Egeland, this amounts to a 'tsunami' every six months. The death toll definitely outstrips that of the Darfur region of the Sudan.*
- 25.4 About half of the 60 million Congolese are under the age of 18 and children are particularly affected by the crisis that the country is going through. Some 20% of the children do not live beyond the age of 5 years. Of those who survive, 38% suffer from malnutrition. Half of children between the ages of 6 and 11 years do not attend school. 10% of the children have lost one or both parents to AIDS. About 20,000 have been child soldiers.*
- 25.5 The DRC has one of the highest maternal mortality ratios in Africa, at 1,300 deaths per 10,000 live births.*
- 25.6 Nearly 90% of the population live with 1 US dollar per day and 70% of the population are undernourished.*
- 25.7 There are just a few kilometres of tarmacked roads in the country.*
- 25.8 Hospitals, schools and factories are in ruins.*
- ...
26. *The Government is faced with a difficult situation where all sectors of the economy have been destroyed and all need urgent attention. With rampant corruption and a dysfunctional civil service, the government is unable to collect the necessary revenue from the mining sector which is seeing a huge influx of investments. Part of the problem is the mining contracts that were signed during the war and the transition period by corrupt government officials which deprive the country of much needed revenues for several decades to come. In a move to remedy this situation, the Government last year launched a process for reviewing all the mining contracts. All the contracts have been found to be one sided and in favour of the mining companies. The Government is now in the process of negotiating with the mining companies amendments to the existing contracts.*
27. *The people are becoming more and more restless as the Government is not able to deliver even basic services to the people. Several strikes have taken place recently in all sectors of the economy. In most cases, the police have reacted with disproportionate violence, killing and wounding scores of civilians. The number of cases of human violations remains high and there is a great deal of insecurity, even in the major cities. Most of the abuses of human rights violations are committed by poorly paid and undisciplined Government soldiers and police. Reported cases of human rights violations go unpunished as the justice system is ill-equipped, corrupt and controlled by the Executive Branch of the Government.*
28. *The history of the DRC has been marked by predation of its enormous wealth and the oppression of its people by foreigners and its own elites. Many opportunities have been missed in the post-colonial period to remedy this*

situation. Independence in 1960, Mobutu's coup d'état in 1965, the National Sovereign Conference in the early 1990s, the demise of Mobutu's kleptocratic regime in 1997 and the 2006 elections were all developments in which the Congolese people pinned their hopes for a better future. They all have turned out to be great disappointments as there has been more continuity than change in the prevailing corruption and mismanagement of the country. The new Government has proved to be just as corrupt and dysfunctional as its predecessors. There is no perceptible will at the highest levels of the State to restore the rule of law, rebuild an independent justice system capable of prosecuting cases of corruption and human rights violation and create security forces with the capacity to ensure the State's control over its territory. The immediate future does not look promising.

29. ...

Government control over the Kinshasa and Katanga areas

30. The State institutions have all but collapsed in the DRC following several decades of neglect and more than 11 years of a very deadly conflict that further reduced the capacity of the State to control its territory and provide protection and security to people and their property. The state is absent in large swathes of the national territory which have come under the control of militias and warlords. Even in areas, such as Kinshasa and the Katanga province where there is relative peace and stability, the state is unable to protect civilians and guarantee their security. The police force is corrupt, ill-trained and equipped, and poorly paid. It lives off the very people it is supposed to protect. The Congolese media is replete with stories of men in uniform racketing or even killing civilians in Kinshasa and other parts of the country.

31. The incidents reported in Home Office DRC Country of Origin Report, 08.02.2008, section 3.07 and section 8.452 are typical of these areas (see pages 40 and 75 of 'MWK1'). In fact, the confrontation between then Vice-President Jean-Pierre Bemba's guards and those of President Joseph Kabila is an illustration of the lack of [and] the dysfunctional nature of the State apparatus. The Vice-President and the President had under their control personal command militias that they used at will against their political opponents. The two militias clashed several times in Kinshasa in 2006 and 2007. Another indication of the insecurity that prevails in Kinshasa is the recent shooting, in broad daylight and near one of the presidential palaces, of Senator Onosumba by a group of men wearing the uniform of the national army.

...

State infrastructure

35. The normal infrastructure of a State does not exist in the DRC. The State has all the trappings of a modern State but lacks the capacity and motivation to deliver even the most basic services that a State is expected to provide to its citizens.

36. Corruption is rampant in public administration. Although the public pays a heavy tribute to the vice of corruption, they tolerate it as they consider it a survival mechanism for the poorly paid civil servants. People feel obliged to pay bribes to civil servants as a way to 'motivate' them. This state of affairs is due not only to civil servants' greed but also to poor remuneration and working conditions. ..."

30. At paragraph 39 of his report Dr Kodi says that there is no functioning judicial system in the DRC. After a passage dealing with corruption in the DRC, which he describes as rampant and permeating all sectors of the economy and the social fabric of the country, he says this:

"44. The new government is faced with the difficult responsibility of deciding on priorities in an environment where all the sectors require urgent attention. In fact, the DRC has been shattered by several decades of kleptocracy and conflict which has left the population of one of the richest countries in Africa in dire straits. Most of the active population is unemployed and ekes out a wretched living in the informal sector of the economy. The country's formal economy and the infrastructure have been completely destroyed."

He then turns to the topic of the justice sector. At paragraphs 47 and following he says this:

"47. The justice sector of the DRC functions so poorly and is so steeped in corruption that it fails to even try cases of petty corruption. The harshest criticism of the justice sector was made during Mobutu's era by the First President of the Supreme Court, Kakese Mbiango Bruno on 30 November 1999 but still applies to the current situation.

48. With unusual and striking candour, he said: 'Yes, for many years now, we judges, public prosecutors, clerks of the courts, barristers ... we have almost banished [justice] from the courts and have replaced it with all sorts of behaviours and dealings which make a parody of justice. All of this has corrupted, perverted, tarnished and depraved justice.'

49. Just like civil servants, judges and magistrates work in very difficult conditions. With their menial salaries they cannot make ends meet and are, therefore, quite vulnerable to corruption. They are very poorly equipped and most of them lacked even the basic documents on the laws of the country. Impoverished and demoralised, they turn a blind eye to the numerous human rights violations, arbitrary arrests and detentions, extrajudicial killings, torture and other crimes. When cases are actually tried, they are often expeditiously carried out with complete disregard for due process, reports are falsified or people are unjustly condemned. As a result, the legacy of impunity of Mobutu's era continue unabated. So, even those who have committed some of the most serious war crimes and crimes against humanity, are rewarded with high-ranking positions in the armed forces.

50. The Constitution of the DRC provides that the judiciary is independent from the legislative branches of Government and vests the responsibility for the judicial branch with the Supreme Council of the Judiciary. In reality, however, the President and the Minister of Justice run the justice sector as if it was one of the departments of the ministry. Flouting the provisions of the Constitution, the President recently appointed all the

top judges and magistrates. He will also certainly usurp the powers to demote, transfer or fire them at will, as the practice has been in the past. Interferences from the Minister, the President's Office or the numerous intelligence services are common occurrences against which the judges and magistrates have no recourse.

51. As my views on the justice sector show, I agree with the statement made by the Special Rapporteur on the independence of judges and lawyers (see pages 391 to 396 of 'MWK'): 'There are too few judicial personnel, both in the prosecution service and in the judiciary, and courts in the country. Judges do not have the logistic and physical facilities they need to perform their duties in a dignified and professional manner. They lack appropriate premises such as courtrooms, vehicles in which to reach places of investigation, basic computer equipment, and the financial resources to cover the running costs of the judicial system. Furthermore, they are not adequately paid. Their lack of financial independence has a direct impact on the lack of independence of both civilian and military justice and encourages systematic corruption among judges and court officials.'
52. I also completely agree with the information provided in the following documents which I used in writing my own comments on the justice sector in the DRC:
 - 52.1 Building a State for the Congolese People – by Ernest Harsch, Africa Renewal, United Nations, 30.1.2008, page 8 (see pages 265 of 'MWK'): 'Trial proceedings are extremely slow and judgments often seem arbitrary. Those with wealth and or political connections are very rarely brought to court...'
 - 52.2 Home Office DRC Country of Origin Report, 08.02.2008, section 5.01 (see pages 24 to 95 of 'MWK1'): 'The judiciary is nominally independent; the president has the power to dismiss and appoint judges.'
 - 52.3 Home Office Operations Guidance Note – DRC, 20.07.2007, para 2.9 (see pages 417 to 435 of 'MWK1'): 'The law provides for an independent judiciary, however, in practice, the judiciary remains poorly paid, ineffective, and subject to influence by government officials. Low salaries have compounded corruption and few citizens have access to legal representation.'
 - 52.4 US Department of State: Country Reports on Human Rights Practices, 2007, pages 4-5 (see pages 284 to 299 of 'MWK1'): 'The law provides for an independent judiciary; in practice judges, who were poorly compensated, remained subject to influence and coercion by officials and other influential individuals...
The civilian judicial system, including lower courts, appellate courts, the Supreme Court, and the Court of State Security, failed to dispense justice consistently and was widely disparaged as ineffective and corrupt.
The 2006 constitution vests responsibility for the judicial branch with a Supreme Council for the Judiciary in order to provide judicial independence. However, the parliament had yet to adopt legislation necessary to implement the provision...
Civil courts exist for lawsuits and other disputes, but the public widely viewed them as corrupt. The party willing to pay the highest bribe was generally believed to receive decisions in its favour.'
 - 52.5 Human Rights Watch: Democratic Republic of Congo Country Summary, January 2008, page 4 (see pages 436 to 440 of 'MWK1'): 'The judicial process continued to be characterised by political interference and corruption.'"

31. The Defendants do not accept Dr Kodi's assertion that there is no functioning judicial system in the DRC. They point to the theoretical underpinning for the rule of law, without seriously attempting to challenge what Dr Kodi says as to the broader picture. The Defendants have for the most part confined their attack on Dr Kodi's evidence to a suggestion that what he says about judicial corruption is exaggerated and largely unparticularised and, where particularised, reliant on examples which are not immediately recent and which occurred in fields of public law far removed from a commercial dispute.

32. For this purpose the Defendants rely upon evidence from two sources: Mr Lambert Shango Djunga, an attorney practising in Kinshasa, and Professor Roger Masamba Makela, Professor of Economic Law at the University of Kinshasa and of Company law at the Protestant University of Congo. Mr Djunga has not practised before the courts in Kolwezi, which is about 200 miles from the provincial capital Lubumbashi, itself about a thousand miles from Kinshasa, and Professor Makela does not suggest that he has any personal experience of these courts either. Both acknowledge the real problem of corruption. Relevant extracts from Mr Djunga's witness statement include:

"20. It is true that DRC courts are generally poorly equipped and do not have up-to-date equipment. However, it should be noted that all judges appointed in various DRC courts have a normal course of education in the sense all of them hold a university degree in law. Access to the judicial system is based on tests after completion of a law degree at a local or foreign university. Although there are some war lords involved in politics in the DRC, there are no warlords who administer justice in the DRC courts.

...

32. I personally have never appeared in the Court of Great Instance in Kolwezi but it is common knowledge among members of the DRC Bar Associations that it is a fully functioning court which is not subject to disruption since there was no war in Kolwezi area. Therefore, I have no reason to think that the Kolwezi Court would not deal with this dispute properly and effectively.

33. To the best of my knowledge, and from information received from Mr Thierry Samba, an attorney member of Lubumbashi Bar Association, the Court of Great Instance in Kolwezi rules every week on several disputes relating to civil or commercial matters.

...

35. Mr Kakese Bruno's comments in paragraphs 47-8 of Mr Kodi's statement was effectively accurate in 1999 during which the country was divided in four or five independent territories each wholly controlled by a group of

warlords. However, since the signatory of the Sun City Political Agreement under the supervision of the UN and AU that led to the setting up of a government of national unity (and more specifically after the 2006 elections), substantive governance reforms have been implemented in the country to fight corruption, mismanagement and wrongdoings so that the above referred comments are very excessive in light of the current situation of the administration of justice in the DRC. Yes, there is still corruption but it is not systematic, especially as a result of the promulgation of a new Law relating to the status of Judges and Magistrates.

...

38. I am frequently involved in court disputes and hearings, and, although there may be individual instances of corruption in the DRC, I have not been aware of court corruption in my cases and I do not believe that corruption is a normal part of the DRC judicial system. There probably are individual judges who prefer to look after their own welfare and so are susceptible to corruption, but my experience of the judges is that they are keen to keep professionalism during the course of their careers. I can confirm that I have not heard anything to make me think that the judges in the Kolwezi Court of Grand Instance are corrupt."

Professor Makela says this:

"5.4.1 Corruption

Corruption is a reality in the Democratic Republic of Congo like elsewhere in Africa or even beyond. The Government recognises it in its Programme and declares to be determined to strongly fight it. This can be seen as an obstacle to a fair justice, but doesn't make impossible to render justice. In many cases this obstacle has been overcome (*sic*). For example, Philipp Morris won a case against a sort of Lebanese Mafiosi because the lawyer was vigilant enough and ready to fight any attempt of corruption ...

To minimise the risk of corruption, the parties must be diligent, vigilant, use all the means the law provides as guarantee for a fair justice. ...

5.4.3 Guarantee of fair justice

To secure parties against corruption or pressures, it is possible to use some guarantee provided by the laws and case-laws of the Democratic Republic of Congo and which work much more than one can imagine.

In case of fraud, it is possible to sue a judge (Articles 58-66 of the Code of the Procedures before the Supreme Court of Justice). Many of them have been condemned. ..."

33. In the light of this evidence it is in my judgment simply not possible to conclude that the DRC is a forum in which the case may be tried suitably for the interests of all the parties and for the ends of justice. In reaching this conclusion I cast no aspersion upon the integrity of any of the judges who sit in the Kolwezi Tribunal de Grand Instance. Indeed I do not rest my conclusion upon the allegations of corruption within the judicial system in the DRC. My conclusion rests more broadly upon the absence of a developed infrastructure within which the rule of law can be confidently and consistently upheld. I appreciate that it can be said that Mr Buchan chose to invest in the DRC, and so must take it as he finds it. That is exactly what Mr Slade did say in the course of argument. That however does not lead to the conclusion that the DRC is in the circumstances as they are now either an available forum or a more suitable forum than is this jurisdiction. On the basis of the evidence the Congolese State is unable to provide to its citizens even the most basic services, in particular it cannot protect civilians and guarantee their security. Obviously the extent to which any state can protect its civilians and guarantee their security is a matter of degree. Here however the evidence is that corruption and mismanagement are so entrenched that there is no perceptible will to restore the rule of law. This is in my judgment different from a situation where despite a real will so to do the state is routinely unable to protect its civilians against random violence. Moreover, in contemporary conditions in the DRC emanations of the state are often themselves the source of violence to civilians. In this situation, in my judgment, it is not possible to regard the DRC as an available forum for the resolution of this dispute, still less one which is the appropriate forum for the trial of the action, i.e. the forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice. It follows that I am not concerned with the question whether there are here present connecting factors such as to indicate that it is with the DRC that the action has its most real and substantial connection. The case concerns shareholdings in a DRC company where the relationship between shareholders is governed by the law of the DRC. The decision of Lawrence Collins J in *Konomaneni v. Rolls Royce Industrial Power (India) Limited* [2002] 1 WLR 1269 lends some support to the suggestion that the courts of the place of incorporation of the company would ordinarily be the most appropriate forum for the resolution of the issues which here arise between the shareholders, although the two cases are I think by no means indistinguishable. I have already pointed out in paragraph 26 above that there is something to be said for the view that the centre of gravity in relation to the alleged wrongdoing is here London. However *Konomaneni* was in any event a case in which the availability of the alternative forum was not in doubt.
34. It also follows from the foregoing that I am not concerned with what Lord Goff has called the "second stage" of the *Spiliada* exercise, i.e. considering whether notwithstanding a forum other than this court is the clearly more appropriate for the trial of the action, the court should nevertheless decline to grant a stay (or decline to set aside the permission to serve outside the jurisdiction) because persuaded by the Claimant, on whom the burden of proof lies, that justice requires that a stay should not be granted (or that permission to serve out should not be set aside) – see *Connelly v. RTZ Corp. plc* [1998] AC 854 at pages 871-872. However if I did have to consider the second stage of the inquiry I would conclude that justice requires that a stay should not be granted. I would conclude that permission to serve outside the jurisdiction had properly been granted, and ought not to be set aside. It would at this stage of the inquiry be relevant to consider whether the DRC court is one in which justice may not be done –

see per Christopher Clarke J in *Cherney v. Deripaska* [2008] EWHC 1530 (Comm) at paragraph 252. Like Christopher Clarke J, I would emphasise that the court in making such an evaluation will proceed only upon the basis of cogent evidence. In that regard the Defendants pointed to the lack of any example in the evidence of corruption on the part of the judges who sit in the Kolwezi court. They point also to the fact that the evidence suggests that the province of Katanga has been less affected than others by the ravages of war and is an area of relative peace and stability. I am acutely conscious of the risk of reliance upon generalised statements which may be difficult comprehensively to refute – again see per Christopher Clarke J in *Cherney v. Deripaska* at paragraph 237. I take into account that many of the examples of alleged judicial corruption given in the evidence relate to public law issues in which there was a clear Government interest. I also take into account that the Defendants were able to point to cases in which, for example, notwithstanding corrupt Governmental interference designed to secure conviction, defendants had been acquitted. All this notwithstanding, the weight of the evidence from such respected, independent and authoritative sources which I have set out above, based as it is for the most part upon sufficiently recent research and experience, is such that it cannot prudently be ignored. In my judgment the evidence demonstrates a real risk that proceedings in the Kolwezi court, like proceedings in courts elsewhere in the DRC, might be susceptible to attempted interference with their integrity. I do not understand the Defendants seriously to dispute this proposition. They seek rather to discount it as exaggerated. They seek also to suggest that the risk that such attempted interference might prove successful in diverting the course of justice is slight, there being no evidence that any judge sitting in the Kolwezi court has ever succumbed to such influence. It would in my judgment be a little unrealistic to approach this problem by reference only to what has occurred in one small enclave within the overall judicial system of the DRC. However that may be, the risk of attempted interference within a culture where such conduct apparently flourishes is in my judgment sufficiently unacceptable to render it unjust that the Claimant should be expected to subject itself to that risk. In examining questions of this sort it is with risk that the court is concerned – see *The Abidin Daver* [1984] AC 398 at page 411 per Lord Diplock. Again I emphasise that in reaching this conclusion I cast no aspersion upon the integrity of the judges who sit in the Kolwezi court. My conclusion is rather that a litigant should not be deprived of his opportunity of a trial in England if the only suggested alternative forum is one in which attempted interference with the integrity of justice is apparently widespread and endemic.

35. There is an additional factor which relates to the personal safety of Mr Buchan. In his witness statement Mr Buchan says this:

"15. Mr Forrest told me when I first met him in 2005 that he had lived and worked in the DRC all his life. He understands the DRC culture. People respect him. He clearly has a close relationship with President Kabila. At p.69 of 'RMB1' is a copy of a letter (translated at p.74 of 'RMB1') dated 20 September 2003 from the Bureau du Conseil Provincial of the Parti du Peuple pour la Reconstruction et la Democratie ('PPRD') that was annexed to a report by 'Global Witness' dated July 2006 entitled 'Digging in Corruption'. The PPRD is the political party of President Joseph Kabila ('the President'), and the letter identifies (in translation):

'We would like to stress that Mr George Arthur Forrest and his Group stand out for having supported us, step by step, in the campaign for expansion of the Party.'

16. Mr Forrest is one of a close circle of advisers to the President, acting as his commercial adviser and accompanying the President on trips outside the DRC. I remember having to arrange meetings or telephone calls with Mr Forrest around trips that he made with the President. Mr Forrest told me that he was a guest at the President's wedding in June 2006. Mr Ditto told me that on one occasion he was travelling in Mr Forrest's private jet and they waited for a lady to board the plane, who, Mr Forrest told him, was the President's mother. It is quite obvious to me that Mr Forrest operates in the DRC under the protection of President Kabila and to take action against Mr Forrest's interests will be viewed in the DRC as acting contrary to the interests of the President.

...

My personal safety in the DRC

21. I have travelled in the DRC three times. On each occasion I stayed with Mr Forrest at his home. I felt safe making these visits because Katanga operated with the approval of the President of the DRC, because of the relationship between Mr Forrest and the President and because of my then good relationship with Mr Forrest. On one occasion we were driving to Mr Forrest's home after dark when Mr Forrest's car, in which we were travelling, was stopped at a road block manned by DRC soldiers. It was obvious to me that they wanted us to pay them in return for them letting us through safely. I was ready to give them my money, but Mr Forrest shouted at them and they simply removed the road block for us. Without Mr Forrest's protection, I would have felt very unsafe.
22. The present advice of the Canadian Department of Foreign Affairs and International Trade is as follows: (see p. 77078 'RMB1')

'OFFICIAL WARNING: Foreign Affairs and International Trade Canada advises against non-essential travel to the Democratic Republic of Congo (DRX). Canadians in the DRC should regularly review their personal circumstances to determine if their continued presence is warranted.

The general political and security situation remains dangerous, unpredictable and unstable. There is a potential for civil unrest. Curfews could be imposed without warning. Travellers should avoid large gatherings and public places where violence could occur.

Travellers going to Kinshasa should make sure someone will be meeting them upon arrival.

...

3. SAFETY AND SECURITY

...

UN Observer forces have been deployed throughout the DRC. However, unofficial armed groups and active duty troops in parts of the DRC are known to pillage, carjack, and steal vehicles, commit extrajudicial killings, rape and kidnap, provoke ethnic tensions, and carry out military operations. The large number of rebel and government soldiers to be decommissioned due to the peace process is another security concern. Travellers may be detained and questioned by ill-disciplined security forces at numerous military roadblocks throughout the country. Visitors to Kinshasa should restrict their travel, particularly at night, to areas with which they are familiar and stay on main roads.

There is a high level of violent and petty crime, especially in urban areas and after dark. Avoid walking alone and displaying valuables. Pickpocketing and robbery is frequent, particularly in high density public areas and public transportation. Particular care should be taken when travelling outside cities and towns. While driving, vehicle doors should be kept locked and windows closed. Stopping at the scene of an accident or at intersections where people are gathered is not advisable.

Roadblocks are often set up by people posing as police or military personnel, in order to rob people travelling at night. Travellers should beware of certain civilians wearing police or military uniforms, or posing as such. They should also avoid travelling alone or after dark.

The DRC government has increased the enforcement of immigration policies, particularly in Katanga province. Foreigners could be asked to produce their passport and a valid visa at any time. Those who fail to comply could face expulsion. Travellers should carry a registered copy of their passport and valid visa at all times, which can be obtained free of charge at the Embassy of Canada in Kinshasa. The original passport should be stored in a secure place. Travellers should also verify with local authorities if there is a need to obtain prior authorization for in-country travel. When possible, documents should be shown only through closed windows to reduce the possibility of their being temporarily confiscated in order to induce a payment.'

23. Now that I am in dispute with Mr Forrest I simply would not feel safe in the DRC. This is because his influence there is so important in restraining soldiers and militia, as illustrated by [the] way in which he dealt with the roadblock when I was with him. Mr Forrest and Mr Ditto would know that it would not be safe for me to attend a trial in the DRC, and this is why I believe that the present applications that their companies have made are thinly disguised attempts to stop me litigating this dispute."

36. As I have already remarked, it is clear on the evidence that Mr Forrest is a very prominent person in the DRC. In addition to his extensive commercial activities he holds the following positions:
 Honorary Consul of the French Republic in the Katanga Province, since 1999;
 Economic Adviser for the Foreign Trade Department of the Kingdom of Belgium, since 2000;
 Vice President of the "Federation des Entreprises du Congo" (FEC), since 2005;
 Honorary Chairman of the UNESCO Chair for Central Africa and the Southern African Development Community (SADC), since 2007; and
 Member of the RDC EITI (Extractive Industries Transparency Initiative) Committee, since 2007.

Mr Forrest describes his commercial activities as follows:

"The Forrest Group began life in 1922 when my father, Malta Forrest, set up a company in Katanga, which initially provided transport services. During the 1930's, the business expanded to include copper, manganese and gold mining and, in the 1950's, branched out further into civil engineering and public works. From the late 1960's, Entreprises Générale Malta Forrest ('EGMF') worked on a series of major road and building construction projects essentially funded by international organisations such as the World Bank and the African Development Bank. I took over the sole running of EGMF in 1986. In the early 1990's, EGMF carried out important mining exploration work in Kolwezi on behalf of Gécamines. Thereafter, EGMF entered into various joint venture projects with Gécamines and other state enterprises in such areas as the mining and processing of cobalt and copper. At the same time, EGMF was also intensively involved in national reconstruction works such as road construction. In 2002, EGMF opened a new office in Kinshasa in order to carry out works on behalf of the World Bank and other investors."

Mr Forrest responds to what Mr Buchan has said about his personal safety as follows:

- "6. I would like, first of all, to challenge what Mr Buchan suggests about our relationship. I have met Mr Buchan in person for the first time in 2003 (and not in 2005) when he came to the DRC. I welcomed him and offered hospitality in my own house (as I did thereafter whenever he came to the DRC). From that time until July 2007 we were in contact on a regular basis and we met many times. Our relations were good.
7. What Mr Buchan has said about my position and relationship with President Kabila is exaggerated and inaccurate in various respects. It is true that because (i) my Group is the DRC's first private employer, (ii) Forrest Group has been working in DRC since 1922, and (iii) I am an active member of the FEC, I come into close contact with President Kabila, ministers, politicians and Congolese businessmen. However, I am not a private adviser of President Kabila nor a member of any of his official delegations when he travels around the world. I have made some donations to political parties and have supported the democratisation process, namely the organisation of elections. However, I am in no sense 'protected' against legal action in DRC. Indeed, I am providing examples of some successful legal claims against Forrest Group companies in DRC...

...

13. I must also address the suggestion in Mr Kodi's and Mr Buchan's witness statements that it would not be safe for Mr Buchan to visit the DRC. I find this suggestion surprising especially since Mr Buchan has, by his own account,

enjoyed my hospitality on his various visits to DRC. ... While I believe that Mr Buchan is mistaken as to the danger he would face in returning to the DRC, and that he exaggerates my influence in the DRC, I certainly undertake to do what I personally (or through my companies) can to ensure Mr Buchan's safety in the DRC."

Mr Forrest also takes exception to some observations made by Mr Kodi in his witness statement which I do not propose to set out in this judgment. In relation thereto Mr Forrest concludes:

"The suggestion that I would engage in, encourage or allow the nefarious activities put forward by Mr Kodi is insulting but also absurd. By contrast, I do repeat that, insofar as Mr Buchan has genuine concerns as to his safety, I willingly undertake insofar as I have any influence to make positive and reasonable efforts to ensure his safety."

37. Mr Buchan is not for his part as I read his evidence suggesting that were he to travel to the DRC he would be at risk of harm instigated by Mr Forrest, rather that were he in the new circumstances to travel to the DRC he would feel bereft of the protection which his hitherto friendly association with Mr Forrest had, he thought, afforded him. I do not discount such a fear. The Canadian Department of Foreign Affairs guidance indicates that travel to the DRC is inadvisable, and bears out the need for a visitor to that country to have local assistance. Whilst Mr Forrest's offer of assistance to ensure Mr Buchan's safety is welcome and I am sure sincere, I find it quite telling that he gives it. I also find it quite chilling.

38. The Defendants say that Mr Buchan would in any event not need to travel to the DRC in order to pursue the litigation in Kolwezi. Alberta's expert witness, Mr Andre-Dumont, says, at paragraph 7 of his report:

"A case of this nature would be tried in the DRC by pleadings of the parties' attorneys, who would also file written briefs. For company law disputes of this nature, the parties or witnesses are normally not called to appear in person in court."

Mr Djunga says this:

"Court proceedings are generally conducted in writing, although an oral debate may be requested by the parties or the court at various stages in the proceedings. The courts commonly ask for further written submissions to supplement the initial pleadings of the parties and may schedule additional hearings at which the supplemental pleadings are received and discussed."

39. In the present dispute the court would be concerned with allegations that documents had been falsely created and with a dispute as to agreements or understandings reached when KOL was incorporated. Whilst this court will not assume that proceedings conducted in a manner and tradition which is not our own are necessarily for that reason alone unsatisfactory and inefficacious, it would be a matter of concern if Mr Buchan should not even have the opportunity to invite the court to hear his oral evidence, or to hear and evaluate the evidence of his protagonists. In any event, it is I think undesirable that a litigant should be denied the opportunity to attend the proceedings of the court in which his cause is being heard. It is equally undesirable that a litigant should feel under any inhibition about travelling to the country in which litigation on his behalf is being conducted in order properly to brief and to consult his lawyers. These considerations all tend to suggest that justice requires that Alberta should not be required to proceed, if at all, before the courts of the DRC even were they to be regarded as the more suitable and natural forum – c.f. the approach of Lord Goff in *Spiliada* at page 478.

40. I turn finally to the suggestion that Alberta is bound by an exclusive jurisdiction agreement. This derives from Article 48 of the Deed of Incorporation which, in the apparent English translation of the original, reads:

"The Shareholders intend to fully comply with the laws in force in the Democratic Republic of Congo.

As a result, the provisions of these laws that are not lawfully departed from by these statutes shall be deemed to be included, and the clauses that are contrary to the compulsory provisions of these laws shall be deemed unwritten."

There is some debate as to whether "intend to fully comply" is a correct idiomatic translation of the original French. Since the original French is unavailable this is a somewhat arid debate. However the purported Revised Deed reads, in the French, "les associés entendent se conformer" which, say Tain and Wayland, should be translated as "agree to fully conform" or perhaps more elegantly "agree fully to conform". As it happens Professor Makela, Tain and Wayland's expert witness, renders the relevant article of the Deed as "intend to fully be conformed". I will assume for the sake of the argument that Article 48 is or contains an agreement to be bound by those provisions of Congolese law from which there is no express derogation elsewhere in the Deed, and to be bound by those provisions of Congolese law from which derogation is not permitted.

Article 131 of the Code of Judicial Organisation and Competence of the DRC states:

"The disputes between shareholders or between shareholders and directors are brought before the judge of the registered office of the company. The same judge is competent, even after the dissolution of the company, for the division and for the resulting obligations, if the claim is introduced within two years of the division."

It is common ground that, had a Tribunal de Commerce been established in Kolwezi, that court would enjoy competence under this article. No such court having been established at Kolwezi, it is again common ground that the Kolwezi Tribunal de Grande Instance enjoys competence. Professor Makela says that the effect of this provision is that the Kolwezi court enjoys jurisdiction to the exclusion of any other tribunal, whether in the DRC or abroad. In his second report he says that the parties cannot derogate from this provision by agreement, although in his first report at paragraph 5.1.2 he said this:

"The parties have had some alternatives in order to avoid Kolwezi tribunals or all Congolese tribunals: arbitration clause, jurisdiction clause (and even applicable law clause). If they freely abandon such opportunities, it is now too

late to step back and to overlook the principles of International Private Law as well as the Congolese Laws on the competence 'ratione Loci'."

Alberta's expert witness, Mr Andre-Dumont, disagrees. He is a member of the Brussels bar. He has developed a special expertise in Francophone Central and Western Africa, where he has been assisting clients, mainly mining companies, for more than twenty years, in particular in the DRC. In paragraph 8 of his second report, responding to the suggestion made for the first time in the first report of Professor Makela, he says:

"Pursuant to Article 131 of the Congolese Code of Judicial Organisation and Competence, disputes between partners of a company are of the competence of the judge of the registered office of the company. However, this provision, which governs the territorial competence within the DRC (or jurisdiction 'ratione loci') does not provide that the judge of the registered office of the company is territorially competent on an exclusive basis to judge disputes between partners of a company. Thus, this provision does not exclude the territorial competence that a foreign judge may have to decide on such disputes according to the rules of competence of his own country."

Moreover he points out that Professor Makela's (correct) observation that the parties had the opportunity to avoid the jurisdiction of the Kolwezi tribunal or another Congolese court by providing for arbitration, or by providing a jurisdiction or even applicable law clause "demonstrates that the competence issue is not one of public policy to be exclusively settled by the Kolwezi Tribunal of Great Instance".

41. I prefer the evidence of Mr Andre-Dumont, which is consistent with Professor Makela's first thoughts. It would be surprising if a Code of Judicial Organisation and Competence sought to achieve exclusivity, without possibility of derogation.
42. In view of that conclusion it is unnecessary to consider the further and possibly difficult question whether it would in any event be appropriate to regard a bare agreement to be bound by the provisions of a particular legal system as manifesting a sufficiently clear intention to agree to the exclusive jurisdiction of the courts of that country.
43. As I have already indicated however, even had I concluded that the parties' agreement to comply with Congolese law achieved, by incorporation, an agreement to the exclusive jurisdiction of the courts of the DRC, still I would not have stayed the present proceedings against Tain and Wayland. The court has in such circumstances a discretion – see the "*Eleftheria*" [1969] 1 Lloyd's Rep. 237. At page 242 Brandon J said:

"The principles established by the authorities can, I think, be summarised as follows:

 - (1) *Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.*
 - (2) *The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.*
 - (3) *The burden of proving such strong cause is on the plaintiffs.*
 - (4) *In exercising its discretion the Court should take into account all the circumstances of the particular case.*
 - (5) *In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded;*
 - (a) *in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.*
 - (b) *whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.*
 - (c) *with what country either party is connected, and how closely.*
 - (d) *whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.*
 - (e) *whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."*
44. The principal issue of fact in this case concerns the agreement or understanding, if any, reached between Mr Buchan, Mr Forrest and Mr Ditto concerning subscription for the shares. Only Mr Forrest lives in the DRC and I have no doubt that he travels regularly to western Europe. The dispute as to the production or sending of letters of demand or letters convening meetings is very much secondary to the main issue and in any event it is not a case in which a mass of documentation is better examined in the courts in which it was generated. The relevant documents will be small in number. Although KOL is a DRC company neither Mr Buchan or Mr Ditto have close connections with that country in that neither lives or works there. Looked at overall, from the objective point of view of all parties, a trial in England is in my judgment likely to be overwhelmingly more convenient than a trial in the DRC. Particularly is this so where Mr Buchan reasonably feels inhibited about travelling to the DRC and where there is a real risk of attempted interference with the integrity of the trial. Finally, I am not satisfied that Tain and Wayland genuinely desire trial in the DRC. The argument that the DRC is in all the circumstances a more suitable forum for the resolution of the dispute lacks plausibility. When Mr Forrest and Mr Ditto concluded with Katanga the agreement which is so ultimately bound up with the matters in dispute, the Call Option, they chose London arbitration backed up by English jurisdiction, rather than arbitration in or the jurisdiction of the courts of the place of incorporation of KOL, the Congolese company in whose shares they were dealing. That to my mind involves a recognition that notwithstanding KOL is a Congolese company, the English jurisdiction is not only an entirely suitable and natural forum in which to resolve disputes concerning its shareholding but is also a more suitable and natural forum than is the DRC jurisdiction. I conclude therefore that even had Alberta begun these proceedings in

breach of an agreement to refer disputes to the Kolwezi court in the DRC, it can show strong cause for not staying this action.

45. As it happens KOL has already made an application to the Kolwezi court in relation to one part of the underlying dispute, viz, the status of Alberta as a shareholder in KOL. The nature of the proceedings is not entirely clear. Alberta/Mr Buchan knew nothing about this until on 15 July 2008 Messrs Salans, Tain and Wayland's English solicitors acting for them on this application, wrote to Alberta's English solicitors, Messrs Dorsey & Whitney in these terms:
- "Further to our letter of earlier today, please find enclosed a judgment of the Tribunal de Grande Instance of Kolwezi and Lualaba dated 30 April 2008, together with an English translation thereof.*
- This judgment came to our attention a little while ago and we have been investigating the background to it, in order to understand its effect.*
- We are instructed that the proceedings leading to this judgment were initiated by Mr Kongolo Wadila, the acting secretary of Kamoto Operating Limited ('KOL'). Our understanding is that a declaration was sought by KOL as to the position of the Claimant based on KOL's (revised) constitution.*
- None of the shareholders is party to the application and the shareholders are therefore, clearly, not bound by the judgment. You may already be aware of the judgment but in case you are not, we bring it to your attention now."*
46. There was in fact enclosed with Messrs Salans' letter both a notice of service of judgment and a judgment. The former, possibly in standard form, recites that the judgment was rendered in the presence of the parties involved or by default. In fact only one party seems to have been involved in the proceedings, KOL, and the judgment is a considered judgment, not one given in default.
47. The application does indeed appear to have been made by KOL. There is no suggestion in the judgment that any other party was served with proceedings. The court appears to have concluded that Alberta failed to pay for its shares, despite several reminders to do so. Applying Article 8(4) of the Deed of Incorporation the court concluded that Mr Buchan, who until the meeting of 14 January 2008 served as a director of KOL, was discharged from his mandate in consequence of Alberta forfeiting its rights over the shares issued to it. The judgment then concludes with passages which may be in part in standard form but which recite that having heard *"the two parties"* (the proffered translation of *"contradictoirement"*) the court declares that the application of KOL is admissible and well founded and gives to KOL formal notice of *"the exclusion from its midst of the Partner Alberta, as established in the minutes of the Extraordinary General Meeting of 14 January 2008"*. The judgment is said to have been rendered by the President of the court with the co-operation of an officer of the Public Prosecutor.
48. This is to English eyes a puzzling procedure. Messrs Salans make the point, trite to an English lawyer, that none of the shareholders having been party to the application the shareholders are therefore clearly not bound by the judgment. It appears to be common ground that this is equally so as a matter of Congolese law. Mr Andre-Dumont so asserts in his second report and Professor Makela, whilst taking issue with other parts of the report, makes no comment on this topic.
49. After this judgment was drawn to his attention Mr Buchan prepared a second Witness Statement in which he said this:
- "Although the effect of this decision is not wholly clear to me, I fear that this is an example of the one-sided justice to which I would be exposed if I were ever to seek to commence proceedings in the DRC."*
50. The judgment of the Kolwezi court is not on this application relied upon for any purpose by the Defendants. Neither Mr Forrest nor Mr Ditto has indicated whether he was aware of the bringing of the proceedings which led to this judgment – it is merely said on their behalf that they were not parties to the application to the Kolwezi court.
51. I have left this incident out of account in my consideration whether the DRC is an available and appropriate forum. Furthermore since Mr Buchan has said that Alberta will not, if this action is stayed, bring proceedings in the courts of the DRC, it is irrelevant to consider to what extent the existence of this judgment might compromise its ability nonetheless to do so if so advised. Had the point been relevant, without further evidence as to the precise effect of the judgment already rendered by the Kolwezi court I would have been loathe to reach a considered conclusion that the DRC is the more appropriate forum for the resolution of the dispute between the Claimant and the Defendants.
52. As it is, the applications of the Defendants must in any event be dismissed.

Stephen Auld QC and Simon Colton (instructed by Messrs Dorsey & Whitney) for the Claimant
 Richard Slade (instructed by Messrs Norton Rose) for the First Defendant
 Sam Wordsworth (instructed by Messrs Salans) for the Second and Third Defendants