



Neutral Citation [2019] EWHC 2551 (Ch)

Claim No.: HC-2013-000211

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)

BUSINESS LIST

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 2 October 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

**THE HIGH COMMISSIONER FOR
PAKISTAN IN THE UNITED KINGDOM**

Claimant

- and -

- (1) ~~PRINCE MUKARRAM JAH, HIS EXALTED
HIGHNESS THE 8th NIZAM OF HYDERABAD~~
(2) PRINCE MUFFAKHAM JAH
(3) SHANNON CONSULTING
(4) THE UNION OF INDIA
(5) THE PRESIDENT OF INDIA
(6) HILLVIEW ASSETS HOLDINGS LIMITED

Defendants and
Interpleader
Claimants

- and -

- (7) THE ADMINISTRATOR OF THE ESTATE
OF THE 7th NIZAM OF HYDERBAD

Defendant

- and -

NATIONAL WESTMINSTER BANK plc

Defendant and
Stakeholder

Mr Khawar Qureshi, QC and Mr Jonathan Brettler (instructed by **Stephenson Harwood LLP**) for the **Claimant**

Mr Hodge Malek, QC and Mr Jonathan McDonagh (instructed by Devonshires Solicitors LLP) for the **Second and Third Defendants and Interpleader Claimants**

Mr Timothy Otty, QC, Mr Harish Salve, SA, Ms Clare Reffin and Mr James Brightwell (instructed by **TLT LLP**) for the **Fourth and Fifth Defendants and Interpleader Claimants**

Mr Eason Rajah, QC and Ms Bryony Robinson (instructed by **Withers LLP**) for the **Sixth Defendant and Interpleader Claimant**

The **Seventh Defendant** and the **Defendant and Stakeholder** did not appear and were not represented

Hearing dates: 10, 11, 12, 13, 17, 18, 19, 20 and 21 June 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Marcus Smith:

A. INTRODUCTION

(1) Overview

1. On 20 September 1948, Nawab Moin Nawaz Jung (**Moin**)¹ caused the sum of £1,007,940 9s 0d to be transferred from an account of the Government of Hyderabad held at Westminster Bank (the **Bank**²) to an account in the name of Habib Ibrahim Rahimtoola (**Rahimtoola**), also at the Bank. I shall refer to this transaction as the **Transfer**. Until 17 September 1948, Moin had been Finance Minister and Minister for External Affairs for the Government of Hyderabad. His status after 17 September 1948 is one of the many questions of fact and law that will have to be resolved in this Judgment. Equally, the authority of Moin to make this transfer is a matter of dispute that will have to be considered and resolved.
2. I shall refer to the state of Hyderabad – in all its emanations – as **Hyderabad**. It will, in due course, be necessary to consider Hyderabad’s status as a sovereign state and as a State of the Union of India (**India** or, if the context requires, the **Union of India**³). Where it is necessary to differentiate between the different emanations of Hyderabad, I do so: otherwise, I shall simply refer to Hyderabad.
3. Rahimtoola was at the time of the Transfer the High Commissioner to the United Kingdom for the Islamic Republic of Pakistan (**Pakistan**⁴), a position he held until early 1952, when he moved to hold other high office for Pakistan. Whether the Transfer was made to Rahimtoola personally or to Rahimtoola in his capacity as High Commissioner is also a matter of controversy.
4. So, too, are the circumstances of the Transfer and the basis upon which Rahimtoola held these moneys.
5. I shall refer to the account out of which the monies were transferred as the **Second Account**. (There was, as will be described, an earlier established account, out of which monies were transferred to fund the Second Account.) I shall refer to the account receiving the monies as the **Rahimtoola Account** and the monies standing to the credit of that account (after the Transfer) as the **Fund**.

¹ A glossary of names and terms used in this Judgment is at Annex 1. The facts of this case involve many people having many different titles and some names of great similarity. I have, for ease of reading, referred to these persons by their most distinctive name and have generally refrained from giving titles on each occasion. No discourtesy is thereby intended.

² Since 1948, Westminster Bank has undergone a number of name changes and re-organisations. Nothing turns on this, and I shall refer to Westminster Bank, in all its emanations, simply as the Bank.

³ The Union of India was originally the Dominion of India. I use the terms India or Union of India to refer to all emanations of India.

⁴ The Islamic Republic of Pakistan was originally the Dominion of Pakistan. I use the term Pakistan to refer to all emanations of Pakistan.

6. The Fund, I should say, is no longer held by the Bank, but has been paid into Court.⁵ A dispute as to the title of the Fund arose almost immediately. Initially, the dispute was between the ruler of Hyderabad, His Exalted Highness, the Seventh Nizam of Hyderabad (**Nizam VII**), and Pakistan. That dispute resulted in proceedings commenced in the Chancery Division of the High Court of Justice under Claim 1954 H No 2387 (the **1954 Proceedings**). The claim was brought by Nizam VII and Hyderabad as plaintiffs against Moin, the Bank and Rahimtoola as defendants. Early in the course of the 1954 Proceedings, Pakistan asserted sovereign immunity. In a letter dated 8 July 1955 to her solicitors, Messrs Sanderson Lee Morgan Price & Co (**Pakistan's solicitors in the 1954 Proceedings**), Pakistan gave the following instructions:

“With reference to the above mentioned action in which the plaintiffs are claiming the sums of £1,007,940.9.0d now standing to the credit of Mr Rahimtoola with Westminster Bank, I now instruct you on behalf of my Government to take such steps as may be necessary to bring to the attention of the Court the fact that my Government claims to be entitled to the said sum, which is held by Mr Rahimtoola as its agent, and declines to submit to the jurisdiction of the English Courts in any proceedings relating thereto and accordingly that my Government objects, on the ground of its sovereign immunity to the jurisdiction of the English Courts, to this action being proceeded with against Mr Rahimtoola, since it is one which directly or indirectly impleads my Government.

This letter is written by the direction of and on behalf of the Government of Pakistan.”⁶

7. This objection to the 1954 Proceedings and assertion of sovereign immunity went all the way to the House of Lords.⁷ The 1954 Proceedings were stayed against the Bank, and set aside against Rahimtoola, by order of the House of Lords on grounds of Pakistan's successful assertion of sovereign immunity. Pakistan asserted sovereign immunity by reason of the fact that Rahimtoola held the Fund as High Commissioner of Pakistan and that the claim brought by the plaintiffs directly or indirectly infringed Pakistan's sovereign immunity. Although at no time in these proceedings did Pakistan assert any beneficial interest in the Fund, the House of Lords held (upholding Upjohn J at first instance and overruling the Court of Appeal⁸) that Pakistan's bare legal title in the Fund, through Rahimtoola as High Commissioner, was sufficient to enable her to assert sovereign immunity.
8. Thus, at this stage, it was not clear who the rival claimants to the Fund were. Nizam VII and Hyderabad had asserted an interest.⁹ Pakistan's assertion of sovereign immunity, as I have stated, involved simply a reliance upon Rahimtoola's holding of the legal estate

⁵ See my order dated 25 October 2018. Paragraph 11 of that order provided:

“All sums and assets paid into Court to the credit of these proceedings shall be held on a special account, together with all accrued interest, to be dealt with as this Court may direct. The Fund shall be held in Court on terms that for the purpose of considering the parties' pleaded claims to the Fund the Court will consider the position as if the Fund were still held in the Rahimtoola Account.”

⁶ All quotations omit footnotes where these are present, and correct minor typographical errors. On occasion, I have considered it appropriate to substitute one of the Annex 1 terms in place of the wording actually used. Where I have done so, I have indicated the change using square brackets.

⁷ [1958] AC 379.

⁸ The decisions of Upjohn J and the Court of Appeal are reported at [1957] Ch 185.

⁹ The primary claimant was Nizam VII: Hyderabad was very much joined for the avoidance of doubt, as is further described in paragraphs 164-166 below.

in the Fund. The only persons asserting a beneficial claim to the Fund were Nizam VII alternatively Hyderabad.

9. There matters rested. Although, in the post-1956 period, there was some attempt to reach agreement as to what should happen to the Fund, these efforts came to naught. In 1963, Nizam VII created a trust over his interest in the Fund (the **1963 Settlement**) and in 1965 the capital and income of the 1963 Settlement were irrevocably appointed upon trust for his grandsons (the **1965 Appointment**). Nizam VII's grandsons were:

- (1) Prince Mukarram Jah, the person who, on Nizam VII's death, succeeded to his title and became His Exalted Highness, the Eighth Nizam of Hyderabad (**Nizam VIII**); and
- (2) Nizam VIII's younger brother, Prince Muffakham Jah (**Prince Muffakham**).

Collectively, I will refer to Nizam VIII and Prince Muffakham as the **Princes**.

10. Also in 1965, Nizam VII assigned to the President of India his claim to the Fund (the **1965 Assignment**).
11. It will readily be appreciated that it is not possible for the same person validly to alienate the same property twice over. Nizam VII's actions through the 1963 Settlement, the 1965 Appointment and the 1965 Assignment created rival claims to the Fund as between the Princes on the one hand and India on the other. Of course, these rival claims were never articulated in any formal way until the commencement of the present proceedings: there was no point in doing so nor possibility to do so, given the stay imposed by the House of Lords in the 1954 Proceedings.
12. In 2013, Pakistan commenced the present proceedings. These were against the Bank for payment of the Fund to Pakistan. This involved – for the first time in legal proceedings – an assertion by Pakistan of a beneficial interest in the Fund. Naturally, the other claimants to the Fund (the Princes and India) sought to join, and were joined to, the proceedings. For its own part, the Bank interpleaded, stating (as it had done in the 1954 Proceedings) that it claimed no interest in the Fund for itself and that it would pay the Fund to whoever the Court determined was entitled to it. Pakistan having waived her sovereign immunity in commencing the proceedings, there was now an opportunity for the ownership of the Fund to be determined.
13. The claims to the Fund operate at two levels or stages:
- (1) *Stage 1*. Stage 1 concerns the question of whether the Transfer transferred the Fund beneficially to Pakistan (as Pakistan contends) or whether Nizam VII retained the beneficial interest in the Fund (as the Princes and India contend) with Rahimtoola simply holding the legal title in the Fund (whether personally or in his capacity as High Commissioner) on trust. If this question is resolved in favour of Pakistan, then there the matter ends. Nizam VII, having divested himself of the Fund absolutely, could have no interest to pass on to either the Princes or to India. On the other hand, if Nizam VII retained a beneficial interest to the Fund, as is contended by the Princes and India, the question would arise as to whether the Princes or India were entitled.

- (2) *Stage 2.* This stage concerns the contingent claims of the Princes and India. Assuming Pakistan loses at Stage 1, the rival claims of the Princes and India would fall to be determined. This is a question that does not concern Pakistan (whose claim only arises at Stage 1); and it is a question that no longer troubles the Court. By a settlement concluded last year – the terms of which are unknown both to me and to Pakistan – the Princes and India have compromised their differences (the **Settlement**). They each claim in right of Nizam VII and they have agreed between themselves how the Fund is to be divided between them should the question at Stage 1 be determined in their favour.
14. The question before the Court is, therefore, the shortly-stated one of whether it is Pakistan or the late Nizam VII who was, in 1948, entitled to the Fund.

(2) **The parties**

15. The parties to these proceedings are or were:
- (1) *Pakistan.* Pakistan claims through her High Commissioner for Pakistan in the United Kingdom, who is the party formally named in the proceedings. Pakistan contends that it is the person occupying the office of High Commissioner at the relevant time who holds legal and beneficial title to the Fund.¹⁰ Although the claim is brought in the name of the High Commissioner, I shall refer to the claimant as Pakistan, as occurred throughout the trial before me.
- (2) *India.* India claims by virtue of the 1965 Assignment.¹¹ The President of India is also a party: that is because the President of India is named as the assignee in the 1965 Assignment. For the purposes of these proceedings, no distinction is to be drawn between India and the President of India, and I shall use the term India to refer to both.
- (3) *The Princes.* The Princes claim by virtue of the 1963 Settlement and the 1965 Appointment:
- (a) Nizam VIII was originally a party to these proceedings, but has since been removed from the action because he no longer has any interest in the Fund. That interest has been assigned to Hillview Assets Holdings Limited (**Hillview**).¹² Although I appreciate that Hillview has stepped into the shoes of Nizam VIII as a claimant to the Fund, it is more straightforward to continue to refer to the interest of Nizam VIII.
- (b) Prince Muffakham is a party to these proceedings; however, by an assignment Shannon Consulting Limited (**Shannon**) is also interested in the

¹⁰ See paragraphs 1 and 3 of the Re-Amended Particulars of Claim (**Pakistan's Pleading**).

¹¹ See paragraph 6 of the Re-Re-Re-Amended Defence and Counterclaim on behalf of India and the President of India (**India's Pleading**).

¹² See paragraph 1 of the Re-Re-Re-Amended Defence and Interpleader Claim of Hillview (**Nizam VIII's Pleading**).

Fund.¹³ Again, it is more straightforward simply to refer to the interest of Prince Muffakham.

- (4) *The Bank.* The Bank has played an important role as the custodian of the monies comprising the Fund and has provided valuable disclosure in the proceedings. After the disclosure process ended, and when once the Fund had been paid into Court, no useful purpose was served by the Bank continuing to participate in these proceedings,¹⁴ and the Bank did not appear before me at the trial of these proceedings.
- (5) *The administrator of the estate of Nizam VII.* Christopher Lintott is the administrator of Nizam VII's estate. He is joined purely so that the estate of Nizam VII is bound by the outcome of these proceedings. Like the Bank, the administrator did not appear before me at the trial of these proceedings.¹⁵ He is also party to, and bound by, the Settlement referred to above and advances no separate claim before me.

(3) The issues

(a) *Pakistan's claims to be absolutely entitled to the Fund*

16. As I have noted, Pakistan claims to be absolutely entitled to the Fund. Paragraph 20.10 of Pakistan's Pleading states:

"...Hyderabad transferred the monies to the Rahimtoola Account in order to compensate/reimburse/indemnify Pakistan in connection with assistance she had provided to Hyderabad/[Nizam VII] and/or to place the monies in the hands of Pakistan, a friendly state which had assisted Hyderabad/[Nizam VII] and keep the monies out of the hands of India. Pakistan assisted Hyderabad/[Nizam VII] by procuring/facilitating the supply and/or transportation of weapons via Pakistan to Hyderabad, in support of Hyderabad's attempts at self-defence against Indian aggression."

17. Thus, Pakistan claims an absolute entitlement to the Fund on two alternative bases:

- (1) The monies were transferred to compensate/reimburse/indemnify Pakistan for assistance provided by her in procuring/facilitating the supply and/or transportation

¹³ See paragraph 2 of the Re-Re-Amended Defence and Interpleader Claim of Prince Muffakham and Shannon (**Prince Muffakham's Pleading**).

¹⁴ As was common ground between all of the parties before me.

¹⁵ In the run-up to the trial, I received communications from someone purporting to have a claim in right of Nizam VII. I forwarded these communications on to Mr Lintott's solicitors for their attention, as this was a matter not for me but for Mr Lintott. This was also made clear to the person writing directly to me. Mr Lintott was, in these proceedings, given every opportunity to consider whether to advance a positive case on behalf of others claiming an interest through Nizam VII, and he decided (for reasons quite rightly unknown to me) not to do so. After the trial, whilst writing this judgment, I received a further communication from this person, apparently making a claim to the Fund. His communication contained various materials, apparently in support of such a claim. I have ignored this communication and have done nothing in response to it. It having been made clear to this person that his appropriate interlocutor was Mr Lintott and not me, it seemed to me that this was the correct course to take, given the entirely inappropriate nature of this communication to me. Should the parties wish to see this communication, they should apply to me: but it has had no effect on the terms of this Judgment.

of weapons. I shall refer to this basis for the absolute transfer of the Fund as the **Arms for Money Argument**.¹⁶

- (2) The monies were transferred in order to keep the Fund out of the hands of India. I shall refer to this basis for the transfer of the Fund as the **Safeguarding Argument**. It is important to appreciate that the Safeguarding Argument postulated an absolute transfer and not a transfer on trust. It was Pakistan's case that if there had been a legal obligation on Pakistan to return the Fund on Nizam VII's demand, the Fund would not be safeguarded from India because India would force Nizam VII to demand the return of the Fund. In short, the Fund could only be safeguarded if the transfer was absolutely to Pakistan.¹⁷

Both of these contentions require a detailed understanding of the relations between India, Pakistan and Hyderabad in the 1940s and 1950s, which I consider later on in this Judgment.

(b) *The Princes' and India's contentions that the Fund was held on trust*

18. The Princes and India disputed Pakistan's claim to be absolutely entitled to the Fund. They contended that there was no absolute transfer to Pakistan but that Nizam VII retained the beneficial interest in the Fund and that a trust arose.
19. The Princes and India also said that the transfer was to Rahimtoola in his personal capacity and that Pakistan had no interest – not even a legal interest – in the Fund.¹⁸ In short, the Princes and India asserted that the fund was held on trust by Rahimtoola¹⁹ in his personal capacity alternatively in his capacity as High Commissioner (i.e., for Pakistan). The forms of trust alleged to have arisen were variously:²⁰
- (1) *An express trust.* On this basis, Nizam VII intended and authorised the creation of a trust, which Moin carried out on his behalf. The trust alleged was a bare trust. This was not the Princes' and India's primary case, although logically it falls to be considered first, because the Princes and India did not accept that Nizam VII had intended or authorised the creation of a trust. It was the Princes' and India's primary case that Moin had acted without the authority or the knowledge of Nizam VII in establishing the trust.²¹
- (2) *A constructive trust.* The Princes and India contended that a constructive trust arose in the circumstances of this case, what they described as a constructive trust "of the first kind" and a "trusteeship *de son tort*". The nature of such a trust – and whether

¹⁶ The Arms for Money Argument is considered in Section G below.

¹⁷ The Safeguarding Argument is considered in Section H below.

¹⁸ See Nizam VIII's Pleading at paragraph 13; Prince Muffakham's Pleading at paragraphs 13 and 13A; India's Pleading at paragraph 13.

¹⁹ Or, presumably, by his successors in title, Rahimtoola himself having died a number of years ago.

²⁰ See Nizam VIII's Pleading at paragraph 13A; Prince Muffakham's Pleading at paragraph 16(a); India's Pleading at paragraph 20.

²¹ This is considered in Sections F and H below.

it arises in the circumstances of the present case – will be considered in due course.²²

- (3) *A resulting trust.* The Princes and India also contended that if neither an express trust nor a constructive trust arose, a resulting trust arose because this was a case where there had been a gratuitous transfer, where the presumption against a gift had not been rebutted.²³
20. Whether there was a trust and, if there was, what sort, involves careful consideration of the conduct, intentions and authority of Nizam VII, Moin and Rahimtoola, both to establish the precise basis of the transfer and the authority and capacity of Moin and Rahimtoola. As I have already noted, there was an issue between the parties as to whether Rahimtoola received the Fund personally or in his capacity as High Commissioner. There was also a dispute as to whether the transfer had been made on the instructions and with the authority of Nizam VII or whether Moin had made the transfer without authority. The Princes and India contended that the transfer was unauthorised by Nizam VII and that Moin acted without authority in making it.²⁴
21. Pakistan denied that any trust, of any kind, arose. That was the inevitable corollary of Pakistan's claim to be absolutely entitled to the Fund. However, Pakistan additionally contended that:²⁵
- “...a payment from one sovereign state to another sovereign state will not give rise to a trust relationship; alternatively will not give rise to a trust relationship without cogent evidence that a trust relationship was intended. States do not intend and cannot be taken to intend to render themselves trustees or beneficiaries in relation to payments made to other states and their agents; alternatively, cannot be taken to intend this highly unusual relationship between states absent cogent evidence of such an intention...”
22. Thus, even aside from the Arms for Money Argument and the Safeguarding Argument, Pakistan contended that a trust could not or did not arise because of Hyderabad's and Pakistan's status as sovereign states.
- (c) *Rahimtoola*
23. Given the disputes between the parties about (i) the absolute transfer or transfer on trust of the Fund and (ii) the capacity in which Rahimtoola received the Fund, a theoretically possible outcome might be that Rahimtoola received the Fund beneficially in his personal capacity. None of the parties contended for this outcome, but it is one – given the parties' differences – that is at least theoretically open to me. Rahimtoola died in 1991. His estate was not made a party to these proceedings. That is because his estate has disclaimed any interest in the Fund.

²² This is considered in Section H(3)(c) below.

²³ This is considered in Section H(3)(d) below.

²⁴ See Nizam VIII's Pleading at paragraph 13; Prince Muffakham's Pleading at paragraph 16; India's Pleading at paragraph 12.

²⁵ Pakistan's Pleading at paragraph 20.1.

(d) *The restitutionary claim*

24. As an alternative to their contention that the Fund was held on trust, the Princes and India made a claim in restitution against both Pakistan and the Bank.²⁶ The factual basis for the restitutionary claim is exactly the same as that for the Princes' and India's trust claim. Specifically, it was contended that the Transfer was unauthorised and that this lack of authority provided the basis for a claim in restitution or unjust enrichment. As with the trust claim, Pakistan denied that there was any unjust enrichment, basing herself on the absolute nature of the transfer. Thus, subject to one point, the restitution claim ought to stand or fall with the dispute about the absolute nature of the transfer to Rahimtoola.
25. The additional point was that Pakistan advanced a limitation defence, contending that the restitutionary claim was statute barred by virtue of the provisions of the Limitation Act 1939 or the Limitation Act 1980.²⁷ Pakistan had sought to raise limitation as a defence to the trust claims as well, but this defence was struck out by order of Henderson J.²⁸
26. The Princes and India accepted that *prima facie* the limitation defence ought to succeed. The restitution claim accrued on 20 September 1948, when (as I shall describe) the Transfer took place. The 1954 Proceedings, brought by Nizam VII, were brought within time. The present proceedings are, on their face, plainly out of time. The Princes and India contended that the limitation defence should, however, fail for the following reasons (which I put in logical order rather than the order in which they were stated by the parties):
- (1) *Pakistan's raising of the bar of sovereign immunity prevented time running against any potential claimants to the Fund: time only began to run again when this procedural bar was waived by Pakistan in commencing these proceedings.* The Princes and India contended that one consequence of Pakistan's successful assertion of the procedural bar of sovereign immunity was to prevent time from running during the period in which that procedural bar was in place. Thus, with effect from the determination of the House of Lords in 1956 that Pakistan was entitled to assert, and had asserted, sovereign immunity, time ceased to run for the purposes of limitation until sovereign immunity was waived by Pakistan by the commencement of these proceedings in 2013.
 - (2) *Pakistan's raising of the limitation defence was an abuse of process.* The Princes and India contended that, having successfully raised sovereign immunity as a procedural bar to Nizam VII's claims, thereby causing the limitation period to expire in relation to parties interested in the Fund, it was an abuse of process for Pakistan to raise limitation as a defence. In effect, by relying on one procedural protection (sovereign immunity), and then waiving it, Pakistan had facilitated its ability to rely on another, different, procedural protection (limitation), which was

²⁶ See Nizam VIII's Pleading at paragraphs 13B and 14; Prince Muffakham's Pleading at paragraph 16(b); India's Pleading at paragraph 20.

²⁷ See, for example, Pakistan's Re-Re-Re-Amended Reply to India's Pleading (**Pakistan's Reply**) at paragraphs 3(e) and 35. Pakistan, of course, served Replies to Nizam VIII's Pleading and to Prince Muffakham's Pleading as well. However, since the points she took were the same in all cases, I shall, for convenience, refer only to Pakistan's Reply to India's Pleading.

²⁸ See Henderson J's judgment at [2016] EWHC 1465 (Ch).

(according to the Princes and India) an abuse of process under the Civil Procedure Rules (CPR).

- (3) *Even if the claim against Pakistan failed by reason of the limitation defence, the same claim could successfully be advanced against the Bank, which had pleaded no limitation defence.* The Bank, according to the Princes and India, received the Fund as agent for Rahimtoola (in whatever capacity) but did not, prior to notice of the claims of Nizam VII to the Fund, pay that money away to the Bank's principal. Accordingly, the Bank was not entitled to the defence of "ministerial receipt" and was itself obliged to account for the Fund to Nizam VII and his successors in title.

Pakistan disputed all three of these points.²⁹

(e) ***Pakistan's foreign act of state and illegality contentions***

27. Pakistan advanced two further points:

- (1) *Foreign act of state and non-justiciability.* Pakistan contended that the facts of this case were such as to render it non-justiciable in whole or in part. Paragraph 19 of Pakistan's Pleading states:

"The Transfer, together with the other financial dealings between the State of Hyderabad and Pakistan prior to the Transfer, were transactions of a governmental nature engaged in by two sovereign states in a political context. The non-justiciability and/or act of State doctrine applies to such transactions (but not to the banker-customer transaction governed by domestic law between [Pakistan] and the [Bank]), so that the Court will decline or abstain from exercising jurisdiction in relation to the subject-matter of these proceedings, except as between [Pakistan] and the [Bank] in relation to the said banker-customer relationship. [Pakistan] is accordingly entitled to payment of the balance standing to the credit of the Rahimtoola Account, this being the only justiciable claim made in these proceedings."

In some cases, a question of non-justiciability can be determined without any factual inquiry needing to be undertaken. This is not such a case. It is – for example – controversial as to whether the Transfer was, in fact, of a governmental nature engaged in by two sovereign states in a political context: the Princes and India contended that Rahimtoola received the Fund in a personal capacity, and that Pakistan's interests were not engaged at all; also, the Princes and India contended that the Transfer was unknown to and not authorised by Nizam VII and was effected by Moin without authority, when he was no longer Finance Minister and Minister for External Affairs for the Government of Hyderabad. These factual questions have a bearing on the question of justiciability and so have to be determined before the question of justiciability itself can properly be considered. So, although this was the first point Pakistan took in her pleading, it is one of the last issues that I consider in this Judgment.³⁰

- (2) *Illegality.* Pakistan contended that India's invasion of Hyderabad (which India, to be clear, characterised as a lawful "police action") was an unlawful act which

²⁹ These points are all considered in Section J below.

³⁰ In Section K below. When I put this point to Mr Qureshi, QC in the course of submissions, he did not dissent from this.

precluded the Princes and India from maintaining their claims. Specifically, Pakistan contended that India's alleged invasion and annexation of Hyderabad in 1948:

- (a) Violated the Charter of the United Nations;
- (b) Violated the terms of the Indian Independence Act 1947; and
- (c) Breached an agreement – the **Standstill Agreement** – concluded between India and Hyderabad on 29 November 1947.

These contentions are considered in Section L below.

(4) Structure of this Judgment

28. My approach to resolving these multiple issues will be as follows:

- (1) The essential facts underlying this claim occurred over 70 years ago. Although I did hear one witness of fact, most of the participants who could have shed light on the events of 1948 had long since died. Clearly, deciding issues of fact in such circumstances can only be described as challenging. I describe the evidence before me, and how I treat that evidence, in Section B.
- (2) Sections C to E deal with different aspects of the factual background. More specifically:
 - (a) Section C begins with Hyderabad itself: its geography and history (so far as relevant), its constitutional position over time, and the circumstances in which it came to be invaded³¹ by India. Section C inevitably has to consider those few days in September 1948 when the Indian Army invaded Hyderabad – which, of course, was when the Transfer was made – in order to gain insight into what Nizam VII and his advisors must have been thinking and what they must have intended.
 - (b) Section D considers the immediate circumstances surrounding the Transfer to the Rahimtoola Account. This includes a consideration of two letters, dated 15 September 1948 and set out in paragraphs 108 and 109 below, which the Princes and India say evidence an express trust of the Fund.
 - (c) Section E describes certain events that post-dated the Transfer.

Sections C, D and E do not seek to be comprehensive. Rather, they seek to provide an overall context within which the more specific contentions of the parties – and the facts supporting those contentions – can be considered.

- (3) Section F considers the actual authority that Nizam VII had and was able to confer at the time of the Transfer. The parties were in dispute as to whether Nizam VII

³¹ I fully appreciate that this is a contentious topic, on which Pakistan and India diverged. Although I appreciate that the term “invasion” is something of a loaded one, so too is the term “police action”. In this judgment, I use the term “invasion”, but I do so neutrally, so as to be indifferent as between the act that was contrary to law as alleged by Pakistan and the police action that India alleged was consistent with law.

had in fact authorised the Transfer. Pakistan contended that he had; the Princes and India that he had not. Clearly, the question of authorisation is a matter relevant to the nature and effect of the Transfer. Before considering, however, whether Nizam VII authorised the Transfer, it is necessary to consider an anterior question: what was the authority of the Nizam in this regard and how was that authority exercised? In particular, how did the Nizam delegate? These questions of authority and delegation are considered in Section F.

- (4) Sections G and H consider, in turn, Pakistan's contentions, summarised in paragraph 17 above, as to the absolute nature of the Transfer. Section G considers the Arms for Money Argument.³² Section H considers the Safeguarding Argument.³³ Consideration of the Safeguarding Argument inevitably requires me to deal with the countervailing contentions of the Princes and India that the Transfer was not absolute at all, but on trust.³⁴ Section H thus also considers the various contentions of the Princes and India that the Transfer was on trust.
- (5) Section I deals with Pakistan's contention – described in paragraphs 21 and 22 above – that even if no absolute transfer was intended by Nizam VII, no trust could arise.
- (6) Section J considers the restitution claim described in Section A(3)(c) above, and in particular the three specific points deployed by the Princes and India in response to Pakistan's defence of limitation.³⁵
- (7) Sections K and L consider Pakistan's two additional contentions.³⁶ Section K considers Pakistan's contentions regarding the foreign act of state doctrine and the question of non-justiciability.³⁷ Section L considers the question of illegality.³⁸

Finally, Section M states my conclusions and sets out how this dispute is to be disposed of.

B. THE EVIDENCE

(1) Introduction

29. Given the very considerable amount of time that has passed between the relevant events and the trial of these proceedings – a period of over seventy years – it is unsurprising that very limited oral evidence of witnesses of fact was adduced by any party. The evidence that was adduced, is described in Section B(2) below.
30. A number of statements were produced for the purposes of the 1954 Proceedings. Inevitably, these statements focussed on the question of sovereign immunity, which was the question that was before the courts: these statements therefore traversed fewer issues

³² See paragraph 17(1) above.

³³ See paragraph 17(2) above.

³⁴ See paragraph 19 above.

³⁵ See paragraph 26 above.

³⁶ See Section A(3)(e) above.

³⁷ Summarised in paragraph 27(1) above.

³⁸ Summarised in paragraph 27(2) above.

than are before me now. Also, these statements were made when disclosure (or discovery, as it then was) had not taken place; and none of the witnesses were cross-examined. The parties sought to adduce the evidence of various of these witnesses under various Civil Evidence Act Notices. I describe this evidence in Section B(3) below.

31. The parties produced a significant amount of documentary evidence, spanning the decades. Much of this material came from the parties' disclosure in these proceedings, but Pakistan also produced documents that she had obtained from various public archives, such as those of Sir Walter, later Lord, Monckton, QC (**Monckton**), who had some involvement in the affairs of Hyderabad. This material requires special consideration, because it was not produced pursuant to the disclosure process under CPR 31. Three documents produced by Pakistan during the course of her disclosure were the subject of Civil Evidence Act Notices by the Princes and India. I describe the documentary evidence in Section B(4) below.
32. Section B(5) describes the expert evidence before the court. None of the Princes nor India sought to adduce expert evidence pursuant to CPR 35. However, India and Nizam VIII did seek to rely on the hearsay evidence of a Hyderabad lawyer to explain the constitutional arrangements that prevailed in Hyderabad in 1948. That evidence had been deployed in the 1954 Proceedings. Although initially Pakistan did not seek to adduce any expert evidence, on Day 5 of the trial (17 June 2019), Pakistan made an application to adduce expert evidence from a forensic examiner, Mr Robert Radley (respectively **Radley** and **Radley 1**). I refused that application for reasons that I give later on in this Judgment.
33. It was clear from a very early stage in these proceedings that oral evidence at trial would be minimal and that the documentary evidence might very well be incomplete. At a hearing on 12 March 2018, I gave each party liberty to produce a "narrative" setting out in considerably greater detail than in a pleading the facts of that party's case.³⁹ Such a narrative would refer to documents and materials in support of that party's case (including documents and materials in the public domain) and would identify areas where expert evidence might be needed (but not adduce it). Pakistan and India each produced a narrative (**Pakistan's Factual Narrative** and **India's Factual Narrative**). The Princes relied on India's Factual Narrative. Neither Pakistan nor India identified, in their Factual Narratives, any areas where expert evidence might be required. I describe these Factual Narratives in Section B(6) below.
34. Finally, in Section B(7) below, I say something about my approach to the totality of the evidence that was before me.

(2) **Witness of fact called to give evidence**

(a) ***Prince Muffakham***

35. In the event, the only witness of fact that I heard from was Prince Muffakham. Prince Muffakham gave two witness statements. His first statement, dated 20 August 2015, was provided by him during the interlocutory phases of these proceedings (**Muffakham 1**).

³⁹ See paragraph 4 of my order dated 12 March 2018 and paragraph 9 of my order dated 25 October 2018.

His second statement, dated 11 December 2018, was given for the purposes of the trial and represented a somewhat fuller version of Muffakham 1 (**Muffakham 2**).

36. Prince Muffakham gave evidence on his own behalf on Day 2 (11 June 2019) of these proceedings. He was a careful and transparently honest witness. However, I am conscious that, notwithstanding the care with which he gave his evidence and his honesty and desire to assist the Court, I must be extremely cautious in the weight that I place on his evidence. That is for three reasons:

- (1) For the most part, Prince Muffakham's evidence was based on contemporary documents he had reviewed, and he frankly accepted that he generally did not have a recollection that was independent of these documents. One example of this will suffice:⁴⁰

Q (Mr Qureshi, QC) Do you recall what was said at the meeting?

A (Prince Muffakham) Roughly. The gist of it.

Q (Mr Qureshi, QC) Yes?

A (Prince Muffakham) The gist of it was that there were talks going on between India and Pakistan for the division of these funds, and that he wanted to convey to me that I should withdraw my claim and my brother should withdraw our claim, so that the two sovereign powers could sort this issue out by the division of the funds.

Q (Mr Qureshi, QC) Now, just pause there.

What you are telling us is that you had no recollection of meeting [Mir], let alone of what took place at the meeting, or when the meeting occurred, until you saw the two letters, correct?

A (Prince Muffakham) Yes.

Q (Mr Qureshi, QC) You are now saying that the recollection that you have just conveyed to me is an accurate recollection?

A (Prince Muffakham) Well, it is in the gist of the letters, anyway.

Q (Mr Qureshi, QC) Exactly. Isn't it really the case that what you are telling me and telling the Court – and this is not a criticism, please understand that I am not trying to criticise you – is what is said in the letters. You have nothing more to add in terms of your own mental recollection – and it is not a criticism – beyond that which is in the letters? Is that a fair point? Being realistic about this?

A (Prince Muffakham) Yes, I don't remember any more than I have said.

Mr Qureshi, QC was carefully seeking to elucidate the parameters of the witness' recollection. In an honest and open response – and this was entirely characteristic of Prince Muffakham – Prince Muffakham laid bare the limits of his knowledge.

⁴⁰ Day 2/p.21 (cross-examination of Prince Muffakham). The precise subject matter is irrelevant: it is Prince Muffakham's recollection of events independent of the documents that I am considering.

- (2) To the extent that Prince Muffakham had evidence to give going beyond the contemporary documentary record, these were (for the most part) of conversations about meetings his mother and Captain Mirza Hamid Beg (a confidant of Nizam VII and the Princes' guardian) had had with others about the Rahimtoola Account after it had been established. Prince Muffakham would have been 9 or 10 at the time, and he was not himself present at these meetings. He simply recalled discussions about those meetings after the event.⁴¹ It is very difficult to attach weight to such recollections. Not only is it likely that – despite his best efforts – Prince Muffakham's recollection will have faded with time, but his recollections were of discussions about other people's discussions of a matter that had taken place some time previously. Such discussions cannot really shed light on the Transfer.
- (3) Prince Muffakham – aided by the record – did give an account of a meeting that he had with one of Rahimtoola's successors as High Commissioner, Mohammad Ikramullah (**Ikramullah**). In this case, I accept that a conversation along the lines described by Prince Muffakham did take place, and that the Prince has a recollection of this. However, the difficulty that I have with this sort of after-the-event evidence is how far it is probative of events occurring some years previously: it is, after all, the intentions and authority as at the time of the Transfer that really matter. Subsequent events and discussions are, of course, not irrelevant, but they are (in my judgment) liable to have less weight attached to them.

(b) *Shaharyar*

37. Shaharyar Mohammad Khan (**Shaharyar**), a distinguished official from Pakistan's foreign office, now retired, provided a witness statement, dated 14 January 2016, in support of Pakistan (**Shaharyar 1**). Although, during the course of the interlocutory phases of the proceedings, Pakistan indicated that Shaharyar would attend to give evidence at trial, Pakistan in fact served a Civil Evidence Act notice dated 11 December 2018 in relation to Shaharyar's evidence, stating that Shaharyar "should not be called as a witness to give oral evidence not only because he does not reside in the United Kingdom (and it would therefore be disproportionately time-consuming and expensive for him to travel to London to give evidence), but also because he is elderly and frail".
38. Because of what Pakistan had previously said about Shaharyar's attendance, this first reason for not calling Shaharyar (non-residence in the United Kingdom) met with a degree of criticism from the Princes and India. As it happened, Shaharyar was in London at the time of the trial and ready and willing to give evidence. However, on Day 1 (10 June 2019) of the trial, I was shown a letter from Shaharyar's wife, indicating her own personal concern about the health implications of Shaharyar giving evidence, this letter being accompanied by a doctor's letter stating that these concerns were well-founded. In these circumstances, the Princes and India stated that they would make no criticism if Shaharyar were not called. In the event, Shaharyar was not called by Pakistan.
39. Whilst I have regard to section 4 of the Civil Evidence Act 1995 in assessing the weight to be given to evidence adduced under a Civil Evidence Act Notice, I do not consider that section 4(2)(a) of the 1995 Act is a relevant factor going to weight in this case. Section 4(2)(a) provides that a Court should have regard to "whether it would have been

⁴¹ Day 2/pp.11-12 (cross-examination of Prince Muffakham).

reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness”. In this case, it was clearly neither reasonable nor practicable for Shaharyar to have been called.

(3) Witness evidence given under Civil Evidence Act Notices

40. In addition to the evidence of Shaharyar, Civil Evidence Act Notices were served in relation to the following statements of the following witnesses:

Statement being adduced	Reason for the CEA Notice	Party relying on the evidence	Description of the evidence
Affidavit of Rahimtoola sworn 15 July 1955 (Rahimtoola 1).	Rahimtoola is deceased.	Pakistan	This was an affidavit produced for the purposes of the 1954 Proceedings, regarding the capacity in which Rahimtoola received the Fund.
Affidavit of Lakshmi Narayan Gupta (Gupta) sworn 17 March 1956 (Gupta 1). Gupta was, in 1948, the Financial Secretary in the Hyderabad Government.	Gupta is deceased.	India Nizam VIII	This was also an affidavit produced for the purposes of the 1954 Proceedings. Gupta spoke principally of the absence of authority for the Transfer from Nizam VII.
Affidavit of Rahimtoola sworn 19 June 1956 (Rahimtoola 2).	Rahimtoola is deceased.	Pakistan	This was an affidavit again produced for the 1954 Proceedings and responsive to Gupta 1. The thrust of the affidavit is the capacity in which Rahimtoola received the Fund.
Affidavit of Nizam VII sworn 3 November 1956 (Nizam VII 1).	Nizam VII is deceased.	India Nizam VIII	Although this affidavit was produced for the purposes of the 1954 Proceedings, it was produced in the Court of Appeal in response to comments made by Upjohn J at first instance. ⁴²

Table 1: Witness evidence given under Civil Evidence Act Notices

41. None of these witnesses could be called, and their evidence obviously relates closely to issues I have to decide. I take it into account, but with the following cautionary notes:
- (1) The evidence was given seven or more years after the events in question, namely the Transfer and the establishment of the Fund.
 - (2) None of the affidavits purports to be comprehensive: they all go to the specific issue that was live during the 1954 Proceedings, namely the question of sovereign immunity.

⁴² In the 1954 Proceedings, [1957] 3 All ER 441 at 444 Viscount Simonds noted: “...it was asserted by the Nizam that the action was unauthorised by him. When the matter was before Upjohn J the evidence was rightly regarded by him as inadequate, but in the Court of Appeal further evidence was admitted, an affidavit by the Nizam himself, containing his statement, which has not been challenged, that Moin had no authority to make the transfer in question...”.

- (3) The evidence would have been given after a certain hardening of positions on all sides had occurred. The fact is that, by the time of the 1954 Proceedings, India was pressing Nizam VII to seek to recover the Fund and Nizam VII was doing so; Pakistan was disinclined to allow India, through Nizam VII, to recover the Fund and was prepared to assert sovereign immunity to do so. Inevitably, the evidence would have been directed – on each side – to support the position being adopted by the parties. I do not say that these affidavits should automatically be disbelieved for this reason: they are sworn documents and my default is to treat them as true. But, at the very least, their content will have been coloured by the positions adopted by the parties.
- (4) The evidence was given before discovery, and the evidence of none of the witnesses was tested in cross-examination. The fact that the evidence of these witnesses could not be tested in cross-examination in the light of discovered documents significantly affects the weight that I can attach to these affidavits.
42. It was suggested that the fact that there might have been an opportunity to cross-examine these witnesses during the course of the 1954 Proceedings, which was not taken, ought in some way to give added weight to the evidence. In other words, it was suggested that the fact that the evidence could have been tested in cross-examination, but was not, justified an inference that the witness was telling the truth or (perhaps more accurately) that the party who could have, but did not, cross-examine, ought in some way to be bound to accept the evidence given as true. I reject that as an approach. The subject-matter of the 1954 Proceedings was very different from that before me now, and it would be unwise to read too much into decisions, taken over sixty years ago, as to whether or not to cross-examine a particular witness.
- (4) Documentary evidence**
- (a) Disclosed documents**
43. Pakistan, the Princes, India and the Bank all gave disclosure. Given the passage of time, this clearly was a challenging exercise for all concerned. It is important that I record that all of the parties fulfilled their responsibilities in an entirely appropriate manner. It is necessary to say this because – inevitably – there were gaps in the documentary record. Some of these gaps were obvious to see. Thus, a document in the disclosure might refer to another document no-one was able to trace or produce. Equally, there were a number of copy-typed documents used for the purpose of the bound case before the House of Lords in the 1954 Proceedings that did not exist in their original form in the disclosure. The inference in such cases must be that these documents did exist in the 1950s, but subsequently were misplaced, misfiled or otherwise lost.
44. These are the documents that are known to be missing.
45. I consider that there will be documents that once existed, which have been lost without trace, and without either the parties or the court appreciating that they once existed. A graphic illustration of this can be seen in relation to various documents that were disclosed by Pakistan on 15 January 2019. These documents were discovered amongst documents in the basement of the Pakistan High Commission in London in December 2018. Two are apparently dated 15 September 1948, and the rest date from 1977 and refer to these earlier letters. No other copies of these letters have been found and they are

not referred to in the documents that have been disclosed. But for the alertness of Pakistan and her legal team, these documents would never have been produced and there would have been no hint as to their existence from other, disclosed, documents.

46. Three of these documents are the subject of Civil Evidence Act Notices made by the Princes and India, as set out below:

Document being adduced	Reason for the CEA Notice	Party relying on the evidence
Letter dated 15 September 1948 from Moin to Rahimtoola.	The writer is deceased.	India Nizam VIII Prince Muffakham
Letter dated 15 September 1948 from Rahimtoola to Moin.	The writer is deceased.	India Nizam VIII Prince Muffakham
Letter dated 28 May 1977 from the Ministry of Foreign Affairs of the Government of Pakistan in Islamabad to the Embassy of Pakistan in London.	The writer is unknown and, if still living, is likely to be resident outside the jurisdiction.	India Nizam VIII Prince Muffakham

Table 2: Documents put in under Civil Evidence Act Notices

47. It will be necessary to consider the content and weight to be given to these documents in due course. By their dates, it is plain that (assuming the dates are correct) the first two documents are closely contemporaneous with the Transfer, which took place on 20 September 1948. The third document is from the Ministry of Foreign Affairs in Pakistan, addressed to the Minister resident at Pakistan's London Embassy, dated 28 May 1977. The letter reads as follows:

"On 15 September 1948, [Moin], the Finance Minister of the then Hyderabad State, had requested [Rahimtoola], the then Pakistan High Commissioner in London, to accept transfer into his account as a trust of an amount of over 1 million lying at the credit of the Nizam's government in the Westminster Bank, London. This transfer of funds was accepted by [Rahimtoola] through his letter of 15 September 1948. The original correspondence exchanged between them is however not readily traceable in the Ministry.

2. We should, therefore, be grateful if you could kindly check up your old records and supply us photocopies of these two letters if available with you."

48. Thus, the Ministry in Pakistan was clearly aware of the letters dated 15 September 1948 going between Moin and Rahimtoola, but had only copy-typed versions.⁴³ The letter to the London Embassy sought to make good that deficiency in the documents. Unfortunately, the Embassy was unable to help, because no correspondence prior to 23 May 1953 was available to the Embassy.
49. This 1977 letter exchange casts extremely helpful light on the survival and loss of documents:

⁴³ It is clear that the Ministry had copy-typed versions from the Ministry's letter to the Embassy dated 21 June 1977, which describes the documents in the Ministry's possession.

- (1) It is clear that Pakistan's London Embassy had, in 1977, no documents pre-dating 23 May 1953.
 - (2) It is an appropriate inference that, prior to their loss, Pakistan's London High Commission/Embassy⁴⁴ sent copies of relevant documents to Pakistan. This must have included the two letters dated 15 September 1948. There is no other plausible explanation for how copy-typed versions of these documents could have ended up with the Ministry in Pakistan.
 - (3) The Ministry in Pakistan was, in 1977, able to send these copy-typed versions back to London, and engage in correspondence with the Embassy as to the existence of better copies. That correspondence has survived in the basement files of the Pakistan High Commission in London, but has not survived in the Ministry's files in Pakistan. It is plain from the file references in the 1977 exchanges that both the Ministry and the Embassy would have kept files. The obvious inference is that at a point in time unknown, but post-dating 1977, there has been a loss of documents in Pakistan.
50. It would be pointless to speculate as to the cause for missing documents. I repeat what I have said about the care and diligence of Pakistan and her legal team regarding Pakistan's disclosure, and I make the same point as regards the Princes and India. I draw no inference from the absence of documents, save that I must be alert to the fact that documents – and potentially very material documents – will have gone missing at various points in time over the years. I must decide the case in the absence of these documents, knowing nothing of their significance or otherwise.
- (b) *Public documents*
51. As I have described,⁴⁵ the Factual Narratives that I permitted the parties to introduce could refer to public, as well as disclosed, documents. Pakistan undertook a most thorough review of public records for relevant or potentially relevant material. The material that Pakistan considered helpful was referenced in Pakistan's Factual Narrative and exhibited to that Factual Narrative in some six lever arch files. In terms of volume, this was about the same as the disclosure that the parties chose to include in the chronological run of documents, which also amounted to some six lever arch files.
52. I have no difficulty in using this material to assist in a consideration of the relevant events. Pakistan – self-evidently, since these were the fruits of her efforts – relied upon them extensively. The Princes and India did not seek to dissuade me from considering this material, but they did stress that I needed to take care when considering these documents. Unlike the disclosure process, which focusses on documents in a party's control, these documents had been obtained from public records. The volume of material regarding the affairs of India, Pakistan and Hyderabad in the 1940s and 1950s is vast. Inevitably, in identifying the material to be referenced in Pakistan's Factual Narrative, some process of selection will have been undertaken. That would mean:

⁴⁴ Between 1972 and 1989, Pakistan was not a member of the Commonwealth of Nations. What was previously its High Commission became Pakistan's Embassy.

⁴⁵ See paragraph 33 above.

- (1) that potentially relevant material might have been omitted; and
 - (2) that irrelevant material – but which looked relevant – might have been included.
53. Without in any way criticising Pakistan’s process, I consider that the warnings of the Princes and India are apposite. To take but one example: many of the documents cited by Pakistan in her Factual Narrative and produced by her related to the Arms for Money Argument. Everyone accepted that there had been assistance by Pakistan in the supply and transportation of weapons to support Hyderabad’s independence. But that fact does not mean that there is an inevitable link between the Fund and the provision of weapons. I cannot be beguiled into concluding, merely from the inclusion of such documents in Pakistan’s Factual Narrative, that such a link exists, because these documents have not been produced out of the disclosure of the parties but through a trawl of public source documents.
54. Context is everything: a document’s source can be telling. For example, a document regarding the provision of weapons to Hyderabad coming from an archive of Nizam VII would be more compelling in support of the Arms for Money Argument than a similar document emanating from (say) the records of Sidney Cotton (**Cotton**), the gentleman centrally involved in the provision of arms to Pakistan and Hyderabad.
- (c) *The source of documents*
55. The parties provided a chronological schedule of documents, containing the key documents from disclosure relied upon by them, together with the source from which that document had been obtained. I found this extremely helpful.
- (5) **Expert evidence**
56. India and Nizam VIII sought to rely upon two affidavits of Nonavinakere Srinavasa Raghavan (**Raghavan**) sworn 17 February 1956 (**Raghavan 1**) and 17 March 1956 (**Raghavan 2**) in the 1954 Proceedings. These were adduced by way of Civil Evidence Act Notice and were relied upon as expert evidence concerning the constitutional arrangements in Hyderabad in 1948. Raghavan 2 is simply a re-sworn version of Raghavan 1, and so adds nothing.
57. It is well-established that CPR 35 does not constitute a complete code for adduction of expert evidence in English civil procedure,⁴⁶ and that expert evidence can be received outside the confines of CPR 35, for instance by way of section 3 of the Civil Evidence Act 1972.⁴⁷ Raghavan, like the factual witnesses referred to in paragraphs 40 above, is now deceased and I do take his evidence into account. Of course, I recognise that Pakistan had no ability to cross-examine Raghavan, and that is a matter that would go to weight. As it happened, however, there was relatively little controversy over Raghavan’s evidence.

⁴⁶ *Hoyle v. Rogers*, [2014] EWCA Civ 257 at [61] to [63] (*per* Christopher Clarke LJ).

⁴⁷ *Hoyle v. Rogers*, [2014] EWCA Civ 257 at [64] (*per* Christopher Clarke LJ).

58. As I have described,⁴⁸ Pakistan sought to adduce the expert evidence of Radley during the course of the trial. I rejected Pakistan's application. I explain why when describing the documents which Radley 1 considered.

(6) The Factual Narratives

59. I have described the Pakistan and India Factual Narratives in paragraph 33 above. In themselves, they are not evidence, merely narratives pulling together into a coherent whole the respective factual contentions of Pakistan and India. I have relied upon them both in order to construct the factual narratives contained in this Judgment: I have, however, when referencing documents, tended to reference the primary documents as identified in the Factual Narratives, rather than the Factual Narratives themselves.

(7) My approach to the evidence

60. In the ordinary course, when assessing factual evidence, a Judge has well in mind the approach of Lord Goff in *Grace Shipping Inc v. CF Sharp and Co (Malaya) Pte Ltd*:⁴⁹

"In such a case [where witnesses were seeking to recall events and telephone conversations of five years earlier] memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities."

61. In this case, none of the critical actors at the time of the Transfer – in particular Nizam VII, Moin and Rahimtoola – could give evidence. After the event – for instance during the course of the 1954 Proceedings – some of these actors did give evidence. But that evidence suffers from all of the fragilities that I have described in paragraph 41 above. For those reasons, the contemporary documents, particularly those directly related to the Transfer, are critical. Of course, the greater effluxion of time between the relevant events and the date of the document, and the remoter the subject-matter of the document, the less cogent such documentary evidence is. I also must bear in mind the potential for the contemporary record to mislead by reason of its incompleteness, known and unknown.⁵⁰ I have well in mind Lord Goff's injunction to have regard not only to the contemporary documents, but also to the overall probabilities. My intention is to view the overall picture having well in mind the overall probabilities, and to consider specific events in that light.

C. HYDERABAD

(1) Partition: India, Pakistan and Hyderabad

62. Hyderabad was a **princely state** during the British Raj, ruled over by the Nizams of Hyderabad. The princely states were not part of **British India**, but His Majesty The King exercised "suzerainty" over the princely states.
63. The Indian Independence Act 1947 partitioned British India to create, as from 15 August 1947 (referred to in the Act as the **appointed day**⁵¹), "two independent Dominions...to

⁴⁸ See paragraph 32 above.

⁴⁹ [1987] 1 Lloyd's Rep. 207 at 215.

⁵⁰ See paragraphs 43 to 50 above.

⁵¹ See section 1(2) of the Indian Independence Act 1947.

be known respectively as India and Pakistan”.⁵² The territory so partitioned was described in section 2 of the 1947 Act.

64. This partition did not affect the princely states, not part of British India, and referred to in the 1947 Act as the **Indian States**. Although section 2 effected the partition of British India between India and Pakistan, and did not affect the princely states/Indian States, section 2(4) of the Act provided that “nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions”.
65. Sections 6 to 8 provided for the consequences of independence. Section 6 stated the competence of the Legislature of each of the new Dominions to have “full power to make laws for that Dominion, including laws having extra-territorial operation”⁵³ and made clear that these legislatures could enact legislation “repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion includes the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.”
66. Section 7 provided as follows:
- “(1) As from the appointed day –
- (a) His Majesty’s Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India;
 - (b) the suzerainty of His Majesty over the Indian States lapses, and with it all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and
 - (c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise:

Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of this subsection, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the Ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.

⁵² Section 1(1) of the Indian Independence Act 1947.

⁵³ See section 6(1).

- (2) The assent of the Parliament of the United Kingdom is hereby given to the omission from the Royal Style and Titles of the words “Indiae Imperator” and the words “Emperor of India” and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm.”

67. Section 8 made temporary provision as to the government of each of the new Dominions.

(2) The position of Hyderabad in 1948

(a) Geography and religion

68. It is important to bear in mind the geography of Hyderabad. A map is at Annex 2 of this Judgment, which I use purely to illustrate the geography. As can be seen, Hyderabad is landlocked within India, and is geographically very far from Pakistan. In terms of religion, the bulk of Hyderabad’s 17.5 million people (at that time) were Hindus, as was the bulk of the Indian population. Nizam VII, by contrast, was (like the bulk of Pakistan’s population) a Muslim.⁵⁴

(b) Approach of the United Kingdom

69. The Indian Independence Act 1947 sought to ensure that arrangements prior to the appointed day with regard to transit, communications, etc continued after the appointed day,⁵⁵ but that the princely states/Indian States would be free to accede to either of the new Dominions if they so chose.⁵⁶ This freedom of choice was a theme throughout the debates in the House of Commons of what was then the Indian Independence Bill. However, there was an equally telling measure of appreciating the realities of the situation. During the second reading of the Indian Independence Bill on 10 July 1947, the Prime Minister, Mr Attlee said this:

“...The House will remember that the Cabinet Mission, in their memorandum of 12 May 1946, informed the States that His Majesty’s Government could not, and will not in any circumstances, transfer paramountcy to an Indian Government. With the transfer of power to two Indian Dominions, it is necessary to terminate the paramountcy and suzerainty of the Crown over the Indian States, and, with them, the political engagements concluded under paramountcy and the mutual rights and obligations of the Crown and the States which derive therefrom. The reason for this is that they all depended for their implementation on our part, on the continuance of the responsibility of Great Britain for the Government of India; and with the transfer of power to two Dominion Governments, it would be impossible for the British Government to carry out these obligations. An important element of those rights and obligations concerns the protection of the States against external aggression or internal subversive movement, and the methods whereby the paramount Power has in the past influenced the policy of the States so as to enable it and them to fulfil such undertakings. A feature running through all our relations with the States has been that the Crown has conducted their foreign relations. They have received no international recognition independent of India as a whole.

⁵⁴ In an internal Foreign Office briefing note dated 6 May 1948, it was noted: “Hyderabad, however, which has a Muslim ruler and ruling class, and a population which is about 80 per cent Hindu, has been reluctant to accede to India although surrounded by Indian territory. The sympathy of the ruling class lies with Pakistan, but geographically and economically the State is completely within the Indian orbit.”

⁵⁵ See the proviso in section 7(1) of the 1947 Act: see paragraph 66 above.

⁵⁶ This is the effect of section 2(4) of the 1947 Act: see paragraph 64 above.

With the ending of the treaties and agreements, the States regain their independence. But they are part of geographical India, and their rulers and peoples are imbued with a patriotism no less great than that of their fellow Indians in British India. It would, I think, be unfortunate if, owing to the formal severance of their paramountcy relations with the Crown, they were to become islands cut off from the rest of India. The termination of their existing relationship with the Crown need have no such consequence. In fact, already a large number of the States have declared their willingness to enter into relationships with the new Dominions, and some have been represented in the Constituent Assembly of India. It is the hope of His Majesty's Government that all States will, in due course, find their appropriate place within one or other of the new Dominions within the British Commonwealth, but until the constitutions of the Dominions have been framed in such a way as to include the States as willing partners, there must necessarily be a less organic form of relationship between them, and there must be a period before a comprehensive system can be worked out."

70. The position of His Majesty's Government was thus clear: the Indian States would – with the passage of the Indian Independence Act – “regain their independence” (to quote the Prime Minister), but it would be unfortunate if such States were, as a result, “to become islands cut off from the rest of India”. The Prime Minister was using “India” to refer to British India, but it is quite clear that, after partition, Hyderabad would be an island floating in an India and not a Pakistan sea.

(c) *Approach of Nizam VII*

71. The then ruler of Hyderabad – Nizam VII – declared his intention to remain independent of India and Pakistan, rather than becoming a part of either. In a confidential note dated 28 July 1947 to Mr Jinnah – the future President of the Constituent Assembly of Pakistan and Pakistan's first Governor-General – it was stated that Nizam VII “would of course much prefer to have close treaty relations with Pakistan rather than with the Dominion of India. It is the land-locked position of Hyderabad in the belly of the most Hindu part of Hindustan which makes it inevitable for His Exalted Highness with his vast Hindu population to make, if possible, some friendly arrangement with Hindustan”.⁵⁷ The note continued to say that Nizam VII “has definitely made up his mind not to accede but he may be driven to closer unity by treaty in regard to External Affairs than he would have wished. But a treaty, as the British have shown, can be denounced”.⁵⁸ The note went on to ask what sort of assistance Mr Jinnah could provide to Hyderabad in terms of supplies of food, salt, kerosene oil, arms, equipment and troops.⁵⁹
72. On 29 November 1947, Nizam VII entered into the Standstill Agreement with India, which aimed – pending final agreement – to continue as between Hyderabad and India those arrangements which had existed as between the Crown and Hyderabad before the appointed day.

(d) *The approach of India, as viewed by Nizam VII*

73. As the subsequent debates at the United Nations show,⁶⁰ there are two views as to the approach of India. So far as Nizam VII was concerned, I am satisfied that (whatever the objective truth) the Nizam considered that India was seeking to force Hyderabad, against

⁵⁷ Paragraph 1 of the note.

⁵⁸ Paragraph 2 of the note.

⁵⁹ Paragraph 6 of the note.

⁶⁰ See paragraphs 80ff below.

her (or, at least, his) will to accede to India and become a part of India. The following documents show very clearly the Nizam's thinking:

- (1) In a letter dated 6 April 1948 from Nizam VII to the Governor-General of India the Nizam referred to the possibility of "an open breach of friendly relations" with India, and a concern about economic pressure (in the form of a blockade) emanating from India.
- (2) In a letter dated 19 April 1948 from Hyderabad's Prime Minister, Mir Laik Ali (**Laik Ali**), to Mr Bevin, the Foreign Secretary in Mr Attlee's government, Laik Ali stated:

"I am now informed by the Indian Union that there is the possibility of their totally sealing off the entire borders of Hyderabad and thereby making our lives impossible. It has also been indicated that the blockade may soon be followed by Military invasion. It is difficult to state in this letter all that we are facing but I can assure you that it is beyond all comprehension. Our difficulties have been multiplied by the fact that telephone and telegraph system in our State passes through and is controlled by the Indian Union. We are not able to place before the world the true facts as serious censorship is applied on all the news and statements originating or in transmission from Hyderabad to the countries abroad."

- (3) In a letter dated 4 July 1948 to Mr Attlee, Nizam VII said:

"...It is now clear beyond doubt that the intention of the Government of India is to bring Hyderabad into complete subjugation either through an instrument of accession or through some alternative arrangement. The manner in which the Government of India have dealt with some of the large Indian States must have come to your knowledge. In clear terms, responsible members of the Government of India have repeatedly conveyed to us that they want Hyderabad to be brought into the Indian fold in precisely the same manner and that any tendency on the part of Hyderabad to maintain its identity will be crushed by every possible means at the disposal of the Government of India..."

...The Indian Government, by their actions, are attempting to nullify the promises given to Indian States before the British Government transferred power to the Dominion of India that Indian States would be free to accede to either of the Dominions of India or Pakistan...

...India's demands have been backed by a policy of intimidation and coercion perilously reminiscent of that applied by the Nazis against Sudetenland. Today, Hyderabad faces a total blockade: my people are denied supplies of all descriptions, including medical stores, chlorine for the purification of water supplies and common salt. Indian Army units remain posted round my borders and raiders from India are making almost daily attacks on my territory. I have incontestable proof that these raiders frequently include personnel of the Indian Army and police forces...

...Because of India's hostile acts, I have thought it necessary to write to you and to submit a copy of this letter to His Majesty the King. If the situation continues to deteriorate, not only the peace and security of Hyderabad but of the whole of Southern India will be imperilled and the 17 million people of my State and many millions more in India will be brought under the shadow of disaster. If India should invade Hyderabad – and there are dangerous signs that this is India's intention – my people will resist with all the force at their command..."

(3) Operation Polo

74. I shall refer to the interaction between the forces of India and the forces of Hyderabad that took place in September 1948 by its code name, **Operation Polo**.

75. On 24 August 1948, the Secretary-General of the United Nations passed on to the Security Council of the United Nations a communication he (the Secretary-General) had received from Zahir Ahmed (**Zahir**), the Foreign Secretary to the Government of Hyderabad, on 21 August 1948:

“The Government of Hyderabad, in reliance on Article 35(2) of the Charter of the United Nations, requests you to bring to the attention of the Security Council the grave dispute which has arisen between Hyderabad and India, and which, unless settled in accordance with international law and justice, is likely to endanger the maintenance of international peace and security. Hyderabad has been exposed in recent months to violent intimidation, to threats of invasion, and to crippling economic blockade which has inflicted cruel hardship upon the people of Hyderabad and which is intended to coerce it into a renunciation of its independence. The frontiers have been forcibly violated and Hyderabad villages have been occupied by Indian troops. The action of India threatens the existence of Hyderabad, the peace of the Indian and entire Asiatic continent, and the principles of the United Nations. The Government of Hyderabad is collecting and will shortly present to the Security Council abundant documentary evidence substantiating the present complaint. Hyderabad, a State not a member of the United Nations, accepts for the purpose of the dispute the obligations of pacific settlement provided in the Charter of the United Nations.

It is understood that the submission of the present complaint to the Security Council does not prejudice the submission of the dispute to the General Assembly.”

76. The Secretary-General brought this further communication, also from Zahir, to the attention of the Security Council on 13 September 1948:

“In view of the officially proclaimed intention of India as announced by its Prime Minister to invade Hyderabad and in view of the actual preparations for imminent invasion the Government of Hyderabad earnestly request that the complaint of Hyderabad against India be put on the agenda of the Security Council at the earliest possible date such as Wednesday 15 September. Invasion is bound to cause unrestrained communal war throughout the Indian continent. International peace, fundamental principles of the Charter and the duty to prevent widespread bloodshed demand immediate consideration of the matter by the Security Council.”

77. Operation Polo took place between 13 and 18 September 1948. *The Times* for 18 September 1948 records:

“Delhi, Sept 17

Four and a half days after the Indian Army had crossed the Hyderabad border from all points of the compass fighting in Hyderabad ended officially this evening at 5 o'clock, when a “cease fire” order by his Exalted Highness the Nizam to his troops came into effect. This followed a broadcast by Mir Laik Ali, the Hyderabad Prime Minister, announcing his own and his Ministry’s resignation, and the sending of a message by the Nizam to Mr Rajagopalachari, the Indian Governor-General, in which the former said that he had ordered that Indian troops should be allowed free entry into Secunderabad⁶¹ and undertook to disband the Razakars (Muslim volunteers).”

⁶¹ A city in Hyderabad.

78. The press also reported that Hyderabad's appeal to the United Nations had been withdrawn.

79. Previously, on 17 September 1948, Nizam VII made the following radio broadcast:

"My beloved people, I have great pleasure to inform you that I have sent the following message today to His Excellency, Rajagopalachari, Governor-General of India. My Government has tendered their resignation and have asked me to take the political situation into my purview. In answer to this, I told them that I was sorry that this was not done earlier and it was impossible for me to do anything at this critical juncture. However, I have ordered a cease fire to my troops and also have ordered to ban the Razakars and allow the Indian Union to occupy Bolarum⁶² and Secunderabad tomorrow. Further, till I have had an opportunity of appointing a Prime Minister and appointing a regular Ministry, I hereby constitute the following into committee...

...

I have also had consultations with my friend, Mr KM Munshi, India's Agent General. I take this opportunity to acknowledge the help he rendered to me at this occasion.

...

I have also ordered my representatives of my old ministry who are now prosecuting the appeal on behalf of Hyderabad before the Security Council of the [United Nations Organisation], not to press it, as I am opening a new chapter of friendliness with India."

80. On 28 September 1948, there was a meeting of the United Nations Security Council. The official records note that communications had been received by the Secretary-General calling into question the validity of the credentials of the representatives of Hyderabad. Those representatives included Moin. Notwithstanding the query regarding credentials, Moin was present at this meeting and permitted to speak.

81. On 12 December 1948, Moin wrote to the President of the Security Council in the following terms:

"On 9 October 1948, I informed the President of the Security Council that it was not my intention at the next meeting of the Security Council devoted to the question of the complaint of Hyderabad against India, to appear before the Security Council and to participate in the discussion concerning the validity of the credentials of the Hyderabad delegation.

That decision was prompted by the desire not to delay either the discussion of the substance of the complaint of Hyderabad or any action of the Council resulting from that discussion.

Since then, reliable information has come to our knowledge which no longer permits us to leave the Security Council in doubt as to the fact that neither at the time when the alleged instructions to withdraw the complaint from the United Nations were issued nor at any subsequent period till the present day has the Nizam been a free agent able to express without constraint the will of the State.

It now appears clearly that instructions in the matter were given under duress, and that the Nizam is now held virtually in the position of a prisoner of the Indian military authorities who have occupied the country by force of arms.

⁶² A locality within the city of Secunderabad.

It is evident that the Nizam has been prevented from communicating freely with his friends and advisers in and outside the country. Indian sponsored newspapers and bodies – such as the Hyderabad State Congress – have been openly advocating the deposition of the Nizam. The evidence in our possession shows that he approves of the continued effort of the Hyderabad delegation to enlist the support and authority of the United Nations for the repression of the aggression which has taken place against Hyderabad.

In view of this, we consider it our duty to re-assert, in most emphatic terms, the authority of our delegation as originally appointed and its continued right and obligation to defend the interests of Hyderabad before the United Nations...”

82. On 19 May 1949, there was a further meeting of the United Nations Security Council. At this meeting, the differing views of India and Pakistan on the question of Hyderabad were again evident. A flavour of this can be seen from the following extracts from the record of the meeting. India’s representative stated (amongst many other things):

“Let me repeat: the action which India was forced to take was not directed against the people of Hyderabad, or even against the ruler, but against a fascist clique which had usurped power and was misusing it in a manner that threatened the tranquillity of India as well as Hyderabad itself. As soon as these men resigned and the Nizam was free to resume charge, he withdrew the complaint which they had made to the United Nations.

I ask, is there anything of international significance in all this? Do not let us be led away by words. This complaint is not really made by Hyderabad, but by certain individuals who had once usurped a little brief authority in Hyderabad and have now lost it. They have ceased to represent the ruler; they never represented the people. Whatever dispute or situation they created in Hyderabad has now come to an end, and conditions are gradually settling down to normal. The Nizam and his officers have been co-operating with the Indian authorities in Hyderabad for the restoration of law and order. No Hindu-Muslim clashes have been reported during the last two or three months. Relations between the two communities are cordial. Various good-will missions led by prominent Muslims from various parts of India have toured Hyderabad. There is no ban or restriction on the entry of any visitor into Hyderabad. Press representatives from India and abroad have visited the State without let or hindrance.”

By contrast, Pakistan’s representative stated (again, amongst many other things):

“The representative of India went on to say that the position of the Nizam was that he had been rescued, as it were, from the hands of his provisional Government, he was now perfectly happy under the Military Governor and was perfectly free, and had voluntarily and quite freely directed that the case which had been brought before the Security Council should be withdrawn. The very first step of the Nizam after the march of Indian troops into Hyderabad was to hand over all authority and jurisdiction to the Military Governor. Thereafter, whether he is free or not is immaterial, he has no authority. He has been completely set aside. All authority has been vested in the Military Governor and the administration is in the hands of the Military Governor.

There are, however, one or two very significant photographs which show what the position of the Nizam and of his heir apparent is. I shall hand these photographs to representatives on the Council for their examination. Here is a man who is described as the richest man on earth – whether that is a qualification or a disqualification is a different matter – who, up to the march of the military forces of India into Hyderabad, was the ruler, and according to correspondents, the more or less absolute ruler, subject to such grants of authority as he had already made or contemplated making, of 17,500,000 people in a territory extending over 82,000 square miles.⁶³ In the first photograph

⁶³ The United Kingdom extends to some 93,600 square miles, if that comparison assists.

he is standing next to the Military Governor, and the very positions of the two form an eloquent commentary on what the position of the Nizam is today. In the second photograph the Nizam is standing between the Military Governor and Pandit Nehru. The third photograph, on the same page, is again extremely eloquent. The Deputy Prime Minister of India, Mr Patel, is receiving His Highness the Prince of Berar, the heir apparent to the Nizam. I will make no comment. Representatives on the Council will themselves see with what distinctive courtesy the Deputy Prime Minister of India is receiving His Highness the Prince of Berar...”

(4) Accession of Hyderabad to India

83. Whilst a public international lawyer might expect a single answer to the question of whether, and if so when, Hyderabad acceded to India, it is quite clear that there is no single answer to this question. It is a part of Pakistan’s case that the conduct of India in invading Hyderabad was unlawful on many levels – on the level of public international law and at municipal law. I have absolutely no doubt that, viewed from the perspective of the law of Pakistan – including her foreign relations law – the invasion of Hyderabad always was and continues to be unlawful as the invasion by one sovereign state of another.
84. I also have absolutely no doubt that, viewed from the perspective of the law of India – including in particular her constitutional law⁶⁴ – Hyderabad has been, since 1950, a State within the Union of India, the territory of which Indian State was subsumed into three other States of the Indian Union in 1956. It was India’s case that Hyderabad was, at no time, a sovereign state.⁶⁵
85. However, it does not seem to me that these perspectives are of any assistance to me. I am sitting as a Justice of the High Court of England and Wales, and it is my duty to apply English municipal law, including English foreign relations law, to the extent that the status of Hyderabad is relevant to these proceedings. Questions of foreign affairs arising in English courts have, as will be described, English law answers.

D. THE PAYMENT INTO THE RAHIMTOOLA ACCOUNT

(1) Establishment of the Hyderabad State Bank Account

86. On 16 September 1947, Nawab Mir Nawaz Jung (**Mir**), Agent General for Hyderabad in London cabled the Finance Minister in the following terms:

“Imperial Bank, whose branch here has our large funds, is subject to jurisdiction of Government of India under the Imperial Bank Act. It would be safer to transfer them to an English bank. I suggest Westminster Bank and Mr Laik Ali agrees with my view and suggestion. If you approve, kindly make arrangements by code cable from Imperial Bank Hyderabad to Imperial Bank London.”

⁶⁴ I was provided with extracts from Aggarawala and Aiyar, *The Constitution of India*, 1st ed (1950), which makes absolutely clear that in 1950 Hyderabad was viewed by these authors as part of the territory of India.

⁶⁵ India’s Pleading states, at paragraph 99(i), as follows:

“For many years until 15 August 1947, Hyderabad had been a vassal state of the British Crown. The arrangements between Hyderabad and the Crown included that Hyderabad had no external relations, these being conducted by the Crown. While it is denied that such matters are material to the true issues in the present proceedings, India has taken the position that Hyderabad was not an independent sovereign state either before or after 15 August 1947.”

87. Gupta wrote to the General Managers of the Bank a letter dated both 21 and 22 October 1947 in the following terms:

“I wish to draw your attention to the discussions that [Mir] had some time back with the Chairman and Directors of [the Bank] in connection with the establishment of agency arrangements between the Hyderabad State Bank and [the Bank]. The question of agency arrangements is engaging the attention of His Exalted Highness’ Government and a communication will be sent to you in due course. It will, however, take some time before the terms of these agency agreements are finally settled between the parties and, therefore, as a first step towards the proposed arrangements, His Exalted Highness’ Government have decided that the Hyderabad State Bank should maintain a current account at one of your branches at London with Government funds. An official letter about this proposal is enclosed herewith for your consideration and I hope that you will kindly take early action in the matter.”

88. A letter to Mr RAB Allan, Managing Director, Hyderabad State Bank, also dated 21 October 1947, and also signed by Gupta, stated:

“I am to state that His Exalted Highness the Nizam’s Government desire that arrangements should be made to open with an appropriate office of [the Bank], in London, a current account with Government funds in the name of the Hyderabad State Bank. This account will be operated by the Managing Director, Hyderabad State Bank and one other responsible Officer of the Bank to be named by the Managing Director.

In pursuance of this decision of the Government, I am arranging to place a sum of £2,000,000/- (Two million pounds only) at the disposal of the Head Office of [the Bank]. You are requested kindly to send this office your specimen signature [form] so that these specimen signatures may be attested and forwarded to [the Bank].

In case [the Bank] desires that any Account Opening Forms should be signed, such forms will be received by you through the Agent General for Hyderabad in London [i.e. Mir] and you are requested kindly to take immediate action to complete and return the forms to the Agent General.”

89. On 22 October 1947, Gupta again wrote to the Bank:

“His Exalted Highness the Nizam’s Government desire that the Hyderabad State Bank should maintain a current account with [the Bank]. I have, therefore, separately instructed the Imperial Bank of India, London, to place a sum of £2,000,000/- (Two Million Pounds only) at the disposal of your Head Office and you are requested kindly to open at an appropriate branch a current account in the name of the Hyderabad State Bank and credit thereto the above mentioned amount. This account will be operated upon by the Managing Director of the Hyderabad State Bank himself and one other senior officer of that Bank to be named by the Managing Director. For the present the specimen signatures of Mr RAB Allan, Managing Director, Hyderabad State Bank, duly attested by me, are enclosed herewith. I shall be glad to learn about the action taken by you in the matter.”

The specimen signatures were enclosed.

90. I shall refer to this account, which was in due course set up, as the **Hyderabad State Bank Account**. It is quite clear – but bears emphasising – that this was an official account, to be operated by the Managing Director of the central bank of Hyderabad (the **Hyderabad State Bank**) – then RAB Allan (**Allan**) – and a senior officer of Hyderabad State Bank to be nominated by him.

91. Annex 3 to this Judgment sets out the various dealings on the three accounts here in issue, namely the Hyderabad State Bank Account, the Second Account and the Rahimtoola Account. From time to time, this Judgment will make reference to these dealings. The transactions listed in Annex 3 are numbered, and I shall refer to them as **Transaction x** , where x is the numbered transaction listed in Annex 3.
92. On the same day (22 October 1947), Imperial Bank of India was instructed to transfer the sum of £2,000,000 to the Bank. On 23 October 1947, Allan wrote to Westminster Bank regarding details of the operation of the Hyderabad Government Account.
93. The Bank – by a letter addressed to Allan and dated 28 October 1947 – responded positively to the proposal that an account be opened. The Bank did make the point that a current account would not be interest bearing, whereas a deposit account would be:
- “By an instruction issued by the Committee of London Clearing Banks in 1945, interest on current account was no longer permitted, but on the other hand we can accept deposits for any fixed period, minimum 14 days, or if preferred a continuing deposit subject to 14 days’ notice of withdrawal, at the rate of one-half per cent per annum.”
- The Bank also responded, in this letter, to the points Allan had made regarding the operation of the Hyderabad Government Account.
94. On 29 October 1947, the Bank wrote a further letter to Allan. This stated, amongst other things, that:
- “The Agent General for the State of Hyderabad [i.e. Mir] called here today to discuss this matter with my Chairman, the Honourable Rupert Beckett, and myself and expressed general approval of the arrangements we propose for the opening and conduct of the account. We agree that the account should be domiciled at our Foreign Branch Office (situated in this building) where facilities exist for conducting such specialised transactions as we envisage you may from time to time require...”
95. On 30 October 1947, the Bank confirmed to Mir that “we have today received the £2,000,000 (Two million pounds) from the Imperial Bank of India and have placed the amount on deposit at 14 days’ notice bearing interest at one-half per cent per annum”. By a letter of the same date, the Bank informed Gupta of the opening of the account and the specimen signatures of Allan (but not the other signatory) had been received. This is Transaction 1 in Annex 3.

(2) Establishment of the Second Account

96. On 1 April 1948, Moin wrote to Allan as follows:

“With reference to our conversation the other day I write to confirm that out of the £2 millions sterling deposited by the Nizam’s Government with the Westminster Bank, London, the sum of one million pounds sterling may kindly be transferred to another account in favour of the Nizam’s Government on the same terms and conditions as were applicable to the original deposit of £2 millions with the instruction that the new account will be operated upon by the Agent General for Hyderabad in London [i.e. at that time Mir] and/or the Finance Minister of the Nizam’s Government [i.e. at that time Moin].

I shall be grateful if you will kindly take necessary action as indicated above and let me know.”

97. On 2 April 1948, Allan wrote to the Bank requesting that an account be opened in these terms. I have referred to this account – in paragraph 5 above – as the Second Account. As with the Hyderabad Government Account, this was an official account. However, control of its operation moved away from officials of the Hyderabad State Bank to Moin and Mir in their official capacities. It is important to note that Moin's 1 April 1948 letter to Allan referred to himself and Mir not by reference to their names but to the offices they held. There is no doubt in my mind that had Nizam VII decided to replace one or other of these gentlemen, it would be their successors in office that would have responsibility for the Second Account.

98. On 4 April 1948, Moin wrote to Mir noting the establishment of the Hyderabad Government Account and the subsequent setting up of the Second Account. Regarding the Second Account, Moin said:

"...The intention of course was that the account will be operated upon by the Finance Minister himself [i.e. Moin] or by the Agent General [i.e. Mir] under instructions from the Finance Minister.

In view of the present circumstances it is however considered advisable, as a measure of protection, that the High Commissioner of Pakistan in the UK should also be authorised to operate on this account and this fact should be communicated to [the Bank]. Like the Hyderabad Agent General, the High Commissioner of Pakistan will also operate on this account under instructions from the Finance Minister of the Nizam's Government."

99. On 7 April 1948, the Bank wrote to Allan confirming that the second account had been opened and the sum of £1,000,000 transferred to it. This is Transaction 2 in Annex 3. However, because Allan's letter to the Bank (see paragraph 97 above) had only mentioned two signatories, no reference was made to the High Commissioner of Pakistan being a signatory. Although the possibility of Rahimtoola as a third signatory was raised with the Bank,⁶⁶ no third signatory was ever recognised on the Second Account.

(3) Transfer of the balance of the Hyderabad State Bank Account to the Second Account

100. On 24 May 1948, Moin wrote to Allan as follows:

"Please refer to your letter No 91/7/5 dated 14 April 1948, enclosing a copy of the transfer advice from the Westminster Bank Limited with regard to the transfer of £1,000,000/- (one million pounds) from the account of the Hyderabad State Bank to that of HEH the Nizam's Government. I now write to request that the balance of £1,000,000/- (one million pounds) which still stands to the credit of the Hyderabad State Bank Account at the Westminster Bank Limited, London, may kindly be transferred to the Nizam's Government Account, on the same terms and conditions as are applicable to the Hyderabad State Bank Account at present.

The Nizam's Government Account as previously advised will be operated upon by the Agent General for Hyderabad in London [i.e., Mir] and/or the Finance Minister of the Nizam's Government [i.e., Moin].

⁶⁶ There is a draft letter to the Bank explicitly referring to the High Commissioner being a signatory: this was prepared by the Bank and given to Mir, but never drawn up and sent to the Bank. There is also a letter dated 30 April 1948 from the Bank to Moin stating that "[d]uring a subsequent interview with the Agent General [i.e. Mir], we were informed that a further signature was to be added as operative on the account".

I shall be obliged if you will please take necessary action and let me know the result in due course.”

101. On the same day (24 May 1948), Allan wrote to the Bank:

“I shall be glad if, on receipt of this letter, you will transfer from our Deposit Account the sum of £1,000,000 (one million pounds) to the account standing in the name of HEH the Nizam’s Government.

2. The accrued interest on our Account may also be applied to the account of HEH the Nizam’s Government.”

102. On 29 May 1948, the Bank confirmed to both Allan and Moin that the transfer of £1 million plus interest had taken place. This is Transaction 5 in Annex 3.

(4) Special treatment of the Second Account

103. There are a number of documents internal to the Bank suggesting that the correspondence regarding the Second Account should not be sent to the Government in Hyderabad. Thus, a memo dated 3 May 1948, referencing the Second Account, stated:

“Please note that until further notice all further correspondence for this account should be handed to MO. NOTHING is to be sent direct.”

It is not known who “MO” was.

104. In an internal memo dated 1 July 1948, a manager at the Bank issued the following instructions regarding the operation of the Second Account:

“It is most important that the following instructions regarding correspondence should be carefully observed.

All letters and advices are to be handed to Mr Thorne, Manager’s Assistant, or in his absence to one of the Managers.

All departments’ records of an address to be used in connection with this account must be destroyed.

It should also be noted that advices should not be addressed to H.E.H. the Nizam’s Government but to –

The Agent General [i.e. Mir], H.E.H The Nizam’s Government,

although the account is in the name of H.E.H. the Nizam’s Government.”

(5) The Rahimtoola Account

(a) Approach

105. This is the most factually controversial part of the case. I propose to approach it in the following way. First – in Section D(5)(b) – I set out, in as neutral a way as possible, the relevant evidence. Thereafter – in Section D(5)(c) – I consider the points Pakistan, the Princes and India made in relation to this evidence and make findings as to what occurred.

(b) *The evidence*

(i) *Communications dated 14 September 1948*

106. On 14 September 1948, Moin wrote to Mir in the following terms:

“This is to inform you that I have today under instructions from HEH the Nizam’s Govt issued instructions to the Westminster Bank, 41 Lothbury, to close the account they have of HEH the Nizam’s Govt by transfer of funds as per those instructions.”

This is obviously a reference to the Second Account: but, so far as the documentary record is concerned (and I fully appreciate that this record may be incomplete⁶⁷), there is no evidence that such instructions were issued to the Bank at this time.

107. The letter was written from the Dorchester Hotel in London,⁶⁸ and it is clear that Moin was present in London on this day. However, he flew to Paris (for the purpose of a United Nations Security Council meeting) on 15 September 1948. Moin’s movements at this time must be noted because two letters, on which the Princes and India rely, are themselves dated 15 September 1948.⁶⁹ In her submissions to me, Pakistan suggested that the dates these letters bore could not be right, amongst other things because of Moin’s movements. That is a matter I will consider in due course: but, for that reason, it is important to note Moin’s movements.

(ii) *Communications dated 15 September 1948*

108. By a letter dated 15 September 1948, Moin wrote to Rahimtoola in the following terms:

“In view of the situation that is now developing in Hyderabad and in order to safeguard the interests of the State, I would be very grateful if you would kindly agree to permit the transfer into your account of just over one million pounds sterling that is now lying at the credit of the Nizam’s Government in the Westminster Bank, London. This amount may kindly be kept by you in trust.”

109. Rahimtoola responded on the same date:

“Your letter of date.

In the circumstances, I agree to your suggestion to keep the amount mentioned by you in my name in trust.”

110. By this time, Operation Polo had commenced, but Hyderabad’s capitulation had yet to occur: as I have described, it occurred on 17 September.⁷⁰

⁶⁷ See paragraphs 43-50 above.

⁶⁸ There are a number of other letters dated 14 September 1948, signed or counter-signed by Moin, giving the address of the Dorchester in London.

⁶⁹ These are the letters the subject of Civil Evidence Act notices: see paragraph 46 above. They are set out in paragraphs 108-109 below.

⁷⁰ See paragraph 79 above.

(iii) *Rahimtoola's evidence*

111. In paragraph 3 of Rahimtoola 1, Rahimtoola says:

“On or about 16 September 1948, it was agreed between [Moin] and myself that the said funds should be transferred to me as the agent of the Government of Pakistan and by a letter dated the said 16 September the said [Moin] instructed the said Bank to transfer the funds standing to the credit of the said account to an account in my name. On receipt of such letter on 20 September 1948 the said Bank in accordance with the instructions therein contained transferred the said funds then amounting to £1,007,940.9.0d to a new account in my name. I accepted such transfer in accordance with the instructions of and as agent for my Government and have never claimed any personal interest in the funds so transferred.”

112. In his second affidavit, Rahimtoola expanded on his description of the relevant events. Rahimtoola 2 states:

- “3. I have never been to Hyderabad and I have never had any dealings with or spoken to the Nizam of Hyderabad whom I have only seen once in my life and that when I was a boy. I do not remember ever having met the Defendant [Moin]...before the month of September 1948 and before then I had had no dealings of any kind with him.
4. Some few days before the 20 September 1948, a representative of the Nizam came and saw me at my official residence, 56 Avenue Road, Hampstead. Such representative came to see me on that occasion in order to ask me to accept a transfer into my name of the funds standing to the credit of the Nizam's Government with the Defendant Bank. The then Foreign Minister of Pakistan, Sir Mohammed Zafrullah Khan [**Zafrullah**] was present at the interview between such representative and myself and he instructed me to accept the transfer of the said funds. I objected on the ground that the Government of Pakistan should not become involved but my objections were overruled by the said Zafrullah Khan who directed me to agree to the transfer of the said funds to an account in my name but to be described as the High Commissioner for Pakistan and also directed me to sign the necessary specimen signature forms and I thereupon agreed to the transfer of the said funds to the account which was subsequently opened in my name and signed the forms. I would never have agreed to the said transfer unless I had been expressly instructed to do so as the High Commissioner of Pakistan and on behalf of my Government by the said Zafrullah Khan under whose instructions I was as High Commissioner bound to act. At the time when I swore my previous Affidavit herein on the 15 July 1955, I assumed that the representative of the Nizam whom I saw on this occasion was Moin since he had signed the letter dated the 16 September transferring the said funds to me but since then I have discussed the matter with the said Zafrullah Khan and I am not now certain whether it was Moin or the Agent General for Hyderabad [Mir] who came to see me on this occasion, but I am certain that it was one or other of them. I do not remember the exact date on which such interview took place. I was never given any written instructions to accept the said transfer.”

(iv) *Communications dated 16 September 1948*

113. By a letter dated 16 September 1948, but in fact hand-delivered to the Bank on 20 September 1948,⁷¹ Moin wrote to the Bank in the following terms:

⁷¹ This is evident from the Bank's letter to Moin dated 20 September 1948 (quoted in paragraph 116 below), which refers to the letter being “handed to us today by Mr Khan”.

“I shall be thankful if you would kindly close the H.E.H. the Nizam’s Govt account with you by transfer of the balance to the credit of Mr Habib Ibrahim Rahimtoola, High Commissioner for Pakistan in London, whose specimen signatures are enclosed herewith.”

This letter – like the others referred to – gave Moin’s address as the Dorchester Hotel. Moin was, of course, in Paris on the 15 September 1948 until quite late. I do not know when he returned from Paris.

114. The specimen signatures were attached: they, like the letter, identified Rahimtoola as the High Commissioner for Pakistan.

(v) *Events of 20 September 1948*

115. As described in paragraph 113 above, Moin’s instruction to transfer the balance of the Second Account to the Rahimtoola Account was hand-delivered to the Bank on 20 September 1948. On the same day, the Bank wrote to Rahimtoola as follows:

“On the instructions of [Moin], we have today opened a deposit account in your name with the sum of £1,007,940.9s, as shown on the enclosed credit advice.

We have been provided with two specimens of your signature and shall be pleased to receive your instructions.”

The letter was addressed to Rahimtoola, “High Commissioner for Pakistan in London”. It was sent to the High Commission itself, then located at 14/15/16 Fitzhardinge Street in London.

The credit advice referred to in this letter was addressed to “Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London) Deposit A/C” and recorded a credit to that account of £1,007,940.9s” as a result of a “[t]ransfer by order of H.E.H. The Nizam’s Government”.

116. Also on 20 September 1948, the Bank wrote to Moin:

“In accordance with the instructions contained in your letter dated 16 September which was handed to us today by Mr Khan, we have transferred the balance of the deposit account in the name of H.E.H. The Nizam’s Government to a new deposit account in the name of Mr Habib Ibrahim Rahimtoola. We thank you for the specimen signatures of this gentleman.

We enclose our formal advice of this transfer and think you may be interested to know that the amount involved is made up as follows...”

117. As a consequence of the transfer, a memo was sent to all departments within the Bank on 20 September 1948 regarding the Second Account:

“Please note that no payment should be made out of this account without reference to Managers.”

Given the intended closure of the Second Account, this was no doubt to ensure that the account did not inadvertently become overdrawn.

(vi) *The Bank's views regarding the basis upon which the account was held*

118. I should record that the Bank itself appears to have been under little doubt as to the basis upon which Rahimtoola held the monies in the Rahimtoola Account. An internal memo dated 7 September 1950 records:

“We have an account in the name of Mr HI Rahimtoola as High Commissioner.⁷² This was the result of a transfer from the Hyderabad Government account, concerning which there was a good deal of controversy at the time (Autumn 1948). Balance £1,017,000.”

119. An earlier memo – dated 18 May 1950 – headed “High Commissioner for Pakistan in London” – states:

“When an official announcement of the appointment of a successor to HI Rahimtoola is announced or noticed in the press, the change is to be referred to Mr Peppiatt, of Freshfields.”

120. I do not suggest that any of the relevant actors for Hyderabad saw these communications, and naturally the internal view of the Bank cannot colour the nature of the Transfer. However, it is appropriate to record these communications, and I return to their relevance later.

(c) **Findings**

(i) *Introduction*

121. All of the parties had points to make in relation to the evidence that I have described. Pakistan sought to persuade me that the letters dated 15 September 1948 were not reliable and that I should not place too much weight on them.⁷³
122. The Princes and India, for their part, contended that Rahimtoola's evidence – and particularly that given in Rahimtoola 2 – should be discounted as substantially incorrect. Although there are points in India's Factual Narrative suggesting that Rahimtoola's evidence in Rahimtoola 1 and Rahimtoola 2 was deliberately incorrect – that is to say, dishonest – that contention was not maintained by the Princes and India.⁷⁴
123. I begin with the evidence of Rahimtoola and then turn to consider the 15 September 1948 letters. I conclude by stating my findings regarding the transfer.

(ii) *The evidence of Rahimtoola*

124. Rahimtoola's affidavits were produced for the purpose of the 1954 Proceedings. As I have described, these proceedings never grappled with the substance of who was entitled to the Fund and were concerned only with the question of Pakistan's assertion of

⁷² This wording was also used in a letter between Bank officers dated 1 January 1951 (though evidently, from its content, written on 1 January 1952).

⁷³ For perfectly understandable reasons, which I describe below, Mr Qureshi, QC was unable to mount a full-fronted attack on these letters. His submission was never, therefore, that I was obliged to ignore the letters because, e.g. they were forgeries and so not material evidence at all. Mr Qureshi, QC made clear throughout his submissions that, bearing his professional obligations in mind, he could not properly make so extreme a point. As a result, he was obliged to pull his punches and his contention was as I have described.

⁷⁴ Transcript Day 7/p.1 (submissions of Mr Otty, QC).

sovereign immunity. That, in my judgment, explains much both about what Rahimtoola says and does not say in his affidavits:

- (1) Rahimtoola's affidavits were obviously prepared by reference to the documents. It is quite clear that Rahimtoola had seen Moin's letter of 16 September 1948⁷⁵ and the Bank's letters of 20 September 1948⁷⁶ when preparing his affidavits.
- (2) In these circumstances, it is – at first sight – extremely strange that Rahimtoola did not refer to the 15 September 1948 communications between himself and Moin. These letters might have assisted Rahimtoola in answering the question of whether he dealt with Mir or Moin, a point on which he expressed himself to be uncertain.⁷⁷
- (3) The failure to reference these letters in Rahimtoola 1 or Rahimtoola 2 might be said to be consistent with these letters not being in existence at the time of the affidavits. In other words, their omission from Rahimtoola's evidence might be supportive of Mr Qureshi, QC's contention that these letters were not "reliable". This was a point not made by Mr Qureshi, QC, but it is a possible explanation for Rahimtoola's failure to reference these documents that I must consider.
- (4) Although I must be open to this possibility, I consider, however, that there is a much more plausible explanation for this omission in Rahimtoola's affidavits. In the 1954 Proceedings, Pakistan was concerned to advance no case at all as to beneficial entitlement to the Fund. She provided her legal team with no instructions at all on the point, and she was prepared to advance her claim to sovereign immunity solely on the basis of her legal title to the Fund. That very nearly caused Pakistan to lose on the sovereign immunity point (indeed, Pakistan did lose in the Court of Appeal). I consider further below the inferences that can be drawn from Pakistan's failure to advance a case regarding the beneficial interest in the Fund, but it can certainly be concluded that – because of the significance of the point – the decision not to advance an argument asserting a beneficial interest was deliberately and carefully taken.⁷⁸
- (5) That, in my judgment, explains the omissions in the Rahimtoola affidavits. Rahimtoola only addresses the question of capacity and avoids the question of beneficial entitlement. The 15 September 1948 communications obviously go to the latter point and – given that Pakistan was seeking to avoid all discussion of such

⁷⁵ Thus paragraph 3 of Rahimtoola 1 (quoted in paragraph 111 above) dates the agreement to effect the Transfer by reference to the letter to the Bank of 16 September 1948.

⁷⁶ Paragraph 3 of Rahimtoola 1 (quoted in paragraph 111 above) notes that the Bank received the letter on 20 September 1948 – a fact that can only be known from the correspondence.

⁷⁷ In paragraph 4 of Rahimtoola 2 (quoted in paragraph 112 above), Rahimtoola expresses uncertainty as to whether he dealt with Moin or Mir, although he was certain it was one or other of them.

⁷⁸ Thus, in the 1954 Proceedings [1958] AC 379 at 394-395, Lord Simonds noted: "Much stress has been laid on the fact that [Pakistan] has not asserted a beneficial interest in the fund. But why should it? It is not concerned to admit, assert or deny. It has the legal title, which cannot be displaced except by litigation, which it is entitled to decline...". In argument before Upjohn J [1957] Ch 185 at 198-199, Pakistan's counsel (Mr McKenna, QC) responded to the question as to what beneficial claim, if any, Pakistan made to the Fund as follows: "The Government's attitude is that the court has no jurisdiction on this motion to inquire into the terms of this transfer." Mr McKenna, QC made absolutely clear that Pakistan's case rested on the legal title alone.

matters – this provides what is to my mind the most plausible explanation for the failure to reference these documents in either Rahimtoola 1 or Rahimtoola 2.

125. I conclude that Rahimtoola 1 and Rahimtoola 2 were carefully compiled documents. They would have sought to tell the truth as Rahimtoola saw it. I can see no basis for concluding that Rahimtoola told deliberate untruths in these documents (and, as I have said, the Princes and India made no such contention) nor do I consider that the statements in these affidavits could have been carelessly made. To the contrary: I consider that these affidavits were drafted with great care so as to avoid trespassing into areas where Pakistan did not wish to go. In these circumstances, whilst I accept Rahimtoola 1 and Rahimtoola 2 as broadly reliable, that is subject to two important qualifications:

- (1) Neither affidavit tells the whole truth. Both affidavits are highly selective in terms of the points that they address. This is not necessarily a criticism, for the 1954 Proceedings were concerned with a single narrow point, sovereign immunity, and the affidavits focussed on that point. However, I do consider that it is important to bear in mind this limited focus when evaluating Rahimtoola's evidence.
- (2) The affidavits were, essentially, produced to buttress Pakistan's claim to sovereign immunity. An essential part of that claim was that Rahimtoola received the Fund as the High Commissioner of Pakistan and not in his personal capacity, and it is this matter that Rahimtoola's evidence addressed – to the general exclusion of anything else. Whilst, as I say, I reject any suggestion of a dishonest account, Rahimtoola and those who assisted him in the drafting of his evidence would inevitably have been inclined to favour or highlight – perhaps unduly – aspects of events that favoured the outcome Pakistan was contending for. Thus, whilst I am inclined to rely on Rahimtoola's evidence for the facts, where that evidence resorts to inference from facts or submission, I am inclined to discount it.

(iii) *The 15 September letters*

126. The Princes and India relied upon these letters in support of their case that an express trust arose. The extent to which these letters do assist the Princes and India to further their contentions regarding a trust is a matter I consider further below. However, it is appropriate to determine now the reliability of these documents. Pakistan contended that these letters were essentially unreliable and should not be relied on by the court. This was a difficult contention for Pakistan to make because, of course, these documents were produced by Pakistan herself on 15 January 2019 in the circumstances described in paragraphs 45-50 above. What is more, they were produced together with some 1977 correspondence between Pakistan's Ministry of Foreign Affairs and Pakistan's London embassy, to which the 1948 letters were attached. It is plain from the terms of the 1977 correspondence that the persons involved in that correspondence regarded the 15 September letters as genuine copies and as being a proper record of their contents.⁷⁹

127. In these circumstances, the most the Pakistan could do was draw to the Court's attention certain "oddities" or inconsistencies in the 1948 letters, specifically:

⁷⁹ See, for example, the letter quoted at paragraph 47 above.

- (1) It was contended that it was difficult to see how Moin could have found the time to write these letters on the date stated, given his movements.⁸⁰ From this, Pakistan sought to draw an inference that the letters were not written on the date they bore. I do not consider that very much weight, if any, attaches to this point. I appreciate that Moin was a busy man, shuttling between Paris and London, but I do not accept that he was so busy as to make the exchange of letters on this date impossible. Clearly, these were times of high stress for officials of Hyderabad, and I see nothing surprising in Moin burning the candle at both ends and doing a great deal in little time. Moreover, even if the dates on the letters are wrong by a day or two – and there is no evidence to suggest any greater mismatch – that scarcely undermines their reliability.
- (2) It was suggested that the wording of Moin’s letter (“...if you would kindly agree to permit the transfer into your account of just over one million pounds sterling...”) was more consistent with the Transfer being made into an existing account, rather than an account specifically set up for the purpose of receiving the Transfer (which was the case). Again, Pakistan relied on this point to suggest that less weight should attach to the letters. I reject this point. It seems to me that to seek to draw inferences out of what are – with great respect to Pakistan – nuances of wording is a fruitless, if not a dangerous, enterprise.
- (3) It was suggested that the fact that there was no reference to Rahimtoola as the High Commissioner of Pakistan was in some way suspicious. Even if that point were right – and I note that Moin’s letter is addressed to “HE” Rahimtoola (i.e. His Excellency, a clear reference to his status)⁸¹ – I do not consider that it takes me anywhere.
128. Even if well-founded, and I find they are not, none of these points could persuade me to disregard these letters or even to treat them as having less weight than any other of the contemporary documents written in September 1948. I pressed Mr Qureshi, QC as to what inferences he was asking me to draw as a result of these three points:⁸²

Marcus Smith J

You see, it is all very well to point to inconsistencies, but those inconsistencies might well – I mean, they might well be explained on all sorts of bases. They are not enough for me just to leave the letters out of account, though, are they?

Mr Qureshi, QC

No, my Lord...All I am saying to your Lordship is, in circumstances where such heavy weight has been placed upon these two documents, it will be very important – in fact, vital – for them to be subjected to scrutiny within that context, to see what actually preceded these documents – I will not call them letters – what preceded these documents and what took place subsequently, and is it consistent at all with any suggestion that these documents have any semblance of

⁸⁰ The letters are dated 15 September 1948. Moin flew out to Paris on that date (see paragraph 107 above) and given the meetings he was arranging on that date, this is likely to have been an early flight. Whilst Moin appears to have been back in London on 16 September 1948 (see paragraph 113 above), it is not known precisely when he returned (see paragraph 113 above).

⁸¹ This is the letter at paragraph 108 above.

⁸² Transcript Day 3/pp.85ff (submissions of Mr Qureshi, QC).

legitimacy in terms of reflecting the position as agreed on 15 September? And I say no.

To be clear, although I have not accepted the substance of any of Mr Qureshi, QC's three points, his injunction to me to view the 15 September 1948 letters (as I choose to call them, for that is their form) in context is entirely well made, and reflects the approach that I have adopted in relation to all of the contemporaneous materials.

129. Pakistan did attempt an altogether more fundamental attack on the letters during the course of the trial. As to this:

- (1) During the course of submissions on Day 3,⁸³ Mr Qureshi, QC made the entirely new submission that the 15 September 1948 letters in fact dated from the 1970s.⁸⁴

Marcus Smith J I have been pressing you, I hope not unfairly, to understand your case, and we began by identifying three inconsistencies. It seems to me that if your fundamental point is not these inconsistencies, but that these are actually – I don't think one can mince one's words – these are forgeries, in the sense that they are documents created some 30 years after the event, then that is a point that needed to be made explicitly clear with some force some time ago.

Mr Qureshi, QC My Lord, I fully understand that.

Marcus Smith J If you are seeking to adduce further expert evidence, then that is a formal application that you will have to make and it will, I am sure, be opposed by the Princes and India.

Mr Qureshi, QC I would not expect anything differently. That is why I have not raised the point before your Lordship, because I can only take it so far.

- (2) In due course,⁸⁵ Pakistan made an application to adduce the evidence of Radley. The substance of Radley's report, Radley 1, was that at least one of the 1977 letters disclosed by Pakistan with the 15 September 1948 letters⁸⁶ was typed at around the same time as the 15 September 1948 letters. In his report, Radley referred the 1948 letters as the "Enclosures". The basis for Radley's conclusion was that all three letters had been typed using the same typewriter. Radley made the point that:

"The evidence strongly supports the proposition that the 1977 letter was typed around the same period in time as the two Enclosures rather than the two 1948 letters being typed, say, at that point in time and the same typewriter again used nearly 30 years later to type the 1977 covering letter."

The force of Mr Radley's point is plain: it seems improbable that precisely the same typewriter would be used to copy-type letters in 1948 and then to type a letter in 1977: it is more likely that the letters were typed on the same machine at the same time, in 1977. Quite why copy typing would occur in 1977, with the prevalence of

⁸³ Transcript Day 3/pp.90ff.

⁸⁴ Transcript Day 3/pp.91-92.

⁸⁵ By an application notice dated 17 June 2019.

⁸⁶ See the description at paragraphs 45-50 above.

the photocopier, is a question that would certainly arise, if this evidence were to be admitted.

- (3) The application to adduce Radley 1 was supported by the seventh witness statement of Mr John Fordham, the partner at Stephenson Harwood having conduct of these proceedings on behalf of Pakistan (**Fordham 7**). Fordham 7 described the late discovery of these documents and the steps Pakistan took in relation to these documents in the following terms:

“9. [Pakistan] and her English legal team, on discovering these documents, immediately considered the possibility that they might not be authentic, in the sense that there may never have been any underlying documents from which the Enclosures were copy typed. However, if this were the case then any “forgery” appeared to emanate from the Ministry of Foreign Affairs itself; the 1977 Letter did appear to be genuine.

10. It was not, therefore, clear that any forensic analysis of the Enclosures could significantly advance [Pakistan’s] case; the real issue was whether original versions of the Enclosures had ever existed or not. No amount of forensic analysis can answer this question, and whilst [Pakistan] has not been able to locate any other copies of the Enclosures from which they may have been copy typed, she has never considered that there is sufficient evidence to show that such documents never existed.

11. My firm did, however, in December 2018, take the precaution of seeking an early indicative view from Robert Radley, the author of the Report, as to the likely date of creation of the Enclosures. Mr Radley’s view was based solely on electronic scans of the documents. His view was that the 1977 Letter and the Enclosures appeared to have been typed at around the same time on the same typewriter. My firm took the view that this in itself did not significantly advance [Pakistan’s] case that the Enclosures might not be authentic; the Enclosures may have been typed copies of documents that did exist when the 1977 Letter was produced, but which have since been lost. The issue is as described above: forensic analysis alone only takes the case so far, and so it was decided not to proceed any further with forensic analysis or seek the Court’s permission to rely on expert evidence in this field.”

- (4) I heard the application to admit the evidence on Day 5 (17 June 2019), and ruled that Radley 1 would not be admitted for reasons that I would give in this Judgment.⁸⁷ My reasons for not admitting Radley 1 are as follows:

(a) As Pakistan frankly acknowledges,⁸⁸ even accepting Radley’s evidence without question, his evidence does not take Pakistan very far. Pakistan accepts that the evidence cannot support a contention that the 15 September 1948 letters never existed. It is, therefore, difficult to see what the evidence of Radley actually adds.

(b) The application to admit new evidence was made extremely late. Mr Fordham very frankly explained the suspicions that existed in relation to the 1948 letters and described how Radley’s views were informally obtained in December 2018. There was no reason why an application to admit this

⁸⁷ Transcript Day 5/p.210.

⁸⁸ See paragraph 10 of Fordham 7.

evidence could not have been made some months before trial. Indeed, it is clear that Pakistan considered this course, and decided against it. I do not consider – even leaving aside the prejudice to the Princes and India – that it would be appropriate to permit Pakistan to change her mind on this point mid-trial.

- (c) The Princes and India made quite clear in their submissions to me that they would want to instruct their own forensic examiners to consider the 1948 letters. They made clear that this might involve disclosure by Pakistan of other documentary evidence (from 1977 and 1948) to test the point Radley was making about the same typewriter being used. Inevitably, such evidence in response would take time to produce and – depending on that evidence – there might have to be cross-examination of the experts. I entirely accept that, were the evidence of Radley to be admitted, the Princes and India would be fully entitled to take such steps. To enable the Princes and India to obtain such evidence would inevitably require an adjournment of the trial, probably at least until the beginning of October 2019. Given the nature of the evidence Pakistan seeks to adduce, and the fact that the application was made extremely late in the day with no justification for this, an adjournment would plainly have been inappropriate.

(iv) *My conclusions on the evidence*

130. I find that Moin and Mir formed the intention of transferring the sums standing to the account of Hyderabad in the Second Account to Rahimtoola in September 1948.
131. It is significant that the Transfer actually occurred on 20 September 1948⁸⁹ (after Operation Polo had succeeded⁹⁰ and after Nizam VII had made his speech on 17 September 1948, accepting the resignation of his Government⁹¹), whereas Moin wrote to Mir on 14 September 1948 (just after Operation Polo began, on 13 September 1948⁹²) to say that the Transfer had occurred on that day “under instructions from HEH the Nizam’s Govt”.
132. Plainly, the Transfer did not occur on that day. Moin had no justification in saying so: the letter of instruction to the Bank is dated 16 September 1948, and the transfer was in fact only effected on 20 September 1948. There is no record of any instructions from Nizam VII, although (given what I have said about the documentary record⁹³) it is possible such a communication existed. There is, on the face of the record, an inconsistency between when Moin told Mir the transfer took place and when Moin actually effected it. I consider the fact that Moin stated that the Transfer had occurred on 14 September 1948, when it in fact took place on 20 September 1948, to be significant. I consider that Moin waited until it was clear that Operation Polo had succeeded and that Nizam VII was in thrall to India before effecting the Transfer. In short, Moin only wanted to take the drastic step of divesting Hyderabad of this money when it was clear that India

⁸⁹ See paragraph 115 above.

⁹⁰ See paragraph 77 above.

⁹¹ See paragraph 79 above.

⁹² See paragraph 77 above.

⁹³ See paragraphs 43-50 above.

was in control of Hyderabad. Of course, by this time, Nizam VII had accepted his Government's resignation, and Moin could no longer uncontroversially be said to have the power and authority of Finance Minister and Minister for External Affairs – although he claimed to retain office. Hence, I find, the attempt to establish the date of the Transfer as 14 September 1948. In short, I find that the letter dated 14 September 1948 is mis-dated: whereas it bears the date 14 September 1948, I find that it was in fact written on or shortly before 20 September 1948. I consider what Moin might have meant by "instructions from HEH the Nizam's Govt" and the question of authority from Nizam VII in due course. For the present I will only say that although I have had regard to the possibility that there may have been a written authorisation of the Transfer by Nizam VII, which has been lost in the course of time, I consider on balance that there was no such written authorisation and that is the basis upon which I proceed.

133. Obviously, in order for the Transfer to be effective, both the Bank and the holder of the new account with the Bank needed to be approached. Although the letter to the Bank was dated 16 September 1948 – again, conveniently pre-dating Nizam VII's 17 September 1948 speech – it was only delivered to the Bank on 20 September 1948.⁹⁴ I find that this letter could have been written at any time between mid-September and 20 September 1948.

134. In terms of the approach to Rahimtoola:

- (1) I find that it was Moin – and not some other Hyderabad official – who made the approach. This is consistent with the authorship of most of the relevant letters relating to the Transfer and fits with Rahimtoola's evidence.⁹⁵
- (2) I find that Moin had a meeting with Rahimtoola. Rahimtoola is too over-emphatic in saying how little he knew Moin.⁹⁶ I find that they knew of one-another and would have inter-acted in an official capacity prior to September 1948. That inter-action may have been slight, but it was enough to secure a meeting. This connection is further evidenced by the fact that Moin was prepared to contemplate the High Commissioner of Pakistan – Rahimtoola – as a signatory on the Second Account.⁹⁷
- (3) The contemporaneous documentation does not evidence a meeting between Moin and Rahimtoola. The only evidence in support of a meeting is Rahimtoola 2. However, I consider that Rahimtoola's evidence is – broadly speaking – reliable and I find that there was a meeting between Moin, Zafrullah and Rahimtoola at Rahimtoola's home at 56 Avenue Road, Hampstead.
- (4) Precisely what was discussed at that meeting is harder to make out. I consider the description of the conversation in paragraph 4 of Rahimtoola 2 to be somewhat

⁹⁴ See paragraph 113 above.

⁹⁵ Although Rahimtoola was unsure whether he was approached by Mir or Moin, he said it was one of these two: see paragraph 112 above, which sets out the relevant parts of Rahimtoola's evidence.

⁹⁶ See paragraph 3 of Rahimtoola 2, quoted in paragraph 112 above. India referred me to at least one occasion prior to this when Rahimtoola had dealt with Moin. More significantly, Rahimtoola was clearly involved, prior to the establishment of the Rahimtoola Account, in transactions taking place on the Second Account. Rahimtoola initiated Transaction 3 in Annex 3: see paragraph 211(2)(a) below. Although Transaction 3 did not on the face of it involve Moin but Mir, what is significant is that Rahimtoola was involved in the affairs of Hyderabad before September 1948.

⁹⁷ See paragraph 99 above.

over-emphatic in terms of the capacity in which Rahimtoola was acting: since the question of capacity is a central one that I must resolve in this Judgment, I am reluctant to base myself on what I find to be a partisan – although I accept honestly intended – statement made some years after the event that was never tested in cross-examination. Whilst, therefore, I find that there was a conversation between Moin, Zafrullah and Rahimtoola, I am only prepared to find that the substance of that conversation was in accordance with the tenor of the 15 September 1948 letters set out in paragraphs 108 to 109 above. It would, in my judgment, be wrong to find that anything more of substance was said.

- (5) I find that the 15 September 1948 letters were exchanged at this meeting.⁹⁸ Given that Pakistan had these on file, obviously Rahimtoola would have received and retained copies of both, which would have gone into the High Commission files and then been copied to Pakistan's Ministry of Foreign Affairs.⁹⁹ Although the letters have not survived, I find it inconceivable that Moin himself did not also retain copies. Given that both letters bear the same date and that time was extremely short, given events in Hyderabad, an exchange of communications at the meeting seems the most likely manner in which these letters were delivered.
- (6) Although the precise date of the letters may not matter, the date of around 15 September 1948 for the letters is plausible, particularly given the reference to "the situation that is now developing in Hyderabad". Certainly, the letters would have been exchanged in the period between 14 September and 19 September 1948: I do not consider that Moin would have authorised Khan to approach the Bank without Rahimtoola having been approached and having approved the Transfer in terms of the 15 September 1948 letters.

(6) Attempts to freeze the accounts

135. By a cable dated 22 September 1948, Gupta instructed the Bank as follows:

"Reference your letter...dated 30 October 1947¹⁰⁰ regarding two million pounds in fourteen days notice account operated by the Agent General for Hyderabad in London [i.e. Mir] or by the Finance Minister Nizam's Government [i.e. Moin]. Kindly arrange that no withdrawals are permitted from this account until further instructions from the Financial Secretary Nizam's Government [i.e. Gupta]. Letter follows."

136. Given that Nizam VII's Government had resigned, it is unclear whether Gupta had the authority to write in these terms, a point made by Mr Qureshi, QC. That is a point that I do not have to decide: Gupta's authority – or otherwise – is not relevant to the issues in these proceedings. What is relevant is the fact that Gupta's actions had the effect of causing the Bank to freeze the Rahimtoola Account, as I shall describe.

137. On the next day (23 September 1948), the Bank cabled in response:

"Your cable 22nd received. On the instructions dated sixteenth September of [Moin] Finance Minister the balance of the account amounting to 1,007,940 pounds nine shillings (one million

⁹⁸ Rahimtoola is unclear as to the precise date of the meeting, but it would have been around 15 September 1948, although (given Moin's travels) probably not actually on that date.

⁹⁹ See paragraph 49(2) above.

¹⁰⁰ See paragraph 95 above.

and seven thousand nine hundred and forty pounds nine shillings) was transferred on the twentieth September to an account with this bank in the name of Habib Ibrahim Rahimtoola High Commissioner for Pakistan in London.”

138. Gupta’s letter – which was dated 23 September 1948, and which must have crossed with the Bank’s cable referred to in paragraph 137 above – stated:

“Kindly refer to your letter...dated 30 October 1947,¹⁰¹ through which you had acknowledged receipt of instructions to place a sum of £2,000,000 (Two Million Pounds) which you had received from the Imperial Bank of India, on a deposit account subject to 14 days’ notice of withdrawal and bearing interest at the rate of ½ per cent per annum. It was originally to be operated by [Allan], Managing Director, Hyderabad State Bank. But subsequently you were instructed by [Allan] to transfer it to a new account opened in the name of H.E.H. the Nizam’s Government to be operated upon either by the Agent General for Hyderabad in London [i.e. Mir] or by the Hon’ble Finance Minister of H.E.H. the Nizam’s Government [i.e. Moin].

I am now to request you kindly to arrange that no further withdrawals are permitted from the above account until further instructions from me.”

139. It appears from these communications that whilst Gupta knew about the Hyderabad Account and the transfers to the Second Account, he did not know about the Transfer to the Rahimtoola Account. Also, his continued reference to the sum of £2 million strongly suggests that he did not know about certain payments out of the Second Account, amounting to nearly £1 million. These are the transactions identified in Annex 3 as Transactions 3, 4, 6, 7 and 8, which I consider in greater detail below.

140. On 27 September 1948, a telegram signed by Nizam VII was sent to the Governor General of India and the Deputy Prime Minister of India:

“Westminster Bank London informs that my ex-Finance Minister [Moin] has unauthorizedly transferred a sum of rupees [sic: £ sterling is obviously meant] one million and seven thousand nine hundred and forty pounds nine shillings standing in the bank in the account of the State to the account of [Rahimtoola] High Commissioner for Pakistan in London in the same bank. Will be grateful if you will ask HMG to use their good offices to have the money re-transferred into the account of Hyderabad State in the Bank and if necessary freeze the amount.”

The reference to “HMG” was a reference to Her Majesty’s Government of the United Kingdom. The Governor General – in a cable of the same date (27 September 1948) – requested confirmation of the facts and a copy of the communication received from Westminster Bank. Nizam VII replied on 28 September 1948.

141. At the same time, Nizam VII told Moin to reinstate the money. That request was made repeatedly.¹⁰²

142. On 28 September 1948, Nizam VII authorised “Mr VK Krishna Menon, High Commissioner for India in London UK to institute and conduct legal proceedings on behalf of myself and in any competent court in respect of Rupees [sic] one million and seven thousand nine hundred and forty pounds nine shillings which was standing in the name of Hyderabad State in the Westminster Bank, London.” This authority was set out

¹⁰¹ Again, this is the letter at paragraph 95 above.

¹⁰² E.g. on 11 October 1948; 18 November 1948; 1 December 1948.

in a formal power of attorney made on 1 October 1948, signed by Nizam VII, and explicitly stating that the monies had wrongly been transferred out of the Second Account.¹⁰³

143. Also on 28 September 1948, the following exchange occurred between Gupta and the Bank. The cable from Gupta to the Bank read:

“Received cable dated 23 September.¹⁰⁴ [Moin] ex-Finance Minister Hyderabad State had no authority to transfer the amount Nizam Government in your bank to be account of Pakistan High Commissioner. Kindly arrange to re-transfer the amount to the account of Nizam’s Government. In any case, no operations should kindly be allowed on the above said amount by the Pakistan High Commissioner. If unable for any reasons to retransfer the amount to Nizam’s Government account the amount may be held in suspense with you pending further action.”

The Bank’s reply was as follows:

“Your cable 28 September received. Transfer to account of Agent General of Pakistan [*sic* i.e. Rahimtoola] was made by authority of authorised signatory and cannot be re-transferred by bank at your request. Amount transferred must remain at disposition of Agent General of Pakistan [*sic*] unless an order is made by British court restraining bank from parting with the money. It is open to Hyderabad Government to make immediate application to British court for such an order if they consider such action desirable.”

144. Pursuant to the request Nizam VII had made to India, India wrote (in a letter dated 29 September 1948, marked “top secret”) to the Prime Minister, Mr Attlee, requesting assistance in obtaining the return of the monies transferred to Hyderabad. The Prime Minister received advice from the Commonwealth Relations Office in Downing Street on 1 October 1948, and a reply was sent on the same day (1 October 1948) indicating that the United Kingdom Government was unable to assist.
145. It is quite clear that these actions by and on behalf of Nizam VII were being directed by India. I was shown various internal communications of India considering what steps the Nizam should take in order to recover the Fund. I consider later whether Nizam VII was acting willingly in seeking recovery of the Fund or whether – as Pakistan contended – he was acting under duress. What is clear is that whether he was doing so willingly or not, Nizam VII was prepared to be directed by India in what he did.
146. As I have described, Nizam VII’s efforts to recover the monies were unsuccessful. However, his efforts (and those of others, like Gupta and India itself) were sufficient to cause the Bank to freeze the Rahimtoola Account and to adopt the position of an interpleader or stakeholder, so that neither Rahimtoola himself – nor anybody else – could deal with the Fund without an order of the Court.

E. EVENTS POST-DATING THE TRANSFER

(1) Introduction

147. The following is not intended to be a comprehensive statement of what happened after the Transfer. Essentially, for nearly seven decades, there was a stalemate regarding the

¹⁰³ Subsequently, Nizam VII appointed his financial advisor Mr Taraporvala as his attorney.

¹⁰⁴ See paragraph 137 above.

Fund, which only ended in 2013, when Pakistan commenced the present proceedings. However, there are some matters that do need to be described, notably:

- (1) The significance of the appointment of a new High Commissioner for Pakistan, Mirza Abol Hassan Ispahani (**Ispahani**), in succession to Rahimtoola: Section E(2) below.
- (2) The 23 May 1953 letter to Ispahani (the **Ispahani letter**): Section E(3) below.
- (3) The 1954 Proceedings: Section E(4) below.
- (4) An assignment, by way of a deed dated 27 October 1956, whereby the State of Hyderabad assigned to Nizam VII all of its interest in the Fund (the **1956 Assignment**): Section E(5) below.
- (5) Various subsequent dealings (or purported dealings) with the equitable interest in the Fund: Section E(6) below.

(2) Appointment of a new High Commissioner for Pakistan

148. In 1952, Ispahani was appointed High Commissioner for Pakistan in succession to Rahimtoola. The Bank was naturally concerned how this might affect the Rahimtoola Account. In a letter dated 2 January 1952, the Bank noted:

“According to a report in yesterday’s *Daily Telegraph*, Mr Ispahani, who has been Pakistani Ambassador to the United States for the past four years, has been appointed High Commissioner in London. This means that he will be taking the place of Mr HI Rahimtoola, in whose name as High Commissioner we have a very important deposit account here, which however is conducted under legal guidance owing to the possibility of a dispute between Pakistan and India which might affect it.”

149. The Bank considered that if time allowed before his departure, the Chairman of the Bank (Lord Aldenham) should seek to have lunch with Rahimtoola.¹⁰⁵ The lunchtime meeting took place, and the following memorandum recorded part of what was said:

“Mr Rahimtoola came to lunch with the Chairman last Thursday, 24 instant. I asked Lord Aldenham today whether any reference had been made to the account of over £1 million opened by H.E.H. The Nizam’s Government in favour of HI Rahimtoola. He said that Mr Rahimtoola had referred to it quite casually and seemed to regard it at his own personal disposition because he said that, now that he was going to Paris, he did not think that anyone would be able to “extradite” him in connection with it.”

(3) The Ispahani letter

150. In a letter dated 23 May 1953, the Secretary to the Government of Pakistan, Ministry of Foreign Affairs and Commonwealth Relations (a Mr Husain) wrote to Ispahani in the following terms:

¹⁰⁵ See the Bank’s communications dated 1 January 1952 and 2 January 1952.

“I am directed to write to you regarding the Hyderabad Fund transferred by [Moin] from the deposit account of the Nizam’s Government with the Westminster Bank to a new account in the name of [Rahimtoola], formerly High Commissioner for Pakistan in the United Kingdom.

A meeting was held in Karachi on 16th May 1953, at which, besides the Prime Minister, who presided, the following were present:

1. The Minister for Foreign Affairs and Commonwealth Relations
2. The Minister for Finance
3. [Rahimtoola]
4. The Cabinet Secretary
5. The Private Secretary to the Prime Minister

The position regarding the Hyderabad Fund mentioned above was discussed. It was pointed out that the amount stood in the name of [Rahimtoola] in his personal capacity without any reference to his position as High Commissioner of Pakistan. If it was admitted that the Fund was transferred to [Rahimtoola’s] account in his personal capacity it was likely that the Government of India (claiming to be the Paramount Power of Government of Hyderabad) would file a suit in the British Court against him to recover the amount. Since the Government of Hyderabad had no international status, and the Government of India was the *de facto* Paramount Power, such a suit would create complications. The Bank was aware of the developments regarding Hyderabad and this Fund, and might out of caution give a notice to India if any attempt was made to operate the account. On the other hand, if the position was accepted that [Rahimtoola] in receiving the Fund had acted as an Agent of the Government of Pakistan, then no suit would lie against him personally and the Government of Pakistan could not be sued in an English Court.

The point was raised also that in a suit against [Rahimtoola] in his personal capacity, the Government of India would claim to be recognised in a British Court as the successor Government to the Nizam’s Government. This would militate against the position we had taken up in the Security Council regarding Hyderabad. On the other hand, any instruction to the Bank that the Fund was held by [Rahimtoola] as an Agent of the Government of Pakistan might be construed by India as an unfriendly act and might further vitiate the relations between the two countries.

Weighing one political disadvantage against another, the general opinion was that action should be taken forthwith to inform the Bank that [Rahimtoola] in accepting the amount transferred by [Moin] had acted in his capacity as an Agent of the Pakistan Government.

It was decided that [Rahimtoola] should send to the Westminster Bank a letter to the effect that the Hyderabad Fund held by [Rahimtoola] was held by him in his capacity as an Agent of the Pakistan Government and that this Fund should now be transferred in the name of [Ispahani], the present High Commissioner of Pakistan in London. The letter should be drafted by HM Law in consultation with [Rahimtoola] who may show it to his solicitors in London before sending it to the Bank.

A copy of the letter drafted in pursuance of this decision is enclosed for your information. It is requested that your agreement to the arrangement proposed above regarding the transfer of this Fund in your name may kindly be communicated urgently to this Ministry.”

151. A letter in these terms, dated 27 July 1953, was duly sent to the Bank:¹⁰⁶

“This is to inform you that the amount of £1,007,940/9/0d which was transferred by [Moin] from the deposit account of the Nizam’s Government with the Westminster Bank to a new account in my name, i.e. Habib I Rahimtoola on 20th September 1948, together with all interest which has accrued thereon since that date may now please be transferred to the name of Mr MAH Ispahani, the present High Commissioner for Pakistan in the United Kingdom. This amount which has stood in my name so far was held by me not in my personal capacity but as an agent of my Government, i.e. the Government of Pakistan at the time when I was acting as Pakistan’s High Commissioner in UK. I would be much obliged if, after the amount is transferred in the name of my successor-in-office, i.e. [Ispahani], an intimation to that effect is kindly sent to me so that it may be forwarded by me to my Government. This account will, in future, be operated upon by the present Pakistan High Commissioner in UK and his successors-in-office acting as agents of the Government of Pakistan.

I enclose specimens of [Ispahani’s] signature herewith.”

152. On 14 August 1953, the Bank responded to Rahimtoola in the following terms:

“We refer to your letter of the 27 July (a formal acknowledgement of which and of the enclosure to which was given on 6 August) requesting us to transfer to [Ispahani], as your successor in office as Pakistan High Commissioner in the United Kingdom, the amount now standing to the credit of a Deposit Account in your name in our books.

As you are aware a claim regarding the moneys in question has been put forward by the Nizam’s Government, and in this connection on the 28 September 1948, [Gupta] in the capacity of Financial Secretary Nizam’s Government, Hyderabad, cabled us entering an objection to our action in complying with instructions dated 16 September 1948, of [Moin] (Finance Minister H.E.H. The Nizam’s Government) by transferring under date of 20 September 1948 the amount of £1,007,940. 9s 0d to a Deposit Account in your name.

You will no doubt also be aware of the statement made in the Indian Parliament on 30 November 1950 that the Indian Government proposed to file a suit for the recovery of the amount standing to the credit of such Deposit Account.

In the circumstances, we are advised that we should not act on the instructions contained in your letter of 27 ultimo without the written concurrence of the State of Hyderabad and of the Government of India.

We regret any inconvenience to which you may be put by reason of the terms of this letter.”

(4) The 1954 Proceedings

153. The Bank’s letter of 14 August 1953¹⁰⁷ provoked the following response (dated 24 November 1953) from Pakistan’s solicitors in the 1954 Proceedings:

“We are Solicitors to the Government of Pakistan, and your letter to [Rahimtoola] dated 14 August 1953 has been forwarded to us for attention.

The moneys referred to in [Rahimtoola’s] letter to you dated 27 July 1953 were held by him as agent for the Government of Pakistan at the time when he was High Commissioner for Pakistan

¹⁰⁶ Rahimtoola was also formally directed by Pakistan to send the letter.

¹⁰⁷ Set out in paragraph 152 above.

in the United Kingdom, and it is now desired that they should be transferred into the name of his successor-in-office, namely [Ispahani], the present High Commissioner for Pakistan in the United Kingdom.

Our clients cannot agree that your letter disclosed any valid reason for failing to carry out the instructions given to you by [Rahimtoola] as their agent, and on behalf of our clients we reiterate those instructions.

We have been instructed to inform you that if you wish to communicate either with the Government of Pakistan or with [Rahimtoola] in connection with this matter you should do so through us.”

154. On 17 May 1954, the solicitors for Nizam VII (Messrs Stanley, Johnson & Allen, **Nizam VII’s solicitors in the 1954 Proceedings**) wrote to Rahimtoola in the following terms:

“We are instructed to act on behalf of [Nizam VII] and on behalf of the Government of the State of Hyderabad with reference to a sum amounting to £1,007,940.9.0 which, in the month of September 1948 was held by the Westminster Bank in London in a deposit account to the credit of the Hyderabad Government.

On or about the 30 September 1948, on the instructions of [Moin], the whole of this sum together with the accrued interest thereon was withdrawn from the Hyderabad Government account and placed to the credit of another account with the same Bank in [Rahimtoola’s] name.

[Moin] had no authority from the Nizam or his Government to effect this particular withdrawal and, as your Excellency is of course aware, the fund transferred to the account in your Excellency’s name, and all accrued interest thereon, have at all times been and still are the property of [Nizam VII] and his Government. We assume that your Excellency has safeguarded the fund and the interest thereon on that basis.

[Nizam VII] and his Government now require the sums in question to be paid to them or to their order, but it is doubtful whether the Bank will feel able to make such payment except in pursuant of an order of the court. We have the authority of H.E.H. the Nizam and his Government to commence proceedings to obtain such an Order, and, if such proceedings should prove requisite, it seems to us to be desirable and proper that your Excellency should be joined as a party. We shall accordingly be grateful if your Excellency will be good enough to nominate Solicitors in London to accept service in London, on your Excellency’s behalf, of any proceedings for the recovery of these sums which we may find it necessary to institute.

We think we should add that the necessity for proceedings might well be obviated if your Excellency would be good enough to authorise the Bank to pay over the sums in question to the Nizam and his Government, or to their order. We shall be very grateful indeed to hear that your Excellency is prepared to give such authority.”

155. A letter before action was also written to the Bank, seeking the Bank’s assurance that it would not pay away the sums in question or any part of them, except either pursuant to a court order or to a person nominated by Nizam VII’s government.
156. There appears to have been a letter from the Bank’s solicitors (Messrs Freshfields, the **Bank’s solicitors**) dated 8 June 1954, but that was not before the court. On 11 June 1954, Nizam VII’s solicitors in the 1954 Proceedings wrote to the Bank as follows:

“We have to acknowledge receipt of your letter of the 8 inst, but we have received no communication either from Mr Rahimtoola or from [Pakistan’s solicitors in the 1954

Proceedings] on his behalf as to the attitude which they have adopted although we have written to Mr Rahimtoola on the matter.

We are obliged by the suggestion you make regarding interpleader proceedings and when the attitude which is to be taken by the other parties has been more fully ascertained we will take our Counsel's view as to the suggested course.

The State of India for whom we act have no interest or make any claim to the funds in question."

157. Proceedings were commenced by Nizam VII and the State of Hyderabad by a writ issued on 8 July 1954. The defendants were (i) Moin, (ii) the Bank and (iii) Rahimtoola.

158. In response to the letter of 8 June 1954 (referred to in paragraph 156 above), Pakistan's solicitors in the 1954 Proceedings wrote to the Bank's solicitors as follows on 9 July 1954:

"...as you are aware, Mr Rahimtoola, who is now the Governor of West Punjab in Pakistan, does not claim any personal interest in the monies. He was concerned solely as agent of the Government of Pakistan, of which he was High Commissioner in the United Kingdom at the relevant time and on whose behalf the monies were originally transferred to him.

The Government of Pakistan do claim to be entitled to the monies in question and they do not recognise that as a matter of public international law either the Nizam of Hyderabad or the present Government of the State of Hyderabad or the Government of India (who you previously informed us had also made a claim) is the de jure successor to the State of Hyderabad as it existed at any relevant time. The issues involved are obviously unsuitable for adjudication by any municipal, as opposed to international, tribunal and the Government of Pakistan are not prepared to waive their sovereign immunity to the jurisdiction of the Courts of the United Kingdom either by consenting to be made parties to the Interpleader proceedings initiated by your clients or otherwise.

In these circumstances, we cannot agree to accept service of any proceedings on behalf of the Government of Pakistan and we are instructed to inform you that if service of proceedings is effected on the Government of Pakistan steps will be taken to have such service set aside."

159. The Bank's solicitors responded on 29 July 1954, noting the contents of this letter, but noting also that Nizam VII had commenced proceedings and that the dispute would no doubt come before the court in due course. On behalf of the Bank, it was stressed that the Bank had "no interest in this matter save as bankers". As regards India:

"[India's solicitors in the 1954 Proceedings] have informed us that the State of India, for whom they act, have no interest nor make any claim to the funds in question."

160. On 8 July 1955, Pakistan wrote to her solicitors with the following instructions:

"With reference to the above mentioned action in which the plaintiffs are claiming the sums of £1,007,940.9.0d now standing to the credit of Mr Rahimtoola with Westminster Bank I now instruct you on behalf of my Government to take such steps as may be necessary to bring to the attention of the Court the fact that my Government claims to be entitled to the said sum, which is held by Mr Rahimtoola as its agent, and declines to submit to the jurisdiction of the English Courts in any proceedings relating thereto and accordingly that my Government objects, on the ground of its sovereign immunity to the jurisdiction of the English Courts, to this action being proceeded with against Mr Rahimtoola, since it is one which directly or indirectly impleads my Government.

This letter is written by the direction of and on behalf of the Government of Pakistan.”

161. This document was placed before the court in the proceedings commenced by Nizam VII. As I have described, Pakistan did not venture beyond this bare assertion of an interest in the Fund, without articulating how, if at all, a beneficial interest arose.¹⁰⁸
162. The matter came before Upjohn J in the Chancery Division and was heard by him in June/July 1956.¹⁰⁹ He held that the debt, being vested in Rahimtoola as a servant of the Government of Pakistan, must be treated as a debt which was due at law to the Government and to which the Government had a title that was not illusory or manifestly defective, even though the Government showed no equitable title to the debt. On appeal to the Court of Appeal,¹¹⁰ this decision was overturned. The matter came before the House of Lords,¹¹¹ which held that the proceedings should be stayed because Rahimtoola was the agent of the sovereign state of Pakistan, which had the legal title to the subject matter of the action and the right to sue the Bank for it. I have already described the strategic course pursued by Pakistan in the 1954 Proceedings not to assert any beneficial interest in the Fund.¹¹²
163. It is necessary to describe the events leading up to the 1954 Proceedings in this detail in order to deal with one point, which was pressed by Pakistan during the interlocutory stages of these proceedings, and mentioned (but not pressed very hard) by Mr Qureshi, QC in his submissions at trial. The point was not, however, abandoned and so I deal with it now:
- (1) In support of Pakistan’s contention that India had behaved illegally, it was suggested that India had – through her solicitors – deliberately lied as to her interest in the Fund.
 - (2) It was said that the statement made on behalf of India in the 11 June 1954 letter¹¹³ that “[t]he State of India for whom we act have no interest or make any claim to the funds in question” – which was referred to in the Bank’s solicitors’ letter of 29 July 1954¹¹⁴ – was not only false, but knowingly so.
 - (3) At an interlocutory stage – when this point was raised – I indicated that the contention seemed to me to be unarguable, and I refused to grant Pakistan permission to amend her case to advance it. That remains my view. In point of fact, at this time, India had no legal interest in the Fund and the statement in the 11 June 1954 letter is entirely accurate. I reject any suggestion that the letters – when they refer to an “interest” – are referring to anything other than an assertion of right in the Fund. Given the nature of the correspondence, that point is simply not tenable.
 - (4) Subsequently, of course, Nizam VII effected the 1965 Assignment which gave – or arguably gave – India an interest in the Fund. That later assignment can in no

¹⁰⁸ See paragraph 124 above.

¹⁰⁹ Reported at [1957] 1 Ch 185.

¹¹⁰ Reported at [1957] Ch 185.

¹¹¹ Reported at [1958] AC 379.

¹¹² See paragraph 124 above.

¹¹³ See paragraph 156 above.

¹¹⁴ See paragraph 159 above.

way retrospectively turn the accurate statement made by India's solicitors in the 1954 Proceedings into a false one – still less a knowingly false one.

(5) The 1956 Assignment

164. By a deed dated 27 October 1956, the State of Hyderabad assigned to Nizam VII all of its interest in the Fund. The point of the 1956 Assignment appears in its recitals, which provide:

“Whereas:

- (1) prior to 20 September 1946 the sum of £1,007,940.9.0 was held by the Westminster Bank Limited in a deposit account to the credit of His Exalted Highness the Nizam's Government of Hyderabad, such deposit account bearing compound interest at the rate of one half per cent per annum, to be credited quarterly.
- (2) [Moin] was authorised to operate the said account subject to directions to be given to him from time to time by the Nizam.
- (3) The parties have been advised that in law the said sum and the accrued and accruing interest thereon have always remained the property of the Nizam in his personal capacity.
- (4) On or about the said 20 September 1948 without the knowledge or authority of the Nizam said sum together with the accrued interest thereon was wrongfully and in breach of trust transferred by the said [Moin] to a new account at the said Bank in the name of one [Rahimtoola].
- (5) Proceedings for the recovery of the said sum and the accrued and accruing interest thereon have been instituted in the Chancery Division of the High Court of Justice in England.
- (6) The Nizam is the first plaintiff in the said proceedings but [Hyderabad] has been joined as plaintiff in the proceedings as a precautionary measure and in order to avoid questions as to whether the said proceedings are properly constituted.
- (7) By virtue of the provisions of the States Reorganisation Act 1956, the State will cease to exist as from the 1st day of November 1956.
- (8) For the removal of doubt it is desirable that [Hyderabad] should release and assign all its claim, right, title, property and interest (if any) to or in the said fund and the interest accrued and accruing thereon to the Nizam.”

165. The 1956 Assignment was intended to prevent Nizam VII's (potential) entitlement to the Fund from vanishing down a legal “black hole”. It will be necessary to consider in greater detail the change in Hyderabad's legal status over time, but (as I have described in paragraph 84 above) at least from India's point of view Hyderabad was a State of India from 1950 onwards. Prior to that, Hyderabad was not a part of India and the property of the Nizam and the property of the government of Hyderabad were (as will be seen) indistinguishable. Whether Hyderabad's accession to India changed this state of affairs – so that the Nizam's personal property came to be differentiated from that of Hyderabad itself – was clearly regarded as a possibility by those advising Nizam VII, hence the joinder of Hyderabad to the 1954 Proceedings as an alternative claimant. In short, it was clearly considered possible that the Nizam's interest in the Fund vested – after the accession of Hyderabad to India – in Hyderabad and not in the Nizam.

166. The effect of the States Reorganisation Act 1956 was to cause Hyderabad to cease to exist as a State of the Indian Union. Its territory was subsumed into three other States of the Indian Union by that Act. Thus, the identity of the person holding the Nizam's (potential) interest in the Fund might become extremely unclear if, prior to the States Reorganisation Act 1956, that interest was actually held by Hyderabad. Hence, for the avoidance of doubt, any interest of Hyderabad was transferred to Nizam VII prior to the entering into force of the States Reorganisation Act 1956.

(6) Subsequent dealings

167. There were, after the conclusion of the 1954 Proceedings, various (fruitless) efforts to resolve the issue of the Fund, which I shall not describe here. These efforts are, to an extent, material to the insight they provide into the nature of the transfer of the Fund to Rahimtoola, and I consider these efforts in this light below. I do not consider them further here.
168. There were, however, a number of dealings (or purported dealings) with the equitable interest in the Fund – in addition to the 1956 Assignment – that must be mentioned, even though the Princes and India have compromised their differences and advanced a unified claim before me.

(a) The Princes

169. By the 1963 Settlement, Nizam VII assigned all his estate, right, title and interest in the Fund to the Bank of Nova Scotia Trust Company (Bahamas) Limited to hold upon the discretionary trusts declared in that deed. By the 1965 Appointment, the trust fund of the 1963 Settlement was irrevocably appointed as to capital and income upon trust for Nizam VIII and Prince Muffakham in equal shares absolutely.
170. The Princes contended that they were thereafter together absolutely entitled to the Fund and respectively had an absolute beneficial interest in 50% of the Fund.
171. On 17 February 2015, Nizam VIII assigned part of his interest in the Fund to Hillview. Subsequently, Nizam VIII assigned the remainder of his interest to Hillview, such that he had no beneficial interest at all in the Fund – the entirety of that interest vesting in Hillview. In these circumstances, Nizam VIII applied to be removed as a party to the proceedings, and (by an order dated 25 October 2018) I acceded to that application.¹¹⁵
172. Shannon is the assignee of the rights of Prince Muffakham in the Fund.

(b) India

173. By the 1965 Assignment, Nizam VII assigned to the President of India his claim to the Fund. India's claim to the Fund is pursuant to the 1965 Assignment.

¹¹⁵ See paragraph 5 of the order; and see my judgment on this point at [2018] EWHC 3146 (Ch) at [21] to [30].

(c) *Other interests*

174. The Administrator of the estate of Nizam VII is a party to these proceedings so that any other person claiming through Nizam VII is bound by the result. The Administrator played no active part in the proceedings and advanced no case in relation to the Fund.
175. During his lifetime, Rahimtoola disclaimed any interest in the Fund, and that is the position of Rahimtoola's estate. For that reason, Rahimtoola was not made a party to the proceedings.

F. THE ACTUAL AUTHORITY OF NIZAM VII AT THE TIME OF THE TRANSFER

(1) Introduction: why the issue matters

176. It was a live issue between the parties whether or not Nizam VII had actually authorised the Transfer. Pakistan contended that he had done so; the Princes and India that he had not. As will be seen, the question of authority is a material factor when it comes to analysing the nature of the Transfer.
177. Before considering what Nizam VII may or may not have authorised, it is necessary to consider what his authority actually was and how it could be exercised.
178. The nature of the Nizam's authority falls to be considered at the relevant time, which is the time of the Transfer, September 1948. It will already be appreciated that September 1948 was a momentous month for Hyderabad and its ruler. The events of September 1948 affect the nature of Nizam VII's authority. It is also clear that the events of September 1948 in some way informed the Transfer itself. The terms of the Transfer were – as I have found¹¹⁶ – agreed as between Moin and Rahimtoola on or about 15 September 1948 – just as Operation Polo began – whilst the Transfer itself was executed on 20 September 1948, a few days after it would have been clear to Moin that Nizam VII's position was politically very different to that which had pertained prior to the commencement of Operation Polo.
179. The fact is that between 15 and 20 September 1948, Hyderabad fell to Indian forces and, on 17 September 1948, Nizam VII dismissed his Government. The question of the Nizam's authority and how he exercised it is thus a difficult one, that potentially changed over precisely this period.
180. I approach the question of the Nizam's authority in the following way:
- (1) First, what law governs the ability of Nizam VII in September 1948 to authorise certain transactions or to delegate certain powers to others? The question of applicable law is considered in Section F(2) below. Perhaps unsurprisingly, I conclude that this question is a matter not of English law, but the "law" of Hyderabad.
 - (2) If that is the case, the question arises as to whether Hyderabad constitutes a "law district" recognised by English law for the purposes of the English conflict of laws

¹¹⁶ See paragraphs 130-134 above.

rules. That raises the question of the status, in the eyes of the United Kingdom, of Hyderabad in September 1948. This question is considered in Section F(3) below.

- (3) Thirdly, there is the question – assuming the law of Hyderabad does apply and does constitute a “law district” – of what the law regarding the Nizam’s authority actually is. This question is considered in Section F(4) below.

Finally, in Section F(5) below, I consider a question that arises out of these matters: namely, at what point in time did Moin’s actual authority, as a Hyderabad Government official, cease?

(2) Applicable law

181. I must use English law to determine the issues before me, unless some foreign or international element in the case indicates that the law of another jurisdiction is applicable: “[t]he objective of conflict of laws rules is to enable a court to decide which system of law is to be applied to resolve a legal question when there is a foreign, i.e. non-English, element involved in an issue”.¹¹⁷
182. The Nizam was a personal and absolute ruler of Hyderabad. No distinction was drawn as between his personal capacity and his capacity as ruler. Plainly, the question of the authority of a foreign principal and ruler raises a question with a non-English element.
183. Whether the question is framed as one of personal capacity, the delegation of authority by a principal to an agent or the authority of a ruler of a state, the same law is indicated: the law of the state where the principal is domiciled or resident or the law of the state the ruler rules over. More specifically:
- (1) When considering the question of the capacity of a corporation in *Haugesund Kommune v. Depfa ACS Bank*,¹¹⁸ Aikens LJ considered:
- (a) That the concept of “capacity” had to be given a broader, “internationalist”, meaning, unconstrained by any narrower definitions accorded by English domestic law. Aikens LJ defined capacity as the legal ability of a corporation to exercise specific rights, including but not limited to the legal ability to enter into a valid contract with a third party.¹¹⁹
- (b) That the capacity of a corporation to exercise specific rights is determined by the constitution of the corporation, which is itself governed by the law of the place of incorporation.¹²⁰
- (2) When considering the question of the capacity of an individual, matters are less clear, but the better view favours the law of the individual’s domicile for questions of capacity. In *Cooper v. Cooper*,¹²¹ Lord Macnaghten stated:

¹¹⁷ *Haugesund Kommune v. Depfa ACS Bank*, [2010] EWCA Civ 579 at [38].

¹¹⁸ [2010] EWCA Civ 579.

¹¹⁹ At [47].

¹²⁰ At [27]-[28].

¹²¹ (1888) 13 App Cas 88 at 108.

“It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the domicile. It may be that all cases are not to be governed by one and the same rule.”

Dicey & Morris suggests that the pendulum on the question of contractual capacity at least “has swung towards the law governing the contract”.¹²² However, it seems to me that where one is considering the capacity of a single person to authorise, in a single act, several others to do something or to delegate to someone else many transactions in his capacity as the personal ruler of a kingdom (and I expressly leave on one side, for the present, the exact status of Hyderabad), the law of domicile is indicated.

- (3) This is further borne out when one considers what law should apply to determine the capacity of a principal to authorise an agent. *Dicey & Morris* notes:¹²³

“At common law, a contract of agency was governed by its proper law, which was, in general, the law of the country where the relationship of principal and agent was created. This place could be difficult to determine where principal and agent lived in different countries. In such a case, the law of the place where the principal carried on business was likely to be given considerable weight...”

- (4) Finally, it is necessary to recall that Nizam VII was also the ruler of Hyderabad. Rule 37 in *Dicey & Morris* provides:¹²⁴

“A governmental act affecting any private proprietary right in any movable or immovable thing will be recognised as valid and effective in England if the act was valid and effective by the law of the country where the thing was situated (*lex situs*) at the moment when the act takes effect, and not otherwise.”

This is part of the foreign act of state doctrine, which I consider in detail further below, whereby the courts of the United Kingdom will recognise, and will not question, the effect of a foreign state’s legislation or other laws in relation to acts which take place or take effect within the territory of that state.¹²⁵

Whilst the Transfer itself obviously occurred, at the instance of Moin, in the United Kingdom, I consider that the extent to which Moin’s conduct was, or was not, authorised by Nizam VII to be a matter for the law of Hyderabad, on this basis also.

184. I conclude that the applicable law is that of Hyderabad, which was indeed India’s contention.¹²⁶

¹²² Collins (ed), *Dicey, Morris & Collins: The Conflict of Laws*, 15th ed (2012) (*Dicey & Morris*) at [32-172].

¹²³ *Dicey & Morris* at [33-410].

¹²⁴ *Dicey & Morris* at [25R-001].

¹²⁵ *Belhaj v. Straw*, [2017] UKSC 3 at [11(iii)(a)], [35]-[36] (*per* Lord Mance), [121]-[122], [135]-[136] (*per* Lord Neuberger).

¹²⁶ See paragraph 7(i) of India’s Pleading. The other parties did not adopt so explicit a position, either for or against the application of Hyderabad law.

(3) Is the law of Hyderabad law that is recognised in the English courts?

(a) *The problem stated*

185. The English conflict of laws – amongst other things – identifies the law applicable to a particular issue being litigated before an English court. Normally, one refers to applying the law of another “country”.¹²⁷

“This word has from long usage become almost a term of art among English-speaking writers on the conflict of laws, and it is vitally important to appreciate exactly what it means. It was defined by Dicey as “the whole of a territory subject under one sovereign to one body of law.” He suggested that a better expression might be “law district”: but this phrase has never found much favour with English-speaking writers, who prefer the more familiar word “country.” England, Scotland, Northern Ireland, the Isle of Man, Jersey, Guernsey, Alderney, Sark, each British colony, each of the Australian States and each of the Canadian provinces is a separate country in the sense of the conflict of laws, though not one of them is a State known to public international law. However, for some purposes larger units than these may constitute countries. Thus, the United Kingdom is one country for the purposes of the law of negotiable instruments, Great Britain is one country for most purposes of the law of companies, Australia is one country for the purposes of the law of marriage and matrimonial causes, and Canada is one country for the purposes of the law of divorce.”

186. The question is whether Hyderabad is a “country” or “law district” in this sense. This is no straightforward question, given the unique status of princely states during the British Raj, the difficult nature of their new status after 15 August 1947, the effect of Operation Polo and the subsequent incorporation (in 1950) of Hyderabad as a State in the Indian Union. Some measure of these difficulties can be discerned from paragraph 99 of India’s Pleading:

- “(i) For many years until 15 August 1947, Hyderabad had been a vassal state of the British Crown. The arrangements between Hyderabad and the Crown included that Hyderabad had no external relations, these being conducted by the Crown. While it is denied that such matters are material to the true issues in the present proceedings, India has taken the position that Hyderabad was not an independent sovereign state either before or after 15 August 1947.
- (ii) The United Kingdom’s suzerainty, or paramountcy, ceased on 15 August 1947 pursuant to section 7 of the Indian Independence Act 1947...
- (iii) It is admitted and averred that pursuant to the 1947 Act there was Partition of former British India to create the Dominion of India and the Dominion of Pakistan. It is further admitted that the territory of Hyderabad was not within either Dominion and that the same was true of other Indian “princely states”. It is further admitted that Hyderabad did not initially accede to India.
- (iv) By a Standstill Agreement between India and Hyderabad (by [Nizam VII]), dated 29 November 1947, it was agreed that all agreements and administrative arrangements as to the matter of common concern, including external affairs, defence and communications, which were existing between the Crown and the Nizam immediately before 15 August 1947 would continue (so far as might be appropriate) as between India and the Nizam for one year from 29 November 1947.

¹²⁷ Dicey & Morris, [1-065].

- (v) Accordingly, India was responsible for the external relations of Hyderabad at all material dates and in particular throughout 1948.
 - (vi) On 13 September 1948, troops of India entered the territory of Hyderabad in a Police Action (known as Operation Polo).
 - (vii) On 17 September 1948, the troops of Hyderabad surrendered and the Government of Hyderabad administration headed by Laik Ali (and including Moin) resigned, and it was at no point reconstituted.
 - (viii) It is admitted that Hyderabad later acceded to India. Further, on 26 January 1950 there came into being the Union of India and a new State of the Union of India, the Union State of Hyderabad.
 - (ix) By his letter dated 18 November 1948 to the Governor-General of India, [Nizam VII] acknowledged that Hyderabad had no external relations, whether before or after 15 August 1947, and asked that India continue to be responsible for external affairs, defence and communications. In any event, the subject of external relations on behalf of Hyderabad was treated as the responsibility of the Government of India from 18 November 1948 at the latest, by the express desire of [Nizam VII].”
187. It is readily to be appreciated that this statement of the facts was controversial amongst the parties: in particular, it was not accepted by Pakistan and it sits ill with the expressed views of Nizam VII up to the conclusion of Operation Polo.¹²⁸ However, India’s Pleading lays out with helpful clarity the private international law difficulties that arise in this case:
- (1) What was the status of Hyderabad in the period between 15 August 1947 (when Partition occurred and the princely states were “cut loose” from the Crown) and 1950 when, according to the Indian constitution, Hyderabad became a State of the Union of India? Does this status affect an English court’s ability to recognise the laws of Hyderabad as those of another country or law district? Put another way, if (as appeared to be the contention of India) the effect of the Standstill Agreement was to render Hyderabad a “vassal” state of India (as the princely states had, according to India, been prior to 15 August 1947, when they were “vassal” to the Crown) to what extent are the laws of India relevant to the questions I must address?
 - (2) To what extent does the outcome of Operation Polo affect this position? Does the dispute as to the nature of the operation – whether it was a “Police Action” (as India contends) or an invasion or unlawful annexation (as Pakistan contends) – colour the answer to this question?
- (b) *The status of Hyderabad from 15 August 1947 until the conclusion of Operation Polo*
188. There must be some question as to whether Hyderabad constituted a sovereign state and so a legal person as a pure question of public international law. According to Article 1 of the Montevideo Convention on Rights and Duties of States¹²⁹ “[t]he State as a person of international law should possess the following qualifications: (a) a permanent population;

¹²⁸ See paragraphs 71-73 above.

¹²⁹ More fully: the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 26 December 1933.

(b) a defined territory; (c) government; and (d) capacity to enter into relations with other States”. It is in respect of this last criterion – the ability to conduct international relations – that the question mark as to personality under public international law arises.¹³⁰ The fact is that prior to the appointed day, Hyderabad’s external relations were conducted by the Crown; and after the conclusion of the Standstill Agreement, they were conducted by India.

189. Fortunately, I am not directly concerned with the question of whether Hyderabad was, under the abstract principles of public international law, a sovereign state. As Mann notes:¹³¹

“The facts, circumstances, and events which lie at the root of foreign affairs and their conduct by the Executive have conveniently been described as facts of State. These are facts which are peculiarly within the cognisance of the Executive. For this reason, at any rate in so far as they are within the scope of the United Kingdom’s Executive, they can be proved only in a special manner, namely by a certificate issued by the Foreign and Commonwealth Office or by a statement made to the court by the Attorney-General rather than by other documentary or oral evidence.”

Whilst the law regarding the manner in which facts of State are proved before an English court has moved on since Mann’s statement, it is quite clear that the extent of British and foreign territory and the existence and recognition of foreign states and governments are facts of State.¹³²

190. The present law in this regard is stated by Andrew Baker J in *Mohamed v. Breish*, which I quote, omitting the references to authority:¹³³

“32. It is a fundamental principle of English law and an aspect of the unwritten constitutional bedrock of the United Kingdom that it is the prerogative of the Sovereign, acting through Her Government as the Executive branch of the State, to decide whom to recognise as a fellow sovereign state and whom to recognise and treat as the executive government of such a state. The courts, as the judicial branch of the state, must accept, adopt and follow any such recognition as the state must speak with “one voice” in such matters. Where, therefore, a court, considering a case in which it is relevant to ask who is the government of a foreign state, is informed by the Foreign and Commonwealth Office (the “FCO”) in unequivocal terms that HMG recognises some particular persons or body as such, that information must be acted upon by the court as a fact of State. Such an unequivocal notification from the FCO is, in substance, the voice of the sovereign as to a matter upon which she has an absolute right to direct the answer...

35. The provision to the courts of direct confirmation as to the recognition status of foreign governments is nowadays not HMG’s general practice. Since 1980, the policy has been to recognise foreign states and, in general, to leave HMG’s attitude as to which individuals or bodies represent their governments to be inferred from its dealing with them. The courts have, therefore, been required from time to time to make a finding by drawing such an inference. Factors that should rightly influence the decision in such a case have been developed...”

¹³⁰ See, further, Crawford, *Brownlie’s Principles of Public International Law*, 9th ed (2019), at 119-126.

¹³¹ Mann, *Foreign Affairs in English Courts*, 1st ed (1986), at 23.

¹³² Mann, *Foreign Affairs in English Courts*, 1st ed (1986), at 30-32, 37-41 and 42-46.

¹³³ [2019] EWHC 306 (Comm).

191. Although *Mohamed v. Breish* concerned less the recognition of a state and more the recognition of the government of a state, the same approach is taken by the English courts when considering whether or not a state is recognised as a sovereign state where there is no Foreign and Commonwealth Office certification.¹³⁴
192. In this case, there has been no Foreign and Commonwealth Office certification of Her Majesty's Government's attitude towards Hyderabad as regards the period between 15 August 1947 and the end of Operation Polo on 17 September 1948. Accordingly, it is necessary to consider the evidence as to the Government's attitude. As to this:
- (1) The Indian Independence Act 1947 made quite clear that whilst British India was being partitioned into the Dominions of India and Pakistan, nothing was to affect the princely states/Indian States – who were to be free to choose whether to accede to either or neither of these Dominions.¹³⁵ However, at the same time, the suzerainty of the Crown over the Indian States ended.¹³⁶
 - (2) The Government's approach was clearly stated in the debates described in paragraphs 69-70 above. The Indian States were to have a freedom of choice. It seems to me clear that the inevitable corollary of the Government's position that the Indian States were legally free to choose not to accede to either India or Pakistan (whatever the political realities) was that they were, from 15 August 1947, sovereign states, irrespective of their status prior to the appointed day.

I conclude that from the appointed day (15 August 1947) to the end of Operation Polo, when the Nizam submitted to Indian forces, Hyderabad was a foreign state in the eyes of Her Majesty's Government and that Nizam VII was the ruler of that state.

(c) *The status of Hyderabad after Operation Polo*

193. In my judgment, the fact that Hyderabad was annexed by India – whether pursuant to a “police action” or otherwise – cannot alter the status of Hyderabad, unless Her Majesty's Government were unequivocally to say so, whether by a certificate or otherwise. For this court to hold – without such an unequivocal statement – would be to attach uncritical weight to the use of force. It seems to me, therefore, that – absent such an unequivocal statement from Her Majesty's Government – Operation Polo can have made no difference to the status of Hyderabad, at least for the purposes of an English court.
194. In due course, Nizam VII became the Rajpramukh (Princely Governor) of the new state of Hyderabad within the Union of India, which position he held until the states of India were reorganised in 1956.¹³⁷ At that time, the state of Hyderabad was split into three parts, and was merged with and into neighbouring states. Nizam VII died in 1967.
195. The accession of Hyderabad, as a State of the Union of India, effected on the face of it voluntarily by Nizam VII is a different matter compared to the effects of Operation Polo. As regards this accession, I must consider once again such evidence as exists regarding

¹³⁴ See McLachlan, *Foreign Relations Law*, 1st ed (2014) (*McLachlan*), at [10.32]ff and in particular [10.49]-[10.59] and the authorities there cited.

¹³⁵ See paragraphs 69-70 above.

¹³⁶ See paragraphs 69-70 above.

¹³⁷ As described in paragraph 166 above.

this accession and Her Majesty's Government's attitude towards it, there again being no certification from the Foreign and Commonwealth Office. I conclude, based upon the following material, that the Government has recognised the accession of Hyderabad to India:

- (1) In a telegram from the United Kingdom's Commonwealth Relations Office to the Acting United Kingdom High Commissioner in India (and copied to the Acting United Kingdom High Commissioner in Pakistan) dated 26 August 1950, the following queries were raised:

- "2. Grateful for urgent information as to when accession of Hyderabad to India became effective, and whether any instrument of accession under section 6 of the Government of India Act 1935 was executed by the Nizam and accepted by the Governor-General.
3. Only information on record here relates to Firman issued by Nizam on 24 November 1949...which suggests that accession became effective on 26 January 1950. We have no information as to its ratification.
4. Grateful for any other comments on legal position which may occur to you."

- (2) The Acting United Kingdom High Commissioner for India responded on 31 August 1950:

- "1. According to Government of India's White Paper on Indian States revised edition of March 1950, page 113, Hyderabad did not repeat not accede to India before it formally became part of India on January 26, 1950, though Standstill Agreement of November 1947 "enjoining virtual accession of the State in respect of Defence, External Affairs and Communications", continued by virtue of Nizam's letter of 18 November 1948 until enforcement of new constitution.
2. Fact that Hyderabad did not accede before January 26, 1950 was recently confirmed to me by official closely concerned, who added that Government of India had purposely avoided any question of accession and maintained until that date Nizam's authority as source from which military Governors' and chief Ministers' powers were derived."

- (3) A memorandum of interview kept by the Bank dated 14 August 1953, recording the views of a Mr WJ Smith, a Principal Acting Assistant Secretary in the Commonwealth Relations Office records as follows:

"The status of Hyderabad was discussed having in mind that this State is one of the 27 States of the Republic of India and briefly the history is as follows:

Consequent upon the passing of the Indian Independence Act 1947, agreement as to the association between Hyderabad and the Republic of India was not immediately reached and accordingly a "Standstill Agreement" was entered into on November 29, 1947 for one year. During the period of the Agreement, Indian troops marched into Hyderabad (September 1948) ostensibly to quell an insurrection and shortly after this the Nizam of Hyderabad accepted the Constitution of the Republic of India and took the oath of loyalty in January 1950 and was sworn in as Rajpramuk (Ruler). Thus, Hyderabad is in fact one of the States of the Republic of India and presumably this would be the International view. However, the Dominion of Pakistan refused to accept this, their contention being that the Nizam yielded to force majeure and they state that a plebiscite should be held to determine

whether the State continues within the Indian Constitution or is transferred to the Dominion of Pakistan. This view is still held by Pakistan and at a recent Press Conference after the Meeting of the Security Council (1953), when Mr Mahamed Ali, the Prime Minister of Pakistan, was asked whether Hyderabad had been discussed during the deliberations of the Council, he stated that this matter was still on the Agenda and in Mr Smith's opinion this position will continue for some time, possibly indefinitely.¹³⁸

The status of Hyderabad has, of course, presented difficulties to the United Kingdom Government inasmuch as the ownership of property (Consulates, etc) and the claims to funds held previously by "India" had to be settled. As far as Mr Smith was aware, the United Kingdom Government had left India and Pakistan to settle these matters amicably between themselves, and when agreement was reached, had released the property or funds in accordance with the terms agreed between the two Governments. He was unable to indicate whether there had been any legal action regarding these matters but did not think the question had come before the British Courts.

I then asked Mr Smith whether his Department would be prepared to put in writing their views on Hyderabad, and he stated that any written inquiry would be answered but would be couched in very careful terms and would be on the lines above indicated; that is, Hyderabad is in fact part of India, but this is not recognised by the Pakistanis."

196. These documents strongly suggest that the Government recognises the accession of Hyderabad to India, and that is the finding that I make. This conclusion reflects the present reality: as I noted to the parties during the trial, the United Kingdom maintains a British Deputy High Commission in the city of Hyderabad in what was once the state of Hyderabad, representing the United Kingdom Government in Hyderabad.

(4) What is the law of Hyderabad on this point?

197. Having concluded that the law of Hyderabad is the properly applicable law, I turn to consider the nature of Nizam VII's authority according to that law.

198. I make the following findings:

- (1) Nizam VII was an absolute monarch.¹³⁹ There was no distinction between the Nizam's privy purse and the public funds of Hyderabad.¹⁴⁰ The Nizam's rights and powers over such property were not restricted, and he was free to appropriate or dispose of such property at any time and for any purpose, whether public or otherwise, as he thought fit.¹⁴¹
- (2) The Nizam was capable of delegating power, and he could and did do so by way of formal and complex documents. However, these documents operated as means whereby the Nizam could exercise his power through delegation and did not constitute a constraint on his power. Rules of this sort could be revoked or suspended or overridden by the Nizam at any time.¹⁴²

¹³⁸ Mr Smith was prescient. During the hearing, Mr Qureshi, QC confirmed that the matter of Hyderabad remained on the agenda.

¹³⁹ Paragraph 2 of Raghavan 1.

¹⁴⁰ Paragraph 3 of Raghavan 1.

¹⁴¹ Paragraph 3 of Raghavan 1.

¹⁴² Paragraph 4 of Raghavan 1.

- (3) Although the Nizam might operate formally – through edicts known as “firmans” – his orders might equally well be given informally, even verbally. In this case, a number of significant transactions – in addition to the Transfer itself – took place without specific sanction of Nizam VII. Thus, the creation of the Hyderabad State Bank Account and the creation of the Second Account, as well as the transfers of money out of and between these accounts, were not explicitly authorised by Nizam VII. It is, of course, possible that the relevant actors considered that these powers had been delegated to them, and that specific intervention by the Nizam was unnecessary. I did not have the benefit of submissions as to whether these acts could be justified by reference to specific delegated or written authority, but I am by no means persuaded that this was so in each and every case. It is unnecessary to go into this question in any detail, because all of the parties before me accepted that Nizam VII could act, authorise and delegate formally or informally according to his will. It was not contended by any of the parties that these acts – that is, the establishment of the Hyderabad State Bank Account and the establishment of the Second Account, nor any of the dealings on these accounts, apart from the Transfer itself – were done without the authority of Nizam VII, even though no formal instruction, whether by way of “firman” or otherwise, could be identified.

(5) The authority of Moin as a Hyderabad Government official

199. I will consider and make findings in relation to the authority that Moin had at the time of the Transfer later on in the Judgment.¹⁴³ However, it seems to me to be clear that Moin cannot have had any authority deriving from his position as an official in the Government of Hyderabad. That authority ceased on 17 September 1948, when Nizam VII accepted his Government’s resignation.¹⁴⁴
200. I do not consider that it is possible to say that Moin’s authority as an official of the Government of Hyderabad continued, notwithstanding the resignation of the Government, because Nizam VII was in some way under duress. That, I consider, would be to second guess the internal constitutional arrangements of Hyderabad. The Nizam was an absolute ruler: having recognised his state and his position, at this time, as the ruler of that state, I am compelled – by the foreign act of state doctrine articulated in paragraph 183(4) above – to recognise his authority and pay it proper regard. The Nizam was undoubtedly capable of dismissing his Government or accepting its resignation, and he did so. At that point, Moin’s authority (for the purposes of this Judgment, at least) as Finance Minister and Minister for External Affairs in Nizam VII’s Government ended.
201. That does not mean to say that Nizam VII did not confer authority on Moin informally – independent of his role as a Government official. That, as I say, is a matter I will consider in due course.

¹⁴³ See paragraphs 221ff below.

¹⁴⁴ See paragraph 79 above.

G. ABSOLUTE TRANSFER OF THE FUND: THE ARMS FOR MONEY ARGUMENT

(1) Introduction

202. Pakistan's case was summarised in paragraph 17(1) above. In essence, Pakistan's case was that the Transfer was made to compensate/reimburse/indemnify Pakistan for assistance provided by her in procuring/facilitating the supply and/or transportation of weapons.
203. In Further Information of her pleadings provided by Pakistan, it was suggested that the circumstances in which the Hyderabad Government Account and the Second Account were set up and operated suggested a close connection with the clandestine supply of arms to Hyderabad by or through the good offices of Pakistan. Accordingly, so Pakistan contended, the purpose and operation of these accounts might very well assist in inferring the true intentions of the relevant parties when the Transfer was made and the Fund established.¹⁴⁵
204. There is, as it seems to me, considerable force in this point. It is necessary to consider:
- (1) First, whether there was provision of arms to Pakistan and to Hyderabad at this time and what the purpose of such provision was: Section G(2) below.
 - (2) Secondly, the extent to which Hyderabad was involved in this provision of arms: Section G(3) below.
 - (3) Thirdly, the extent to which a connection can be made between the Transfer, the provision of weapons, and Hyderabad's involvement in the provision of weapons: Section G(4) below.

My conclusions are stated in Section G(5) below.

(2) The provision of weapons in Pakistan and Hyderabad

205. There is no shortage of contemporaneous evidence showing that weapons were being imported into Hyderabad and/or into Pakistan for use in Hyderabad against India. The weapons – or at least some of them – were flown into Pakistan or Hyderabad by Cotton.
206. A minute from Mr Attlee to the Secretary of State for Commonwealth Relations dated 6 July 1948 references a minute from the Secretary of State regarding the flying of arms into Hyderabad. That minute attached a “note giving the facts”. The note provides as follows:

“There is reason to think that the Hyderabad Government have for some time been trying, with at any rate the knowledge, if not the active co-operation, of the Government of Pakistan, to secure supplies of arms and ammunition from Europe. The Government of India, in breach of the Standstill Agreement of last November, have provided no supplies of arms since the transfer of power, and have not allowed any supplies from overseas to transit India territory. Hyderabad

¹⁴⁵ See paragraph 1.2 of Pakistan's Response to the Part 18 Request of India.

would no doubt justify its endeavours to smuggle on the ground that they need equipment to maintain law and order, and that India has failed to fulfil her duty under the Standstill Agreement.

2. The facts are very difficult to establish. Certain of the information bearing on them comes from secret sources. There have also been a series of reports from Sir L Grafftey-Smith. But they are generally either what is common gossip in Karachi; or statements alleged to have been made in conversation by either Mr Cotton, or by two Air Force officers in the Pakistan Service, or (on one occasion) by the Pakistan Defence Secretary.

3. Whilst there is no serious reason to doubt that the traffic is taking place, we should probably find it very difficult to establish the facts in court.”

The note went on to list those involved in the smuggling of weapons. These included Mr Cotton.

207. This note is clearly of the view that the Governments of both Pakistan and Hyderabad were involved in the provision of weapons. Furthermore, in a letter from Pakistan’s Ministry of Finance to Mir dated 7 April 1948, Mir was introduced to Mohammad Shoaib (**Shoaib**), who (so the letter said) “is proceeding to the UK on behalf of the Pakistan Government and with my full authority”. Although the letter makes reference to Shoaib’s “mission”, the letter does not descend to particularity about its nature. Shoaib’s mission in the United Kingdom ended on 14 July 1948, when he notified the Bank that he would be leaving London for Pakistan. Shoaib was the Financial Adviser, Military Finance in the Government of Pakistan.
208. Cotton himself appears to have contracted with – amongst other people – a Hyderabad civilian named Najmuddin Khan (**Najmuddin**) for the import of weapons to Hyderabad.¹⁴⁶
209. In my judgment, the detail of the provision of weapons into Pakistan and Hyderabad is unimportant in this dispute. It is evident that there was such a supply, and that there was a long-running dispute between Pakistan and Cotton regarding payment for this supply, which was ultimately resolved by a payment of money by Pakistan to Cotton. I have no doubt that this story involves a great deal of intrigue, high policy and secrecy; I strongly suspect that the materials before me do not tell the whole story. But, for the purposes of this dispute, it is necessary only to make the following findings:
- (1) There was a supply of weapons to Pakistan and Hyderabad. The purpose of this supply was to resist perceived¹⁴⁷ Indian aggression towards Hyderabad.
 - (2) Whilst I have been shown a great deal of material regarding the specific dealings between Pakistan and Cotton regarding the provision of weapons, and whilst I accept that these dealings evidence the supply of arms to Pakistan and Hyderabad for the purpose of resisting perceived India aggression towards Hyderabad, I do not consider that this material demonstrates any involvement of the Hyderabad Government in the provision of such weapons, still less any involvement of the

¹⁴⁶ See the statement of Major J Henry Luschwitz (**Luschwitz**), the director of music of the Hyderabad Army, dated 6 October 1948 at p.4. Luschwitz provided to two statements regarding the gun-running into Pakistan and Hyderabad, dated respectively 8 October 1948 (**Luschwitz 1**) and 9 October 1948 (**Luschwitz 2**).

¹⁴⁷ The perception being that of the Hyderabad and Pakistan Governments.

Hyderabad State Bank Account, the Second Bank Account or the Rahimtoola Account in the provision of such weapons.

- (3) There is some general evidence – for instance the introduction of Shoaib to Mir and the evidence of Luschwitz – that does point to an involvement by the Hyderabad Government. The further evidence, over-and-above this, that points to the involvement of the Hyderabad Government in the provision of weapons is considered in the next Section.

(3) Evidence of Hyderabad’s involvement in the provision of weapons

210. In addition to the evidence described in paragraph 209(3) above, there is some general – that is to say, relatively unspecific – evidence of the Hyderabad Government’s involvement in the provision of weapons. Most of the evidence was produced by India in the late-1940s as part of an effort to control those Hyderabad/Pakistan elements who were – or who were perceived by India to be – disruptive or in opposition to India’s annexation¹⁴⁸ of Hyderabad. The evidence clearly must be regarded in this light, but nevertheless I consider that it demonstrates an involvement by the Hyderabad Government in the funding of the provision of weapons:

- (1) Luschwitz said this in Luschwitz 2:

“I don’t understand the working of the foreign Exchange system, but while I was in London, in April 1948, I gathered the following information from various people including [Mirza], that about three million pounds sterling was standing to the credit of [Mir]. Out of this amount, approximately 800,000 pounds sterling was made available to [Shoaib]. He was then in London, and I cannot vouch how this amount was transferred to him. In any case, it was done in a very roundabout way, and indirectly. Out of this sum, [Cotton’s] contract was accommodated for £400,000/-. I cannot swear to the accuracy of these figures.”

Luschwitz’s figures are not quite right, but his information otherwise very much corroborates what was going on in relation to the Second Account.

- (2) In a letter dated 21 October 1948, India provided the following information to Mr Attlee:

“Remittances to the extent of 6 crores were sent to London and Karachi Banks since October 1947. These funds were placed at the disposal of Agents General and Finance Minister, Hyderabad, without safeguards against unauthorised payments. Total amount so made available in London, 3 million pounds. Of this amount, one and a half million has been spent. Some important payments made in London are as follows:

- (a) 890,000 pounds sterling to [Shoaib],
- (b) 100,000 pounds to [Cotton],
- (c) 10,000 pounds sterling to Sir Alexander Rogers for conducting negotiations for purchase of Goa,

¹⁴⁸ I use this term in as neutral a sense as is possible to describe the position of Hyderabad after the success of Operation Polo.

- (d) 5,000 pounds sterling to Mr Ghulam Mohammad, Finance Minister to Pakistan for an unspecified object.

500,000 pounds has been spent on other items about which account has been demanded from Agent General, London. In addition, one million odd pound sterling transferred to account of Pakistan High Commissioner, London; and 450,000 pound sterling to account of [Zahir]...”

211. Moving from the general to the more specific, Annex 3 describes the various transactions which principally took place on the Second Account. Of these, Transactions 3, 4, 6, 7 and 8 are of significance in relation to the question of the provision of weapons:

- (1) In a letter from Shoaib to Mir, Shoaib says:

“As arranged with your Govt, kindly transfer to my account at the Westminster Bank, amounts as follows:

£500,000

£250,000

£100,000

£44,000 when requested by Col Mirza.

This is for OD.”

The letter is undated, but the four payments described match the amounts of Transaction 4 (£500,000), Transaction 3 (£250,000), Transaction 6 (£100,000) and Transaction 7 (£44,000). Colonel Iskander Mirza (**Mirza**) was at all material times the Secretary of Defence of Pakistan. It is not known who or what “OD” was.

- (2) Apart from this letter, the Transactions are documented in the following way:

- (a) *Transaction 3.* This was a payment, out of the Second Account, of £250,000 to Shoaib, made on 16 April 1948. The payment appears to have been initiated by Rahimtoola in a letter dated 16 April 1948 to Mir. The letter states:

“As desired by the Finance Minister, HEH the Nizam’s Government, I would like to draw from the account opened in the name of HEH the Nizam’s Government with Westminster Bank, a sum of £250,000...Kindly ask the bank to place this amount at the disposal of Mr Shoaib, whose specimen signature attested by me is enclosed.

The details and papers regarding these accounts will be kept by us.”

By a letter of the same date, Mir instructed the Bank to “place at the disposal of [Shoaib] a sum of £250,000” from the Second Account. As a result, the Bank opened an account in the name of Shoaib, to which it credited the sum of £250,000 from the Second Account. Shoaib was notified of this on 16 April 1948.

- (b) *Transaction 4.* This was a payment, out of the Second Account, of £500,000 to Shoaib, made on 30 April 1948. On 29 April 1948, Mir requested that the Bank “place at the disposal of [Shoaib] a sum of £500,000” from the Second Account. On the same day, Shoaib requested that his account with the Bank be credited by this amount, which duly occurred.
- (c) *Transaction 6.* This was a payment, out of the Second Account, of £100,000 to Shoaib, made on 18 June 1948. The payment was authorised by Mir in a letter to the Bank dated 18 June 1948, stating “[p]lease pay to the account of [Shoaib] with you a sum of £100,000...”.

In a letter dated 26 June 1948, Mir wrote to “HEPM” and “HFM” stating:

“As ordered by your Excellency and HFM the following transfers have been intimated to the Westminster Bank, Lothbury (Head Office), London:

18-6-48	£100,000	[Shoaib]
21-6-48) £5,000	Mr Ghulam Mohamed
) £44,000	[Shoaib]
) £100,000	under control of [Shoaib] for [Cotton]”

The first £100,000 is – by its amount and date – obviously Transaction 6; the £44,000 and the second £100,000 would appear to be Transactions 7 and 8. The letter is significant because it shows Mir reporting to the Hyderabad Government on transactions being undertaken for Hyderabad. It is speculation, but I infer from all the circumstances that “HEPM” is a reference to His Excellency the Prime Minister – Laik Ali – and that “HFM” is a reference to Hyderabad Finance Minister – Moin.

- (d) *Transaction 7.* This was a payment, out of the Second Account, of £44,000 to Shoaib, made on 21 June 1948. There is a letter to Mir from Mirza¹⁴⁹ requesting that Shoaib’s account with the Bank be credited with the sum of £44,000. The request to the Bank to effect this transaction was made by Mir on the same day.
- (e) *Transaction 8.* This was a payment to Barclays Bank in the amount of £100,000 in favour of Cotton under the control of Shoaib out of the Second Account. On 21 June 1948, Mir wrote to the Bank, requesting that the Second Account be debited “with a sum of...£100,000...and establish an irrevocable credit with Barclays Bank Ltd...in favour of F Sidney Cotton of 3 Seamore Place, Curzon Street, W1, authorising the said Barclays Bank to release various sums to the said F Sidney Cotton as may be directed by Mr M Shoaib”.

¹⁴⁹ The signature is extremely difficult to read but appears to be that of Mirza. I am satisfied that I can reach this conclusion because of the reference to Mirza requesting the £44,000 payment in Shoaib’s letter described in paragraph 211(1) above. In any event, the sender’s address on the letter – 9 South Street, Mayfair – was the address of the Delegation of Pakistan.

- (3) I find that Transactions 3, 4, 6, 7 and 8 were all payments for the acquisition and/or transport of weapons or similar *materiel* to Pakistan and/or to Hyderabad. It is difficult to be more specific as to the precise nature of the transactions, but this broad conclusion is justified by the evidence:
- (a) The payments out of the Second Account were initiated by either Shoaib or Mirza, who were both involved in the Pakistan military establishment, Shoaib in Pakistan's Ministry of Finance as the Financial Adviser, Military Finance and Mirza as Pakistan's Secretary of Defence.
 - (b) At least some of the payments out of the Second Account went indirectly to Cotton or were earmarked for his use who, as I have described, was himself implicated in the supply and transport of weapons. Thus, Transaction 8 expressly references Cotton.
 - (c) Some payments out of Shoaib's account with the Bank can also be shown to have gone to Cotton: a payment of £140,000 to the Aeronautical and Industrial Research Corporation Ltd was authorised on 29 April 1948. The company's address was given as "3 Seamore Place, Curzon Street, W1", which was Cotton's address.¹⁵⁰

212. This expenditure – and its purpose – was well-known to the Hyderabad authorities:

- (1) On 26 January 1948, Nizam VII issued a firman which referred to "the reservation of the sterling balances held with the Imperial Bank of India, London, wholly for the purchase of machinery", and commanded "the Sterling amounts held by the Finance Department in their account in England should be reserved wholly for the purchase of machinery and the utilisation of this amount for objects of personal nature should be prohibited".¹⁵¹ Hyderabad had more foreign currency at its disposal than simply the money in the Hyderabad State Bank Account or the Second Account.¹⁵² It may, therefore, be that the reference to these sterling amounts was to money still held with the Imperial Bank of India and not that transferred from the Imperial Bank of India to the Hyderabad State Bank Account with the Bank. Equally, I do not need to speculate whether the reference to "machinery" was a euphemistic reference to weapons. What I derive from this firman is that the Hyderabad foreign currency reserves were the subject of interest and control by Nizam VII himself.
- (2) On 13 June 1948, Nizam VII issued a "most secret" firman. It stated:

"The instructions issued and the action taken by the Prime Minister in view of the emergency conditions in the matter of transferring of £ Sterling One Million from the Government Funds in favour of Mir Nawaz Jung and incurring expenditure therefrom on

¹⁵⁰ See paragraph 211(3)(c) above. Cotton was the managing director of this company.

¹⁵¹ There is an earlier arzdast (a form of instruction not emanating from the Nizam) dated 22 October 1947 emphasising the scarcity of foreign currency reserves.

¹⁵² It is difficult to say how much. Obviously, the parties' disclosure focussed on the monies going into and out the Hyderabad State Bank Account and the Second Account, but nevertheless there was evidence of the existence of other significant sterling balances.

official purposes from time to time for various secret objects as stated in the Prime Minister's English Arzdasht dated 5 June 1948¹⁵³ is confirmed and sanctioned.

...

3. A Statement of the expenses incurred will be subsequently submitted direct to me and it will be sufficient if, for the purpose of settlement of accounts, only a certificate to the effect that these expenses have really been incurred with my sanction on Government objects is sent to the Controller-General of Accounts & Audit. If expenses of a similar nature are incurred in future, then similar procedure will be adopted in respect of their accounts, etc."

This firman demonstrates an understanding on the part of the Nizam of: (i) the establishment of the Second Account; (ii) the transfer of £1 million into that account; (iii) the role of Mir; and (iv) the use of the Second Account to further "various secret objects" for "official purposes". There can be no doubt that Nizam VII knew what was going on, was authorising transactions like Transactions 3, 4, 6, 7 and 8 and was content for transactions like that to be accounted for in the manner described in paragraph 3 of the firman.

- (3) On 5 September 1948, Laik Ali wrote to the Hyderabad Controller-General explaining certain expenditure:

"...I had authorised an expenditure of £ one million to be incurred by our Agent-General at London, out of the balance of the £ two millions, held by the Government with the Westminster Bank, London.

The above amounts were reported by the two Agents-General at London and Karachi to have been utilised on the purchase of miscellaneous equipment and stores on demand of the Army Commander. On the basis of this, the expenditure may be booked under 41-Misc – MISCELLANEOUS."

It is clear that the accounting process authorised by Nizam VII was being followed.

- (4) On 14 September 1948, Moin wrote to Mir in the following terms:

"This is to inform you that under orders of the Nizam, the Prime Minister has certified as secret expenditure the amount totalling one million pounds sterling from the account of the Nizam's Government with the [Bank]. The certificate has been recorded with the Comptroller General of Accounts and Audit at Hyderabad."

213. In light of this evidence, I find that:

- (1) The Government of Hyderabad was involved in the funding of the provision of weapons in its own defence against the perceived aggression of India. It is impossible to be certain as to the extent of the purchases of weapons by the Government of Hyderabad: Hyderabad had access to sterling balances, over and above those contained in the Hyderabad State Bank Account and the Second Account, with which to fund such purchases. Additionally, as I have described, the Government of Pakistan itself funded some weapons purchases.

¹⁵³ This document has not survived.

- (2) The Second Account was clearly implicated in the purchase of some of these weapons. It is possible to tie a number of transactions taking place on the Second Account to weapons purchases. Such purchases tended to be intermediated by Shoaib, and the general process appears to have been that Shoaib would instruct Mir to make a transfer to him, and he (Shoaib) would then procure the weapons, either directly or through persons such as Cotton.
 - (3) Nizam VII was aware of and approved of this use of the Second Account. Nizam VII appreciated the importance of Hyderabad's sterling balances for the purpose of purchasing weapons, and included the Second Account. The "most secret" firman of June 1948 sanctioned weapons purchases, and put in place a process for the monitoring of and accounting for expenditure, which was followed by officials in Nizam VII's administration.
214. These conclusions are supported by one other indicator. The Nizam's policy towards India was controversial within his own Government. Clearly, Moin and Mir supported it; equally clearly, Gupta did not, as is evidenced by his assiduity in freezing the Second Account and the Rahimtoola Account. I am sure that there were other officials who favoured either alliance with India or with Pakistan in this controversial matter. The Second Account was operated in a manner intended to enable a "pro-Pakistan" weapons policy to be implemented without interference from "pro-India" Hyderabad officials. Thus, the Second Account had very different signatories for its operation than the Hyderabad State Bank Account,¹⁵⁴ and was operated under conditions of some secrecy, whereby the Bank accounted for transactions not to the Nizam's Government in Hyderabad but to the Agent General (Mir) in London.¹⁵⁵ All of this suggests a secret process, in which the Nizam himself was complicit, but by no means all of his Government. The process was secret because it involved (controversially) aligning Hyderabad with Pakistan and not India. That suggests that the Second Account was established for the specific purpose of weapons purchases, which indeed it was substantially used for.
- (4) Connection between the Transfer and the provision of weapons**
215. Pakistan's Arms for Money Argument amounts to this: that the Transfer was – in some unspecified way – recompense to Pakistan for the procurement and transport of arms. I cannot accept this contention and reject it for the following reasons:
- (1) Whilst the Second Account was used, as I have found, for the purchase of weapons, specific drawdowns were made from the account for specific – albeit now not specifically known – purposes. In other words, whilst the money in the Second Account might have been earmarked for the purpose of purchasing weapons, the money remained the Nizam's until disbursed for a particular purpose and pursuant to a particular request. Drawdowns from the account, although under a veil of confidentiality, were accounted for at the highest levels.
 - (2) I can see no reason why Moin – acting on behalf of Nizam VII – would have transferred the entire balance from the Second Account to the Rahimtoola Account without any clear understanding of how this money would be used and without any

¹⁵⁴ See paragraph 97 above.

¹⁵⁵ See paragraphs 103-104 above.

control so as to ensure that any agreed use was observed. There is no evidence of any such understanding; and no evidence of any effort on the part of Moin (or any other Hyderabad Government official) to ensure that the money was used properly. If there had been any substance in the Arms for Money Argument, there would have been some evidence to support the existence of this underlying purpose. Whilst I note Mr Qureshi's point that these were secret and sensitive matters, and that this would have affected the documentary record, the fact is that there are surviving documents regarding the transfer (as I consider below) which contradict and do not support the Arms for Money Argument.

- (3) I appreciate that because the Rahimtoola Account was frozen shortly after it was created¹⁵⁶ there are no inferences to be drawn from transactions occurring on the Rahimtoola Account: there were no such transactions. But I consider there would have been some material evidencing the type of transaction that Moin and Rahimtoola (and, perhaps, others) expected to occur, whether that be weapons purchases in the future or reimbursement for past purchases of weapons. There was a precision in the drawing down of monies from the Second Account and in the accounting of those monies that is entirely inconsistent with Moin transferring the entire balance of the Second Account away from Nizam VII in unspecified payment for unspecified goods or services. The transactional history of the Second Account shows that payments out were made in defined amounts, as and when needed by Shoaib. Shoaib generally requested Mir to effect the drawdown. No arrangements were made for this pattern to continue after the Transfer.
- (4) There was no demand or request from Pakistan that the money be transferred. Again, it seems to me that if there were substance in the Arms for Money Argument, Pakistan would have at least requested – and perhaps demanded – the Transfer.
- (5) In short, there is nothing to suggest that the Transfer was anything to do with payment for weapons, apart from the evidence of Shaharyar. In Shaharyar 1, Shaharyar seeks to establish a connection between the Fund and the provision of arms to Hyderabad. His evidence is entirely at second hand, deriving from conversations he had with Mir in London between 1960 and 1962. Shaharyar 1 states:
- “7. My awareness of the Hyderabad Fund dispute developed during my time as Third Secretary in the High Commission for Pakistan in London from 1960 until 1962. Prior to that, I believe the decisions of the English Court had been referred to in my classes as a law student at Cambridge.
8. So far as I can recall, from my early interactions with [Mir] onwards, we discussed the Hyderabad Fund matter. I was told by [Mir] that the Nizam was seeking to compensate Pakistan for the assistance which she had provided to Hyderabad and the Nizam.
9. Subsequently, I believe [Mir] offered to assist the Government of Pakistan in providing evidence to advance a claim for the Hyderabad Fund and I

¹⁵⁶ See paragraphs 135ff above.

communicated that offer to the Foreign Office. Apart from the negotiations I refer to below, I had no further substantive involvement in this matter thereafter.

10. By way of context, it was in the period from early 1948 onwards that the Indian Government had exacerbated tensions, and eventually launched a military campaign against Hyderabad to absorb the state into India. In that regard, whilst the matter was somewhat sensitive, I was aware from discussions within my political and social circles that Pakistan had been assisting in the transfer of arms and other equipment to Hyderabad to enable Hyderabad to defend itself. I had understood from these discussions that a Second World War pilot, Mr Cotton, was flying night sorties from Karachi to Hyderabad for the purposes of these transfers.
11. Accordingly, to my mind, [Mir's] reference to the assistance Pakistan had provided to Hyderabad was a reference to such military assistance, as well as political assistance Pakistan had given to Hyderabad. As far as I am aware, the military assistance was not publicly acknowledged, being a matter of extreme sensitivity.
12. I kept in touch with [Mir] and met with him until shortly before his death in 1996. During the period 1982 until 1987, I worked as Additional Secretary in charge of UN Affairs, based in the Mission in Geneva. [Mir] lived in Geneva at that time and I often met with him. After 1987, I spoke to [Mir] from time to time and we would touch upon the Hyderabad Fund matter. In particular, I would give him a brief insight into negotiations that were on-going between Mr Dixit, Indian Foreign Secretary from 1991 to 1994, and me, during my time as Foreign Secretary of Pakistan from 1990 until 1994, in an attempt to settle the dispute. In my view, as a diplomat, irrespective of the legal entitlement, a negotiated solution between India, Pakistan [and the Princes] was the most desirable outcome. Regrettably, Mr Dixit and I both retired in 1994 and we were unable to achieve this outcome."

Whilst I have no doubt as to Shaharyar's honesty in making his statement, Shaharyar's is of little assistance to me. I am entirely prepared to accept that Pakistan's role in arming Hyderabad was, in the decades after 1948, a sensitive one. But the critical question lies in relation to the intention of funding of such armaments from the Second Account. Here, Shaharyar's evidence is at second-hand – deriving simply from what Mir told him. What is more, what Mir told him is remarkably unspecific. It amounts, in essence, to a single sentence:

"I was told by [Mir] that the Nizam was seeking to compensate Pakistan for the assistance which she had provided to Hyderabad and the Nizam."

I am afraid this evidence is entirely insufficient to support the edifice that Pakistan sought to build on it.

- (6) It is not simply that there is an absence of evidence in support of the Arms for Money Argument. Three factors positively point in another direction:
 - (a) If the purpose of the Transfer was in some way to pay for weapons, Mir not Moin would have been involved. As the various transactions on the Second Account indicate (as set out in Annex 3 and as described in paragraph 211 above), it was Mir and not Moin who sanctioned the various withdrawals. I regard the fact that it was Moin who effected the Transfer as being a

significant indicator that the purpose of the Transfer was not related to the purchase of weapons.

- (b) What is more, the documents that exist in relation to the Transfer – particularly the 15 September 1948 exchange of letters between Moin and Rahimtoola – utterly fail to support the Arms for Money Argument. I will consider, in due course, the significance of the use of the word “trust” in this correspondence: the only point that needs to be made for the present is that according to Moin’s and Rahimtoola’s own words the Transfer was not in payment of weapons but “in trust”.
- (c) There is a far more plausible explanation for the Transfer, which is that Moin was concerned to ensure that the Fund did not end up in India’s hands. In short, in light of events in Hyderabad, Moin was making sure that the Fund was held safely away from India. In reaching this conclusion as to the purpose of the Transfer, I am not necessarily finding that the Safeguarding Argument, as advanced by Pakistan, is correct. The Safeguarding Argument, as framed by Pakistan, postulates an absolute transfer. The Princes and India, for their part, contended that there was no absolute transfer, but rather a transfer on trust. That argument – whereby only the legal interest in the Fund was transferred – might be said to be a variant of the Safeguarding Argument and was, according to the Princes and India, a proper explanation of the Transfer. I consider the nature of the transfer and the Safeguarding Argument in Section H below. For present purposes, I simply conclude that I consider it to be clear beyond doubt that “safeguarding” in some form or other – getting the money away from India’s potential clutches – was Moin’s object in effecting the Transfer. It had nothing to do with the payment of weapons.

(5) Conclusion

216. Although the Government of Hyderabad was involved in the purchase of weapons in order to resist what Nizam VII saw as attempts by India forcibly to annex Hyderabad, and although the Second Account was used to pay for some of these weapons, I do not consider that the Transfer had anything to do with the purchase of weapons or the compensation of Pakistan (in any way) for the purchase of weapons. The purpose of the Transfer was, as I have found it, entirely different. For these reasons, I reject the Arms for Money Argument.

H. ABSOLUTE TRANSFER OF THE FUND: THE SAFEGUARDING ARGUMENT

(1) Introduction

217. I have concluded, in my consideration of the Arms for Money Argument, that the purpose – or, at least, Moin’s purpose – in effecting the Transfer was to “safeguard” the Fund. That does not, however, mean that I have concluded that the Safeguarding Argument – as contended for by Pakistan and as summarised in paragraph 17(2) above – succeeds. Whilst I am satisfied that the purpose of the Transfer was to render the Fund less accessible to India on India’s successful annexation of Hyderabad, it does not follow from this that the Transfer was absolutely for the benefit of Pakistan (as Pakistan contended) or, indeed, absolutely for the benefit of Rahimtoola in his personal capacity.

218. The Princes and India contended that the Transfer was made on trust. The trustee, it was contended, was Rahimtoola in his personal capacity. Three different sorts of trust were contended for by the Princes and India:

- (1) An express trust in favour of Nizam VII;
- (2) A constructive trust whereby Rahimtoola assumed the obligations of a trustee towards Nizam VII; or
- (3) A resulting trust, whereby Rahimtoola held on trust because Nizam VII is presumed not to have intended to dispose of his money gratuitously.

In considering whether any one of these trusts has been established, I will inevitably be considering the alternative case, namely Pakistan's case, which (as I have described) was that there was no trust at all and that Pakistan received the Fund absolutely by virtue of a transfer to her High Commissioner, then Rahimtoola.

219. I shall begin by considering the relevant facts. I will then consider whether, on the basis of my findings, a trust has or has not been established.

(2) The facts

(a) Approach

220. I shall consider the facts under the following heads:

- (1) Whether, and if so in what terms, Nizam VII authorised the Transfer.
- (2) What Moin intended when effecting the Transfer and whether this was within or without the scope of such authority as Nizam VII had conferred on him.
- (3) Rahimtoola's intentions in relation to the Transfer.

(b) Authorisation by Nizam VII

221. For the reasons I have given,¹⁵⁷ I do not consider that any pre-existing authority that Nizam VII gave to his Government or to officials within his Government as such persisted after 17 September 1948. The Nizam accepted the resignation of his Government and – again, for the reasons I have given¹⁵⁸ – that is a legal fact that I must simply accept. Accordingly, any powers or authority conferred on Moin in his capacity as an official within the Nizam's Government ended on 17 September 1948. Given the publicity that surrounded Nizam VII's announcement, and given Moin's obvious interest, it is unrealistic to consider that Moin would not have heard of the resignation of the Government of Hyderabad before 20 September 1948, when the Transfer was effected.¹⁵⁹

¹⁵⁷ See paragraphs 199-201 above.

¹⁵⁸ See paragraph 200 above.

¹⁵⁹ I was not addressed on the question of whether Moin's ostensible authority to make the Transfer persisted after 17 September 1948 and make no findings in this regard. The situation was, obviously, a fraught and confusing one, and a strong case could be made for the persistence of Moin's ostensible authority. The point is actually an

222. Of course, that does not mean that the Nizam could not have conferred authority on Moin independently of his office and even very informally. As I have also found, the Nizam's authority *qua* Nizam persisted undiminished even after the end of Operation Polo.¹⁶⁰ The question is not whether Nizam VII had the authority, but whether he exercised it.
223. I have described the payments out of the Second Account. A number of these were made for the provision of weapons to resist perceived Indian aggression and were made – as I have found – with the knowledge and authority of Nizam VII.¹⁶¹
224. It seems to me that as at the relevant date – 20 September 1948 – it is highly likely that Nizam VII would have wanted his officials to safeguard the monies in the Second Account, in the sense that he would have wanted these monies placed (i) out of India's reach but (ii) under his own control. In short, I consider that Nizam VII would have wanted the Fund to be protected from India, but not at any price. He would not have wanted the Fund paid away irrevocably. That, to my mind, is highly suggestive of some kind of trust arrangement, where the legal title in the Fund was transferred, but where the beneficial interest was retained by Nizam VII.
225. Equally, I consider that it would have been very unlikely for the Nizam to have entrusted this safeguarding function to a private person, however eminent. The Nizam's dealings were at a high level with Pakistan (both states operated together in the procurement of weapons) and it seems to me that the Nizam would only have entrusted a safeguarding function to Pakistan and not, for instance, to Rahimtoola personally.
226. It is, of course, possible, that between Hyderabad's capitulation on 17 September 1948 and the Transfer on 20 September 1948, Nizam VII's views underwent as dramatic a change as the fortunes of Hyderabad, and that Nizam VII decided, more-or-less immediately, to throw his lot in with India. In other words, given that India had succeeded in annexing Hyderabad, it was pointless for Nizam VII to seek to safeguard the Fund. I find such a change of attitude in so short a space of time to be unlikely. I consider that, as at 20 September 1948, Nizam VII would have remained concerned to safeguard the Fund in the manner that I have described and would have wanted the Fund kept out of India's hands. Equally, I have little doubt that, as the years passed, Nizam VII's attitude would have changed.
227. However, I am sceptical as to whether – in these fraught days of September 1948 – Nizam VII would have been able to communicate his wishes to those he trusted, specifically to Moin. Whatever his status, Nizam VII was, after the success of Operation Polo, in India's custody, and his lines of communication would have been extraordinarily difficult even before then, given Hyderabad's landlocked state.¹⁶²

academic one: had the Bank declined to make the Transfer, in accordance with the account-holder's express request, the rival claims to the Fund would simply have been asserted in relation to the Second Account, rather than the Rahimtoola Account.

¹⁶⁰ See paragraphs 193ff above.

¹⁶¹ See paragraph 212 above.

¹⁶² Even before Operation Polo, the documents before me made reference to the fact that India exercised significant blocking control over Hyderabad's ability to transmit cables.

228. I find that there was no communication of any sort from Nizam VII to Moin authorising the Transfer – albeit that the Transfer was in accordance with the Nizam’s wishes, as unexpressed to Moin. This is consistent with the evidence before me:

(1) Nizam VII consistently maintained – in documents created for the purposes of or in relation to the 1954 Proceedings – that the Transfer was made without his authority or knowledge. As to this:

(a) In a letter dated 9 October 1955, Nizam VII said this:

“I am in receipt of your letter of 8 October 1955, and, in reply, I have to state that the money deposited in London with the Westminster Bank was only to be used for the purposes of the Hyderabad State, and there was no intention of transferring the amount to any other Government or person, nor do I remember to have issued any Firman, authorising transfer of the money to any Government or person.

(2) My Peshi Office has made a thorough search of its records, but no copy of any such Firman, authorising transfer of the balance to the credit of the account with the Westminster Bank, to Mr Habib Rahimtoola, or to the Pakistan High Commissioner in London, is traceable.

(3) My Peshi Secretary will be prepared to testify accordingly, if necessary.”

This reads like a clear statement that the Transfer was not authorised, and that, plainly, is the impression intended to be conveyed. Read carefully, the letter might be said to be consistent with a transfer of the Fund to Pakistan on trust for the Nizam pursuant to an informal (unwritten) instruction from the Nizam. The letter also avoids expressly stating that Moin acted without authority. Such unexpressed reservations would, however, imply a high degree of disingenuousness on the part of Nizam VII.

(b) In Nizam VII 1, the Nizam was rather more emphatic. Paragraph 2 states:

“On or about 1 April 1948, and at all times thereafter up to and including 16 September 1948, [Moin] was my Finance Minister. It came to my knowledge that by his letter dated 16 September 1948, [Moin] asked [the Bank] to close the [Second Account] by transferring the balance to the credit of [Rahimtoola] and the [Bank] complied with the said instructions on 20 September 1948 by transferring the sum of £1,007,940.9.- from the [Second Account] to the account in the name of [Rahimtoola]. I say that this transfer was made by [Moin] without my knowledge or authority. I say that at no time had I given any direction or sanction or authority either orally or in writing or by way of Firman or otherwise to [Moin] or to any other person to transfer the said sum of £1,007,940.9.-, or any part thereof, to [Rahimtoola], or to the Pakistan Government or to any person representing the Government of Pakistan. In fact, on learning about the said unauthorised transfer of the said sum of £1,007,940.9.- I cabled to [Moin] on 27 September 1948 to take immediate steps to have the said sum retransferred to my State Account.”

There is no room for ambiguity or secret reservation here. This is a formal affidavit, prepared for the purposes of the 1954 Proceedings, and in response to a gap in the evidence identified by Upjohn J. Doubtless it was drafted by lawyers – the language has a definite legalistic flavour – but I

regard it as inconceivable that Nizam VII would not have appreciated that this was an important document and that in swearing the affidavit he was swearing to the truth of this account. If there was an informal instruction to Moin, then Nizam VII was, I consider, telling a knowing untruth in this document.

- (c) There are a number of other documents in which the Nizam asserts that the Transfer was unauthorised, notably the 1956 Assignment¹⁶³ and the correspondence immediately following the Transfer, in which Nizam VII sought to recover the Fund.¹⁶⁴

It is necessary, of course, to treat this evidence with some caution, as it was produced well after the events in question and in circumstances where it is clear that Pakistan was disinclined to return the Fund to the Nizam. The case that Nizam VII was advancing in the 1954 Proceedings was that Moin had acted without authority and in breach of trust. The Statement of Claim in the 1954 Proceedings provided as follows:

- “2. In relation to the [Bank], [Moin] was entrusted by [Nizam VII] and his said Government with power to order withdrawals from the said deposit account, but in relation to [Nizam VII] and his Government, [Moin] was not entitled to exercise any such powers of withdrawal without the prior consent of [Nizam VII] or his said Government or a person or persons duly authorised by him or them in that behalf.
3. On or about 14 or 16 September 1948, [Moin], in breach of trust and without any instructions or consent of [Nizam VII] or his said Government or any one duly authorised by him or them in that behalf, directed the [Bank] to transfer the said sum of £1,007,940.9.0 together with all interest accrued thereon, to an account with the [Bank] in the name of [Rahimtoola].
4. On or about 20 September 1948, the [Bank], pursuant to the said direction, transferred the said sum to an account with itself in the name of [Rahimtoola].
5. To the knowledge of [Rahimtoola], the said money so transferred to him was the property of [Nizam VII] or his said Government, and [Rahimtoola] received the same with that knowledge and without giving any consideration for such transfer. Insofar as may be necessary, the Plaintiffs also allege that, to the knowledge of [Rahimtoola], [Moin] directed the transfer of the said sum to [Rahimtoola] on the footing that the latter would hold the same in safe custody for [Nizam VII] or his Government.”

The Nizam’s evidence obviously goes to support this claim. Nevertheless, despite the fact that Nizam VII’s affidavit was produced in support of this case, I do not consider that it is appropriate to conclude that Nizam VII lied in this affidavit. I consider that he told the truth, and that the Transfer was indeed unauthorised by him. Of course, what his evidence leaves unsaid is what was irrelevant in the 1954 Proceedings, namely Nizam VII’s private views as to the desirability of safeguarding the Fund at the time of the Transfer.

¹⁶³ See paragraphs 164-166 above.

¹⁶⁴ See paragraph 141*ff* above.

- (2) The Nizam's staff – notably, in Gupta 1 – confirmed that the Transfer was unauthorised. It is important to note that – by this stage – the Nizam's officials were themselves having to decide where Hyderabad's future and their loyalties lay – with India or in opposition to India. Gupta fell within the first category, becoming an Indian civil servant in future years.
- (3) Moin fell on the other side of the divide and opposed the Indian invasion. He never provided a statement in formal terms, whether in the 1954 Proceedings or otherwise. However, he did make one public comment of significance, which is consistent with his acting in accordance with the unexpressed will of Nizam VII. In response to assertions made by India at the United Nations regarding the transfer of monies to the Rahimtoola Account, Moin wrote the following letter to *The Times*, which was published on 1 October 1948:

“In your issue of today you have given prominence to the cryptic allegation made by the representative of India at yesterday's meeting of the Security Council regarding the transfer of certain funds of the Government of Hyderabad in the Westminster Bank. Some time ago, in view of the invasion of Hyderabad, I took, in my capacity as Finance and Foreign Minister of Hyderabad, steps which I considered necessary for safeguarding the assets of the State. I am now in communication with the Nizam concerning the funds in question, which are fully intact.”

Whilst it would be dangerous to read too much into this statement, the sense one gains is that Moin was acting on his own, without direct instruction, in what he considered was consistent with the interests of Hyderabad and Nizam VII.

229. I conclude that Moin acted in what he considered to be the best interests of Nizam VII and Hyderabad. He sought to preserve Hyderabad's assets from India. This involved preventing even the Nizam from accessing the funds he sought to protect, as evidenced by his evasion of the Nizam's requests to have the Fund repaid into the Second Account.¹⁶⁵ It may very well be that Moin's conduct carried with it the silent approbation of Nizam VII, but I find that any such approbation was indeed silent. Part of the service Moin rendered to Hyderabad was, as I find, a decision to act alone – without Governmental cover – in what he considered to be the best interests of his ruler and his country. But that does not change the fact that I find the Nizam's evidence to be substantially true (whatever his private feelings may have been) and that after 17 September 1948 Moin acted without authority or instruction from Nizam VII.
230. If, contrary to my finding, there was any instruction from Nizam VII, it would have been of the vaguest and most general sort: to safeguard the assets of Hyderabad (or the Nizam's assets, which is the same thing) from India.

(c) ***Moin's intention***

(i) ***Introduction***

231. Two, related, issues arise.

¹⁶⁵ See the documents referenced at paragraph 141 footnote 102 above. Moin's insistence that the Nizam's request to have the Fund re-transferred be supported by the actual signature of Nizam VII supports this: it was both a delaying tactic and a means of testing whether Nizam VII was acting on his own behalf.

- (1) To whom was the transfer made – to Rahimtoola personally or to Rahimtoola as High Commissioner?
- (2) On what basis was the transfer made – absolutely or on trust?

These issues are, of course, inter-related and I consider them together.

232. There is a question anterior to these issues, namely whether it is open to me to re-visit the first of these issues, given that this issue had already been decided during the course of the 1954 Proceedings. I consider first, therefore, whether an issue estoppel arises, before secondly considering (if it is open to me) the basis upon which the transfer was made.

(ii) *Issue estoppel*

233. The parties before the House of Lords in the 1954 Proceedings were the same as the parties before me.
234. The Princes and India acknowledge that an issue estoppel (but not a cause of action estoppel) can arise in the present circumstances, but they contend that no issue estoppel will arise as a result of findings in earlier proceedings where there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, being material which could not by reasonable diligence have been adduced in those proceedings.
235. The authority cited in support of this proposition was *Arnold v. National Westminster Bank plc*.¹⁶⁶ In that case, the House of Lords held that although issue estoppel constituted a complete bar to relitigation between the same parties of a decided point, its operation could be prevented in special circumstances. Lord Keith said this:¹⁶⁷

“It is to be noted that there appears to be no decided case where issue estoppel has been held not to apply by reason that in the later proceedings a party has brought forward further relevant material which he could not by reasonable diligence have adduced in the earlier. There is, however, an impressive array of dicta of high authority in favour of the possibility of this. It was argued for the defendants that exceptions to the rule of issue estoppel should be admitted only in the case of the earlier judgment being a default or a foreign judgment and further that an exception should not be recognised where the point at issue had actually, as here, been raised and decided in the earlier proceedings, but only where the point might have been but was not so raised and decided. The later dicta are, however, adverse to these arguments. It was argued that there was no logical distinction between cause of action estoppel and issue estoppel and that, if the rule was absolute in the one case as regards points actually decided, so it should be in the other case. But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different

¹⁶⁶ [1991] 2 AC 93. See also *Takhar v. Gracefield Developments Ltd*, [2019] UKSC 13, where the approach of Lord Keith in *Arnold* was affirmed. The Supreme Court was, in this case, considering the more serious case where the earlier judgment had been fraudulently obtained. That case is *a fortiori* the present, where it was common ground that no question of fraud arose.

¹⁶⁷ At 108-109.

complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl Zeiss Case*, [1967] 1 A.C. 853, 947.”

236. I conclude that whilst an issue estoppel will generally prevent the re-litigation of the issue previously determined, that rule is subject to an exception, not broad but wide-ranging, whereby an issue previously determined may be revisited if it is in the interests of justice to do so. Obviously, the rule that an issue previously decided between the same parties must stand for the future is an important one: nevertheless, an issue previously decided may be re-opened where it is in the interests of justice to do so. Typically, that test will be satisfied where there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, being material which could not by reasonable diligence have been adduced in those proceedings.
237. The question of the capacity in which Rahimtoola acted was, of course, central to the 1954 Proceedings. Unless Rahimtoola received the Fund as the agent of Pakistan, Pakistan’s assertion of sovereign immunity would fail. In a very real sense, Rahimtoola’s capacity was the issue before the House of Lords.
238. In these circumstances, I have naturally been cautious about whether it is open to the Princes and India to re-open this question. I have concluded that it is, for the following reasons:
- (1) As Lord Keith noted, underlying the principle of issue estoppel is the need to work justice between the parties. Just as cause of action estoppel prevents the relitigation of claims, so issue estoppel prevents the relitigation of issues that have previously been determined judicially between the same parties.
 - (2) Lord Keith noted that the inflexible application of the doctrine might, in special circumstances, work not justice but injustice between the parties. I consider that to be the case here. The 1954 Proceedings were concerned with a preliminary – albeit very important preliminary – question as to whether the proceedings could properly continue. The decision that the case could not proceed, by reason of Pakistan’s sovereign immunity, took place before discovery and on the basis of limited written evidence. Since the commencement of these proceedings, a great deal of work has been done to produce voluminous additional material which was not before any of the courts in the 1954 Proceedings. That material has been the subject of very careful examination over the many days of this trial.
 - (3) Whilst not all of this new material necessarily goes to the question of Rahimtoola’s capacity, the question of capacity is one that is coloured by many of the contemporaneous documents. Thus, for example, whilst it cannot be said that the 15 September 1948 letters are determinative of the question of capacity, they

certainly provide valuable insight into Rahimtoola's conduct and so the capacity in which he acted. In these circumstances, without seeking to identify any particular document that makes a difference in terms of outcome on this issue, I consider that it is appropriate to determine the matter of Rahimtoola's capacity afresh in the light of all of the evidence, including the additional material that has been adduced by the efforts of the parties since the decision of the House of Lords was handed down in the 1954 Proceedings.

(iii) *The Transfer*

239. When considering Moin's thinking and intentions, I consider that it is impossible to separate the questions of to whom the Transfer was to be made and on what basis. The two points are inextricable when considering the facts.

240. I conclude that Moin's intention was to transfer the Fund to Rahimtoola in his (Rahimtoola's) capacity as High Commissioner and that the Transfer to Rahimtoola was on the basis that he would, in his official capacity, hold the Fund on trust for Nizam VII. I have reached this conclusion for the following reasons:

- (1) The entire purpose of safeguarding would be defeated if the Transfer was an absolute one. The whole point – as I find – of safeguarding was not to divest Hyderabad or Nizam VII of property, but to ensure that it did not fall into the hands of India, taking account of the fact that – as a result of the successful outcome of Operation Polo – Nizam VII might very soon be or already was in the power of India. In these circumstances, a transfer on trust – as opposed to an absolute transfer – made perfect sense.
- (2) This is consistent with the arrangement Moin reached with Rahimtoola, as described in the 15 September 1948 letters. Whilst the use of the word “trust” is by no means conclusive of the existence of a trust, it does seem to me that the use of this word indicates very clearly that something other than an absolute transfer was intended by Moin.
- (3) That is also consistent with other statements of Moin, notably his letter to *The Times* set out in paragraph 228(3) above. Furthermore, this was undoubtedly the impression that the Bank got: as I have described,¹⁶⁸ the Bank's view was that the Rahimtoola Account was in Rahimtoola's name as High Commissioner. The Bank must have got that impression from somewhere, and I anticipate that it would likely have been Moin or someone (like Mr Khan) acting for Moin. I consider that the Bank's understanding reflects what Moin intended.
- (4) Rahimtoola was the transferee of the Fund because he was the High Commissioner. The fact that Rahimtoola was Pakistan's High Commissioner was no coincidence, but the very reason Rahimtoola was selected:
 - (a) Given that Moin was acting to preserve Hyderabad state assets (or, which was the same thing, the Nizam's assets) from another state (India), he would

¹⁶⁸ See paragraphs 118-120 above.

be foolish to entrust the holding of the Fund to a private individual. It would be far safer to entrust the monies to a state actor, like Pakistan.

- (b) What is more, Pakistan – indeed, Rahimtoola himself – had had prior involvement in the monies that were ultimately transferred. I have described the involvement of Pakistan, through Rahimtoola himself, Shoaib, and Mirza, in Transactions 3, 4, 6, 7 and 8.¹⁶⁹ It is perfectly clear that these persons were acting not on their own account, but for Pakistan. When effecting the Transfer out of the Second Account to one of these persons (Rahimtoola), it beggars belief that Moin could have intended Rahimtoola to receive the Fund in his personal capacity.
- (c) If Moin had given any thought to the question of what would have happened had Rahimtoola suddenly died, it is clear that Moin would have wanted Rahimtoola's successor to be as reliable as Rahimtoola: that could best be assured by defining the trustee by reference to the office he held, and that I consider is what Moin intended.

I consider it overwhelmingly unlikely that had Rahimtoola not been High Commissioner, Moin would have made the Transfer to him.

- (5) A transfer to Rahimtoola in his official capacity on trust for the Nizam would have been consistent with the Nizam's own intentions, as I have found them to be.¹⁷⁰ Of course, I have found that these intentions were not communicated to Moin, and that Moin was acting without the authority of the Nizam in making the Transfer. However, as his letter to *The Times* demonstrates, Moin's aim was to act in accordance with what the Nizam's intentions would have been, and I consider that he would have had a good understanding of these intentions and would have wanted to act in accordance with them.

(d) *Rahimtoola's intention*

241. I turn to the question of Rahimtoola's intention. I have described Rahimtoola's evidence in paragraphs 111 and 112 above and stated my conclusions as regards both its strengths and its weaknesses. I have found that his evidence was essentially directed to the capacity in which he received the Fund, because this evidence was necessary to establish or support Pakistan's claim to sovereign immunity. Whilst I consider that there may have been a degree of over-emphasis in regard to the question of capacity, I do not consider this evidence to be in its essence unreliable. To the contrary: I believe it. It is consistent with what I have found to be Moin's intentions as regards the question of the capacity of the transferee; and it seems to me the presence of Zafrullah – which I accept was the case – renders this clearly a case where Rahimtoola was acting in his official capacity. The Princes and India contended that the lunchtime meeting that Rahimtoola had with the Chairman of the Bank¹⁷¹ demonstrated that Rahimtoola regarded the Fund as his own. I do not consider that what Rahimtoola is recorded as saying over an informal lunchtime meeting is remotely persuasive as to how Rahimtoola held the Fund. Indeed, the note kept by the Bank does not even record Rahimtoola's words. It merely records the

¹⁶⁹ See paragraph 211 above.

¹⁷⁰ See paragraphs 221ff above.

¹⁷¹ See paragraphs 148-149 above.

impression of Lord Aldenham that Rahimtoola “seemed to regard [the Fund as] at his own personal disposition”.

242. The question of the basis upon which Rahimtoola received the Fund receives rather less attention in Rahimtoola’s evidence, for the reasons I have given.¹⁷² Thus – as I have described – he makes no mention of the 15 September 1948 letters. These letters – and particularly that authored by Rahimtoola himself – make very clear that this was not an absolute transfer, but a transfer where the beneficial interest in the Fund remained vested in Nizam VII. I conclude that Rahimtoola’s intentions are as stated in his letter of 15 September 1948, namely that the Fund would, on transfer, be held on trust for Nizam VII. I find that that intention is to be attributed to Pakistan and that successors to Rahimtoola, in their capacity as High Commissioner, would similarly hold on trust for Nizam VII.

(3) The law

(a) Introduction

243. As I have noted, the Princes and India contended for a trust on one of three bases: express trust; constructive trust; and resulting trust. I consider these three types of trust in turn below, and – in light of the facts as I have found them – state my conclusions as to the basis upon which the Fund is held.

(b) Express trust

(i) The three certainties

244. An express trust will arise where the “three certainties” essential for the creation of a trust are met:

- (1) There must be certainty of intention to create a trust on the part of the settlor. In her written submissions, India suggested that there needed to be a common intention by the transferor and the transferee.¹⁷³ I do not accept that that is a requirement for an express trust. It is the intention of the settlor that counts, and the intention of the trustee in accepting the trust is irrelevant. The trustee can, of course, refuse to accept the role of trustee, but that is not a point that goes to the necessary intention to create a trust.
- (2) There must be certainty in relation to the subject-matter of the trust.
- (3) There must be certainty as to the beneficiary of the trust.

245. Although conceptually speaking the three certainties are separate, they can seldom in practice be segregated. In the present case, assuming there was an intention to create a

¹⁷² See paragraph 124 above.

¹⁷³ India’s written submissions at paragraph 34: “An express trust will arise where the transferor and transferee intended that the property transferred between them should be held on trust...”.

trust, there can be little doubt as to the second and third certainties. The subject-matter of the trust was the Fund; and the beneficiary Nizam VII.¹⁷⁴

(ii) *Agency*

246. In this case, the settlor would have been Nizam VII – the money was his – acting through his agent, Moin. However, since I have found that Moin had no authority to effect the Transfer – whether on trust or otherwise – it follows that no express trust can arise in this case.

247. If, contrary to my finding, Nizam VII did give Moin authority to make the Transfer on his (the Nizam's) behalf, then that authority would have been along the lines set out in paragraph 230 above. It would have been a broad authority to safeguard the assets of Hyderabad (or the Nizam's assets, which is the same thing) from India. Assuming – contrary to my primary finding – that Moin did have authority, it is necessary to consider the question of intention more closely:

- (1) The one thing that is absolutely clear is that Nizam VII did not, personally, do anything to effect the Transfer or to constitute the Fund. He acted, if at all, through Moin.
- (2) This gives rise to difficult questions as to whose intention is relevant where some authority has been conferred by Nizam VII on Moin, but where that authority is (or may be) limited. In short, there is a question of the interplay between authority that may have been granted to Moin and the principal's (i.e. the Nizam's) ultimate wishes.
- (3) This question was considered in *Day v. Day*.¹⁷⁵ In 1954, Mrs Day, with her husband, acquired a home in Southampton (the "property"). The property was held jointly and, when Mr Day died, the property vested in Mrs Day by survivorship. At the time of her death in 2008, Mrs Day was survived by six children. In her will, she directed that the property be sold and the sale proceeds divided between her children equally. Prior to her death, in about 1985, Mrs Day sought to enable one of her children (her son Terence) to obtain a loan from a building society. The only way this could be achieved was by giving security (by way of mortgage) over the property. Mrs Day executed a general power of attorney pursuant to the Powers of Attorney Act 1971 in favour of her solicitor. Acting within his actual authority, the solicitor conveyed the property from Mrs Day alone to Mrs Day and her son to be held by them as beneficial joint tenants. As a result, on Mrs Day's death, the entirety of the beneficial interest in the property accrued to Terence, and the property could not be shared amongst all of the children as intended by Mrs Day's will. The borrowing secured over the property had been repaid well before Mrs Day's death. Mrs Day's other children sought rectification of the conveyance so as to provide that the property was held by Mrs Day and Terence on trust for Mrs Day absolutely.

¹⁷⁴ Pakistan expressly disavowed any suggestion that there might be a trust entitling Pakistan to spend the fund on arms, holding any residue on trust for Nizam VII: Transcript Day 5/pp.163-164, 168, 170.

¹⁷⁵ [2013] EWCA Civ 280.

- (4) At first instance, the claim for rectification failed. The recorder trying the case concluded that because the solicitor had the power to effect the conveyance in the manner that he did (i.e. he had actual authority) and because there was no evidence that the solicitor was acting, in any way, against instructions received from Mrs Day, the claim for rectification had to be dismissed.
- (5) On appeal, the Court of Appeal stressed that the conveyance was in the nature of a voluntary settlement by Mrs Day. It was, in short, a unilateral transaction. Many different types of instrument can be rectified and the cases show that a distinction is drawn between bilateral and multilateral instruments on the one hand and unilateral instruments on the other. It would be odd – indeed, impossible – for the law to require some kind of mutuality of intention in order to rectify a unilateral instrument. Given that a unilateral transaction can be brought about by the sole will of the person effecting the transaction, one would expect the requirements for rectification to reflect this, as the Court of Appeal found that they did:¹⁷⁶

“What is relevant in such a case is the subjective intention of the settlor. It is not a legal requirement for rectification of a voluntary settlement that there is any outward expression or objective communication of the settlor’s intention equivalent to the need to show an outward expression of accord for rectification of a contract for mutual mistake...In *Chartbrook Ltd v. Persimmon Homes Ltd*, [2009] UKHL 38, the House of Lords agreed with Lord Hoffmann’s (*obiter*) explanation of an objective test for rectification for mutual mistake in the case of a contract so as to bring the final document into line with the parties’ prior consensus objectively ascertained.¹⁷⁷ Nothing he said there touched upon the requirements for rectification for unilateral mistake in a non-contract case. Although, as I have said, there is no legal requirement of an outward expression or objective communication of the settlor’s intention in such a case, it will plainly be difficult as a matter of evidence to discharge the burden of proving that there was a mistake in the absence of an outward expression of intention.”

- (6) Having established that this was a question of unilateral intention, the question arose, in this case, of whose intention was relevant: that of Mrs Day or that of her solicitor, her attorney? The Court of Appeal held that – on the facts of this case at least – it was Mrs Day’s intention that mattered:

“25. ...In the first place, the doctrine of rectification is concerned with intention, or rather the mistaken implementation of intention, rather than the power and authority to effect a particular transaction. The intention of the principal and the scope of the agent’s authority may, and often will, overlap, but they are not synonymous concepts. In the case of a voluntary settlement, rectification hinges on whether the settlor executed the settlement in the mistaken belief that it implemented his or her intention. Whether or not the settlor’s solicitor was authorised to draw up the settlement on any particular terms or, as here, was acting within his actual or apparent authority in executing it on behalf of, and in the name of, the settlor is a different question. The recorder appears to have been of the view that [the solicitor] had authority to execute the conveyance on behalf of Mrs Day because he acted pursuant to a general power of attorney and that was a complete

¹⁷⁶ At [22]. See also [21], citing the decision of Brightman J in *Re Butlin’s Settlement Trusts*, [1976] Ch 251 at 260-261, 262.

¹⁷⁷ This (*obiter*) explanation is in any event no longer good law: see the decision of the Court of Appeal in *FSHC Group Holdings Ltd v. GLAS Trust Corporation Ltd*, [2019] EWCA Civ 1361. Nothing in that decision affects what the Court of Appeal said in *Day v. Day*.

answer to any claim Mrs Day might have made in her lifetime for rectification of the conveyance. Mrs Day, however, was the settlor and it is her intention and the implementation of her intention, and not the scope of [the solicitor's] authority, which are in issue on the claim for rectification.

26. Secondly, on the issue of the scope of authority, the recorder appears to have thought it axiomatic that the general power of attorney, by virtue of its very generality, authorised Mr Froud to execute, on Mrs Day's behalf, a conveyance of the property on such terms as he saw fit to facilitate the Gateway mortgage. If that was the view of the recorder, it is plainly wrong. A solicitor's actual authority is prescribed by any instructions expressly given by the client, whether or not those instructions are then implemented by the solicitor acting pursuant to a general power of attorney. So far as a third party is concerned, a general power of attorney may well clothe the solicitor with apparent authority to effect a transaction and so make the transaction binding on the principal even though the transaction was outside the solicitor's actual authority. In so far, however, as there is any overlap between the principal's intention in carrying out a particular transaction and the scope of the agent's authority to execute that transaction, it is the actual authority of the agent that is relevant and not the agent's apparent or ostensible authority. The actual instructions to the agent may cast light on the actual intention of the principal, which is the relevant factor for rectification. Apparent or ostensible authority of the agent may make the transaction binding on the principal even where it does not coincide with the actual intention of the principal and the express instructions given to the agent, but (subject to the facts of any particular case) there is no obvious reason why such apparent authority should throw any light on the right to rectification.
27. Thirdly, since Mrs Day never formed any intention to confer a beneficial interest in the property on the defendant, the recorder could only reject the claim for rectification if Mrs Day's overriding intention was that the proposed transaction should be carried out in any way that [the solicitor] might choose. The recorder, however, never directly addressed that question. He found, on the mere basis of the grant of the general power of attorney, that [the solicitor] was authorised to execute the conveyance on such terms as he saw fit to facilitate the Gateway mortgage. Not only was that analysis wrong for the reasons I have given, but it simply did not address the critical question of Mrs Day's actual intention and, in so far as it had any relevance to that issue, the actual instructions given to [the solicitor].
28. In fact, apart from the generality of the power of attorney itself, there was no evidence that the intention of Mrs Day was that [the solicitor] could carry out the proposed transaction in any way he chose. The mere statement of such a possible intent shows its inherent improbability. It would mean that it would have been Mrs Day's intention, and within [the solicitor's] actual authority, to permit Mr Froud to arrange for the property to be conveyed both legally and beneficially to the defendant alone. I cannot see how such a remarkable conclusion, so obviously against Mrs Day's interests, could be supported by the mere existence of a general power of attorney or, indeed, anything short of the clearest evidence that those were her actual instructions."
- (7) In these circumstances, the Court of Appeal concluded that Mrs Day's instructions to her solicitor were to do what was necessary, consistently with Mrs Day's best interests, to allow the property to be used to enable Terence to raise funds. The transfer of a beneficial interest in the property to Terence went beyond those

instructions and the solicitor's actual authority and was inconsistent with Mrs Day's intention.¹⁷⁸

- (8) *Day v. Day* is of obvious relevance to the present case. The Transfer of the Fund was a unilateral transaction, and there can be no question of Nizam VII being bound to a transaction within Moin's ostensible authority but outside any actual authority conferred on Moin by Nizam VII, as might be the case if Moin had executed a contract with a third party on the Nizam's behalf. In this case:
- (a) If, contrary to my conclusion, Nizam VII did give Moin authority to effect the Transfer, then (even if that authority had been broadly framed so as to do anything necessary to safeguard the Fund, without limitation) the Nizam's intention would have been to effect a qualified and not an absolute transfer.
 - (b) Had Moin sought to effect a transfer that was absolute, then – as *Day v. Day* shows – the transfer would have been rectified or read as being of the legal estate only.
 - (c) As it happens, Moin did not seek to effect an absolute transfer. It is plain that – as I have described – he intended to create a trust in favour of Nizam VII.
- (9) Accordingly, if (contrary to what I have found) Moin had the authority to make the transfer, an express trust came into being on 20 September 1948, as a result of which Rahimtoola held the Fund, in his capacity as High Commissioner, on trust for Nizam VII. As it is, because Moin had no such authority, no such express trust came into being.

(c) **Constructive trust**

(i) *The law*

248. The English law regarding constructive trusts and constructive trusteeship is notoriously woolly or – as *Lewin* describes it – “an elusive creature”.¹⁷⁹ In *Carl Zeiss Stiftung v. Herbert Smith & Co (No 2)*, Edmund-Davies LJ noted:¹⁸⁰

“English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court in technicalities in deciding what the justice of a particular case might demand.”

249. As a result, the books agree that “[c]onstructive trusts can arise over a wide variety of situations”,¹⁸¹ but there is little consensus over what, exactly, these situations are. The Princes and India relied upon what has been termed a constructive trust of “the first kind”:

- (1) *Lewin* describes a constructive trust of “the first kind” in the following terms:¹⁸²

¹⁷⁸ At [29].

¹⁷⁹ Tucker, Le Poidevin and Brightwell (eds), *Lewin on Trusts*, 19th ed (2015) (*Lewin*) at [7-010].

¹⁸⁰ [1969] 2 Ch 276 at 300.

¹⁸¹ Glister & Lee, *Hanbury & Martin: Modern Equity*, 21st ed (2018) at [12-006]. See also *Lewin* at [7-015].

¹⁸² *Lewin* at [7-011], emphasis supplied.

“Constructive trusts of the first kind arise where persons have accepted or assumed the role of a trustee by transactions not impeached by the claimant, independently of, and preceding, any breach of duty. Such a constructive trustee really is a trustee. He does not receive the trust property in his own right, but by a transaction which was intended to create a trust from the start. The trustee’s possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and any subsequent appropriation of the property to his own use is a breach of that trust.”

Snell describes this sort of trust as one “imposed on property to give effect [to] a person’s intention to make a gift to another or to act as an express trustee, but where the formalities necessary to give effect to the gift or the express trust have not been fully complied with”.¹⁸³

- (2) A trusteeship *de son tort*¹⁸⁴ is one example of a constructive trust of the first kind. As to this form of constructive trust, *Lewin* says this:¹⁸⁵

“If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee *de son tort* and he may be called to account by the beneficiaries for the money he has received under the colour of the trust. A trustee *de son tort* closely resembles an express trustee and is a constructive trustee of the first kind in the classification of constructive trusts we have given earlier in this work. The principle is that a person who assumes an office ought not to be in any better position than if he were what he pretends: he is accountable as if he had the authority which has been assumed. While it is essential, if a person is to become a trustee *de son tort*, that he consciously takes the office of trustee, it does not matter whether he knows all the trusts or the extent of his powers. For it is a trustee’s duty to acquaint himself with the trusts and his powers upon his taking office, and a trustee *de son tort* can be in no better position.”

(ii) *A constructive trust “of the first kind” generally*

250. This is not a case where it can be said that there was an intention to create a trust, but where the necessary formalities to do so have not been complied with. As I have found, there was no intention on the part of Nizam VII to create any kind of trust. Had there been such an intention, an express trust would have arisen.¹⁸⁶ However, such an intention to create a trust is not required where the constructive trust alleged is a trusteeship *de son tort*.

(iii) *A trustee de son tort*

251. I find that Rahimtoola, in his capacity as High Commissioner, was a trustee *de son tort*. The label is – at least in this case – a misnomer for Rahimtoola cannot be criticised for accepting the obligations of trustee in circumstances where – unknown to him – Moin had no authority. It is in this case clearer to say that Rahimtoola, as High Commissioner, *bona fide* accepted the obligations to act as trustee for Nizam VII, in circumstances where it appeared (particularly given that the letter evincing his intention to act as trustee was dated 15 September 1948, when Moin still had an official capacity) that Moin had

¹⁸³ McGhee (ed), *Snell’s Equity*, 33rd ed (2015) at [21-021].

¹⁸⁴ *Lewin* at [7-017].

¹⁸⁵ *Lewin* at [42-101].

¹⁸⁶ See paragraph 229 above.

authority to create this trust on behalf of Nizam VII. I accept India's submission in paragraph 37 of her written submissions:

"All that is required for a finding of such a trust in this case is a conclusion that there was an intent on the part of the transferee that beneficial ownership was not to pass, and that the Fund would therefore be held on trust. If it were held, for example, that Rahimtoola or Pakistan had assumed the responsibility of acting as a trustee (by which it is meant that they had no intention to take beneficially), but for some reason they did not take as an express trustee then a constructive trust of this kind would arise and they would be a trustee de son tort (see *Lewin* at [7-015], [7-017], [42-101])...a finding of such an assumption of responsibility by Rahimtoola or Pakistan is entirely justified on the facts now before the Court. A finding of such a trust may, moreover, be made without any finding as to the intention of the transferor."

(d) Resulting trust

252. A resulting trust can arise in two sets of circumstance, only one of which is relevant in this case. Lord Browne-Wilkinson described this sort of resulting trust in *Westdeutsche Landesbank Girozentrale v. Islington LBC*:¹⁸⁷

"...where A makes a voluntary payment to B...there is a presumption that A did not intend to make a gift to B: the money is held on trust for B...It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention..."

253. As regards this type of resulting trust, *Lewin* says this:¹⁸⁸

"In a case where the relationship between transferor and transferee is not such as to raise a presumption of advancement, the presumption of resulting trust, if applicable, will operate so that the transferor retains beneficial ownership if there is no evidence of the actual intention of the transferor...In such a case the presumption of resulting trust is crucial because, apart from the presumption, there would be no basis on which the transferor could claim to retain beneficial ownership against the person in whom the property is vested. But ... the presumption of resulting trust is easily rebutted. The reason for this is that while a transferor may certainly have special reasons for wanting to retain the beneficial ownership of the property transferred, it is odd to presume, before one considers the evidence that that was his intention. It has therefore been said that the 'so-called' presumption of resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution. In other words the presumption of resulting trust is a fall-back when the evidence of the transferor's actual intention does not establish whether he did or did not intend to make a gift.

...

It will be observed...that a resulting trust, whether based on a presumption, or on the evidence, is founded on a presumption or evidence as to the transferor's intention. There is no requirement as such for the transferee to share or participate in that intention."

254. If this were not a case of constructive trust – as I have found¹⁸⁹ – this would be a case of a resulting trust. The Transfer to Rahimtoola was entirely voluntary, and there is no evidence to support any suggestion that Nizam VII intended to make a gift of the Fund

¹⁸⁷ [1996] AC 669 at 708.

¹⁸⁸ *Lewin* at [9-008] to [9-010].

¹⁸⁹ See paragraph 251 above.

to either Pakistan or Rahimtoola. To the contrary, I consider that Nizam VII intended to retain his interest in the Fund.¹⁹⁰

(4) The question of “choice” as to trustee and the Ispahani letter

255. In submissions before me, the Princes and India sought to rely upon the Ispahani letter, set out in paragraph 150 above, in support of their contention that the Fund was held on trust by Rahimtoola in his private capacity rather than in his capacity as High Commissioner.
256. Obviously, this is a document that I have taken into account when considering the intentions of the various parties, specifically those of Rahimtoola himself. It is certainly the case that the Ispahani letter shows a sophisticated level of thinking as to how Pakistan should handle questions as to how the Fund was held going forward. Pakistan was clearly aware that if the Fund was held by Rahimtoola personally, the way would be paved for Nizam VII (and, through Nizam VII, India) to claim the Fund, whereas if the Fund was held by Pakistan (*i.e.* by Rahimtoola as High Commissioner) the procedural bar of sovereign immunity could be invoked by Pakistan were Nizam VII to lay claim to the Fund. Accordingly, Pakistan elected to make clear that the Fund was held by Rahimtoola in his capacity as High Commissioner.
257. The trust was constituted on 20 September 1948. It was either constituted with Rahimtoola as trustee in his personal capacity or in his capacity as High Commissioner. That is a question that must be resolved in light of all the evidence – and I have done so. The Ispahani letter is a good example of why I must treat Rahimtoola’s evidence with a degree of caution, and I have done so. But the Ispahani letter cannot of itself affect the conclusion that I have reached on the basis of this evidence. The fact is that Pakistan might very well – in 1953 – debate how its argument might be framed, but she could not, in 1953, alter the terms of the trust as created in 1948 or the capacity of the trustee of that trust. The Ispahani letter, in my judgment says nothing about the constitution of the trust in September 1948: it says a great deal about Pakistan’s approach in the 1954 Proceedings, but that is nothing to the point.

(5) An absolute interest in Pakistan

258. The inevitable corollary of my finding that the Fund is held on trust is that Pakistan cannot herself hold beneficially. However, even apart from the findings that I have made in the foregoing paragraphs, there are other reasons for finding that Pakistan never held the Fund absolutely for itself:
- (1) I find Pakistan’s deliberate failure to assert a beneficial interest in the 1954 Proceedings to be telling.¹⁹¹ Clearly, Pakistan could – successfully – assert sovereign immunity on the basis of her legal title to the Fund and, as Lord Simonds noted,¹⁹² Pakistan was not concerned to admit, assert or deny: she had the legal title, which could not be displaced except by litigation, which Pakistan was entitled to decline. However, Pakistan’s assertion of a (disputed) beneficial interest would undoubtedly have strengthened her claim to sovereign immunity, and I find that it

¹⁹⁰ See paragraphs 221ff above.

¹⁹¹ See paragraph 124 above.

¹⁹² See paragraph 124(4) footnote 78 above.

is a proper inference to draw that no such beneficial interest was asserted by Pakistan because Pakistan considered that none existed. In resisting the Nizam's claim a mere six years after the Transfer, Pakistan was, I consider, fulfilling the safeguarding function she had assumed in 1948: she was keeping the money out of the hands of India through the assertion of sovereign immunity based on her legal interest alone. That was the only way she could, having no beneficial interest in the Fund herself.

- (2) Although it would be very dangerous to attach great weight to the negotiations that occurred between the various parties interested in the Fund after the 1954 Proceedings had ended, when it was clear that absent a settlement, the Fund would simply remain with the Bank, I do gain some assistance from a conversation Prince Muffakham had with Ikramullah:

- (a) Prince Muffakham describes the meeting in Muffakham 2:

“25. A positive indication that Pakistan accepted that the Fund belonged to my grandfather was given to me directly by Mr Mohammed Ikramullah. I met him towards the end of 1957 (I do not recall the precise date, but by reference to a letter sent to my mother by Lord Monckton dated 16 December 1957, I think it must have been before the date of that letter). Mr Ikramullah was at that time the High Commissioner of Pakistan in London. The meeting came about because I happened to be involved in the Islamic Society of Oxford University, where I was a student from October 1957, and Mr Ikramullah was kind enough to visit the Society as a guest to speak at one of our functions. I was a member of the committee of the society and therefore met him as he was received and later I had the opportunity to speak to him. Upon learning who I was (i.e. the grandson of [Nizam VII]) he brought up the topic of the Fund and he said (speaking to me in Urdu) words to the effect of: this money belongs to you people, your family, and has only been kept with us on trust. The word he used which I have translated as “trust” was “amanat”.

26. This was a striking conversation because Mr Ikramullah was a most distinguished person. He had, I believe, been the first Foreign Secretary of Pakistan (i.e. a leading civil servant – equivalent to the Permanent Secretary of the Foreign Office in the UK) at the time of Partition, and he was in post during Operation Polo. On the basis that Mr Ikramullah held this position, I would expect that he must have been familiar with the circumstances of the transfer to Mr Rahimtoola. He certainly gave me the impression that he well understood the situation when we met in 1957.”

- (b) The letter from Monckton to Prince Muffakham's mother, referred to by Prince Muffakham, describes a conversation Monckton had with Ikramullah in December 1957, where they discussed a trust to be formed for the Nizam's family. It is quite clear, from later negotiations (which came to nothing), that Pakistan continued to be concerned to ensure that India did not benefit from any payment of the money, and that is no doubt why discussions between Ikramullah and Monckton focussed on a trust for the benefit of the Nizam's family, rather than returning the Fund to Nizam VII. The letter concluded:

“I understand from Mr Ikramullah that he had given [Prince Muffakham] an inkling of what was in his mind when they met just before [Prince Muffakham] came out to you.”

- (c) Prince Muffakham – in his oral evidence – confirmed his evidence in Muffakham 2, and his evidence is, of course, corroborated by Monckton’s letter. I believe what he says.
- (d) It seems to me that I can infer from the conversation Ikramullah had with Prince Muffakham that Ikramullah’s and, therefore, Pakistan’s then understanding was that Pakistan had herself no beneficial interest in the Fund. I consider that I can draw this inference because Ikramullah was Pakistan’s successor as High Commissioner, who would have been well aware of the history of the Fund and the Transfer, as the Ikramullah letter, if nothing else, demonstrates. Ikramullah would have known that it was Pakistan’s position that he – the High Commissioner – held the Fund as such. When speaking of the Fund, he must have appreciated that he could only be speaking in an official capacity.

(6) Conclusions

259. For the reasons I have given, I find that:

- (1) The Fund was held originally by Rahimtoola as High Commissioner and thereafter by his successors as High Commissioner.
- (2) However, the Fund was not held absolutely for Pakistan, but was held on trust. The trust was a constructive trust alternatively a resulting trust.
- (3) The Fund was not held on an express trust, because Moin acted outwith his authority from Nizam VII when making the transfer. If, contrary to this finding, Moin was authorised by the Nizam, then an express trust would have arisen.

I. NO TRUST IN ANY EVENT

(1) Introduction

260. Pakistan’s pleading on this point is set out in paragraphs 21-22 above. Pakistan advanced two alternative cases:

- (1) First, that a payment from one sovereign state to another sovereign state cannot give rise to a trust relationship as a matter of English law.
- (2) Secondly, and alternatively, that inter-state transactions are, intrinsically, different from transactions between private persons, and that:
 - (a) States cannot be taken to intend to render themselves trustees or beneficiaries in relation to payments made between them; and/or
 - (b) Cogent evidence would be required of any such intention.

261. Although not completely clear, it appears to be Pakistan's case first that transactions between sovereign states have no private law implications at all, at least so far as the creation of trusts is concerned; alternatively, that an English court ought to be slow to find the existence of a trust in such a case. I consider these two points in turn below.

(2) No trust relationship can arise as a matter of private law

262. As a sovereign state Pakistan was entitled to, and did, assert sovereign immunity. That enabled Pakistan to prevent the question of ownership of the Fund from being litigated before and determined by an English Court. Pakistan contended that the doctrine of sovereign immunity went beyond this procedural bar to the bringing of a claim against a sovereign state. It was contended that, in those cases where sovereign immunity was waived by a sovereign state, the law applicable to the matter before the Court was not the law that would ordinarily apply were the litigant not a sovereign state. The applicable law was different and in this case prevented a trust from arising.

263. No authority was cited in support of this proposition and I can identify no legal basis for suggesting that the ordinary private law consequences of a sovereign state's actions do not attach in the proceedings that follow a waiver of sovereign immunity.

264. Indeed, Pakistan's contention is contrary to established law. English Courts identify as persons for the purposes of private law individuals (that is to say, natural persons), corporate bodies (private legal persons, whether recognised under English law or applicable foreign law) and sovereign states.¹⁹³ One of the consequences of recognising a state is that – as a matter of English law – that state has all the capacities and powers of a person under English law.¹⁹⁴ The state may, therefore, enter into a contract; and own, hold and transfer property. In doing so, it will be subject to the law of the land. That is so, whether the sovereign state acts as a claimant (*i.e.* where she is seeking to vindicate a private law right that she may have)¹⁹⁵ or as a defendant (*i.e.* where another is seeking to vindicate a private law right against that state).¹⁹⁶ Where a sovereign state is impleaded as a defendant, that state has the benefit of sovereign immunity. Where, however, that immunity is not asserted or waived, then municipal law applies to that state in the ordinary way and without variation or exception.¹⁹⁷

265. In this, a sovereign state's position is no different from that of the Crown. It is clear law that "[t]here is nothing to prevent the Crown from acting as a trustee if it chooses deliberately to do so".¹⁹⁸

¹⁹³ *Arab Monetary Fund v. Hashim (No 3)*, [1991] 2 AC 114 at 165 (*per* Lord Templeman); *The Law Debenture Trust Corporation plc v. Ukraine*, [2018] EWCA Civ 2026 at [54] and [63]; *McLachlan* at [10.09].

¹⁹⁴ *The Law Debenture Trust Corporation plc v. Ukraine*, [2018] EWCA Civ 2026 at [65] and [71].

¹⁹⁵ *McLachlan*, Ch 11.

¹⁹⁶ *McLachlan*, Ch 12.

¹⁹⁷ Fox and Webb, *The Law of State Immunity*, 3rd ed (2013) at 21.

¹⁹⁸ *Lewin* at [2-015]; *Civilian War Claimants Association Ltd v. The King*, [1932] AC 14 at 27 (*per* Lord Atkin); *Nissan v. Attorney-General*, [1970] AC 179 at 223 (*per* Lord Pearce).

(3) A court should exercise caution when considering whether a trust arises in the case of sovereign states

266. I have already noted that the use of the term “trust” does not, of itself, determine that an express trust arises. Megarry V-C made this point in *Tito v. Waddell (No 2)*:¹⁹⁹

“I propose to turn at once to the position of the Crown as trustee, leaving on one side any question of what is meant by the Crown for this purpose; and I must also consider what is meant by “trust”. The word is in common use in English language, and whatever may be the position in this court, it must be recognised that the word is often used in a sense different from that of an equitable obligation enforceable as such by the courts. Many a man may be in a position of trust without being a trustee in the equitable sense; and terms such as “Brains Trust”, “Anti-trust” and “Trust Territories”, though commonly used, are not understood as relating to a trust as enforced in a court of equity. At the same time, it can hardly be disputed that a trust may be created without using the word “trust”. In every case one has to look to see whether in the circumstances of the case, and on the true construction of what was said and written, a sufficient intention to create a true trust has been manifested.

When it is alleged that the Crown is a trustee, an element which is of especial importance consists of the governmental powers and obligations of the Crown; for these readily provide an explanation which is an alternative to a trust. If money or other property is vested in the Crown and is used for the benefit of others, one explanation can be that, without holding the property on a true trust, the Crown is nevertheless administering that property in the exercise of the Crown’s governmental functions. This latter possible explanation, which does not exist in the case of an ordinary individual, makes it necessary to scrutinise with greater care the words and circumstances which are alleged to impose a trust.”

267. I accept that even in the case of private individuals, the use of the term “trust” is by no means conclusive as to the existence of an express trust: it is one of the factors that must be taken into account when considering whether or not a trust has been created. The matter becomes even more sensitive where a state is involved: it is quite possible for property to be held “on trust” importing an obligation that has nothing to do with the private law concept, but as referring to altogether less concrete obligations that are in no way enforceable in a court of law.²⁰⁰

268. In the present case, I have of course found that no express trust arose, because Moin had no authority from Nizam VII to constitute such a trust. If, contrary to this conclusion, Moin did have authority, then I consider that the intention was to create a private law trust. Throughout the history of the accounts – from the original transfer of monies into the Hyderabad State Bank Account to the Transfer itself – Nizam VII was dealing with private law obligations: he was transferring a chose in action, owed to him by (initially) Imperial Bank and then the Bank. In no way was the Nizam dealing with non-private law obligations. If Nizam VII authorised the Transfer, then it is to my mind inconceivable that he intended anything other than a private law trust to arise. I can see no point in the creation of a “trust” in any other sense.

269. Rather than finding an express trust to exist, I have concluded that (i) there was a constructive trust and (ii) if no constructive trust, a resulting trust. Neither of these trusts

¹⁹⁹ [1977] 1 Ch 106 at 211.

²⁰⁰ Megarry V-C referred to “trusts in the lower sense” and “trusts in the higher sense” (at 216). I am not sure that this nomenclature particularly assists: it is simply that sometimes an “obligation” may be assumed that is unenforceable in court, perhaps as where a state accepts that it holds an object of art “on trust for the nation”.

arise through the intention of the settlor: they both arise through operation of law. In *Tito v. Waddell*, Megarry V-C was concerned with the significance of the word “trust” in the context of an express trust. He said nothing about trusts arising by operation of law, because in such cases the words used by the settlor are irrelevant to the constitution of the trust.

270. Accordingly, Pakistan’s contentions in this regard do not alter the conclusions that I have reached regarding the basis upon which Pakistan holds the Fund.

J. THE RESTITUTION CLAIM

(1) Introduction

271. The Transfer is – self-evidently – an enrichment of Pakistan. For a claim in unjust enrichment to succeed, the enrichment must also be “unjust”, which generally means that the claimant must bring him- or herself within one of the accepted categories of “unjust” enrichment. In this case, the “unjust” factor is the fact that the transfer was not authorised by Nizam VII. That, according to India’s written submissions, is a “classic case for restitution”,²⁰¹ and this was not seriously contested by Pakistan. I have found that the Transfer was indeed an unauthorised one and, accordingly, the restitution claim ought to succeed.
272. Apart from the limitation defence pleaded by Pakistan, there is no defence to this claim. However, Pakistan has pleaded the defence of limitation, and *prima facie* (for the reasons described in paragraph 26 above) the defence is a good one.
273. This section is concerned with the three contentions that the Princes and India advanced in order to overcome this defence. As I have described in paragraph 26 above, the Princes and India contended that:
- (1) When Pakistan successfully invoked sovereign immunity, causing the 1954 Proceedings to be stayed, time ceased to run against any claimants to the Fund. Time only began to run again when Pakistan waived her sovereign immunity.
 - (2) Pakistan’s conduct in raising the limitation defence amounted to an abuse of process.
 - (3) Even if the claim against Pakistan failed by reason of her invocation of the limitation defence, the same claim could be advanced against the Bank, which had raised no limitation defence.
274. I consider these points in turn below. Before I do so, it is necessary to say something about the applicable law regarding limitation. When the 1954 Proceedings were commenced, they were within time under the then applicable statute of limitation, the Limitation Act 1939. By order of the House of Lords, and by reason of the House of Lords’ decision that Pakistan could assert sovereign immunity, the 1954 Proceedings were stayed. It might be thought that the limitation defence asserted by Pakistan could be circumvented by having the stay lifted and causing the Princes and India to be joined

²⁰¹ Paragraph 55(c) of India’s written submissions.

to the 1954 Proceedings. This point was considered by Henderson J in the interlocutory stages of these proceedings.²⁰²

“The Princes also have an argument of a more technical nature. They submit that, if a statute of limitation were to apply at all, it would be the Limitation Act 1939, not the Limitation Act 1980. The reason for this is that any applicable limitation period would have expired before the commencement of the 1980 Act, which itself provides (by paragraph 9(1) of Schedule 2) that nothing in the 1980 Act will enable an action to be brought which was barred by the 1939 Act. The significance of this point, for present purposes, is that, if the 1980 Act applied, it might be possible for India or the Princes to apply to be joined to the 1954 proceedings, and to lift the stay on those proceedings for the purposes of bringing a claim against Pakistan in reliance on the procedure provided by section 35 of the 1980 Act and CPR rule 19.5, with the result that the claim would then be treated as having been brought against Pakistan in 1954. I express no view on the question whether the doctrine of relation back in section 35 of the 1980 Act could in principle be successfully invoked by India and the Princes in the circumstances of the present case. What matters is that no similar possibility would be available if the position is governed by the 1939 Act, because it contained no equivalent of section 35 enabling a change of parties with retrospective effect after the expiry of a limitation period. In *Ketteman v Hansel* [1987] AC 189, the House of Lords confirmed that, under the law as it stood before 1980, a person added as a defendant did not become a party until the writ had been served on him, and his joinder could not be treated as having retrospective effect. It follows that any new claim made against Pakistan in the context of the 1954 proceedings would be treated as having been brought in 2016 rather than 1954.”

Thus, lifting the stay of the 1954 Proceedings to permit other parties to be joined would serve no useful purpose.

275. I respectfully agree with Henderson J’s reasoning regarding the application of the Limitation Act 1939 rather than the Limitation Act 1980: the cause of action accrued on 20 September 1948, and it is clear that the entry into force of the Limitation Act 1980 cannot improve the position of the Princes and India.

(2) Pakistan’s raising of the procedural bar of sovereign immunity prevented time running against any claimants to the Fund, which only began to run when the procedural bar was waived

276. Neither the Limitation Act 1939 nor the Limitation Act 1980 constitutes a complete code as to when causes of action become time-barred. For example, neither Act provides for when a cause of action accrues. Thus, it has been the common law that has found that causes of action accrue when even “latent” damage (*i.e.* damage that the claimant could not reasonably have been aware of) occurs.²⁰³ Significantly, it was the legislature, and not the common law, that dealt with the injustice of a cause of action becoming time-barred before the claimant could reasonably become aware of it, in section 11 of the Limitation Act 1980 (in the case of personal injury) and in section 14A of the Limitation Act 1980 (in the case of latent damage not involving personal injury).²⁰⁴

²⁰² [2016] EWHC 1465 (Ch) at [105].

²⁰³ In the case of personal injuries, see *Cartledge v. E Jopling Ltd*, [1963] AC 758; and in the case of damage to property, see *Pirelli General Cable Works v. Oscar Faber & Partners*, [1983] 2 AC 1. See also the discussion in McGee, *Limitation Periods*, 8th ed (2018) (McGee) at [1.008].

²⁰⁴ Section 14A was introduced into the Limitation Act 1980 by the Latent Damage Act 1986 as a direct result of the decision in *Pirelli General Cable Works v. Oscar Faber & Partners*, [1983] 2 AC 1.

277. The fact that it has been necessary to introduce extensions of the limitation period in appropriate cases by statute seems to me to constitute a complete answer to the Princes' and India's contention that the period during which Pakistan asserted sovereign immunity does not count towards the limitation period. Both the Limitation Act 1939 and the Limitation Act 1980 are structured similarly. In each case, Part I sets out the periods of limitation for different classes of action, *i.e.* the period within which, after the cause of action has accrued, the claim must be brought. Part II of both Acts then contain a series of extensions to or exclusions of these ordinary time limits. Thus, for instance, both Acts provide for an extension of the applicable periods in cases of disability.²⁰⁵ I do not consider that it is open to me to create a fresh basis for extending the time within which a claim must be brought, no matter how appropriate such a basis for extending time might seem to me. As the law in the case of latent damage shows, such changes have been achieved through legislation, and not through judicial intervention.
278. The only authority relied upon by the Princes and India in support of their contention was *Musurus Bey v. Gadban*,²⁰⁶ where it was held that the immunity from suit of a foreign ambassador in the English courts during his period of accreditation and a reasonable period thereafter had the effect that time did not begin to run against his creditors until the end of that period. Henderson J considered *Musurus Bey* in his interlocutory judgment in these proceedings,²⁰⁷ where he noted that this decision had been the subject of criticism in later cases.²⁰⁸ He concluded:²⁰⁹
- “The question is not straightforward, however, and in my view it is unsuitable for summary determination. The better course is to leave it for determination at trial, when it can be considered together with the question whether it is an abuse of process for Pakistan to rely on limitation defences at all. Since the trust claims of India and the Princes will have to go to trial in any event, I cannot see any advantage in determining the difficult questions of law to which these aspects of Pakistan's limitation defences give rise in advance of the trial, and I think the court will be better placed to consider and rule upon them in the context of its actual, rather than hypothetical, findings of fact.”
279. There is, as it seems to me, nothing in *Musurus Bey* to cause me to alter the conclusion expressed in paragraph 277 above. Not only has the *Musurus Bey* decision been criticised in later cases, as Henderson J noted, but more to the point the decision pre-dates the 1939 Act which – for the reasons I have given – seems to me to be codificatory of the circumstances in which limitation periods can be extended.²¹⁰

²⁰⁵ See section 22 of the Limitation Act 1939 and section 28 of the Limitation Act 1980.

²⁰⁶ [1894] 2 QB 352.

²⁰⁷ [2016] EWHC 1465 (Ch) at [138] to [139].

²⁰⁸ At [139].

²⁰⁹ At [139].

²¹⁰ This is substantially the view expressed by Ouseley J in *Chagos Islanders v. The Attorney General and Her Majesty's British Indian Ocean Territory Commissioner*, [2003] EWHC 2222 (QB) at [599], where he dismissed as unarguable the proposition that “the Court could suspend the effect of the Act where it would be unconscionable to allow the Defendants to rely upon it”. Ouseley J made the point, which I agree with, that the question of the extension of limitation periods was one for Parliament, and not the courts. Permission to appeal Ouseley J's decision was sought and refused. The Court of Appeal ([2004] EWCA Civ 997 at [43] to [53]) expressed the view that “the judge was very probably right in rejecting this argument as a matter of principle” but did not consider

(3) Abuse of process in raising the limitation defence

280. In his interlocutory judgment, Henderson J described the Princes' and India's contention in this regard in the following way:²¹¹

"115. My inclination, therefore, would be to hold that it is in principle open to India and the Princes to argue that Pakistan's limitation defences are abusive, and the court should not permit her to rely on them. If the court can properly entertain the question, I would then see very considerable force in the argument that Pakistan's conduct in pleading the defences was indeed abusive. The abuse would lie in Pakistan's reliance upon limitation to defeat claims which she had herself prevented from being pursued within the relevant limitation periods by her invocation of sovereign immunity. It is important to observe that the abuse would lie, not in Pakistan's original decision to plead sovereign immunity, nor in her subsequent decision to waive that immunity by starting the present proceedings, but only in the reliance upon limitation defences to defeat claims which she had herself prevented from being begun in time.

116. It would be no objection to such an analysis, I think, that, once she had invoked her sovereign immunity, Pakistan was in principle able to defer adjudication upon the merits of the dispute indefinitely, and certainly until long after the expiry of any relevant limitation period. The point is, rather, that, once Pakistan had deliberately brought this state of affairs into existence, it would be an abuse of process for her to initiate proceedings for the purpose of resolving the dispute, but then rely on a defence which owed its existence to the immunity which she had now waived. Unless implicitly excluded by the statutory scheme of the Limitation Acts, a challenge to Pakistan's limitation defences on these grounds would in my view, at the lowest, have good prospects of success."

281. Pakistan's alleged abuse of process thus arises out of a combination of:

- (1) Pakistan's assertion of sovereign immunity, thus preventing these claims from being made;
- (2) Her waiver of that immunity by the bringing of a claim herself regarding the property over which the Princes and India also asserted a claim; and
- (3) Her assertion, against those rival claims, of a limitation defence that it was open to her not to take.

282. The limitation rules under the 1939 and 1980 Acts do not extinguish claims, but simply bar a claim or cause of action.²¹² It was Pakistan's choice to plead a limitation defence and, had she not done so, the Court would not have been concerned that a claim was being made out of time by the Princes and India.

283. In considering whether Pakistan's choice to raise limitation as a bar to the restitutionary claim was an abuse of process, I must stress that I am proceeding on the basis (which is clearly the case) that Pakistan has acted without in any way seeking to "game" the system. Were a sovereign state to raise a sovereign immunity defence, with the intention of

the point to be unarguable. I express no views as to arguability or otherwise: I simply hold that the law, as I understand it, does not permit of the exception contended for by the Princes and India.

²¹¹ [2016] EWHC 1465 (Ch) at [115].

²¹² *McGee* at [2.038].

waiving it the moment rival claims were time-barred, that would constitute an important ingredient in considering whether there was an abuse. That ingredient is, I stress, entirely absent here. I proceed on the basis that Pakistan has acted entirely without such considerations when raising and waiving her sovereign immunity.

284. Viewing matters in this light, the question is whether it can be said that Pakistan's choice to raise a limitation defence constitutes an abuse of process under CPR 3.4(2)(b), which provides that "[t]he court may strike out a statement of case if it appears to the court...that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings". As to this:

- (1) There is no definition of what constitutes an "abuse of the court's process" and it is clear that the categories of potential abuse of process are not closed.²¹³ That said, there can plainly be nothing wrong in a party relying upon a defence conferred upon it by statute, and to describe such a course as an abuse of process must require, in my judgment, fairly extreme or unusual circumstances. None of the parties was able to point me to any authority that might assist on the point, save that in *Chagos Islanders v. The Attorney General and Her Majesty's British Indian Ocean Territory Commissioner*,²¹⁴ Ouseley J expressed the view that there was "no basis upon which a court could decide that a statute could be removed from the arena to which its language made it apply, simply because a court thought that it would be unconscionable to allow a party to rely upon the rights which Parliament had given him."
- (2) Clearly, there can be nothing wrong in a sovereign state successfully asserting a right to sovereign immunity. Equally clearly, there can be nothing wrong in a sovereign state successfully asserting a defence of limitation. Ordinarily, the combination of these two procedural bars does not arise: that is because sovereign immunity – once successfully asserted – is very rarely waived. I am not surprised that this situation is without precedent, and that none of the parties was able to identify any relevant law to assist me.
- (3) The question, as clearly posed by Henderson J, is whether, having raised one procedural bar, and then waived it, Pakistan is now entitled to raise a second, different, procedural bar, that only exists because of the raising of the first bar or whether Pakistan's raising of the limitation defence in this context constitutes an abuse of process.²¹⁵ I find that this conduct does amount to an abuse of process. The point about the assertion of sovereign immunity is that it operates as a complete bar to the litigation of certain proceedings. It is not open to the state asserting sovereign immunity to pick and choose which points to proceed with and which points to block by asserting sovereign immunity.
- (4) In a very different context, the Court of Appeal recognised that an ability to pick and choose in this way would be profoundly unjust. In *The Law Debenture Trust Corporation plc v. Ukraine*,²¹⁶ the claimant trustee (**Law Debenture**) entered into

²¹³ *Hunter v. Chief Constable of the West Midlands Police*, [1982] AC 529 at 536.

²¹⁴ [2003] EWHC 2222 (QB) at [599].

²¹⁵ What is more, had the provisions of the 1980 Act applied in 1948, it would have been possible to join the Princes and India to the 1954 Proceedings, as described above.

²¹⁶ [2018] EWCA Civ 2026.

a trust deed with a sovereign state, Ukraine. The deed was governed by English law. Ukraine defaulted under the notes. The Russian Federation was the sole holder of the notes and – on Russia’s direction – Law Debenture brought a claim against Ukraine for payment of the final repayment amount under the notes, and in due course applied for summary judgment on its claim. Ukraine resisted that application on various grounds, one of which was that the issue of the notes had been procured by unlawful threats made, and pressure exerted, by Russia, so as to render the notes voidable on grounds of duress. Of course, a contract made as a result of illegitimate pressure is unenforceable as a matter of English law: the issue, in this case, was that the acts by Russia which Ukraine relied upon as constituting duress or illegitimate pressure involved acts of high policy by Russia in the sphere of international relations in the exercise of sovereign authority which Law Debenture contended was non-justiciable under the doctrine of foreign act of state. It will be necessary to consider this doctrine and the decision of the Court of Appeal further below. For present purposes, what is of interest is the Court of Appeal’s statement of what it would have held, had Law Debenture’s contention as to non-justiciability succeeded:²¹⁷

“...The basic point is that Russia, through Law Debenture, is positively seeking to enforce contractual rights in private law against Ukraine. In our view, it can only fairly seek to do so if Ukraine is afforded a fair opportunity to defend itself...It would be unjust to permit Law Debenture and Russia to proceed to make good the contract claim without Ukraine being able to defend itself by raising its defence of duress at trial...”

Accordingly, had Law Debenture’s contention as to non-justiciability succeeded, the Court of Appeal would have stayed the entire proceedings.²¹⁸

- (5) The situation is very similar in the present case: Pakistan’s assertion of sovereign immunity in the 1954 Proceedings prevented everyone, including Pakistan, from asserting a claim to the Fund in this jurisdiction – the only jurisdiction that matters, given the location of both the Fund and the Bank. Whilst Pakistan is perfectly entitled to waive its sovereign immunity, and has done so, the effect of that waiver must not be to provide one party (Pakistan) with an advantage in the litigation which only exists by reason of the assertion of the immunity. The waiver in this case has enabled Pakistan to deploy a defence that she could not have deployed had she never asserted sovereign immunity and this, I find, is an abuse of process because it is obstructing the just disposal of these proceedings.

285. Accordingly, I hold that it is an abuse of process for Pakistan to assert a defence of limitation in relation to the Princes’ and India’s restitutionary claim against her and that the paragraphs in Pakistan’s statements of case asserting this defence must be struck out. It also follows that the Princes’ and India’s restitutionary claim against Pakistan succeeds.

²¹⁷ At [183].

²¹⁸ At [184].

(4) Claim against the Bank

286. The Princes and India also contended that they had an alternative restitutionary claim against the Bank, based upon the doctrine of ministerial receipt. The long-accepted rule – established by Lord Mansfield in *Buller v. Harrison*²¹⁹ – is that where an enrichment is received by an agent, the agent will be liable to repay the claimant, unless the agent has accounted to his principal for the enrichment so received without notice of the claimant’s claim. Where there is notice, the agent must interplead and will be liable if the monies are paid away. It is quite clear that where the agent has simply credited his principal with the enrichment, without actually transferring it to the principal, the agent remains liable to the claimant.²²⁰ Millett LJ stated the position in *Portman Building Society v. Hamlyn Taylor Neck (A Firm)*:²²¹

“[W]here the plaintiff has paid money under (for example) a mistake to the agent of a third party...[and] the agent still retains the money...the plaintiff may elect to sue either the principal or the agent, and the agent remains liable if he pays the money over to his principal after notice of the claim. If he wishes to protect himself, he should interplead. But once the agent has paid the money to his principal or to his order without notice of the claim, the plaintiff must sue the principal.”

287. Since the Fund has, since shortly after the Transfer, from about 22 September 1948, been held by the Bank without permitting Pakistan or anyone else to deal with the Fund, it is difficult to see how this claim against the Bank can be resisted. Consistently with its position as an interpleader or stakeholder, the Bank sought neither to advance a limitation defence nor to take any other point. The Bank’s position has, throughout, been that it will pay the Fund in accordance with the Court’s direction.

288. Pakistan, for her part, relies upon two first instance decisions which hold that, where an agent receives money for and on behalf of a principal then – even before the agent has transferred the money to the principal – the only proper defendant is the principal. That is because, according to these decisions, only the principal has been enriched, and not the agent (who was always obliged to account to the principal). Thus:

(1) In *Jeremy D Stone Consultants Ltd v. National Westminster Bank plc*,²²² Sales J held:

“240. The Claimants undoubtedly did pay money into SEWL’s NatWest accounts (principally the No 2 account) on the basis of their mistaken belief that the hotel business was genuine. The Claimants therefore have a cause of action against

²¹⁹ (1777) 2 Cowp 565, 98 ER 1243.

²²⁰ The law has been stated thus many times. In addition to the authorities cited in this paragraph, see also: *Pollard v. Bank of England*, (1871) LR 6 QB 623 at 630 (per Blackburn J); *Continental Caoutchouc and Gutta Percha Co v. Kleinwort, Sons & Co*, (1904) 90 LT 474; *Kleinwort, Sons & Co v Dunlop Rubber Co*, (1907) 97 LT 263; *Kerrison v. Glyn, Mills, Currie & Co*, (1911) 81 LJKB 465; *Transvaal and Delagoa Bay Investment Co Ltd v. Atkinson*, [1944] 1 All ER 579; *Australia and New Zealand Banking Group Ltd v. Westpac Banking Corp*, (1988) 164 CLR 662; *Agip (Africa) Ltd v. Jackson*, [1990] Ch. 265 at 288–289 (per Millett J); *Jones v. Churcher*, [2009] EWHC 722 (QB) at [41] and [66] to [78] (per His Honour Judge Havelock Allen, QC); *Burrows, A Restatement of the English Law of Unjust Enrichment*, 1st ed (2012) at Proposition 25; *Watts & Reynolds, Bowstead & Reynolds on Agency*, 21st ed (2018) (*Bowstead & Reynolds*) at Article 111 and [9-106].

²²¹ [1998] 4 All ER 202 at 207.

²²² [2013] EWHC 208 (Ch).

SEWL in unjust enrichment to reclaim the payments made, but SEWL has no money to meet such claims. The issue, therefore, is whether the Claimants also have claims in unjust enrichment against NatWest, which received the Claimants' payments into SEWL's accounts.

241. In my judgment, the Claimants have no good claim in unjust enrichment against NatWest, either because NatWest was not enriched by the payments or because (even if on proper analysis it was enriched) it has a good defence.²²³
242. As to the issue of enrichment, it is true that when the Claimants paid sums to NatWest for the account of SEWL, NatWest received those sums and added them to its stock of assets as monies to which it was beneficially entitled. However, the increase in its assets was matched by an immediate balancing liability, in the form of the debt which NatWest owed SEWL reflected in the increase in SEWL's bank balance as a result of the payments. This is how the relationship between bank and customer works. There was no basis – at any rate none known to NatWest at the relevant time as the receipts came in, credit entries were made on the accounts and payments were made out against those credit entries – on which NatWest had any entitlement to withhold payment of sums representing credit balances on the accounts when instructed by SEWL to pay.
243. Therefore, in my judgment, NatWest was not enriched by the payments made by the Claimants into SEWL's bank accounts (in that regard, see *Box v. Barclays Bank plc*, [1998] Lloyd's Rep Bank 185 and *Compagnie Commercial Andre SA v. Artibell Shipping Co Ltd*, [2001] SC 653, Court of Session, Outer House at [16] *per* Lord Macfadyen). The Claimants' proper unjust enrichment claim is against SEWL, whose assets were increased upon the making of the payments to its bank accounts by the increases in its balances on those accounts (representing the debt owed to it by NatWest)."
- (2) In *Sixteenth Ocean GmbH & Co KG v. Société Générale*,²²⁴ Peter MacDonald Eggars, QC, sitting as a Deputy Judge of the High Court followed *Jeremy D Stone*: "Whether there was an enrichment is a question of fact. An enrichment is constituted by the receipt of a benefit, which can be money or a non-monetary benefit. The benefit must be a real one. Thus, if the receipt of a benefit is matched by a corresponding liability, the net gain to the defendant is zero, and the defendant will not have been enriched (*Jeremy D Stone Consultants Ltd v. National Westminster Bank plc*, [2013] EWHC 208 (Ch) at [242])."
289. Neither of these decisions grapples with – or even mentions – the weight of authority lying behind the doctrine of ministerial receipt, and the view has been expressed that they are *per incuriam*.²²⁵ Even where the law as stated in these decisions is supported in terms of outcome – as in *Goff & Jones* – it is recognised by the authors of that work that these

²²³ We are here only concerned with the question of enrichment.

²²⁴ [2018] EWHC 1731 (Comm) at [109].

²²⁵ *Bowstead & Reynolds* at [9-106] says the decision in *Jeremy D Stone Consultants Ltd* is *per incuriam*.

decisions are heterodox.²²⁶ Neither of the authorities cited in *Jeremy D Stone Consultants Ltd* stands in clear support of the proposition there advanced regarding enrichment.²²⁷

290. I consider that I am bound, by established authority, to hold that in a case such as the present, where the bank holds the monies of its principal on notice of the claimant's restitutionary claim, it is liable to repay those monies and therefore should (as the bank has done here) interplead. In any event, even absent established authority, this is clearly the correct outcome:

- (1) Holding that an agent – like a bank – when it receives a mistaken or unauthorised payment that could be the subject of a claim in restitution has not been enriched because of the obligation of the agent to account to his principal means that – in such cases – the defence of change of position and the related defence of ministerial receipt are redundant.²²⁸ The fact is that personal restitutionary claims arise directly as between the party deprived and the party enriched, and indirect enrichment does not generally found a personal restitutionary claim.²²⁹ The doctrine of ministerial receipt, to an extent, constitutes an exception to this rule, recognising the agent's duty to account to his principal.
- (2) The approach adopted in *Jeremy D Stone* and *Sixteenth Ocean* draws an impossible to justify distinction between an account in credit and an overdrawn account. In the former case, the bank will – according to these decisions – not have been enriched and the restitutionary claim will fail against the bank. In the latter case, because the customer's debt to the bank will have been repaid to the extent of the mistaken or unauthorised payment, the bank will have been enriched and the claim in restitution will succeed (or at least not fail on the grounds that there has been no enrichment).
- (3) The approach adopted in *Jeremy D Stone* and *Sixteenth Ocean* simply cannot explain the long line of cases that hold that a receiving bank may – where the account still contains the monies received and these have not been paid away – reverse the payment in the bank's books, as the credit is provisional only.²³⁰

²²⁶ Mitchell, Mitchell & Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) (*Goff & Jones*) at [28.18].

²²⁷ Two authorities were cited in *Jeremy D Stone* at [243]: *Box v. Barclays Bank plc*, [1998] Lloyd's Rep Bank 185 and *Compagnie Commercial Andre SA v. Artibell Shipping Co Ltd (No 2)*, [2001] SC 653, Court of Session, Outer House at [16] *per* Lord Macfadyen. In *Box*, the claimants contended that monies held by a bank were held on constructive trust by it, because its customer (which was in liquidation) had operated a deposit taking business without authorisation. The claim – which had nothing to do with the doctrine of ministerial receipt – failed. In *Artibell*, Lord Macfadyen did say that a bank would not be enriched by a mistaken payment because the bank would itself come under an immediate obligation to pay a corresponding amount to its customer. However, the relevant authorities on point were not considered, and it appears that the point was conceded by counsel. The only authority cited in *Sixteenth Ocean* was *Jeremy D Stone* itself.

²²⁸ Where the agent, not knowing of the restitutionary claim, pays the principal. In such a case, it is clear law that the agent will have a good defence and the claimant can only claim against the principal.

²²⁹ See *The Commissioners for Her Majesty's Revenue and Customs v. The Investment Trust Companies*, [2017] UKSC 29 at [37] to [39] and [57] (*per* Lord Reed) and the discussion of this decision in Smith & Leslie, *The Law of Assignment*, 3rd ed (2018) at [29.53]ff.

²³⁰ See *Colonial Bank v. Exchange Bank of Yarmouth*, (1885) 11 App Cas 84 at 90, 91; *Bavins & Sims v. London and South Western Bank Ltd*, [1900] 1 QB 270 at 275-276.

291. In the circumstances, in the alternative to the Princes' and India's restitutionary claim against Pakistan, their restitutionary claim against the Bank succeeds.

K. FOREIGN ACT OF STATE DOCTRINE AND NON-JUSTICIABILITY

(1) The nature of the Doctrine

292. In *Belhaj v. Straw*,²³¹ the Supreme Court considered the foreign act of state doctrine. Lords Mance, Neuberger and Sumption gave substantive judgments. Lord Wilson agreed with Lord Neuberger without giving a separate judgment and Lady Hale and Lord Clarke gave a brief judgment agreeing with the reasoning and conclusions of Lord Neuberger.²³² Lord Hughes agreed with Lord Sumption without giving a separate judgment. Accordingly, the best starting point is that of Lord Neuberger, as representing the majority view.²³³
293. Lord Neuberger considered the foreign act of state doctrine in [118]ff. He referred to it as the **Doctrine**, which term I shall adopt. He summarised the nature of the Doctrine thus:²³⁴

“In summary terms, the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully...”

294. Lord Neuberger considered that the Doctrine could be broken down into four rules:
- (1) *Rule 1.* The courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.²³⁵
 - (2) *Rule 2.* The courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.²³⁶
 - (3) *Rule 3.* Lord Neuberger described this rule as follows:²³⁷

“The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not

²³¹ [2017] UKSC 3.

²³² At [174].

²³³ In *The Law Debenture Trust Corporation plc v. Ukraine*, [2018] EWCA Civ 2026 at [170] to [171], the Court of Appeal regarded Lord Neuberger's judgment as the leading judgment.

²³⁴ At [118].

²³⁵ At [121]. Unlike the other three rules – which Lord Neuberger regarded as part of English domestic law (at [118] and [120]) – Lord Neuberger suggested that this rule “is not part of the Doctrine at all, or at least is a freestanding aspect of the Doctrine effectively franked by international law”. Clearly, the effect of foreign law cannot be a matter of English law, but whether a foreign state is recognised by the United Kingdom as such is at least insofar as the fact of State doctrine is one of English law.

²³⁶ Again, subject to the state and the government being recognised, which are “facts of State”.

²³⁷ At [123].

interpret or question dealings between foreign states; “Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory”: *per* Lord Pearson in *Nissan v. Attorney General*, [1970] AC 179, 237. *Nissan* was a case concerned with Crown act of state, which is, of course, a different doctrine and is considered in *Mohammed (Serdar) v. Ministry of Defence*; *Rahmatullah v. Ministry of Defence*, [2017] AC 649, 787, but the remark is none the less equally apposite to the foreign act of state doctrine. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels: see *Shergill v. Khaira*, [2015] AC 359, [40], [42].”

- (4) *Rule 4.* Lord Neuberger described rule 4 as follows:²³⁸

“A possible fourth rule was described by Rix LJ in a judgment on behalf of the Court of Appeal in *Yukos Capital SARL v. OJSC Rosneft Oil Co (No 2)*, [2014] QB 458, [65], as being that

“the courts will not investigate the acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office.””

(2) Aspects of the Doctrine relied upon by Pakistan

295. It seems clear that Pakistan’s assertion of non-justiciability rests on Rule 3.²³⁹ Indeed, it is difficult to see how Rules 1, 2 or 4 could sensibly be deployed by Pakistan in support of her assertion of non-justiciability.

296. Pakistan frames her assertion of Rule 3 in the following way:²⁴⁰

“The Transfer, together with the other financial dealings between the State of Hyderabad and Pakistan prior to the Transfer, were transactions of a governmental nature engaged in by two sovereign states in a political context. The non-justiciability and/or act of State doctrine applies to such transactions (but not to the banker-customer transaction governed by domestic law between [Pakistan] and the [Bank]), so that the Court will decline or abstain from exercising jurisdiction in relation to the subject-matter of these proceedings, except as between [Pakistan] and the [Bank] in relation to the said banker-customer relationship. [Pakistan] is accordingly entitled to payment of the balance standing to the credit of the Rahimtoola Account, this being the only justiciable claim made in these proceedings.”

297. This pleading is pardonably general, for a large number of facts were in dispute between the parties, which this Judgment has resolved.²⁴¹ In light of my findings, Pakistan’s case can be put – at its highest – as follows:

²³⁸ At [124].

²³⁹ This was India’s understanding – as set out in paragraph 68(d) of India’s written submissions – and this was never gainsaid by Pakistan.

²⁴⁰ To repeat the quotation from paragraph 19 of Pakistan’s Pleading, already set out at paragraph 27(1) above.

²⁴¹ It was for this reason that I am considering questions of non-justiciability so late in this Judgment: see paragraph 27(1) above.

- (1) The Transfer was, indeed, between two sovereign states – or, more accurately, between the absolute ruler of one sovereign state and the High Commissioner representing another sovereign state in the United Kingdom.
- (2) The Transfer involved the establishment of a trust by Pakistan on behalf of Nizam VII. Thus, one sovereign state was acting as trustee for another sovereign state.
- (3) The circumstances in which the Transfer came to be made arose out of India's invasion of Hyderabad. A third sovereign state – India – is thus also involved. These circumstances, as I have found, constituted the motivating force behind the Transfer.

298. Pakistan's case is perhaps well put by Lord Denning in the 1954 Proceedings, where he said:²⁴²

"I would therefore for myself approach this case somewhat broadly and ask whether the dispute is one properly cognizable by our courts: and I would test it by asking what would be the position if the transaction had taken place, not between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan, but between the Finance Minister of Hyderabad and the Foreign Secretary of Great Britain, and the money had been transferred, not into the name of the High Commissioner of Pakistan, but into the name of a high officer such as a Custodian of Property? Would an action lie in our courts for the return of the money? Clearly not. The transaction was more in the nature of a treaty than a contract or a trust. Reference would be made to such well-known cases as *Nabob of the Carnatic v East India Co*, (1792-3) 2 Ves 56 and *Civilian War Claimants Association Ltd v The King*, [1932] AC 14 to show that no action would lie for money had and received or upon a trust. The court would not listen to an enquiry whether the Finance Minister of Hyderabad had authority to make the transfer. It would say that any representations to that effect must be made to the Crown and not to the courts. If our courts would not in like circumstances entertain an action against our own Government or its agent, they should not entertain an action against the State of Pakistan or its agent. Upjohn J put the point in a sentence when he said: "The present transaction was an inter-governmental transaction; let it be solved by inter-governmental negotiations". That is the kernel of the matter. I agree with it and would allow the appeal."

Pakistan, unsurprisingly, placed reliance on this passage.

299. The question is whether the factors that I have enumerated in paragraph 297 above are sufficient to render the question of the Transfer non-justiciable. I should say that I consider these to be the only material factors in relation to this question. As her pleading makes clear, Pakistan also sought to rely upon "other financial dealings" between Hyderabad and Pakistan. I do not consider these to be relevant. I obviously accept that they took place, and that a number of these dealings concerned the purchase of weapons. However, I have found that these transactions had nothing to do with the Transfer, which was entirely concerned with the question of "safeguarding", that is, keeping the Fund away from India.

300. I turn, therefore, to the question of justiciability.

²⁴² [1958] AC 379 at 423.

(3) Justiciability

(a) *The ambit of Pakistan's case*

301. Pakistan's primary case was that all aspects of this dispute were non-justiciable, save for the banker-customer relationship between the Bank and Pakistan, which was justiciable. Pakistan's alternative case was that all aspects of this dispute were non-justiciable.
302. I consider first whether Pakistan can, properly, put forward a case of partial justiciability, before considering the question of justiciability more generally.

(b) *Partial non-justiciability*

303. None of the parties was able to identify any law regarding the notion of "partial" non-justiciability. It seems to me that where an issue is entirely severable, standing distinct from all other issues, it is possible to contend that the issue of justiciability is confined to that particular issue or (alternatively) does not apply to that issue, but applies to all other issues.
304. However, where the issue said to be justiciable is closely entwined with issues said to be non-justiciable, in my judgment all of the issues are either justiciable or non-justiciable. For the Court to take a course where it decided one point, but left out of account other, related and material points (because to decide such points would be to infringe Rule 3 of the Doctrine) would be to decide a case on a false and probably unjust basis: *ex hypothesi*, if a court leaves out of account points that related to and are material to the point it is deciding, the court will likely be – and certainly arguably will be – making a judgment on a false basis.
305. The present case is an excellent case in point. Assuming the banker-customer relationship to be justiciable, but all other points non-justiciable, the outcome would be that Pakistan would obtain the Fund in circumstances where the non-justiciable points lead to an outcome where Pakistan in fact held on trust for Nizam VII and was not, itself, beneficially entitled. It seems to me that, in this case, justiciability is "all or nothing" and that the contrary is not seriously arguable. The issue, whilst differently framed, is precisely that considered by the Court of Appeal in *The Law Debenture Trust Corporation plc v. Ukraine*: I have set out the relevant passage in paragraph 284(4) above.

(c) *Non-justiciability: Rule 3 expanded*

(i) *The ambit of Rule 3*

306. Lord Neuberger considered how Rule 3 had been applied in the case-law in [128] to [130] of his judgment and considered the application of Rule 3 in relation to property and property rights (particularly apposite for the purposes of this case) in [144] to [165] of his judgment. I derive particular assistance from the following points:
- (1) Rule 3 is principally concerned with cases that come before the municipal courts which involve dealings or disputes by or between a sovereign state or states, where such dealings or disputes involve actions by such states operating on the plane of

public international law.²⁴³ In formulating Rule 3,²⁴⁴ Lord Neuberger was clearly drawing a distinction between those cases where a state is acting as only a sovereign state can, and those cases where a sovereign state is exercising rights or imposing upon itself obligations that a natural person or a corporation could transact. That distinction also underlies the case-law referenced by Lord Neuberger.²⁴⁵

- (2) That distinction is also clearly evident in Lord Neuberger's consideration of *Nissan v. Attorney General*.²⁴⁶ *Nissan* was, of course, a case of Crown act of state, not foreign act of state, and that distinction needs to be borne in mind. Nevertheless, Lord Neuberger noted that, bearing in mind the importance which both the common law and the Human Rights Convention attach to the right of access to the courts, judges should not be enthusiastic in declining to determine a claim under Rule 3 albeit that they should be "wary of accepting an invitation to determine an issue which is, on analysis, not appropriate for judicial assessment".²⁴⁷ He then went on:²⁴⁸

"I believe that this is reflected in observations of Lord Pearson in *Nissan v. Attorney General*, [1970] AC 179. Immediately after the passage quoted in [123] above,²⁴⁹ he said, at 237:

"Apart from these obvious examples, an act of state must be something exceptional. Any ordinary governmental act is cognisable by an ordinary court (municipal not international)²⁵⁰: if a subject alleges that the governmental act was wrongful and claims damages or other relief in respect of it, his claim will be entertained and heard and determined by the court."

A little later, he explained that where the Doctrine applied:

"the court does not come to any decision as to the...rightness or wrongness of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it."

And added that: "This is a very unusual situation and strong evidence is required to prove that it exists in a particular case."

²⁴³ As Lord Neuberger noted at [147], "[t]he third rule may be engaged by unilateral sovereign acts (*e.g.* annexation of another state) but, in practice, it almost always only will apply to actions involving more than one state (as indeed does annexation)". The phrase "plane of international law" derives from the *Tin Council* case (*JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*, [1990] 2 AC 418 at 499, cited with approval by Lord Sumption at [221]: it is "axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law". See also Lord Sumption at [234] and [237].

²⁴⁴ At [123].

²⁴⁵ At [128] to [130].

²⁴⁶ [1970] AC 179. Lord Neuberger's consideration is at [145].

²⁴⁷ At [144].

²⁴⁸ At [145].

²⁴⁹ See paragraph 294(3) above.

²⁵⁰ Emphasis supplied.

- (3) Lord Sumption expressed the same point in the following terms:²⁵¹

“One might ask why an English court should shrink from determining the legality of the executive acts of a foreign state by its own municipal law, when it routinely adjudicates on foreign torts and foreign breaches of contract. The answer is that the law distinguishes between exercises of sovereign authority and acts of a private law character. It is fair to say that the decided cases on the point generally involved internal revolutions or civil wars leading to a breakdown of law of a kind which could ultimately be resolved only by force. Other countries implicitly recognise the outcome diplomatically with retrospective effect, and their courts follow suit. Similar problems can arise in relation to the acts of totalitarian states where there may be no rule of law even in normal times. But I do not think that the act of state doctrine can be limited to cases involving a general breakdown of civil society or states without law. Quite apart from the formidable definitional problems to which such an approach would give rise, the basis of the doctrine is not the absence of a relevant legal standard but the existence of recognised limits on the subject matter jurisdiction of the English courts.”

- (4) Rule 3 is “based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving, as discussed by Lord Mance in [40]-[45] and by Lord Sumption in [234]-[239] and [244]. It is purely based on common law, and therefore has no international law basis, although, as discussed below, its application (unsurprisingly) can be heavily influenced by international law”.²⁵²

- (5) Lord Neuberger also considered questions of territoriality:

“163. So far as the cases are concerned, the first, second and third rules have only been applied in relation to acts within the territory of the state concerned. I find it hard to see how it could be argued that the first rule, which is concerned with legislation, could apply to acts which take effect in a location outside the territory of the state concerned. The same applies to the second rule, which is concerned with executive acts. The older cases indicate that both rules are based on sovereign power, and, as mentioned in [136] above, the nature of sovereign power is that it is limited to territory over which the power exists.

164 Further, a location outside the relevant territory would be in the territory of another state, and normal principles, including the first rule, would indicate that the laws of that other state would normally apply. It is therefore hard to see how the law of the state which committed the act could apply so far as the first rule is concerned. As to the second rule, in the absence of any judicial decision to the contrary, I cannot see any good reason why, if the act in question was unlawful pursuant to the laws of the location in which it occurred, the act of state doctrine should assist a defendant simply because the act was carried out by the executive of another state.

165 The position with regard to territoriality seems to me to be less clear so far as the third rule is concerned. As Rix LJ observed in the *Yukos* case, [2014] QB 458, [49], “It is not entirely clear” from what Lord Wilberforce actually said in *Buttes Gas* whether what I have called the third rule “is confined...to what transpires territorially within a foreign sovereign state”. However, I also agree with Rix LJ

²⁵¹ At [232].

²⁵² At [151].

that, at least in some circumstances it could do so, as it is inherent in the nature of the rule that it may apply to actions outside the territory of the state concerned.”

(ii) *The public policy exception*

307. Further assistance is obtained from the Court of Appeal’s decision in *The Law Debenture Trust Corporation plc v. Ukraine*.²⁵³ I have set out the material facts in paragraph 284(4) above. One of the issues before the court was whether, as Law Debenture contended, Ukraine’s defence of duress or illegitimate pressure involved acts of high policy by Russia in the sphere of international relations in the exercise of sovereign authority and was, therefore non-justiciable under Rule 3 of the Doctrine.²⁵⁴

308. The Court of Appeal approached this issue in the following way:

- (1) First, was there a domestic “foothold” – a basis in legal analysis under English law – which required or permitted the court to embark upon an examination of Ukraine’s case that Russia made threats against it which were unlawful as a matter of international law or otherwise illegitimate?²⁵⁵ As to this:
 - (a) English municipal courts do not decide questions of international law in the abstract. The question must in some way relate to a cause of action or defence to a cause of action that can be litigated before the English courts.²⁵⁶
 - (b) In this case, the foothold was Ukraine’s invocation of the substantive doctrine of duress under English law in its defence to Law Debenture’s claim on the notes.²⁵⁷
- (2) Secondly, given the existence of a domestic “foothold”, was the issue nonetheless beyond the competence of the English courts to resolve?²⁵⁸ The Court of Appeal held that, even though Ukraine’s defence raised matters of high policy by Russia, thus bringing Rule 3 into play, the issue was nevertheless justiciable before an English Court by reason of a public policy exception that had been identified by Lord Neuberger. As to this:
 - (a) In *Belhaj v. Straw*,²⁵⁹ Lord Neuberger held that Rule 3 did not apply. If, contrary to that holding, Rule 3 did apply, then a public policy exception came into play, which permitted the English courts to determine the matter notwithstanding the application of Rule 3.²⁶⁰

“Having said that, even if the third rule otherwise applied, I would still hold that this is a case where, assuming that the claimants were detained, kidnapped and tortured as they allege, the public policy exception would apply. In that connection,

²⁵³ [2018] EWCA Civ 2026.

²⁵⁴ The Court of Appeal held that this was, if anything, a Rule 3 case: [173].

²⁵⁵ At [155(i)].

²⁵⁶ See [155].

²⁵⁷ At [159].

²⁵⁸ At [155(ii)].

²⁵⁹ [2017] UKSC 3 at [167] and [168].

²⁶⁰ At [168].

Lord Sumption's impressive analysis of the relevant international law is important in the present context because I consider that any treatment which amounts to a breach of *ius cogens* or peremptory norms would almost always fall within the public policy exception. However, as explained above, because the Doctrine is domestic in nature, and in agreement with Lord Mance and Lord Sumption, I do not consider that it is necessary for a claimant to establish that the treatment of which he complains crosses the international law hurdle before he can defeat a contention that the third rule applies."

- (b) The Court of Appeal considered that whilst Ukraine's defence triggered Rule 3, the case also fell within the public policy exception articulated by Lord Neuberger.²⁶¹ This was for the following (cumulative) reasons:

"175. First, instead of dealing with Ukraine pursuant to a treaty governed solely by international law, Russia chose to structure its loan relationship with Ukraine in the form of a Eurobond, with an English choice of law clause and a clause choosing the English court as the forum. The strong willingness of English courts to apply rule of law standards to do substantive justice between parties to a contract governed by English law is well known. At the point of contracting, Russia chose to submit any claim by Law Debenture to the jurisdiction of the English court and hence has taken the risk with its eyes open that the court would apply the English law of duress as a substantive matter. This is a materially different context from one in which a third state has its actions called into question in litigation between two different parties, such as in *Belhaj* and *Abbasi*. Although we do not go so far as to say that the third rule cannot apply where the relevant state has chosen to submit to the jurisdiction of the English court, this is a factor which in our view makes the argument for self-restraint by the English court significantly weaker and correspondingly makes it easier to identify aspects of public policy in favour of the court deciding the issues before it according to their substantive merits. A similar point was made by this court in the context of enforcement against a state of an arbitration award resulting from an arbitration agreement contained in an unincorporated treaty: *Republic of Ecuador v. Occidental Exploration and Production Co*, [2005] EWCA Civ 1116 at [47]; and the force of this is greater in the present context, where the relevant relationship has been structured according to the domestic law of England and a specific choice of English jurisdiction has been made.

176. Secondly, insofar as the foreign act of state doctrine reflects to some degree a principle of respect by the domestic court for comity between states, it is relevant that in the present case comity points in both directions. Russia is a friendly state which wishes the court to exercise self-restraint, so as not to determine a matter which is relevant to the claim which Law Debenture brings on Russia's behalf. Ukraine is a friendly state which wishes the court to determine that matter, as a matter of justice between the parties, as part of its consideration of the merits of the claim which Law Debenture brings on Russia's behalf.

177. Thirdly, there is an aspect of comity between states which positively points in favour of the English court proceeding to determine Law Debenture's claim on Russia's behalf, including by scrutiny of Ukraine's defence of

²⁶¹ At [173] and [181].

duress. This is because the only way in which Russia can benefit in relation to the claim in contract under the Notes is by directing Law Debenture to sue in the English court, and if the English court does not proceed to determine that claim on its merits (including by scrutiny of Ukraine's defence of duress) the result would be that the court would stay the claim: see the discussion of issue (3) below. Russia, by arranging for Law Debenture to bring this contractual claim, has indicated clearly to the court that it wishes the court to proceed to determine it according to the merits, including by dealing with any defences which the court finds are arguably available to Ukraine as a domestic foothold. If Russia's preference is that the court should not make a determination of the issues of international law raised by Ukraine as part of its defence of duress, the solution is in Russia's own hands: it could cause Law Debenture to withdraw the contract claim or agree to a stay of that claim. Thus the public policy reasons underlying the third rule of the foreign act of state doctrine can be met in that way. Conversely, as a matter of basic justice, it does not seem to us that Russia can expect to seek to have this contract claim vindicated in an English court without that court proceeding to scrutinise the defence of duress which is arguably available to Ukraine. The fact that Russia presses the court to determine the contract claim knowing that such a defence arises in relation to it again weakens the argument for self-restraint by the court and correspondingly makes it easier for the court to identify public policy reasons why an exception to the third rule should apply. Indeed, in our view the need to do justice between the parties to the present claim and between Russia and Ukraine in a private law dispute between them is itself a reason of public policy why in this case the public policy exception should be found to apply.

178. Fourthly, there is nothing inherently non-justiciable or unmanageable in the legal standards which the English court would be called on to apply in determining whether Ukraine's duress defence is made out. English courts are well capable of construing treaty obligations and general obligations of states under international law and assessing their application: see the authorities above in this section of the judgment. This is not a case of an absence of "judicial or manageable standards by which to judge" the relevant issues, to use the language of Lord Wilberforce in *Buttes Gas*, [1982] AC 888 at 938. Ukraine's case is based on alleged threats to violate international treaties and obligations. There is no inherent insuperable difficulty in the court considering the evidence in relation to any threats made and assessing whether they were lawful or not according to the standards set out in those treaties and in the general norms of international law containing those obligations. The willingness of an English court to examine the position in international law where that is relevant to some issue in domestic law, even in respect of acts of the highest state policy such as in relation to war or the prosecution of armed conflict, is illustrated by the *Kuwait Airways*, *Belhaj* and *Serdar Mohammed* cases cited above.
179. Fifthly, there is no scope in this case for another aspect of public policy which underlies the third rule of foreign act of state, namely the constitutional concern that in a matter relating to the conduct of the United Kingdom's foreign affairs the courts should be astute not to usurp or cut across the proper role of the executive government, which has the primary responsibility for carrying on those affairs: see *Shergill v Khaira* at [42], set out above; also *Buttes Gas* [1982] AC 888 at 938. In the present case, there have been statements by Ministers making clear that the United

Kingdom regards the activities of Russia in seizing the Crimea and assisting military action by insurgents in Eastern Ukraine against the Ukrainian government as being in clear violation of Russia's obligations under international law, including in particular its obligations under the norm of *ius cogens* reflected in Article 2(4) of the UN Charter. The United Kingdom also gives effect in its law to EU sanctions imposed in response to such violation. These are matters which reflect in substance the alleged threats by Russia on which Ukraine seeks to rely in these proceedings, and it is not suggested that the United Kingdom government's attitude could be expected to be any different in relation to those alleged threats. Further, the United Kingdom government is on notice of the present proceedings and has had a full opportunity to intervene to draw to the court's attention any difficulty which their due resolution by the court might cause in the conduct of the foreign affairs of the United Kingdom. It has not sought to intervene or to suggest that any such difficulties might arise if the court accedes to Ukraine's submissions.

180. Sixthly, the public policy exception to the third rule is founded upon English public policy and is not restricted to cases of grave infringement of human rights: see *Belhaj* at [155], set out above. In our judgment, there is an especially strong public policy in this country that no country should be able to take advantage of its own violation of norms of *ius cogens*. This was adverted to by Lord Neuberger in *Belhaj* at [168], set out above, albeit in the context of the particular claims in issue in that case. However, it is significant that Lord Neuberger did not confine his reasoning to the particular norms relevant in that case, but stated the position more widely by reference to the category of *ius cogens* itself. In our view, this is because domestic public policy here is informed by public policy inherent in international law when it identifies norms as peremptory norms with the character of *ius cogens*. Identification of norms as having that character indicates the strong international public policy which exists to ensure that they are respected and given effect. Domestic public policy recognises and gives similar effect to that strong public policy. There is no norm more fundamental to the system of international law and the principle of the rule of law than that set out in Article 2(4) of the UN Charter."

- (3) The third question – what should happen to the proceedings assuming Rule 3 applied but the public policy exception did not – did not therefore arise for consideration by the Court of Appeal.²⁶² The Court of Appeal did, however, briefly consider the point: I have set out the Court of Appeal's reasoning in paragraph 284(4) above.

(iii) *Synthesis*

309. Rule 3 is essentially concerned with those cases where, in litigation before the English courts (*i.e.* where there is a "foothold", that is a claim *prima facie* justiciable in English courts²⁶³), an issue arises regarding the lawfulness of a state's conduct that is inherently non-justiciable. That will typically be because the issue is one of public international law,

²⁶² At [183].

²⁶³ Where there is no "foothold" – as where an English court is asked to resolve a question of pure public international law – the question resolves itself: there is no cause of action known to English law.

i.e. where there is an issue involving entities having personality according to public international law, which issue operates at the plane of international law rather than municipal law.²⁶⁴

310. It seems to me to follow that issues of private law, even if they involve sovereign states, are *prima facie* justiciable. As Lord Sumption made clear, the mere fact that the lawfulness of a sovereign state's conduct is called into play does not necessarily engage Rule 3.²⁶⁵

"The act of state doctrine does not apply... simply by reason of the fact that the subject matter may incidentally disclose that a state has acted unlawfully. It applies only where the invalidity or unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it. There is no real difference between the parties on this point, but it is worth emphasising none the less, for it is of some importance. Some such distinction is essential if the act of state doctrine is not to degenerate into a mere immunity against international embarrassment..."

311. Assuming an issue, not arising incidentally, but being necessary for the determination of the very subject of the action, gives rise to non-justiciable questions, then Rule 3 is engaged. Whether that means the claim cannot be heard at all and the proceedings stayed or whether parts of the claim can proceed will depend on all the circumstances.
312. What is clear, however, is that even if Rule 3 is engaged, there is a public policy exception. Quite how this exception works is a matter yet to be explored: it may be that the exception involves a balancing exercise, whereby a "strong" engagement of Rule 3 can defeat a "weak" public policy exception, which is very much what the Court of Appeal's approach in *Law Debenture v. Ukraine* appears to suggest. Or it may be that, when once Rule 3 is engaged, the question of non-justiciability is a given that can only be off-set by some form of public interest exception which, once established, does not need to be weighed in the balance. There is something to be said for either approach, but (for the reasons I give below) this is not a matter that arises in the present case.

(4) Application in the present case

313. I conclude that, on the facts of the present case, Rule 3 is not engaged. I have reached this conclusion for the following (related and cumulative) reasons:

- (1) The fact that the Second Account was used for the purchase of weapons is, as I have noted, irrelevant.
- (2) The issues before me are all private law issues, concerning the nature of the Transfer and the manner in which the Fund is held. It is not possible to identify an issue that is non-justiciable. There is certainly no issue of public international law or state action on the plane of public international law that falls for determination.
- (3) Of course, I have found that the motivation for the Transfer was to keep the Fund away from India – to safeguard it. That motivation arose from the Nizam VII's and Moin's views as regards India's intentions toward Hyderabad, including Operation

²⁶⁴ Where private law claims involving sovereign states arise, sovereign states gain protection through doctrines such as the doctrine of state immunity, on which Pakistan successfully relied in the 1954 Proceedings.

²⁶⁵ *Belhaj v. Straw*, [2017] UKSC 3 at [240].

Polo. It is unnecessary for me to decide whether Operation Polo was lawful in international law or not. What matters is the effect India's conduct had on the states of mind of Nizam VII and Moin. As I have found, the perception of Moin, and perhaps that of Nizam VII, was that the Transfer had to be effected in order to safeguard the Fund.

314. I conclude that Rule 3 of the Doctrine is not engaged. It is unnecessary for me to consider whether, had Rule 3 applied, the public policy exception to that Rule would have been engaged.

L. ILLEGALITY

(1) Introduction

315. Pakistan's case on illegality turns on an allegation that India's invasion of Hyderabad was an act unlawful under international and perhaps municipal law. Specifically, it was contended by Pakistan that the invasion and annexation of Hyderabad violated the Charter of the United Nations, violated the terms of the Indian Independence Act 1947 and breached the Standstill Agreement.²⁶⁶

316. Pakistan thus alleged three, very different, kinds of illegality:

- (1) First, that the terms of the Indian Independence Act 1947 had been violated. This, obviously, involves an allegation that English law has been violated.
- (2) Secondly, that the Standstill Agreement had been violated. This involves an allegation that a treaty between two sovereign states (as I have found them to be) – Hyderabad and India – was violated by one of them in 1948 by Operation Polo, if not by the events that preceded Operation Polo. The United Kingdom is neither a party to this treaty nor has this treaty been incorporated into English law.
- (3) Third, that the Charter of the United Nations had been violated. This is an international treaty to which the United Kingdom is a party. The treaty has only in part been incorporated into the domestic law of the United Kingdom.²⁶⁷

317. The Princes and India declined to plead a detailed case in response to these allegations of illegality. The Princes contended that the plea was irrelevant to their claims, since the only illegality alleged by Pakistan was that of India, and no illegal conduct was alleged against the Princes.²⁶⁸ For her part, India pleaded as follows:²⁶⁹

²⁶⁶ See paragraph 21 of Pakistan's Pleading.

²⁶⁷ Thus, the United Nations Act 1946 makes provision for the United Kingdom to support, by order in council, measures mandated under Article 41 of the United Nations Charter. It is to be inferred that much of the United Nations Charter has not been incorporated into domestic law because it operates on the plane of international law, and there is no need for domestic implementation.

²⁶⁸ See paragraph 45D of Nizam VIII's Pleading and paragraph 70A of Prince Muffakham's Pleading.

²⁶⁹ Paragraph 116(v) of India's Pleading.

“India declines to plead to the allegation that [Operation Polo]²⁷⁰ was “unlawful”, which is analytically irrelevant and if it were not would in any event be non-justiciable. In circumstances where India claims solely in right of [Nizam VII] (and not, as Pakistan has alleged, by virtue of a compromise made with the [Princes]) and as one of the alleged successors to the rights of [Nizam VII], the allegations raised in relation to the legality or otherwise of [Operation Polo] are as irrelevant to the claim advanced by India as they are to the claims advanced by the [Princes]. Pakistan has never advanced such allegations in defence to the claims brought by the Princes and would have no basis for doing so.”

318. Pakistan’s illegality contention raises a number of questions:

- (1) The first question is whether India is indeed correct in her assertion that the question of illegality is “analytically irrelevant” to the claim to the Fund advanced by India.
- (2) The second question is whether, even if the question of illegality were relevant to India’s claims, whether the Settlement that India has reached with the Princes means that the Princes’ own claims are rendered unenforceable. Pakistan accepted that, absent the Settlement, there could be no question of the Princes’ claims being rendered unenforceable by India’s illegality.
- (3) The third question, which only arises if the first two questions are determined in Pakistan’s favour, is whether there has in fact been illegality on the part of India.

I consider these three questions in turn below.

(2) **Is illegality “analytically irrelevant”?**

319. India’s point is that whereas Operation Polo took place in 1948, India’s interest in the Fund only arose after the 1965 Assignment.²⁷¹ Thus, at the time of the alleged illegality – which, it must be stressed, was only alleged against India – the person entitled to the fund (as I have found) was Nizam VII. India’s point was that it was impossible for the illegality alleged by Pakistan to affect an entitlement arising by virtue of an assignment occurring some 17 years later.

320. Mr Qureshi, QC had no real answer to this point. The closest he came was to suggest that the claims of Nizam VII and India could not really be disentangled. This point was well-expressed in an article cited by Mr Qureshi, QC by Clyde Eagleton.²⁷² Mr Qureshi very properly pointed out that Mr Eagleton was an adviser to Moin, as the purported representative before the United Nations of Hyderabad, and it is fair to say that his article puts matters very much from that perspective, rather than the perspective of India. In his article:

²⁷⁰ India referred to this as the “Police Action”: that, of course, was India’s characterisation of Operation Polo, which was not accepted by Pakistan. I prefer to use a neutral description of the operation, which the code name provides.

²⁷¹ Even then, India’s title was disputed by the Princes, who contended that their rights under the 1963 Settlement and the 1965 Appointment took priority over India’s claims. For the purposes of considering Pakistan’s contentions, I shall assume that India was entitled to the Fund pursuant to the 1965 Assignment.

²⁷² Eagleton, *The Case of Hyderabad Before the Security Council*, (1950) 44 Am J Int Law 277 (*Eagleton*).

- (1) Mr Eagleton points out that the Security Council permitted Moin to continue to represent Hyderabad after Nizam VII had accepted the resignation of his Government.²⁷³ Mr Eagleton drew the following conclusion from this:²⁷⁴

“Such a communication [from Nizam VII rescinding Moin’s credentials at the United Nations] would have, in ordinary circumstances, peremptorily ended the participation of the Hyderabad delegates; but, in the circumstances of this case, acceptance of the Nizam’s message would have meant acceptance by the Council of the fact of conquest by India and also would have assumed that the Nizam was not acting under duress. These assumptions, as we have seen, the Security Council was unwilling to make, and the matter was kept upon the agenda [of the Security Council]. This action – retention of the matter on the agenda – can be construed in no other way than to mean that the Security Council is not satisfied as to the legality of the action taken by India. If it were satisfied, and willing to accept as legitimate the conquest and absorption by India, it would have to accept the message withdrawing the credentials of the Hyderabad Delegation, whether written by the Nizam or not; but, until it does decide the question one way or the other, the validity of the credentials given to the Hyderabad Delegation must be respected.”

- (2) Mr Eagleton then noted that, with the absorption of Hyderabad into India, “[p]ractically speaking, the case of Hyderabad is finished. Under the new Indian Constitution Hyderabad has been incorporated into the state of India, and the Nizam submissively participated in the ceremony by which it was done. The item remains upon the agenda of the Security Council,²⁷⁵ but there is no indication of interest in that body. States could refuse to recognise as legal this change brought about by the use of force contrary to treaty; the Security Council could still take action, though it would be difficult to undo a *fait accompli*. Possibly, a British court will be called upon to give the decision which the Security Council failed to render”.²⁷⁶

- (3) This passage concludes with footnote 70, which states:²⁷⁷

“When [Moin] found that Hyderabad was in danger of being conquered, he transferred a large part of Hyderabad State money into a special fund in a British bank. This was done in his capacity as Finance Minister and, as a result of his foresight, India was unable to take over this money. According to newspaper reports, India has now instituted suit (in the name of the Government of Hyderabad) in a British court to obtain money. The claim must be based upon the premise that conquest gives title, for title has been acquired in no other way...In any case, a decision to turn the money over to India would give legal effect to a transfer of title accomplished by the use of force contrary to the Charter of the United Nations.”

321. The point is that the claim by Nizam VII and Hyderabad in the 1954 Proceedings was – by virtue of the “conquest” of Hyderabad and the “duress” over Nizam VII – in effect India’s claim, and that this was not a case where India’s alleged illegality was irrelevant,

²⁷³ See paragraph 80 above.

²⁷⁴ *Eagleton*, at 299 to 300.

²⁷⁵ As it still does.

²⁷⁶ *Eagleton*, at 301.

²⁷⁷ *Eagleton*, at 301.

but where it was central to the claim in the 1954 Proceedings and so central to the present claims of the Princes and India. The essence of the point is that this was India's claim "in the name of the Government of Hyderabad". Mr Eagleton puts the matter tendentiously, because the primary claimant was Nizam VII not Hyderabad.

322. Put this way, one can see how it might be said that the claims of Nizam VII and India could not really be disentangled and that India's interest in the Fund arose independently of and prior to the 1965 Assignment. Nevertheless, I consider this argument to be misconceived:

- (1) Even accepting that Mr Eagleton was properly putting the position in public international law,²⁷⁸ the question of Hyderabad's accession to India is a "fact of state" being considered before an English court which I have already determined. I have found that prior to her accession to India, Hyderabad was a sovereign state and that the accession of Hyderabad to India is a matter that has been recognised by the Government of the United Kingdom. In these circumstances, it is not open to me to question the accession of Hyderabad to India. Even if it was clear that India was the direct or indirect beneficiary of the 1954 Proceedings (e.g. by virtue of the position of Hyderabad as a claimant in those proceedings), it would not be open to me to conclude that this was giving legal effect to a transfer of title accomplished by the use of force.
- (2) But India was not the direct or indirect beneficiary of the 1954 Proceedings. It is quite clear that the primary claimant was Nizam VII in his own right. Hyderabad was joined as a claimant to deal with the potential argument that the Nizam was not the proper claimant, following Hyderabad's accession to the Indian Union. It is clear that Nizam VII was the primary claimant because – when Hyderabad itself was about to cease to be a state within the Indian Union – a precautionary assignment was taken by Nizam VII from Hyderabad to ensure that the claim to the Fund did not vanish in a legal "black hole" and that no challenge could be made to Nizam VII's title to sue. It is thus clear that the person interested as claimant in the 1954 Proceedings was not India by virtue of her "conquest" of Hyderabad,²⁷⁹ but Nizam VII in his personal capacity.
- (3) It follows from this, that any question of "duress" of Nizam VII is something of a red herring. The claim of Nizam VII to have the Fund restored to him was not in order to benefit Hyderabad as a state in the Indian Union nor even India herself, but simply to ensure that the Nizam's personal fortune – which he had sought to put out of India's grasp in 1948 – was restored to him.

323. I conclude, therefore, that India's primary submission is well-founded, and that even if there were illegality of the nature alleged by Pakistan, that illegality is irrelevant to the present claim. The claim to the Fund was originally Nizam VII's claim: that claim has passed to the Princes and/or to India by virtue of the 1963 Settlement, the 1965

²⁷⁸ As I have noted, Mr Eagleton was perhaps *parti pris*, and it must be noted both that Moin was subsequently not recognised as Hyderabad's representative (as described in *Eagleton* at 300-301) and that retaining an item on the Security Council's agenda may do no more than reflect "a custom...being developed whereby the Security Council keeps a matter indefinitely upon its agenda with no intention of acting upon it, the purpose being to save face, and that this is the explanation in the case of Hyderabad" (*Eagleton* at 301).

²⁷⁹ As put by Mr Eagleton.

Appointment and the 1965 Assignment. Because of the Settlement between the Princes and India, it has been unnecessary for me to decide who is properly the Nizam's successor in title. The Settlement has rendered that issue academic.

(3) The significance of the Settlement

324. It is clear that Pakistan's illegality argument could only operate as against India. It could not – as Pakistan accepted – serve to defeat the Princes' claims. Pakistan contended that if India's claim was tainted by illegality (contrary to my finding above), then – because of the Settlement that had been reached between the Princes and India²⁸⁰ – this illegality served to defeat not only India's claim, but also that of the Princes. In short, because the Princes had effected a compromise with a party whose claim was tainted by illegality, the Princes' own claims – which were otherwise good and entirely untainted by illegality – would themselves fail.
325. It is difficult to see how this argument can possibly be correct. Essentially, it means that any person reaching a settlement with another person, whose claim is potentially tainted by illegality, would be ill-advised to reach any settlement with such a person, because the illegality would infect an otherwise lawful claim. In this case, the effect of the settlement would – according to Pakistan – at one and the same time have the effect of depriving the Princes of their claims, whilst permitting Pakistan to claim the Fund which I have found does not beneficially belong to her.
326. Assuming – contrary to my conclusion – that India's claim was tainted by illegality, so as to preclude India from claiming the Fund, I find that the taint affecting India's claim would be insufficient to prevent the payment of the Fund to the Princes and/or India for the receiving party then to distribute amongst the other parties in accordance with the Settlement reached by them. I have reached this conclusion for the following reasons:
- (1) As I have described,²⁸¹ the claims to the Fund operate at two levels: Stage 1 being the question as to whether the Transfer caused the Fund to be transferred beneficially to Pakistan or whether the Fund was transferred on trust for Nizam VII; and Stage 2 dealing with the contingent claims of the Princes and India to the Fund assuming Pakistan lost at Stage 1.
 - (2) These Stages involve very different questions. Stage 1 concerns the rival claims to the Fund of Pakistan and Nizam VII, whereas Stage 2 concerns the rival claims of the Princes and India. Pakistan has no *lis* in relation to Stage 2. Her entitlement is determined – one way or the other – at the conclusion of Stage 1.
 - (3) I have determined Stage 1 against Pakistan, and – but for the Settlement – would now proceed to determine the rival claims of the Princes and India. It is difficult to see how, in this hypothetical case, Pakistan could properly raise any point at Stage 2, including a question of illegality.
 - (4) Of course, I appreciate that a Court cannot simply disregard a question of illegality, but must consider it (if appropriate) of its own motion. That said, Pakistan's point

²⁸⁰ Described in paragraph 13(2) above.

²⁸¹ See paragraph 13 above.

can, at best, be said to be an arguable point and one which I have – for the reasons given above – rejected. There is no reason why a dispute which gives rise to questions of illegality cannot properly be compromised, provided the compromise itself is not tainted by illegality.²⁸² Even if Pakistan’s contention of illegality had been arguable, I find that the Settlement between India and the Princes to be one that it was open to them to make, and that one of the effects of the Settlement is to render further irrelevant the question of illegality raised by Pakistan.

(4) Different types of illegality alleged by Pakistan

(a) Introduction

327. In light of my findings, it is strictly unnecessary for me to address the substance of Pakistan’s contentions regarding illegality. I have found the illegality argument to be irrelevant to this dispute and in any event compromised by the Settlement between the Princes and India.

328. Nevertheless, Pakistan pleaded her case on illegality in some detail and although India (as well as the Princes) declined to engage with these points, it is appropriate that I briefly deal with Pakistan’s substantive case on illegality, given the emphasis Mr Qureshi, QC placed on this.

329. As I have noted, Pakistan relied upon three, very different, allegations of illegality. It is necessary to consider them in turn.

(b) The Indian Independence Act 1947

330. In Pakistan’s Pleading, Pakistan contended that India’s conduct in relation to Operation Polo was in violation of section 7(1) of the Indian Independence Act 1947, the text of which is set out in paragraph 66 above.²⁸³ Specifically, Pakistan contended that:

“21.3 The State of Hyderabad was an Indian State within section 7 of the Indian Independence Act...It is apparent from the terms of section 7(1) of the 1947 Act that the Ruler of Hyderabad, the Nizam, was able to denounce any agreement relating to customs, etc, continued under section 7(1). This provision is only consistent with the Nizam’s continuing sovereignty and political independence; and wholly inconsistent with any suggestion that the new Dominion of India had any right to interfere with the Nizam’s sovereignty and political independence in relation to any matters.

21.4 India’s violation of the Nizam’s sovereignty and political independence, by threatening to use, and using, force against the State of Hyderabad, was contrary to the terms of the Indian Independence Act 1947, from which it was clear that Nizam was to remain sovereign following the lapse of His Majesty’s suzerainty.”

331. Since the 1947 Act is a part of English law, it follows that any illegality under this Act is a matter that I would have to take into account if the illegality were related to the claims before me. However, not only is the illegality unrelated to the claims before me, but there has also been no infringement or violation of or illegality under the 1947 Act. The 1947 Act – as I have described – established the Dominions of India and Pakistan as

²⁸² See *Binder v. Alachouzouos*, [1972] 2 QB 151; Foskett, *Foskett on Compromise*, 8th ed (2015) at [4-72].

²⁸³ Paragraphs 21.2 to 21.4 of Pakistan’s Pleading.

independent sovereign states and cut free the Princely States or Indian States from the suzerainty of the Crown. It did not, however, impose obligations as to future conduct on any of these parties, still less did it guarantee the future status of these (now) sovereign states: there is nothing in the 1947 Act itself to render India's conduct as against Hyderabad unlawful. I find that there has been no breach of the 1947 Act.

(c) *The Standstill Agreement*

332. Pakistan contended that Operation Polo violated the terms of the Standstill Agreement.²⁸⁴

333. The Standstill Agreement is a treaty between India and Hyderabad. I have found that it is a treaty between two sovereign states, but even if it were not (if, for example, I were wrong in my conclusion that Hyderabad was, at this time, a sovereign state) the fact that the Standstill Agreement may have been infringed by India is irrelevant for the purposes of English law. The Standstill Agreement is not governed by nor is it a part of English law and involves no performance in England. Indeed, beyond the historical, it has no connection with England at all. Accordingly, even if it has been breached – as to which I make no finding – that breach cannot sustain Pakistan's illegality argument.²⁸⁵

(d) *The Charter of the United Nations*

334. Paragraph 21.1 of Pakistan's Pleading states:

"India violated Article 2(4) and/or Article 2(3) of the UN Charter and/or customary international law by its use of force, and earlier threats to use force, against the territorial integrity and/or political independence of the State of Hyderabad. India's use of force against the territorial integrity and political independence of the State of Hyderabad commenced on (or about) 13 September 1948. The Army of the State of Hyderabad surrendered to the Indian army on (or about) 18 September 1948. The State of Hyderabad lost her political independence and it was subsequently formally annexed by India."

335. Articles 2(3) and 2(4) of the Charter of the United Nations provide:

"The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

- (3) All Members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered.
- (4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

336. India did not contend that an infringement of the Charter of the United Nations was in all cases irrelevant for the purposes of an illegality argument. As Mr Otty, QC put it, there might be grounds for international law to inform English public policy.²⁸⁶ I accept this. However, it is a matter of dispute between Pakistan and India as to whether Operation Polo constituted an infringement of the United Nations Charter and/or customary international law. This question, as it seems to me, is one falling squarely within Rule 3

²⁸⁴ Paragraphs 21.5 to 21.6 of Pakistan's Pleading.

²⁸⁵ See *Shergill v. Khaira*, [2014] UKSC 33 at [43]; *Belhaj v. Straw*, [2017] UKSC 3 at [234].

²⁸⁶ Transcript Day 8/p.153.

of the Doctrine as being precisely the sort of issue that is incapable of being determined in a domestic court.

337. Because I have found that the illegality alleged by Pakistan is irrelevant to these proceedings, it is unnecessary for me to consider what order I should make in these proceedings, were I to conclude that Rule 3 of the Doctrine pertained. In the analogous situation considered by the Court of Appeal in *The Law Debenture* case, the Court of Appeal would have been minded to stay the entirety of the proceedings, because it would have been unfair to permit Russia, through Law Debenture, to assert a claim against Ukraine whilst Rule 3 of the Doctrine prevented Ukraine from articulating what might be a complete defence to that claim. Pakistan could make a similar argument here: if Rule 3 of the Doctrine applies, then she is unable to put forward her illegality defence, which might be a complete defence to the claim.
338. For the reasons I have given, this question does not arise, but I should make clear that if it did, I would have been disinclined to stay the proceedings. That is because, following Operation Polo, as I have described, Hyderabad became a part of the Indian Union which is an accession that I have found to have been recognised by the Government of the United Kingdom. In these circumstances, even if Operation Polo was an unlawful usurpation of Hyderabad's sovereignty, it is a fact of State that Hyderabad is a part of India. Given that any illegal action by India against Hyderabad before 1950 appears (at least so far as the United Kingdom is concerned) to have merged into the acceptance by the United Kingdom of Hyderabad's accession to India, I would not have caused the proceedings to be stayed by reason of the operation of Rule 3, because that would have been inconsistent with the United Kingdom's position regarding the status within India of the former State of Hyderabad, which status began in 1950.

(5) Overall conclusion

339. I conclude that Pakistan's illegality argument fails for the following reasons
- (1) First, India is indeed correct in her assertion that the question of illegality is "analytically irrelevant" to the claim to the Fund advanced by India.
 - (2) Secondly, even if the question of illegality were relevant to India's claims, the Settlement between the Princes and India has rendered the issue irrelevant because the rival claims to the Fund of the Princes and India have validly been compromised, such that the question of illegality is no longer before the Court.
 - (3) Thirdly, there is no illegality alleged that is sufficient to cause this Court to prevent the Princes and India – specifically, India – from asserting her claim to the Fund.

L. CONCLUSIONS AND DISPOSITION

340. I conclude that:
- (1) The Fund was held by Pakistan through her High Commissioner in the United Kingdom on trust for Nizam VII and his successors in title. The Fund was not held by Rahimtoola personally, nor did either Pakistan or Rahimtoola have any beneficial interest in the Fund.

- (2) The trust was either a constructive trust in favour of Nizam VII or a resulting trust in favour of Nizam VII. It was not, as I have found, an express trust because I find that Nizam VII did not communicate to Moin any authority to effect the Transfer and create a trust. However, Moin's conduct was consistent with the unexpressed wishes of Nizam VII. Both Moin and Rahimtoola intended that an express trust should arise and – had there been a communication of authority by Nizam VII to Moin – an express trust would have arisen.
 - (3) There is nothing in the involvement of Pakistan, India, Hyderabad or Nizam VII as sovereign states or rulers of sovereign states to prevent a trust (whether express, constructive or resulting) from arising.
 - (4) It is unnecessary, given the Settlement reached as between the Princes and India, for me to determine whether it is the Princes or India that is Nizam VII's successor in title, whether by virtue of the 1963 Settlement and 1965 Appointment (in the case of the Princes) or the 1965 Assignment (in the case of India). However, it is appropriate to record that the Nizam's successor in title can be no-one other than the Princes or India. The administrator of Nizam VII's estate (Mr Lintott) was a party to these proceedings and was given every opportunity to bring a rival claim to those of the Princes and India: he did not do and is bound by the outcome of these proceedings. It is also appropriate to record that during the course of these proceedings, I have seen no hint of the possibility of any further claimant to the Fund, beyond the Princes and India.
 - (5) The Princes' and India's alternative claims in restitution succeed against (i) Pakistan and (ii) in the alternative, the Bank. I find that Pakistan's assertion of a defence of limitation is an abuse of the process of the court and order that the paragraphs in Pakistan's statements of case asserting this defence be struck out. The Bank never pleaded a defence of limitation, and I find that a claim in restitution is properly maintainable against the Bank.
 - (6) Pakistan's contentions of non-justiciability by reason of the foreign act of state doctrine and non-enforceability on grounds of illegality both fail.
341. In these circumstances, Nizam VII was beneficially entitled to the Fund and those claiming in right of Nizam VII – the Princes and India – are entitled to have the sum paid out to their order. I will leave it to the parties to frame an appropriate form of order for my approval.
342. I am very grateful to the parties for all their considerable assistance in this matter. I have no doubt that the parties and their legal teams would wish to record their sadness, which I share, at the passing of Mr Brettler, Pakistan's junior counsel from 2015 onward in these proceedings, on 12 July 2019. This was his last case, and his loss will be keenly felt.

ANNEX 1

GLOSSARY OF NAMES AND TERMS USED IN THE JUDGMENT

TERM	MEANING	FIRST USE IN THE JUDGMENT
Allan	RAB Allan, Managing Director of the Hyderabad State Bank.	Para 90
appointed day	The date specified in the Indian Independence Act 1947, being 15 August 1947.	Para 63
Arms for Money Argument	Pakistan's contention that she was absolutely entitled to the Fund on the basis described in paragraph 17(1) of the Judgment.	Para 17(1)
Bank	The Westminster Bank, as it was called in 1948, including any subsequent name changes and/or re-organisations since 1948.	Para 1
Bank's solicitors	Messrs Freshfields.	Para 156
<i>Bowstead & Reynolds</i>	Watts & Reynolds, <i>Bowstead & Reynolds on Agency</i> , 21 st ed (2018).	Para 286 fn 224
British India	Prior to the appointed day, the territory now divided between India and Pakistan.	Para 62
Cotton	Sidney Cotton, an adventurer centrally involved in the provision of arms to Pakistan and Hyderabad.	Para 54
CPR	The Civil Procedure Rules.	Para 26(2)
<i>Dicey & Morris</i>	Collins (ed), <i>Dicey, Morris & Collins: The Conflict of Laws</i> , 15 th ed (2012)	Para 183(2) fn 122
Doctrine	Lord Neuberger's shorthand term for referring to the foreign act of state doctrine.	Para 293
<i>Eagleton</i>	Eagleton, <i>The Case of Hyderabad Before the Security Council</i> , (1950) 44 Am J Int Law 277.	Para 320 fn 272
Fordham 7	The seventh statement of Mr Fordham, on behalf of Pakistan.	Para 129(3)
Fund	The monies standing to the credit of the Rahimtoola Account.	Para 5
<i>Goff & Jones</i>	Mitchell, Mitchell & Watterson, <i>Goff & Jones: The Law of Unjust Enrichment</i> , 9 th ed (2016).	Para 289 fn 226
Gupta	Lakshmi Narayan Gupta, the Financial Secretary of Hyderabad at the time of Operation Polo, later an Indian civil servant.	Para 40
Gupta 1	Affidavit of Gupta in the 1954 Proceedings, sworn 17 March 1956.	Para 40

Hillview	Hillview Assets Holdings Limited, the assignee of Nizam VIII's interest in the Fund.	Para 15(3)(a)
Hyderabad	The state of Hyderabad in all its emanations.	Para 2
Hyderabad State Bank	The central bank of Hyderabad.	Para 90
Hyderabad State Bank Account	The account established by the Hyderabad State Bank with the Bank.	Para 90
Ikramullah	Mohammad Ikramullah, one of Rahimtoola's successors as High Commissioner.	Para 36(3)
India Union of India	The state of India as created by the Indian Independence Act 1947 on 15 August 1947 in all its emanations.	Para 2
India's Factual Narrative	The narrative produced by India pursuant to the permission granted by the court to adduce such a narrative.	Para 33
India's Pleading	Re-Re-Re-Amended Defence and Counterclaim on behalf of India and the President of India.	Para 15(2) fn 11
Indian States	The term used in the Indian Independence Act 1947 to refer to the princely states.	Para 64
Ispahani	Mirza Abol Hassan Ispahani, High Commissioner of Pakistan in succession to Rahimtoola.	Para 147(1)
Ispahani letter	A letter, dated 23 May 1953, from Pakistan's Ministry of Foreign Affairs and Commonwealth Relations to Ispahani.	Para 147(2)
Laik Ali	Mir Laik Ali, Prime Minister of Nizam VII's Government until 17 September 1948.	Para 73(2)
Law Debenture	The Law Debenture Trust Corporation plc.	Para 284(4)
Lewin	Tucker, Le Poidevin and Brightwell (eds), <i>Lewin on Trusts</i> , 19 th ed (2015).	Para 248 fn 179
Luschwitz	Major J Henry Luschwitz, the director of music of the Hyderabad Army, who gave evidence in relation to the acquisition and transportation of weapons.	Para 208 fn 146
Luschwitz 1	Luschwitz's statement, dated 8 October 1948.	Para 208 fn 146
Luschwitz 2	Luschwitz's second (supplemental) statement, dated 9 October 1948.	Para 208 fn 146
McGee	McGee, <i>Limitation Periods</i> , 8 th ed (2018).	Para 276 fn 203
McLachlan	McLachlan, <i>Foreign Relations Law</i> , 1 st ed (2014).	Para 191 fn 134
Mir	Nawab Mir Nawaz Jung, Agent General for Hyderabad in London by September 1947 until 17 September 1948.	Para 86

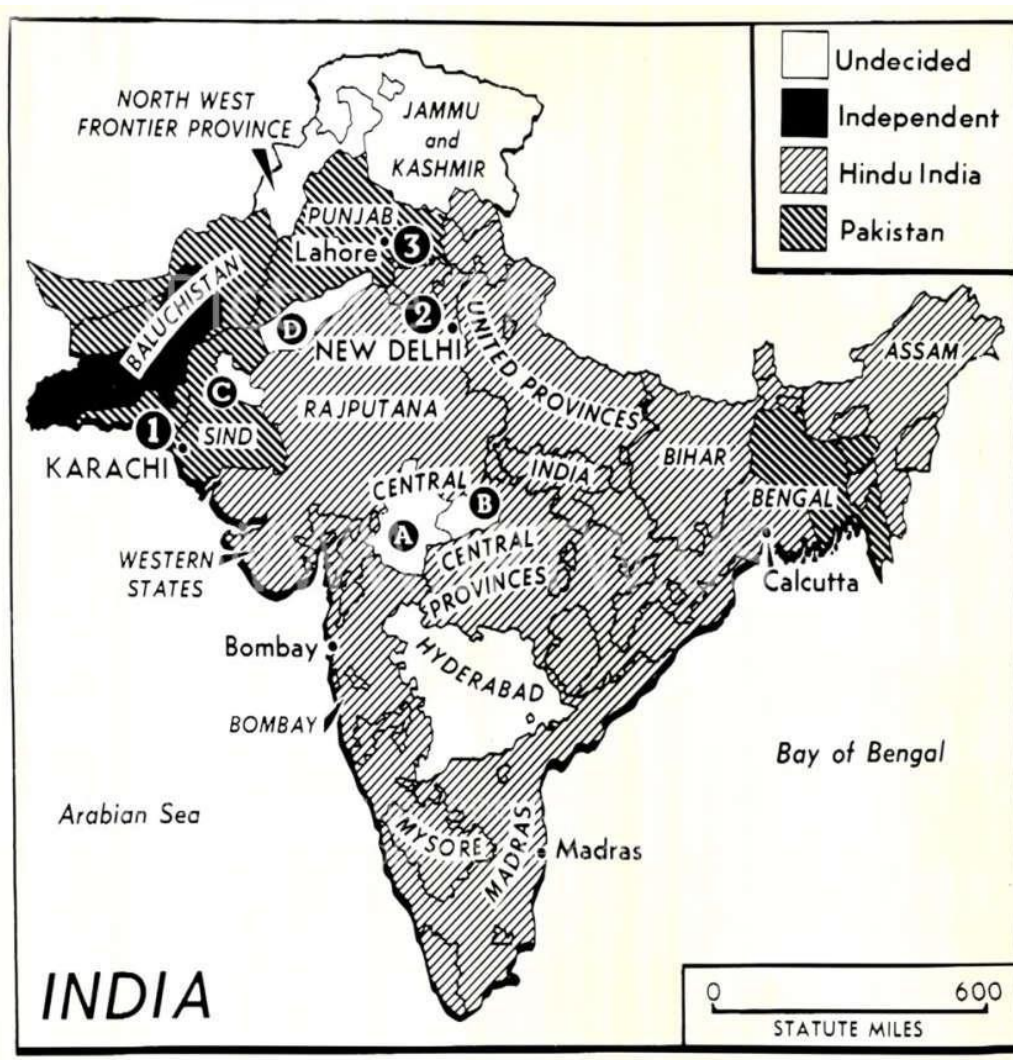
Mirza	Colonel Iskander Mirza, at all material times the Secretary of Defence of Pakistan.	Para 211(1)
Moin	Nawab Moin Nawaz Jung, Finance Minister and Minister for External Affairs in Nizam VII's Government until 17 September 1948.	Para 1
Monckton	Sir Walter, later Lord, Monckton, QC.	Para 31
Muffakham 1	Prince Muffakham's first statement in these proceedings, dated 20 August 2015.	Para 35
Muffakham 2	Prince Muffakham's second statement in these proceedings, dated 11 December 2018.	Para 35
Najmuddin	Najmuddin Kham, a Hyderabad civilian involved with Cotton in the acquisition and transport of weapons into Pakistan and/or Hyderabad.	Para 208
Nizam VII	The Seventh Nizam of Hyderabad, in 1948 the ruler of Hyderabad.	Para 6
Nizam VII 1	Affidavit of Nizam VII in the 1954 Proceedings, sworn 3 November 1956.	Para 40
Nizam VII's solicitors in the 1954 Proceedings	Messrs Stanley, Johnson & Allen.	Para 154
Nizam VIII	The eldest grandson of Nizam VII and the Eighth Nizam of Hyderabad.	Para 9(1)
Nizam VIII's Pleading	Re-Re-Re-Amended Defence and Interpleader Claim of Hillview.	Para 15(3)(a) fn 12
Operation Polo	The interaction between the forces of India and the forces of Hyderabad that took place in September 1948.	Para 74
Pakistan	The state of Pakistan as created by the Indian Independence Act 1947 on 15 August 1947 in all its emanations.	Para 3
Pakistan's Factual Narrative	The narrative produced by Pakistan pursuant to the permission granted by the court to adduce such a narrative.	Para 33
Pakistan's Pleading	Pakistan's Re-Amended Particulars of Claim in these proceedings.	Para 15(1) fn 10
Pakistan's Reply	Pakistan's Re-Re-Re Amended Reply to India's Pleading.	Para 25 fn 27
Pakistan's solicitors in the 1954 proceedings	Messrs Sanderson Lee Morgan Price & Co.	Para 6
Prince Muffakham	The younger grandson of Nizam VII and the (younger) brother of Nizam VIII.	Para 9(2)
Prince Muffakham's Pleading	Re-Re-Amended Defence and Interpleader Claim of Prince Muffakham and Shannon.	Para 15(3)(b) fn 13

princely state	Territory geographically a part of the Indian subcontinent, but not a part of British India	Para 62
Princes	A collective reference to Nizam VIII and Prince Muffakham.	Para 9
Radley	Robert Radley, an expert forensic examiner.	Para 32
Radley 1	The first report of Radley.	Para 32
Raghavan	Nonavinakere Srinavasa Raghavan, a lawyer and expert in the law of Hyderabad, who provided evidence in the 1954 Proceedings	Para 56
Raghavan 1	Affidavit of Raghavan in the 1954 Proceedings, sworn 17 February 1956.	Para 56
Raghavan 2	Affidavit of Raghavan in the 1954 Proceedings, sworn 17 March 1956. This was a re-swearing of Raghavan 1 and so added nothing of substance.	Para 56
Rahimtoola	Habib Ibrahim Rahimtoola, in 1948 the High Commissioner to the United Kingdom for the Islamic Republic of Pakistan.	Para 1
Rahimtoola Account	The account receiving the Transfer and holding the Fund.	Para 5
Rahimtoola 1	Affidavit of Rahimtoola in the 1954 Proceedings, sworn 15 July 1955.	Para 40
Rahimtoola 2	Affidavit of Rahimtoola in the 1954 Proceedings, sworn 19 June 1956	Para 40
Safeguarding Argument	Pakistan's contention that she was absolutely entitled to the Fund on the basis described in paragraph 17(2) of the Judgment.	Para 17(2)
Second Account	The account out of which the Transfer was made.	Para 5
Settlement	The Settlement concluded between the Princes and India (and the Administrator of the estate of Nizam VII) as regards their contingent claims to the Fund.	Para 13(2)
Shannon	Shannon Consulting Limited, the assignee of Prince Muffakham's interest in the Fund.	Para 15(3)(b)
Shaharyar	Shaharyar Mohammad Khan, a former diplomat and Pakistan Foreign Minister called to give evidence on behalf of Pakistan.	Para 37
Shaharyar 1	The first witness statement of Shaharyar, dated 14 January 2016.	Para 37
Shoaib	Mohammad Shoaib, in 1948 the Financial Adviser, Military Finance in the Government of Pakistan.	Para 207
Standstill Agreement	An agreement concluded between India and Hyderabad on 29 November 1947.	Para 27(2)(c)

Transaction x	One of the transactions listed in Annex 3, where x is the number of the Transaction in Annex 3.	Para 91
Transfer	The transfer of £1,007,940 9s 0d on 20 September 1948 by Moin to Rahimtoola.	Para 1
Zafrullah	Sir Zafrullah Khan, Pakistan's Foreign Minister in 1948.	Para 112
Zahir	Zahir Ahmed, in 1948 the Foreign Secretary to the Government of Nizam VII.	Para 75
1954 Proceedings	The claim brought by Nizam VII and Hyderabad in the Chancery Division of the High Court of Justice under Claim 1954 H No 2387.	Para 6
1956 Assignment	An assignment, by way of a deed dated 27 October 1956, whereby the State of Hyderabad assigned to Nizam VII all of its interest in the Fund.	Para 147(4)
1963 Settlement	A trust created by Nizam VII over his interest in the Fund.	Para 9
1965 Appointment	An irrevocable appointment of the capital and income of the 1963 Settlement upon trust for the Princes.	Para 9
1965 Assignment	An assignment by Nizam VII of his claim to the Fund to the President of India.	Para 10

ANNEX 2

MAP SHOWING THE POSITION OF HYDERABAD IN 1948



ANNEX 3

TRANSACTIONS ON THE HYDERABAD STATE BANK ACCOUNT, THE SECOND ACCOUNT AND THE RAHIMTOOLA ACCOUNT

Date	Transaction ²⁸⁷	Balance on Hyderabad State Bank Account	Balance on Second Account	Balance on the Rahimtoola Account
ESTABLISHMENT OF THE HYDERABAD STATE BANK ACCOUNT				
30 Oct 1947	Transaction 1 Transfer of £2m from the Imperial Bank of India to the Hyderabad Government Account	£2,000,000		
ESTABLISHMENT OF THE SECOND ACCOUNT				
7 Apr 1948	Transaction 2 Transfer of £1m from the Hyderabad Government Account to the Second Account	£1,000,000	£1,000,000	
16 Apr 1948	Transaction 3 Payment to Shoaib in the amount of £250,000 out of the Second Account ²⁸⁸	£1,000,000	£750,000	
30 Apr 1948	Transaction 4 Payment to Shoaib in the amount of £500,000 out of the Second Account	£1,000,000	£250,000	
29 May 1948	Transaction 5 Transfer of £1,000,000 (plus accrued interest) from the Hyderabad Government Account to the Second Account	Nil	£1,250,000	
18 Jun 1948	Transaction 6 Payment to Shoaib in the amount of £100,000 out of the Second Account	Nil	£1,150,000	
21 Jun 1948	Transaction 7 Payment to Shoaib in the amount of £44,000 out of the Second Account	Nil	£1,106,000	
23 Jun 1948	Transaction 8 Payment to Barclays Bank in the amount of £100,000 in favour of Cotton under control of Shoaib out of the Second Account	Nil	£1,006,000	
ESTABLISHMENT OF THE RAHIMTOOLA ACCOUNT				
20 Sep 1948	Transaction 9 The Transfer from the Second Account to the Rahimtoola Account	Nil	Nil	£1,007,940.45

²⁸⁷ This is not a complete list of transactions. It omits all reference to accrued interest on the account and also omits one (minor) transaction, which I found to be of no relevance or assistance, namely 21 June 1948 transfer of £5,000 to Ghulam Mohammad. The point of the table is not to provide a complete account, but rather an overview of the various transactions that are referenced in the Judgment.

²⁸⁸ The descriptions of Transactions 3, 4, 6, 7 and 8 are derived from a list, by the Bank, detailing payments out of the Second Account prior to final transfer.

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