

JUDGMENT : Morison J.: Commercial Court. 6th December 2005.

Introduction

1. In this Judgment I shall call Walker International Holdings Limited 'Walker'; Republique Populaire du Congo 'Congo', Societe Nationale des Petroles du Congo 'SNPC'; Jackson 31 Limited 'Jackson'; and Financiere et Investissements Du Congo SA 'Fininco'.
2. By an arbitral Award made on 20 July 2000, Congo was ordered to pay Walker an amount in excess of FFf 100 million. On 30 October 2000, Master Miller ordered that Walker be at liberty to enforce the Award in the same manner as a judgment, and on 16 August 2001 judgment was entered against Congo for the Euro equivalent of the debt plus interest, and the costs of the arbitration.
3. The debt on which Walker sued arose out of a loan agreement made between Congo [the State] and a lender called Sadelmi Cogepi [whose rights were subsequently assigned to Walker]. Walker is one of a number of organisations which have bought debts due from the Congo at a substantial discount and are seeking to enforce their rights against Congo. There has been a steady stream of litigation relating to enforcement action in France, the Cayman Islands, the USA and in this jurisdiction. Congo is determined not to pay these debts and has taken steps to try and put its assets out of the reach of creditors such as Walker.
4. This case is slightly different from the other litigation in that it relates to shares ['the shares'] in a company, Jackson, which owns a property in London. Walker says that the shares which were acquired in the name of Fininco are truly shares which belong to Congo and can be made the subject of charging orders. Interim charging orders were made over the shares and property on 23 June 2003 and in the light of objections made by Fininco and Jackson, Master Miller, on 20 November 2003, made an order in the following terms: "*There be a trial of the issue as to whether the judgment debtor [Congo] is "interested beneficially" within the meaning of section 2 of the Charging Orders Act 1979 in either the share capital of [Jackson] or the property at 31 Sackville Street, London W1S 3 DZ.*"
5. This trial started on 11 July 2005; the last day of evidence was 28 July 2005 and closing submissions were made over two days at the beginning of October 2005. The following oral evidence was given:
 - (1) Mr Ikama, who was appointed to the Board of Fininco in September 2002, having previously been the financial adviser to the Chairman of SNPC, then Mr Itoua. He told me that he is still such an adviser to the present Chairman, Mr Gokana.
 - (2) Mr Sheehan, a director of Walker.
 - (3) M. Manseau called on behalf of Walker. His brief was to set out the steps which Walker had taken in France to enforce its arbitration award and judgment; "provide the background to the decision of the Paris Court of Appeal which held that SNPC was an emanation of the State" [Congo] and "to provide a summary of the financial arrangements put in place by [Congo] which are structured so as to thwart the legitimate attempts of creditors to enforce against assets of [Congo]."
 - (4) Professor Issa Sayegh, an expert on French and Congolese Law was called on behalf of Fininco who also expressed opinions on the Ohada Treaty.
 - (5) Professor Geraud de Geouffre de la Pradelle, an emeritus professor at the University of Paris who gave evidence of French and Congolese law on behalf of Walker.
 - (6) Sanford Saunders a partner in a Washington Law Firm, Greenberg Traurig LLP, called on behalf of Walker
 - (7) Madame Perrier, an accountant with PwC, France, who gave evidence principally about the arrangements for a compte courant as between parent and subsidiary, called on behalf of Fininco.
 - (8) Professor Dossou, who gave evidence on 'geopolitical' matters on behalf of Fininco. He is a most distinguished man: an international lawyer, a politician in his home state of Benin [where he stood as an unsuccessful Presidential candidate in 1991] and a participant in many major international events, including being a founder member of the African Association of International Law and a member of the MacBride Consultation Group at the Teheran talks with the Iranian authorities for the liberation of American hostages.
 - (9) Maitre Brudey, a barrister, and a member of the Brazzaville Bar, called on behalf of Walker.
 - (10) M. Bernard Hinfray, a French chartered accountant, who gave expert evidence, on behalf of Walker, in response to that of Madame Perrier.
 - (11) Mr Gary Kleiman, who gave evidence on geo political matters on behalf of Walker, in response to the evidence of Professor Dossou. Mr Kleiman is a consultant in his firm based in Washington which gives independent analysis and advice on developing and emerging economies and financial markets in many countries including Africa. His breadth of knowledge about the Congo was impressive.
6. There are some 60 files of paper material; and the parties' counsel, to whom I am grateful, provided the court with closing submissions in writing running to 100 pages for Walker, and for Fininco 75 pages.
7. I have to say that much of the evidence was of marginal relevance only to the issues which I must determine.

Summary of the parties' submissions

8. In essence, Walker's case is
 - (1) Congo and SNPC are to be regarded as one and the same thing or that SNPC is to be regarded as Congo's agent, nominee and trustee in all, or some of its dealings (including, at the very least its dealings in respect of the Shares) and that SNPC's assets are available for execution in satisfaction of the debt owed by Congo to

Walker. In any event, it is contended that Fininco and Jackson are estopped from arguing to the contrary by virtue of the declaration of the Appeal Court in Paris [judgment dated 3 July 2003] and/or the order of the Grand Court of the Cayman Islands [dated 17 July 2003]. The judgment of the Cayman Islands Court has now been registered in this jurisdiction by virtue of an Order of Master Miller dated 22 July 2005. Congo and SNPC have been kept fully informed about this hearing and have elected to take no part.

- (2) Fininco itself (or at the very least, Fininco's ownership of the Shares) is a sham, pretence, device, cipher or façade giving the appearance of ownership of the Shares by an independent third party but in reality leaving ownership in the hands of Congo/SNPC.
"Fininco is nothing but another example of [Congo's] use of corporate (and other) ownership structures conceived to retain ownership and control of [Congo's] assets in [Congo's] hands whilst giving the impression of genuine third party ownership as a way of secreting assets and frustrating creditors. Fininco is, accordingly, a sham or pretence and is, to all intents and purposes, to be equated with and treated as [Congo/SNPC] by another name." paragraph 16 of Walker's closing submissions.
 - (3) Alternatively, Fininco holds the Shares as a mere agent, nominee or trustee for Congo/SNPC.
 - (4) To the extent that it is necessary to assert it, Fininco is an emanation d'Etat of Congo/SNPC.
 - (5) Walker has been and is the victim of transactions and/or arrangements entered into, or participated in, by Congo/SNPC with the intention of placing assets of Congo/SNPC beyond the reach of creditors such as Walker and prejudicing the interests of such creditors within the meaning of section 423 of the Insolvency Act 1986. In such circumstances, pursuant to its wide powers under section 423(2) of the Act, the Court should grant relief.
9. In essence, the case for Fininco, as advanced on their behalf by Mr Julian Flaux QC is as follows:
- (1) There is no basis for concluding that Fininco is a sham entity. On the contrary it is a separate corporate entity established according to Congolese Law and OHADA [Organisation pour l'Harmonisation en Afrique du Droit des Affaires] with its own assets and operations. Fininco is *"recognised as a corporate entity within the SNPC group, distinct from its parent not only by its own external auditors, Ernst & Young, but by the external auditors appointed to audit SNPC at the behest of the IMF, KPMG."*
 - (2) To establish agency or nomineehip requires an intention that the particular purchase will be as agent or nominee. An examination of the purchase files relating to the acquisition of the shares and the property are inconsistent with Fininco being a mere nominee as opposed to purchasing for itself.
 - (3) Only if the court concluded that Fininco was a sham and was to be equated with SNPC would the Court need to consider whether SNPC and Congo are to be equated. As a matter of English Law the language used is whether the entity is an alter ego or organ of the State; mere State control will not suffice.
 - (4) The alternative case under section 423 of the Insolvency Act does not add anything to Walker's case "and should be rejected". The transaction in question has to be one to which the debtor was a party and that begs the question whether SNPC and Congo are one and the same. In any event, there is no factual basis for the assertion that a "substantial purpose" of the transaction was to put assets out of the reach of creditors. The attack on the transaction under this head is solely on the basis that SNPC advanced the money to Fininco interest free. There is no evidence that the sale took place at an under value having regard to the potential increase in the value of the property which would redound to the benefit of SNPC as 80% shareholder.

The previous decisions

10. In the light of these submissions it is necessary therefore to refer to the judgment of the Appeal Court of Paris. It concluded that SNPC was created by the Law of 23 April 1998 and was
- "defined as a public industrial and commercial establishment taking the form of a company with the status of a legal entity and with financial autonomy, all of its capital being owned by the state, according to its articles of association dated 9th April 1999, that company:*
- *has at its purpose to intervene on behalf of the state, directly, through its subsidiaries or in association with foreign partners, in all operations concerning the production, processing, transformation, development and transport of liquid and gaseous hydrocarbons on Congolese territory and abroad, and particularly to undertake or participate in all operations connected with the aforementioned mission, to conduct the necessary investment operations and market the products, on behalf of the state to hold and manage the assets and rights belonging to it, directly or through an interposed company and generally to undertake the public service mission of developing, operating and marketing Congolese hydrocarbons;*
 - *has a capital of 900,000,000 CFA francs, mainly constituted by all the assets, rights and mining titles initially held by the state;*
 - *the company is placed under the financial control of the state and the Audit Office;*
- Whereas it results from this strong guardianship that S.N.P.C does not have enough statutory operational independence as regards taking autonomous decisions, in its own interest, to enable it to be considered as having autonomy in law and in fact with respect to the Congolese State. It is not even in control of its own future through a personal investment policy, or of its organisational structure. The existence and extent of a commercial activity of its own distinct from its public service mission is not clearly apparent from its accounts. According to the annual report on its 2000 accounts, the company made a net theoretical book profit of \$58.5 million, but it is specified that "the recording of the State's reimbursements of undertakings to certain operators by a deduction from production equivalent to the SNPC oil profit, representing a debt due from the company to the state, leads to an entirely*

absorbed result". Thus, having no real autonomy, the company can only invoke a debt due to it from the state without really building a development policy based on its financing of itself;

Whereas if as a rule the state's guardianship or even control of a legal entity, exercised through its directors, and the public service mission which is devolved to it, are not sufficient to enable it to be considered as an entity emanating from the state implying its assimilation with that state, in the cases in point with respect to S.N.P.C. the Congolese state has reserved to itself not a simple power of supervision but a veritable power of guidance and approval constituting true interference. This means that S.N.P.C has no real autonomy that could result from its status as a company recorded in the register of financial operators. It constitutes a legal entity which is clearly fictitious and, hence, is an emanation of the Republic of the Congo."

11. In the Cayman Islands, the Claimants were Walker and another company in a similar position to it [Afcap]. During the course of the French proceedings the existence of an arrangement, the subject matter of the Cayman proceedings, came to light. The defendants were Congo, "its debt management agency" CCA, SNPC and a special purpose vehicle, incorporated in the Cayman Islands, called Olearius. SNPC and Congo granted a loan facility to Olearius repayable out of the proceeds of forward sales of oil made by SNPC as 'agent for Olearius'; and Congo assigned all its oil rights to Olearius. The way the scheme worked was described by the Chief Justice in his judgment dated 14 October 2003 as follows: "The Banks first make the funds available to Olearius. These funds are used to buy oil from SNPC under the Forward Purchase Agreement. Some of the oil that Olearius purchases is for on sale to Vitol SA and other buyers. The oil sold by SNPC to Olearius is the property of [Congo]. Cash proceeds of the sales under the Forward Purchase Agreement are credited directly to the Collection Account from which payment on the loan facility is made to the Lenders by Olearius. Excess proceeds in that account are passed by Olearius on to or to the order of SNPC. SNPC is also responsible for the repayment of bridge financing, facility fees, expenses, hedge premise and the funding of the Debt Service Reserve Account. An additional element of the Scheme is that [Congo] has guaranteed the loan on behalf of Olearius and has also assigned rights to Olearius to receive oil. The entire arrangement is known as the Hedge Crude Oil Prepayment Facility."

12. The Court continued:

- (1) The entire capital of SNPC is held by ROC. It was responsible for the marketing of ROC's oil production.
- (2) Members of the Board of Directors are chiefly representatives of the Government and are appointed by decree issued in Council of Ministers.
- (3) The Company is under the economic and financial supervision of the Government Accounting Office.
- (4) The Ministry has permanent power of orientation and supervision of the enterprise.
- (5) The Company's mission is to undertake any necessary investment operation on behalf of the ROC and to hold and manage on behalf of the Government the assets and rights belonging to the Government.

The Paris Court of Appeal ultimately came to the conclusion that because the Congolese Government had reserved to itself "not a simple supervisory power but a rather genuine power of orientation" that had nullified any reality that SNPC was an autonomous company.

What gives this Court pause is the need to take the leap from finding that SNPC is closely supervised to the conclusion that it therefore is an "emanation" of ROC to the extent as a matter of English common law; that that connotes a fiction, a mere sham or façade. Even if this Court accepts all five of the French Court's findings of fact, that does not lead ipso facto to the conclusion that SNPC is fictional. Again that conclusion may be a matter of French law, having no corresponding basis in English Law.

The approach taken by the French Court may be criticised as flawed, to the extent it implies a fiction or mere sham; in that every State is at liberty to set up Government bodies and agencies which lawful under their Governmental systems for perfectly legitimate purposes such as those expressly forming the *raison d'être* of SNPC. Moreover, there are obvious and troubling concerns of international comity which arise from arriving too readily at such conclusions.

As to Olearius, the only allegation of a façade or sham in the Plaintiffs' pleadings was that the formation and use of Olearius in the alternative marketing arrangement was a device or sham to ostensibly retain the Congolese Defendants' assets by structuring their affairs in such a way as to prevent execution against them. The Plaintiffs point out that the Facility was so structured that there would be no collection account in the name of the producer of the commodity, that being SNPC. As a result of this that account would be unavailable for attachment by creditors of the producer.

I have already described from the Lenders point of view, the *raison d'être* of Olearius; which by its name, conveys the metaphoric derivatives of its oil bearing purpose.

The same can be said for the use of the SPV Scheme. There is nothing inherently exceptionable in the use of the SPVs as financial vehicles. SPVs are used extensively throughout the world for the structuring of financial transactions for many different reasons. Olearius, as a Cayman Islands SPV, is by no means unique in that regard.

The Lenders contend that the Facility negotiated with SNPC was for the legitimate commercial purpose of the provision of a commercial loan to be repaid from and secured by the production of oil and the sale of oil.

I accept without reservation, that the transaction evidenced by the Facility Documents is a legitimate structured finance arrangement which enables the Mandated Arrangers to seek to obtain better security by lending to an SPV rather than lending to the producer of the oil.

Based on all the foregoing, this Court declines the Plaintiffs' invitation to declare SNPC the alter ego of ROC or a mere sham or façade. The Court also expresses reservations about the propriety of any such relief against Olearius.

Notwithstanding the foregoing, I am however satisfied that SNPC is a necessary and proper party whose assets because of the nature of its relationship with ROC, should be made available to satisfy ROC's judgment debts.

13. Part of the evidence put before the court in the Cayman Islands was what is known as the Cleary Gottlieb Memorandum dated 16 May 2002. I refer to this memorandum when considering the question whether SNPC is an organ of the Government in Congo such that its assets can be regarded as the assets of Congo.
14. There is an appeal from the decision of the Paris Court to the Court of Cassation and an appeal has been lodged. There is a dispute between the French Law experts as to whether the Appeal Court has correctly applied the law. Unlike the Chief Justice, I decline to express any conclusion on that. It is for the French Courts and not this court to determine whether the law has been correctly applied. I simply take note of the decision of the Appeal Court and the reasons for it so far as relates to this case.
15. There is a third decision of relevance and that is by Tomlinson J. in the case of *Kensington International v Republic of the Congo* dated 16 April 2003.
"Mr McQuater submits, and I accept, that the evidence overwhelmingly shows that SNPC is a Congolese public entity for the purposes of Clause 1 of the April 1984 Loan Agreement. As Mr McQuater points out, for the purposes of these claims, this is as far as the claimant needs to go. However, Mr McQuater submits, and I agree, that the evidence in the case does, in fact, go further and demonstrates that SNPC is simply part of the Congolese state and has no existence separate from the state. That is demonstrated by the Congolese legislation, which establishes SNPC and demonstrates that its purposes are to undertake the exploitation of Congo's oil reserves on behalf of Congo, to hold the state's related assets on its behalf and to represent the state in oil related matters. The by-laws of SNPC are to similar effect. It is financed by the state. Its function is to act on behalf of the state, it is under the financial and economic control of the state and its officers are government appointees.
*In a recent decision of the French Court of Appeal, in the matter of **SNPC v Walker International Holdings Limited** on 23rd January 2003, that court found in contested proceedings that SNPC was simply the alter ego of Congo, thereby affirming the decision at first instance to the same effect. On 29th January 2002, the Tribunal de Grand Instance, Paris reached a similar conclusion in favour of another creditor, Connecticut Bank of Commerce".*
16. But, and it hardly needs saying, each case must be decided on its own facts. Congo did not enter an appearance before Tomlinson J. I do not know what material was presented to the French Courts nor to the Court in the Cayman Islands. There is in a sense an elaborate game of 'cat and mouse' being played by the creditors and Congo in the courts throughout the world, where each party seeks to build upon a success and explain away a defeat in other courts. As one entity is 'found' another entity appears in its place. The fact that, in their cases, the Chief Justice did not think that SNPC was an emanation of the State; whereas the Paris Court of Appeal and Mr Justice Tomlinson thought otherwise is of interest. Judicial good sense might demand that courts should adopt a uniform approach, but there is, as yet, no apparent uniformity and that means that I must plough my own furrow on the field of evidence with which I have been provided.

The evidence in this case

17. I have heard no evidence from SNPC or from Congo, save from Mr Ikama, whose evidence was so evasive and defensive, and at times remarkable, that I am unable to place any credence on it save where what he told me was supported by the documents; and even where there are documents I have to consider whether the documents are for 'show' rather than reflecting reality. I give as one example of Mr Ikama being evasive an extract from his cross-examination about the relationship between Fininco & one of its alleged shareholders, COSER.
*"Q. Now, when you wanted to ask COSER for money as a shareholder, who did you write to?
A. Still within the framework?
Q. In 2002 and 2003, when you wanted money from a shareholder, COSER, who did you write to?
A. In 2002?
Q. In 2002, after you arrived in September 2002 and in 2003, when you wanted money from COSER as a shareholder, who did you write to?
A. Well, when I arrived, it was still the representative, Mrs Mbongo.
Q. So you wrote to Mrs Mbongo?
A. Under what circumstances?
Q. When you wanted money from the shareholder COSER, who did you write to?
A. I would write to a representative of the structure.
Q. And who was that; it was Mr Itoua, was it not?
A. No.
Q. Who was it then?
A. It was Mrs Mbongo.
Q. Mr Ikama --
A. At that time, if I needed to write a letter I would address it to Mrs Mbongo.
Q. But there are no documents in the files where you have asked for money from COSER where you have written to Mrs Mbongo.
A. I did write to COSER because they owed me part of the money.*

- Q. So you did write to COSER. Where are those documents? They are not in the bundles. Where are those documents?
- A. What I tell you is the following: COSER owes me money, it has nothing to do with that. So, when I write to Mrs Mbongo, I ask her for money because in fact they are in a building where we share services and they owe me money for the services we offer but it has nothing to do with this.
- Q. Let me ask the question again. When you, wearing your Fininco hat, wanted to get money from the shareholder COSER, who did you write to? Or did you not write to COSER at all?
- A. I sent a letter to be able to finance my activities and it was sent to SNPC.
- Q. And you sent that to Mr Itoua.
- A. I have not finished. With regard to this particular activity, I did not send a letter to COSER.
- Q. So is this right: you never sent a letter seeking shareholder funds from COSER wearing your Fininco hat in 2002 or 2003?
- A. For that particular activity, no.
- Q. What do you mean, "for that particular activity"?
- A. For what gathers us here today. Jackson.
- Q. Jackson, or anything else in respect of Fininco; did you ask COSER for any other monies?
- A. I think, your Honour, well for this particular matter, well, it does not relate to this matter. I cannot answer.
- Q. Yes, it does, Mr Ikama. Did you, in 2002 and 2003, ever write to COSER, one of the shareholders, for funds in respect of the running of Fininco?
- A. For funds with regard to this transaction, I have to say no.
- Q. I appreciate that but in relation to anything else, Microfinance?
- A. Yes, for other things.
- Q. BVMAC?
- A. Yes, I did write to COSER but it has nothing to do with this transaction.
- Q. Who did you write to?
- A. I am not held to talk about it here.
- Q. Who did you write to?
- A. I came here for something specific, so ask me questions on what I have come for.
- Q. So are you telling the court that there are documents passing between Fininco and COSER which have not been disclosed to this court in relation to your requests for monies from COSER?
- A. I think that I am disposed to disclose documents that relate to the matter. Or else, once again, are you trying to say that I do not understand anything about disclosure? Because I was only thinking about documents that had a direct relation to the case."

This extract shows a disposition to avoid answering what were simple and direct questions: I think he was playing for time to work out an acceptable answer. In reaching this conclusion, I have taken into account the fact that he gave evidence through an interpreter, which always makes the oral evidence less fluent. But he gave an overall impression of wanting to say as little as possible that revealed precisely what was happening and why. As an example of Mr Ikama's unreliability, he said that Fininco opened a bank account immediately after he had taken over the running of Fininco in early September 2002. I suggested that there must be documents relating to this. They should have been disclosed earlier but were not. When they were produced they showed that the bank account was opened on 27 November 2002. Further, I suspect that Mr Ikama could have told the court a great deal about SNPC and the way it is managed and run, but he chose not to do so. Whether at the urging of a number of banks or oil companies, as suggested by Mr Flauch QC, or not, the fact is that Congo wishes to trade their oil without creditors such as Walker getting their hands on the money, and for that purpose elaborate schemes are set up which are carefully documented. In that environment, it would not be surprising if documents were generated which had no substance, but were there in form only. In this context, not everything is quite what it seems to be: appearance and reality diverge.

18. So far as this court is concerned, neither Congo nor SNPC have appeared; yet Fininco wish me to determine, in the absence of witnesses who plainly would have relevant evidence to give, that SNPC is not an organ of the State. The failure of Fininco to adduce such evidence on behalf of Congo/SNPC is a matter which I can and do take into account when assessing the evidence. It is the Claimants who say that Fininco was separate and distinct from the judgment debtor, Congo, and it was for them to produce such evidence in support of that case as they saw fit. I am satisfied that there is no good reason why Mr Itoua, Mr Ovoundard or Mr Ebelebe have not been called as witnesses. I infer from the failure to call them that the evidence advanced on Fininco's behalf, in relation to Fininco's incorporation, its status, the purchase of the shares and in relation to the question whether Congo/SNPC are to be treated as one, has less weight than it otherwise would have had: see *Wisniewski v Central Manchester Health Authority* [1998] Lloyd's Law Reports (Med) 223 and the Australian case referred to therein, *O'Donnell v Reichard* [1975] VR 916. I also infer that the reason why they were not called is that it was hoped that Fininco could succeed in its case without these witnesses, whereas had the evidence been called the court's conclusion would or might have been different. This was not an accidental failure to call relevant evidence; it was not a failure due to language or distance since the court has access to satisfactory video links; nor was it a failure

because of expense; it was deliberate so as to avoid the court having a full and comprehensive picture of the truth.

19. In due course I shall consider the question whether SNPC is an emanation of the State so that it and the State of Congo can be regarded as the same legal entity for enforcement purposes, on the basis of the written documents made available to me. I do so knowing that evidence which was available to the Claimants has not been put before the court and that there has been no disclosure by SNPC or Congo, neither of whom appeared in these proceedings. In making my decision I shall take account of the three judgments to which I have referred, in so far as they assist my determination.

Fininco's incorporation

20. I start with the manner of Fininco's incorporation.
21. It is a company which was apparently incorporated in Brazzaville on 23 January 2002. It would appear that an entity called COSER was also incorporated at the same time. Documents have been produced which indicate that the subscribing shareholders for Fininco paid 50 million FCFA, of which 40 million was paid by SNPC and the balance split equally between COSER and an entity called Fonds de Depot de Garantie ['Fonds']. Yet there was a single cheque dated 18 December 2001 for FCFA 50 million drawn on what appears to be a compte courant between SNPC and Congo. Oddly, the notary recorded having received the money 6 days before this cheque was drawn and even more oddly Fininco did not have a bank account until 27 November 2002 when this cheque was then cashed in Fininco's favour. Yet a compte courant [running account] was apparently in existence between SNPC and Fininco showing monies going from SNPC to Fininco. In fact, without a bank account [and without any paid up share capital or any working capital] the money provided by SNPC must have been paid directly to the third parties. Thus, in form, there was a running account between parent and subsidiary, which would not be unusual; but in reality what was happening is that SNPC were running Fininco by paying off its creditors directly. Fininco could just as well have not been there until it was in a position to trade on its own account.
22. Further, Fininco is recorded as having subscribed for part of COSER's share capital, without any bank account or monies to enable it to do so. It appears that COSER and Fonds were lent the money to subscribe for shares in Fininco by SNPC, who actually provided the total sum subscribed; yet the money which was supposed to have come from Fininco does not show in Fininco's books. This, says Walker, with force, is a good indication that what is happening here is the preparation of documents to conceal the reality, and that this payment was overlooked. Furthermore, the list of subscribing shareholders was drawn up on 28 December 2001, showing COSER to be one of the shareholders; yet COSER was not incorporated until the following year [23 January].
23. Fonds is 100% owned by Congo. It is a body set up, apparently, to receive and manage deposits and guarantee monies that international oil companies pay to Congo as security for their obligations to restore to their original state the lands they exploit for oil. The documents show that Fonds is formally "*under the control of the state both economically and financially*". It is directly under the control of the Council of Ministers, and the Presidency has direct responsibility for it. In my judgment, there can be no doubt that Fonds is Congo.
24. The other 'shareholder' in Fininco, COSER, is apparently owned by SNPC, Fininco and another subsidiary of SNPC. It is no more nor less than SNPC or Congo in another guise under another name. I should add that Fininco's share capital was apparently increased at the end of 2003, to 200 million FCFA, with the shareholders retaining their respective percentage shares [eg SNPC 80%]. There were two versions of the financial statements for 2002 and without the entries in the compte courant being retroactively booked in the compte courant, the additional share capital would have been impossible. SNPC paid for the whole of the increase in share capital and some of the documents disclosed reveal that SNPC were credited with 138,000 shares (100% ownership) instead of its 80% holding which it apparently had of 110,100 shares. Fininco's statuts [Articles] record that "*the corresponding sums [that is, the 50 million FCFA] have been deposited for the account of the company at the BGF Bank, Brazzaville branch*". This was untrue.
25. Fininco is, therefore, owned directly and indirectly by Congo/SNPC and the shareholding arrangements referred to above give cause for concern that form overrides actuality. The arrangements for its creation and financing are deceptive.
26. It is true that Fininco has Articles of Association in a form which complies with OHADA accounting requirements. There is a minute of a board meeting held on 23 January 2002 at which Mr Itoua was appointed Chairman and a Mr Ovoundard was appointed Managing Director. Neither of them was called to give evidence although both were available. It also has its accounts audited by Ernst & Young of Brazzaville. But for the first year, described by the auditors as the "first actual year" ending December 2002 it recorded in the Profit & Loss Account a nil figure for staff charges, although other documents, if genuine, would suggest that Mr Akobo was recruited as an employee as from 15 November 2002 and Ms Ngakala was recruited from 9 September 2002 the same day as Mr Ikama was appointed as managing director. I do not understand how any of the three of them were paid for such service as they may have rendered in 2002; whoever was responsible for their salaries it was not Fininco. I infer that they were on SNPC's payroll.
27. There is also what purports to be an agreement between SNPC and Fininco relating to a compte courant [running account]. The agreement purports to be dated 9 September 2002 although for reasons explained hereafter I do not accept that this document records a concluded agreement at that date.

28. So far as Fininco's financial autonomy is concerned, in my judgment it had none in 2002 and 2003, and this appears to be common ground between the accountancy experts [see paragraph 8 of the joint memorandum where they say: "*The experts agree to admit that FININCO did not have any financial autonomy in relation to SNPC during 2002 and 2003. The situation was due to both the financing method set up and the lack of any significant activity by FININCO during those two years ...*".]
29. Further, the *compte courant* method of financing has some unexplained features about it in this case. I accept that as between parent and subsidiary, as a method of financing, a *compte courant* into which the parent feeds money for the benefit of the subsidiary is both a common occurrence and not inconsistent with a subsidiary's autonomy vis a vis its parent. Contributions by the parent to a subsidiary in this way are considered as loans and not as contributions to the share capital. The main characteristic of a *compte courant* is that it is redeemable [repayable] at any time [see paragraph 18 of M. Hinfray's report]. But, in the first place, the financial position of Fininco is such that it has no real prospect of repaying the money. Essentially, Fininco does nothing and earns little or nothing. There is no mention made of this 'debt' or its repayment in what is apparently a Programme of Activities for Fininco for the years 2004 to 2007; there has been no demand for repayment by SNPC nor document evincing any intention on SNPC's part to regard itself as a creditor of Fininco. In Fininco's accounts for the year 2002 it is said that the advances were repayable within the year; but in reality there was no prospect at that time that the monies would be repaid and no reliable evidence that there is any intention to repay the monies at any time.
30. As M. Hinfray, whom I regarded as a reliable witness, said, many of the payments made by SNPC went directly to third parties. That is not a common feature of the operation of a *compte courant*. Normally, general advances are made which are then disbursed on the directions of the subsidiary's board of management, but as Fininco had no bank account this was probably not possible. Because Fininco did not have a bank account until nearly the end of the year 2002, 99.3% of payments booked in the *compte courant* were paid directly by SNPC to third parties and for 2003 the figure is 81%.
31. Further, there has been limited disclosure of documents relating to Fininco's *compte courant*. A document has been produced which appears to be dated 9 September 2002. It purports to be signed by Mr Itoua on behalf of SNPC and Mr Ikama on behalf of Fininco. The agreement records that both companies have their registered offices at the same address. It further records that Fininco
"is set up among other things for the carrying out of financial operations relating to the financing of projects, the management of group funds, the purchase, management, assignment of shareholdings both commercial or industrial and property companies;
SNPC and Fininco SA by virtue of their capital links, regularly carry out funding operations together; Fininco SA also contracts with SNPC for the provision of services [at normal market conditions] – my translation of "dans les conditions obeissant aux regles normales du marche").
32. Article 4 of the Agreement is headed "Interest". And it provides: "*The credit account balances in favour of [SNPC] (described as "Partner") shall earn interest at the central bank rate increased by two points. The interest earned shall be payable and passed to the credit account half yearly. Interest shall be capitalised according to the trading rules. The definitive balance shall be fixed when all the current operations and all the undertakings of the Partner have passed to the current account.*"
33. The only other document disclosed in relation to the *compte courant* is one sheet of an accounts ledger which is expressed to be for the period from 1 January 2002 to 31 December 2002. This document shows that SNPC advanced 1,572,974,048 FCFA. There is no provision for interest and nothing in the debit movement column. In their joint memorandum [paragraph 7] it is recorded by M. Hinfray and Madame Perrier: "*The two experts reveal that, for reasons unknown to them, such interest was neither calculated nor recorded in the current account for 2002 and 2003. For 2004, the documents submitted to the Court do not enable them to determine if interest was entered against the current account existing between FININCO and SNPC.*"
34. It also shows that the first seven advances were made before the agreement as to the *compte courant* was purportedly made. Although Madame Perrier indicated that she thought that in practice it sometimes occurred that monies were advanced before the agreement was formalised, she considered that in such a case the conditions would be agreed first and then formalised later. She had seen nothing to show that this had happened in this case. This ledger sheet was printed out in December 2003. As Mr Trace QC submitted on behalf of Walker, there are none of the proper documents disclosed: there should be ledger accounts and petty cash books and a salaries book and so on. Madame Perrier had not been able to look at all the accounting documents and nor had M. Hinfray.
35. The latter points to a number of matters which cast doubt on the veracity of the date on the *compte courant* agreement. He points to a document dated 2 April 2003 which stated that Fininco's Board were seeking the assistance of the parent company's administrative and legal department to look over the first draft of a financial agreement. He comments that he has seen no financial agreement other than that relating to the *compte courant*. In October 2003, the Board required the transmission to the parent company of the *compte courant* so that it could be analysed and standardised within the group. In the Notes to the 2002 and 2003 financial statements all the information required by the OHADA regulations were disclosed except that which related to the *compte courant*. "*This suggests the people who prepared the 2002 and 2003 financial statements were unaware of it.*" The Ernst & Young report for the year ended 31 December 2003 [dated 4 June 2004] contained, in accordance with

OHADA regulations a report on related party transactions. What they reported on "based on the information supplied to us" [it not being their task "to ascertain the possible existence of other agreements"] was the Comptes Courants. The Director concerned, that is, the reporting director, was Mr Itoua. Against the heading "Nature and Purpose" Ernst & Young report "Contribution of funds to current account"; and against the heading "Terms and Conditions" are the words "Not reported". If there was a formal agreement in place at the time, M. Hinfray observes, with force, that for some unexplained reason it cannot have been shown to the auditors. But if, as he suggests, there was at this date no formal agreement, then the compte courant agreement must have been backdated.

36. Mr Flaax QC points out that in an activity report prepared by Mr Ikama and apparently considered at a Board meeting in April 2003, there was a reference to the compte courant. It is also true that a representative of Ernst & Young was apparently present when it was resolved to send a copy of the compte courant agreement to SNPC for analysis and standardisation. He submitted "There is simply no basis for the suggestion that the agreement had not been signed or was in draft or that this was a reference to some other agreement than that signed on 9 September 2002, let alone that Ernst & Young were not aware of the existence of the agreement given that their representative was present during the board discussion of and approval of the agreement."
37. There has been a lack of disclosure of documents which might have resolved the present issue. There are no drafts of any agreement and no correspondence between Fininco and SNPC. Fininco has apparently taken no independent advice about the compte courant. SNPC has disclosed no corresponding entries in their books relating to this compte courant. On the basis of the material before me I would not be prepared to conclude that the compte courant agreement was formally in existence as at 9 September 2002. Had it been in existence as a concluded agreement then there could be no purpose in submitting it for approval to SNPC; apart from anything else, SNPC would presumably have had a copy of it. Further, the words in the special report are clear. The terms and conditions of the agreement were simply not reported to Ernst & Young and the obvious inference I draw, in the circumstances, is that there were no terms and conditions yet agreed between the parties. Had Ernst & Young been aware of the terms of the agreement then they would surely have considered the obligations under that agreement and the liability of Fininco, whose accounts they were preparing, for interest. If that is so, then I find on a balance of probabilities that the agreement which was apparently signed on 9 September 2002 was backdated and is yet another example of form taking precedence over reality. As Mr Trace QC put it "the compte courant agreement was essentially "window dressing" initiated and imposed by SNPC on Fininco".
38. I agree. It also shows a much stronger than normal control by a parent over its subsidiary: huge sums were advanced without interest being provided for and without any formal agreement, contrary to the OHADA principles. In my judgment, Madame Perrier was not factually in a position to support her conclusion that the treatment of the compte courant was in compliance with proper accounting principles. If there was an 'informal' agreement in existence before Mr Ikama's appointment, it was not reported to the Board nor considered in any meeting before the end of the 2002 year and the absence of underlying documents disables her from expressing her opinion. On this issue I have no hesitation in preferring the careful evidence of M. Hinfray, whose meticulous approach to the task in hand was, I think, impressive. In order to ascertain whether there was any reliability in the figures produced on behalf of Fininco it would have been necessary to reconcile their accounts with the accounts of SNPC. But SNPC has decided not to participate in this trial; there has been no disclosure of documents by them and it is unlikely that SNPC would be willing to make such documents available if requested to do so: SNPC was not prepared to make documentation relating to the sales of petroleum products available to the auditors KPMG on grounds, which might appear odd, of "security".
39. In conclusion I can say that I reject the evidence of Mr Ikama on the question of interest on the compte courant. He suggested that the reason why interest had not been provided for was because the rate of interest was subject to re-negotiation and that interest would be capitalised when the process of re-negotiation was complete. There are no documents suggesting that interest was or is under review and such documents as exist show no discussion of interest. Mr Ikama is unquestionably a very clever and able man; I think his explanation was one that occurred to him whilst giving evidence and that this part of his evidence was untrue.
40. The overall conclusion at this stage of the judgment is that it was of no concern how much money was advanced to Fininco because it was never anticipated in 2002 and 2003, that any money advanced would be repaid or that interest would accrue due to SNPC. The existence of Fininco was not necessary. SNPC was spending its own money [or the Congo's money] as SNPC wanted and without any intermediate intervention.

How did Fininco come to buy the shares in Jackson?

41. The sources of information for this part of the case comes from the files of the solicitors instructed to act on behalf of the purchasers, Eversheds, and a file, disclosed during the trial, from the purchasers' agents: James Andrew International [JAI].
42. The chronology of events is as follows:
43. In the middle of February 2002 Mr Ebelebe had contacted JAI about the property. Because neither Mr Ebelebe nor David Lightstone of JAI were called to give evidence we do not know in what circumstances the contact was made. After a visit to the property JAI wrote and said: "I know you have already commenced procedures to obtain consent to proceed with this purchase and in this interim period I will, of course, keep closely in touch with you and the

vendor's agent. If any other serious interest is received for the building during this period I am relying on him to tell me and I will, of course, inform you immediately."

44. On 5 March 2002 JAI sent a fax to Mr Ebelebe asking if he could be told the current position regarding the property. *"The owners have some other interest now and want to know how we stand."* On that fax in what appears to be Mr Lightstone's hand writing are the words *"Purchasers name SNPC parent of SNPC(UK) Ltd."*
45. On 6 March, Mr Itoua of SNPC UK assured JAI of their interest in the property and *"give you authorisation to go ahead with the purchase."* On the same day the agents got in touch with Eversheds. The note of the telephone conversation is *"buy SNPC parent of SNPC (UK) Ltd"*. On that day, there is a note in Eversheds' file saying that clients of *"ours (SNPC) [would] like us to deal with the purchase of an office building in the region of £3. "something" million"*.
46. The following day a "New Matter Information Form" was completed by someone at Eversheds identifying the matter in question as purchase of 31 Sackville Street, London W1 and giving the client's reference number. That was the number allocated to SNPC. At this stage the solicitors had spoken to David Lightstone, the purchaser's agents *"who we know well as they look after the Libyans"*.
47. Also on 7 March 2002, JAI wrote to the vendors' agents [James Boardman & Partners: - "Boardman"] confirming that they had been instructed *"by my clients" SNPC to submit an offer to purchase the fully paid up share capital of Jackson, a Special Purpose Vehicle whose sole asset is the unencumbered freehold interest in the property. Under the heading "Purchaser" the agents wrote: "The company will probably be purchased by SNPC which is the parent company of SNPC (UK) Ltd."*
48. On 12 March 2002 JAI wrote on behalf of their clients, SNPC, to Boardman confirming that SNPC were prepared to increase their offer to buy the shares in Jackson. *"As requested, I have asked Eversheds to provide a letter confirming our client's bona fide intent in this connection, that they are instructed to progress legal formalities as soon as possible and that funds are available to effect the purchase, albeit an amount of this nature is most likely to be transferred from the head office in Congo."*
49. This increased offer [an extra £75,000] was accepted by Boardman on the same day, identifying the purchaser as SNPC *"which is the parent of SNPC (UK) Ltd."* Also on the same day, JAI sent a 'comfort fax' to Eversheds to pass to Boardman, and which was copied to Mr Ebelebe, which stated: *"I have spoken to SNPC's representative this morning and he tells me that ... once lawyers have agreed the documentation, the funds will be made available to complete the purchase."*
50. On the same day, in a letter from Eversheds to JAI, the solicitors said:
*"I understand that you have agreed terms, subject to contract on behalf of our mutual client [SNPC] for the purchase of the special purpose vehicle that owns the ... property.
I confirm that this firm has acted for SNPC and its associated companies for several years.
I have spoken to SNPC's representative this morning. He tells me that the purchase will be in the name of Finaco [presumably a mistake for Fininco] and that once lawyers have been able to agree the documentation the funds will be made available to complete the purchase."*
51. In an internal note of 14 March 2002, Eversheds noted that they had been instructed by SNPC, that their client contact was with Mr Ebelebe. The note concluded: *"Contrary to what is said in the heads of Terms, Paul [Ebelebe] tells me that the purchase will be in the name Finaco [sic] SA."*
52. On May 17 2002, in a letter dated 17 May 2002, Eversheds reported on Title. The letter appears to be addressed to Fininco "C/o SNPC (UK) Limited 70/71 New Bond Street, London. On 31 May 2002 there was an internal message in Eversheds reporting that *"there will be no difficulty in organising the funds so there is nothing to stop us agreeing the documents ASAP."*
53. On 19 June 2002, the agents sent an email to Mr Ebelebe and copied it to Mr Itoua. *"As you know I spoke to Mr Elenga [SNPC's lawyer] in Paris yesterday to explain that I am coming under increasing pressure from the vendors to give them a date by which we will be ready to exchange contracts for the purchase. I explained to Mr Elenga that the normal procedure in the UK to legally commit two parties together in a transaction is at the point of exchange of contracts when 10% of the purchase price is payable with the balance due 28 days thereafter. Mr Elenga explained to me that a Board Meeting is due to be held in Paris in 10 days time after which he will be in a position to give me a date for exchange. I will pass this information on [to] the vendors and I hope that they will be patient with us as I know they have other interest in the property."*
54. A copy of this email was sent to Mr Itoua but it may not have arrived with him. On 12 July 2002 a report was prepared by Eversheds on Jackson and was sent to Mr Ebelebe. The report was acknowledged on 18 July 2002 by a Mr Ambvouli in a letter on SNPC UK's writing paper: *"However, M Bruno Itoua, SNPC's chairman wishes you to continue your investigation further in order to make a final decision."*
55. On 13 August 2002 Eversheds wrote to Mr Ebelebe at SNPC UK with the latest draft of the Agreement telling him that it envisaged a deposit of 10% [£367,500] being paid on exchange.
56. At the end of that month, in an internal note, Eversheds were asking whether they had details *"of who will execute the SPA [Share Purchase Agreement] on behalf of SNPC?"* to which the answer was "No".

57. The documentation appears to have been agreed by about 12 September and the vendors were pressing for exchange by noon on 13 September 2002. There was then difficulty in getting the deposit money. Mr Ebelebe confirmed on 18 September 2002 that Fininco wanted to buy the property and that its managing director was Mr Ikama, who had full authority to contract on Fininco's behalf. By 20 September Eversheds were expecting a telegraphic transfer of deposit from SNPC which did not arrive until 27 September and contracts were exchanged on 4th October at 5:37 pm with the deposit monies taken from Eversheds client account in the name of SNPC.
58. Under the contract, the vendors had the right to demand completion on giving two weeks' prior written notice; otherwise completion was scheduled for 2 months from exchange. On 9 October 2002 the vendors served notice requiring completion by 4 November 2002 and Eversheds wrote to Mr Ebelebe giving him advance warning of the monies that would then be required, including stamp duty and agents' fees. At his request, Eversheds said that they would endeavour to obtain an extension of time, which, at the end of October, was granted to 18 November 2002. During the intervening period, complaints were made by Mr Ikama and Mr Ebelebe about Eversheds' handling of the purchase. Mr Ikama wrote one letter on Fininco paper and Mr Ebelebe, on SNPC UK paper also wrote and complained. One of their complaints was that they had not appreciated that completion could take place before the end of the two month period. It is not for this court to say whether the complaint was manufactured to justify the delay in obtaining the necessary funds to complete or whether Mr Ebelebe had not understood what he appears to have been told. Eversheds sent a full response to each of the complaints on 5 November 2002 to Mr Ikama in Brazzaville and an incomprehensible response was received by them from Mr Ebelebe on the same day.
59. On 14 November 2002 Eversheds sent an urgent fax to Mr Ikama reminding him that completion was to take place on 18 November 2002 and asking for the money. Because the response to the complaint made about Evershed's conduct had been sent to Mr Ikama, Mr Ebelebe telephoned Eversheds to say that he had now been taken "off the case". I infer that the fax was sent to Mr Ikama because of this telephone call. The following day, in the absence of contact with Mr Ikama, Mr Ebelebe spoke with Eversheds and told them that there was difficulty in "collecting together all the money needed to complete the purchase of" Jackson. Mr Ikama's response which came through on 15 November on Fininco paper said that "We have contacted financial institutions with a view to set up a financial arrangement allowing us to pay the sums remaining to be paid."
60. In the light of a possible extension being granted, provided that the vendor could be reassured about the money being available in due course, Eversheds suggested, on 15 November 2002 to Mr Ikama/Abelebe that "the best way of reassuring the Vendors is for one of those financial institutions to confirm that, subject to the usual formalities being completed, they are prepared to set up the necessary financial arrangements to make the money available to Fininco."
61. There was no substantive response to this and Mr Ebelebe indicated that he had spoken to "Ikama's boss, Bruno Itoua" (Head of SNPC in Congo). On 12 December 2002, Eversheds wrote to Mr Ikama saying that the Vendor's agents "are requesting written confirmation that the funds will be in place to ensure completion of the acquisition of the above property on 18 December 2002".
62. It appears that on 17 December 2002 the Ministry of Finance gave permission to SNPC to transfer funds to Eversheds, although the precise status and meaning of this document is unclear. By a fax dated 18 December 2002 Mr Ikama said that "we have taken the relevant steps to make the balance of sums payable available to you in relation to 31 Sackville Street."
63. Mr Ikama said that funds had been authorised on 17 December 2002 for transmission to the UK.
64. In fact, funds were not made available before Christmas or the New Year. On 3 January 2003 Mr Ikama asked Mr Itoua, the head of SNPC, if SNPC would transfer the money direct to Eversheds for the account of Fininco and this was agreed to by Mr Itoua. I emphasise that this is what the documents appear to show. I have heard no credible evidence about them. On 8 January 2003, there is a note of what Mr Ebelebe told Eversheds about the money. He said he had spoken to Mr Ikama who had told him that "he had been to see the bank this morning and that either later this evening or tomorrow morning we would be getting a fax from him confirming the bank instructions and giving full details of the transfer."
65. In fact, on 8 January 2003, Mr Itoua on behalf of SNPC gave instructions to their Bank in the Congo [BGFI bank Brazzaville] to transfer to Eversheds' client account at their bank in the UK [the Holborn Branch of HSBC] just under £3.5 million.
66. Mr Ikama was contacted on 9 January 2003 and he explained that "the funds were available pre Xmas, but due to the Xmas close down could not be transferred."
67. On 14 January Mr Ikama sent a copy of a confirmation of transfer of funds in sterling from SNPC's account at BGFI bank in Libreville to Eversheds account at HSBC, dated 10 January 2003. Boardman, who received copies of them from Eversheds, acknowledged receipt: "They look official but are not evidence of an actual transfer. They are internally generated instructions to the BGFI bank [in Libreville]. We are concerned at the delays and would like some verification that the Bank are in funds and confirmation that the funds were sent."
68. The monies from SNPC arrived at Eversheds' Bank on 16 January 2003 and were credited to their client account in the name of SNPC and the sum was withdrawn from the account on 21 January 2003 [see the cheque

requisition form] when completion took place. I should deal with one document in particular, namely the letter from Fininco addressed to SNPC and dated 3 January 2003 [see paragraph 64 above]. The letter purports to be confirmation that SNPC "is agreeing to lend us the sums relating to the acquisition of the company Jackson." Mr Trace QC says that this document is suspicious for a number of reasons. First he says that this is nothing more than a paper trail: it was always the intention that SNPC would provide the funds. Second, it is remarkable that this document should be produced when there are no other similar documents relating to sums advanced by SNPC through the compte courant, including monies for the deposit payment. There was no report from Fininco to show that the funds had been applied to the purchase. The registered office of Fininco remained on paper, at least until March 2003, at 146 Avenue General de Gaulle, Brazzaville although it was physically located at 96 Avenue General de Gaulle. Thus, there is a letter in the bundles, addressed to Eversheds from Mr Ikama, dated 9 January 2003 with the 146 address on it. Yet, this letter of 3 January 2003 on which Fininco rely is on paper from 96 General de Gaulle. It is of course possible that as an address changes, old paper is used up so that paper with either address on it is available. On the other hand, this document is remarkable for its existence: it is unique, it was unnecessary, and there is doubt about the address. Because there is a pattern of deceptive behaviour I am prepared to conclude that this falls into that pattern. I believe it is a document generated solely for the purpose of this action.

69. Eversheds continued to correspond with Mr Ebelebe about matters such as the payment of the outstanding tax liability of Jackson.

70. From these facts, the following conclusions can be drawn:

(1) At the time when the contract to purchase the shares was entered into Fininco had no bank account and no share capital and no employees on its payroll. The possibility that Fininco would be the nominal purchaser of the shares was first mentioned in March, which was before Mr Ikama had been appointed and when there was no board meeting of Fininco to approve the acquisition. The decision to buy in the name of Fininco was probably taken by SNPC at a Board Meeting in Paris and was communicated to Eversheds by Mr Ebelebe who never was an officer of Fininco but was acting on behalf of SNPC (UK) or SNPC itself. He did not give evidence, although he was available to be called. It is clear that the property was found by SNPC for occupation by SNPC UK. Mr Ikama made a significant slip when giving evidence as to his involvement with the transaction. He was explaining how he came into the picture on 3 September 2002.

"I came in on the 3rd, I was updated on what was going on, and I was told that there were pressures. The person who was there told me what Ebelebe had been doing; sorry, the manager director of Fininco who was there before me, what he had been doing. I know the banks and their agents, having worked a long time with them, and I can tell them: this is the problem that we have, can you help us?"

The files show that the managing director of Fininco, Mr Ovoundard, played no part in the transaction: Mr Ebelebe was the person with whom the agents and solicitors had had extensive dealings. The change in Mr Ikama's evidence was not a correction of an understandable slip of the tongue, it was, in my judgment a calculated alteration because Mr Ikama realized that if he (truthfully) admitted that he had been briefed by Mr Ebelebe, who was not an officer of Fininco but was an officer of SNPC (UK), it would damage Fininco's case that it was in charge of the purchase of the shares and was not acting as a mere conduit pipe for SNPC. In short, the change was a deliberate attempt to mislead the court.

(2) The funds for the purchase of the shares came from SNPC as was always contemplated. Mr Ikama's reference to having contacted "financial institutions" was not truthful and I am reinforced in this view by the fact that he failed to identify them when requested by Eversheds to do so, in order to buy time. At that time Fininco had no bank account and no share capital and the idea that he had contacted financial institutions with a view to raising the money is quite implausible. I am satisfied on the evidence that Mr Ikama knew that the money was always coming from SNPC. I also doubt whether the funds had been made available before Christmas: there are no documents which support that contention, other than an instruction by SNPC to one of its banks.

(3) Fininco had no decision making role to play in relation to the acquisition of the shares in Jackson. It was committed to buying them well before it had the capacity to do so. The truth of the position is that SNPC decided, through Mr Itoua and Mr Ebelebe, to make SNPC funds available to buy the shares and it then decided to put the purchase into the name of Fininco. Thus, although in legal terms Fininco and SNPC appear to be two separate corporations, at the time when the shares were bought, Fininco took no decisions to buy the shares: they were bought for them by SNPC as though Fininco had no separate role to play in the decision making process. The property was being bought for SNPC (UK) to occupy them. Whether SNPC (UK) did occupy them is unclear; they paid no rent for the property. Mr Ikama's evidence about this was evasive and unclear [see Day 4 pages 23 – 26].

(4) The whole transaction simply involved putting the shares and property into the name of a company ostensibly owned by SNPC so that the assets could be held by Fininco whilst remaining, in reality, under the ownership and control of SNPC. I reach this conclusion without having to resolve an argument between counsel as to whether there is what Mr Flaux QC describes as a halfway house between Fininco being considered a sham or a mere façade or the transaction itself being so described, on the one hand, and Fininco acting as nominee agent or trustee of Congo/SNPC whether generally or just in relation to this transaction, on the other. Fininco was not incorporated as a genuine subsidiary of SNPC with its own commercial purpose. On the contrary, it was set up so that it could be used as a tool for SNPC's purposes, in the hope that creditors would not be able to get their hands on Congo/SNPC money. Fininco is as much an organ of the State as SNPC.

Is SNPC an organ of the State and to be regarded as part of the State?

A. The geopolitical background:

71. Congo is an oil rich state which depends for its wealth upon the trade of its oil, and it seeks to organise its oil business in such a way that debts owed by purchasers of Congo oil do not fall within the grasp of Congo's unsatisfied creditors. Oil represents about 70% of Congo's GDP and budget revenue, and 90% of Government exports. In 2003 the country produced more than 81.6 million barrels of oil worth US\$2.21 billion. Despite Congo's oil wealth, its debt burden is amongst the highest in the Central African Region. It has a population of some 3 million people who are some of the poorest on that continent. The Government is seeking to qualify for debt relief under the IMF/World Bank HIPC Initiative [Heavily Indebted Poor Countries Initiative]. There is 'leakage' in the system so that the monies generated by SNPC, which is owned by the State and whose function it is to be responsible for the revenues generated from extraction of all oil rights, does not appear in an accountable or transparent form to be going to the Treasury. As a result, a country "with generous commodity and mineral endowments" has plunged into the ranks of least developed nations.
72. SNPC was formed in 1998 "to assume all upstream activity as the successor to HydroCongo". It describes itself as overseeing the "entire chain" of oil transactions in the Congo.

B. What the documents show

73. SNPC apparently has Articles of Association approved by the Council of Ministers. Its purposes are defined to include
"handling for the account of the state, directly through its subsidiaries all in association with foreign partners, all operations relating to the production, handling, refining and transport of liquid or gas hydrocarbons both in the CONGO territory or abroad.
Holding and managing for the account of the state all of the assets, direct and indirect rights, of any type whatsoever, held initially by the state, directly or through HydroCongo in all its business activities relating to the exploration, operation, handling and refining of hydrocarbons and derivative or related substances."
74. Article 3 provides that its head office shall be in Brazzaville but "it may be, subject to decision by the Board of Directors move[d] to any other place in the Republic, by decree in the Council of Ministers". By Article 4 the existence of SNPC is for an unlimited period "except in the event of early dissolution decided by the Council of Ministers on a proposal by the board of directors". The Board comprises 7 voting members, 4 of whom are representatives of the state, including the President and 3 "chosen by virtue of their competence and their experience". The members of the Board are appointed by decree by the Council of Ministers. The President's representative is the Chairman of the Board and the managing director of the company. Decisions of the Board dealing with matters such as the general direction of the company, its budgeting and balance sheets and approval of its accounts are "subject to the approval of the Council of Ministers." The Board may delegate all or part of its powers to the Chairman of the Board [the managing director of the company]. Under Article 17 the Chairman and Managing Director is responsible for preparing and managing the budgets. SNPC is subject to the control by the supervising authority, control by the State and by the auditor and auditing tribunal. The supervisory authority "shall exercise a permanent directing power and control over the enterprise". Article 37 says that SNPC is subject to the economic and financial control of the state.
75. In 1999, there was a written agreement between Congo and SNPC "relating to the holding by SNPC of rights assets and holdings of the State in the field of hydrocarbons." The purpose of the agreement was to specify "the conditions and methods according to which SNPC holds and manages the Assets for the account of the State ..." SNPC was required to "implement the policy and strategic direction as defined by the government in the field of hydrocarbons. It shall aim to achieve all the objectives that are assigned to it by the state." SNPC was not permitted to exercise the prerogatives of public power relating to the assets it held and managed for the state. All payments made in kind by oil operators are required to be made to SNPC. "The state reserves the right to give other instructions to the operators as a function of the political and economic directions decided upon by the government. The SNPC will be informed of this beforehand." The state conferred upon SNPC "a marketing mandate for the quantities of hydrocarbons that will be delivered to them by the oil operators" and under the mandate, "SNPC will negotiate the prices, under the authority of the head of government or his delegates, taking account of market trends and government directions." "For each sale effected under the mandate, SNPC will pay to the state, into the account of the Treasury opened at the BEAC the product of the sales reduced by the remuneration of the SNPC ...". The remuneration of SNPC was defined to mean a commission of 1.6%. SNPC was required to submit monthly reports and the State was entitled to send an expert of their choice for the purpose of assessing and valuing SNPC's performance or actions "to check if these are in accord with the government objectives."
76. On 16 May 2002 a law firm instructed to act on behalf of SNPC, Messrs Cleary Gottlieb, Steen & Hamilton wrote a note for the attention of Messrs Itoua and Elega identifying the structure for a financing package, backed by oil rights, by a pool of banks. The note explained that the structure involved the loan not being made to SNPC but rather to Olearius, a SPV. The reason for the structure was to prevent the creditors of Congo and/or SNPC from seizing the oil in the hands of SNPC
"since the SPV, being autonomous in relation to the SNPC and the Republic of Congo, could enforce its right of ownership of said oil in order to block their attempted seizure."

To ensure that the independence of the SPV in relation to the Lenders and the SNPC cannot be challenged by creditors of the SNPC or the Republic of Congo, the stock shares of the SPV are held by a Trustee that is fully independent of the Lenders and the SNPC."

77. The evidence before me was that this note was revealed by a journalist, who had somehow managed to obtain a copy of it. Whilst there is no commercial reason why a scheme should not be devised so as to try and protect the Congo's assets, it remains a question whether the scheme has achieved the end it was designed to achieve or whether the courts would view the arrangements as being without real content.
78. According to an IMF Staff Report dated June 2003, the
"full mobilisation of oil revenues needs to remain an essential part of the government's efforts to strengthen its fiscal position. The system of oil revenue monitoring – up to the point of marketing of the State's share of oil by the SNPC and transfer of the proceeds to the treasury – needs to be strengthened. The Government also needs to explore ways of turning the SNPC into a net contributor to the budget. None of the SNPC's after tax income [US\$43 million in 2001] has been transferred to the budget. The increases in the SNPC's stake in oil ventures and its expansion into non-oil sector activities, largely financed from retained earnings, deprive the treasury of potentially significant sources of revenue. One way to ensure a steady flow of at least part of the SNPC's profits would be by formalising a dividend policy.
...
While other state-owned enterprises are being privatised, the SNPC is expanding, with major investments not only in upstream but also in downstream oil operations, and even outside the oil sector – a trend that seems to run counter to the SNPC's stated mandate. The authorities explained that they used the SNPC to underwrite economic ventures in situations where domestic participation was desirable but other potential private investors were not sufficiently strong. They would use their upcoming in-depth evaluation of the experience with the June 2001 Convention between the government and the SNPC as an opportunity to reflect on the range of the company's operations."
79. The IMF, in the same report highlighted the fact that the *"oil fiscal regime under which the government collects its revenue in kind – largely through ... [SNPC] – is prone to misuse of oil resources. For example the direct utilisation of oil fiscal revenues for a predetermined purpose undermines the principle of centralised cash management."*
80. On 1 August 2003 KPMG produced a Review of Financial Statements for SNPC. This was a review of financial statements for the fiscal years ended on 31 December 1999, 2000 and 2001 *"as well as the consolidated financial statements for the year ended on 31 December 2001."* Documents were withheld from KPMG *"the sales turnover information could not be verified because of lack of access to documentation on the valorization of export sales. The review of sales of hydrocarbons had to be limited to in-depth analytical reviews and meetings. We are awaiting documentation."* KPMG were supposed to have been given access to all audit reports as well as to all audit files of Ernst & Young. They supported the auditors' qualification relating to petroleum assets, due to a lack of evidence at the time of handover from HydroCongo of what assets were transferred, a lack of inventory of petroleum assets in the SNPC documentation, and *"needless to say, lack of SNPC verification of these inventories."* SNPC's internal verification was found to be unsatisfactory. They recommended *"urgent disclosure of the legal situation of the refinery [which the State made available to an entity called CORAF] particularly the ownership, the lease, the reciprocal accounts linking HydroCongo, SNPC and the Congolese State, the legal conditions for supplying CORAF with crude and the domestic market with finished products etc."*
81. On the question of *"commitments given and received"* KPMG commented that SNPC had not given them a statement of all such commitments for the three financial years. They concluded that the effect of this was: *"Very high off-balance-sheet commitments are not explained in attached notes, with the result that the financial statements cannot give a true picture of the net-worth situation of the enterprise. In particular, legal actions, security deposits, and major guarantees covering the petroleum reserves must be described in detail and their potential effect must be estimated when possible."*
82. In relation to the profit and loss account, KPMG noted that the oil which was sold was either sold for the account of the State or for SNPC. But the so called 'profit oil' [allegedly SNPC's oil] share sold by SNPC is charged on joint cargoes that include State Oil. *"KPMG was unable to obtain a breakdown of cargoes by State portion and SNPC portion – limitation of scope"* and was also unable to review collections for cargoes sold, but they noted that only a portion of the commission recorded is collected by SNPC.
83. It was noted that SNPC held a 90% interest in Fininco, yet the formal documents to which I have referred show an 80% interest. This inconsistency is unexplained.
84. KPMG reported on the quality of SNPC's accounts for the year 2002.
*"Concerning the consolidated accounts of the SNPC ... reciprocal accounts have not been reconciled: unexplained differences are outstanding ... Quality of the SNPC accounts for 2002 is comparable with 2001 and cannot therefore be certified, despite an improvement was noticed. A significant effort has to be made by the company to comply with our recommendations:
Various measures must be quickly taken: quality of the bank accounts followup, reconciliation of the accounts with the State, inter-company accounts ..."*
85. In their report for the year 2003, KPMG noted that the inter-company accounts were not reciprocal: *"differences have been booked into miscellaneous payable and receivable"* and the *"compte courants with the State and public*

organisms are not reconciled. A multi party commission is in progress to reconcile these accounts. Little visibility on the stages reached by this commission."

86. The IMF produced a further staff report in May 2004. They noted that in relation to oil revenue for the period 1999 – 2001 there was a discrepancy of some CFAF 124 billion. "This gap related to a discrepancy between revenues recorded by treasury and tax liabilities of the oil companies as stipulated in the production-sharing contracts. Although the 1999 – 2001 external audit of [SNPC] was expected to shed light on this issue, the auditors [KPMG] were not granted access to the underlying documentation and were thus unable to reach any conclusions."
87. In a footnote to this, they said: "The terms of reference for the external audit included an examination of the fiscal agency role of the SNPC and an audit of expenditures carried out on behalf of the government. Because of concerns of national security, the auditors were not allowed access to the invoices and bank statements necessary for these evaluations."
88. The authors noted that "off-budget expenditures, carried out by the SNPC on behalf of government were estimated to total 30% [of the discrepancy] as follows:

Explanation/Item	Percent of Shortfall
Construction Projects	10
Security-related expenditures	7
Peace Initiatives	6
Humanitarian Aid	4
Financing charges	3

89. They also noted that "At odds with the government's privatisation strategy, the [SNPC] embarked in 2003 on a diversification strategy, including into non-oil activities such as finance, air transport, and services, financed out of a non-oil investment budget equivalent to 0.5% of GDP in 2003."
90. According to an Appraisal Report dated October 2004 prepared by the African Development Fund "Unlike the Government's privatisation strategy, [SNPC] started to diversify its activities in 2003, engaging notably in non-oil activities such as finance, air transport and the services [sic], on the basis of a non-oil capital budget equivalent to 0.5% of GDP in 2003. The Government should remedy this situation."

The Legal test

91. The legal question which is relevant at this stage is whether SNPC is to be equated with the State so that it does not have an existence separate from the State so that its assets can be regarded in law as belonging to the State. In English law the concept of "emanation of the State" arises when considering whether Directives made under the European Treaties have direct effect in relation to employees of State or State like corporations such as British Gas or Rolls Royce. However, the issue in English law at this stage is akin to but different from the question whether a Directive has direct effect. Nor is the test the same as deciding whether SNPC is a public authority which falls within Article 6 of the European Convention on Human Rights. When considering the phrase "non governmental organisation" [in Article 34] and whether a Parochial Church Council fell within it, Lord Hope said this: [*Aston Cantlow PCC v Wallbank* [2004] 1 AC 546 at 567, paragraph 55] "Whatever [the] value [of the phrase 'emanation of the State'] may be in the context of Community Law, however, it would be neither safe nor helpful to use this concept as a shorthand way of describing the test that must be applied to determine whether a person or body is a non-governmental organisation for the purposes of article 34 of the Convention. There is no right of individual application to the European Court of Justice in EC law. The phrase 'non governmental organisation' has an autonomous meaning in Convention Law."
92. In *Doughty v Rolls Royce Plc* [1992] CMLR 1045 at 1059 Lord Mustill referred to the concept of 'emanation of the State' as "an important feature of public international law." However, counsel's researches have been unable to find an applicable or universally accepted definition of "emanation of the state" in public international law.
93. The question here is not whether SNPC is a governmental or non governmental organisation, although that may be part of the answer, the question is whether it is to be regarded either as an organ of the State or, on the other hand, as a State owned commercial company. If it is an organ of the State, as I understand that expression, then it would not be regarded as a separate and distinct commercial organisation owned by the State, and for Convention purposes, which do not apply, would either be regarded as the State itself or as a governmental organisation.
94. Mr Flaax QC has persuaded me that the test is more akin to the test of whether a State owned company is, for immunity reasons, to be regarded as a department of State or as a separate entity [see section 14 of the State Immunity Act 1978]. If that is correct, then the decisions in *Trendtex v Central Bank of Nigeria* [1977] QB 529, *Czarnikow v Rolimpex* [1979] AC 351 and *Kuwait Airways v Iraq Airways* [1995] 1 WLR 1147 are relevant. It follows that the question whether SNPC is an 'emanation of the State', which was the issue before the French Courts, is not the relevant question in this jurisdiction. Therefore, pace the estoppel argument [for which see below], I am not concerned with the question whether SNPC is an emanation of the State as that phrase is

understood in English law; still less with the question whether I consider that the French Court has correctly applied its own law and whether the appeal to the Court of Cassation will or will not succeed.

The arguments on behalf of Fininco

95. It is Mr Flaux's case based on the documents that:
96. SNPC was established pursuant to a Congolese Law of 23 April 1998 intended to take over the upstream functions of the older State owned organisation HydroCongo. It has its own Articles. By a further Government decree in September 1999 all the assets and rights of the state oil concessions and contracts and all the Government's rights and interests in CORAF, the power generation company, were transferred to SNPC. He invites the court to conclude that the clear intention was that SNPC should be legally and functionally distinct from Congo. He submitted that SNPC had two distinct areas of activity: first it manages the oil rights of Congo on behalf of the state. These rights arise under production sharing agreements with international oil companies of which the major player is TotalFinaElf under which Congo is entitled to 31% of the oil production. Mr Flaux QC submitted that SNPC markets the oil in its own name. It also manages and sells its own oil. That oil is, submits Mr Flaux QC, on the evidence of Mr Ikama, oil belonging to SNPC: "*this part of SNPC's activities and functions is definitely commercial and is conducted on its own behalf and not on behalf of Congo*" [see paragraph 71.4 of Mr Flaux QC's closing submissions]. He further submits that this position is supported by the KPMG reports prepared for the World Bank/IMF.

The Decision

97. The conclusions I draw from the documentation, the only source of potentially reliable evidence, is as follows: SNPC is ultimately controlled by its Chairman who is the President's representative, to whom the Board have power to delegate their functions. Mr Itoua appears to have been personally responsible for signing most if not all documents on behalf of SNPC. There are some aspects of SNPC's existence which suggests it is a company owned by the State. For example it was formally incorporated and has its own Articles. It has a Board of Directors. Its accounts are audited [to a limited extent]. On the other hand, SNPC has unaudited and unverifiable *compte courants* with the State; it does not declare dividends and its profits do not return to the State in cash: instead it makes expenditures normally made by Government, such as paying for elections, peace initiatives and making donations by way of humanitarian aid. This is inconsistent with SNPC being a commercial company owned by the State.
98. There was a black hole in the accounts of SNPC in 2001 because of the relationship between it and the state. Commercial companies do not use their assets to pay for items of expenditure demanded or required by the Government. Instead, they declare dividends which the State collects, out of profits on which the company pays tax. Here, SNPC is, to an extent a tax collector on behalf of the State and an arm of the Treasury in financing Government projects. Those are not functions associated with a State owned commercial organisation. It is, therefore, essentially and fundamentally different from a State owned oil company by reason of its Articles of Association, its funding, its investments, the way its profits are dealt with and its accounting policies.
99. The distinction which Mr Flaux QC seeks to draw between SNPC's own oil and that belonging to the State is one without substance since its accounts do not and cannot accurately differentiate between the two: it has one set of earnings and not two and oil cargoes are mixed. The oil trading cannot be verified since Congo is unwilling for SNPC's documents to be disclosed on grounds of security, not security of SNPC but of the State. The consequence of the Government causing or permitting SNPC to continue its present activities in the way it does is to cause a leak in the monies available for State purposes and to encourage corruption. It also puts SNPC firmly into the category of an organ of the State with no independent commercial existence. The State uses SNPC as a vehicle for doing the Government's business. It is properly to be regarded as a governmental organisation. This case is distinguishable from the facts in the *Rolimpex* case. There, the Polish company did not make disbursements out of its funds for the benefit of the Government. It was expected to make a profit from activities which, albeit under the control of the Minister, were determined by the company itself. Here there was no dividend; the control of the Government was absolute in terms of the voting majority on the Board, even assuming that the Articles were a reality rather than just window dressing. In that case the court received extensive evidence from the company; here no-one has come to tell the court about the way its business is run.
100. Furthermore, I am not persuaded that it would be safe to rely on the face value of the documents. Form and reality may not coincide. For example, the impossibility of separating out the oil trades made by SNPC of State oil from the trades made of what is called its own oil suggests that the distinction between the two is not in reality maintained. Further, it is clear that the state is requiring SNPC to undertake activities which fall outside its articles [see the IMF report]. Finally, the complete lack of witnesses from SNPC to explain the problems which I have identified makes it impossible for the court to accept Mr Flaux QC's submissions. The documents alone do not tell the whole truth. A combination of the factors that I have identified leads me to the conclusion that SNPC is an organ of the state.

Fininco

101. I return to Fininco.
102. Even if Fininco were to be regarded as a nominee or organ of the State when the shares were acquired, has it become a separate and independent subsidiary of SNPC and should I regard its first two years of existence as anomalous and atypical of the status of the company?

103. The arguments here centred on Mr Ikama's evidence and the documents which have been disclosed. It is Mr Flaux QC's case that:
- (1) Fininco was formally incorporated as a subsidiary of SNPC in compliance with OHADA principles governing the incorporation of companies.
 - (2) There is no evidence to suggest, as Walker does, that Fininco was set up to avoid the consequences of the *saisie* proceedings taken by Walker against SNPC in the French Courts. The first *saisie* was obtained on 24 October 2001 and was directed at two of the banks with which SNPC had pre-financing arrangements. *"For an oil company such as SNPC to wish to set up a subsidiary specialising in financial and investment matters is neither surprising nor sinister, nor is the fact that the investments which such a company should make should include the purchase of commercial property in London."*
 - (3) The absence of financial autonomy does not mean that Fininco is not a genuine and independent corporate entity.
 - (4) Fininco's accounts were audited by Ernst & Young of Brazzaville and if there had been any irregularity in the accounts they would have said so. The *"increase in Fininco's share capital was financed by way of set-off against amounts loaned by SNPC and its treatment in the company's accounts were both approved by Ernst & Young ..."*
 - (5) The court should reject M. Hinfray's contention that Fininco had *"no managerial or administrative autonomy whatsoever from SNPC and essentially does what it is told to do by SNPC."* But a company in a group set up to carry out finance and investment would make the investments in accordance with the financial objectives of the group; but that is different from simply acting on the parent's instructions. Thus, Mr Ikama prepared a business plan and a programme of activities setting out the activities of the company as he saw them. These were then discussed in the board. It is not a case of SNPC issuing diktats. Whilst Mr Hinfray referred to a number of items in Board Minutes for his thesis that Fininco had no administrative and managerial autonomy, on analysis they amounted to no more than a desire to standardise group procedures on matters such as taking advice from the parent's lawyers or sending the *compte courant* agreement to SNPC for their analysis and standardisation.
 - (6) Mr Ikama told the court that he was responsible for the way that the financial objectives were achieved; that he controlled day to day management and was responsible for the staff under his control.

Decision

104. In reaching my decision on this aspect of the case I start with the first and obvious point that in formal terms Fininco is supposed to be a subsidiary of SNPC. Yet, on my findings, SNPC does not fulfil the functions of a company separated from the state. Largely because its monies are used to pay for Government expenditure I have concluded that as a matter of English law SNPC is, effectively, a Government Department of the State. It raises taxes and pays for elections and does not pay dividends to the State. Government Departments do not have 'subsidiaries'; it is clear that Fininco is a company set up by a Government Department and its relationships with SNPC must be looked at in that light. To an extent this affects the submissions of Mr Flaux QC who would have the court accept that the relationship between SNPC and Fininco was that of parent and subsidiary and was no different from the way that companies within a group behave to one another.
105. Again, it is fair to say that Fininco was incorporated as a company and as a subsidiary of SNPC although the circumstances of its incorporation give rise to a number of unanswered questions. Its accounts are audited. It holds board meetings. On the other hand, it does not make any money; it is financially dependent upon the *compte courant* with SNPC, which is a potentially legitimate and mainstream method of a parent keeping its subsidiary in funds.
106. Since I have had no reliable oral evidence, and no evidence at all from people who could have helped most, including in particular Mr Itoua, I have had to rely upon documents, which may be more for show than reality. I cannot conclude for certain that Fininco was set up because Walker had made attempts to seize the assets of SNPC in France. On a balance of probabilities, this seems a reasonable inference to draw. The circumstances in which it was incorporated [see paragraphs 20 – 40 above] show that it was done in a hurry. The cross investment between COSER and Fininco is very odd: each apparently investing in the other, even though Fininco's investment in COSER is not recorded in its books and COSER itself never paid any money by way of share capital to Fininco.
107. I am satisfied for the reasons referred to earlier in this judgment that the shares in Jackson were acquired with SNPC funds without any management participation by the Board of Fininco, which had no money or bank account when the contract to buy the shares was made. Fininco's incorporation was, as was noted, incompatible with the objectives of the World Bank/IMF that the State oil company should be privatised. I infer from the circumstances of its incorporation, the way the *compte courant* was established, and the way the shares were bought that Fininco was simply a tool of the Congo/SNPC in 2002 and 2003. Although Fininco nominally held the shares in Jackson, in reality ownership of them was retained by SNPC/Congo. Fininco was no more than an extension of SNPC using Government money to undertake various projects. As such, it was a device used by Congo to spend more of the money, which should have gone to the Treasury, for its own ends. Whether Mr Trace QC is right to say that it was used for the purpose of frustrating creditors I am not absolutely sure, but reach that conclusion on a balance of probabilities.
108. The control of SNPC's earnings which should belong to the State is diluted by Fininco, which is a tool of SNPC and is dissipating SNPC's assets one step removed from SNPC. Fininco is engaged on doing State business under the control of Mr Itoua, initially, and thereafter his successor.

Fininco since 2003

109. Strictly, it is unnecessary to consider whether Fininco's position has changed over the years. At the time of the relevant acquisition it was simply a tool of SNPC. I remain unconvinced that Fininco has achieved sufficient semblance of autonomy after 2003 to alter that conclusion. It is, in form, a separate corporate entity and audited by Congolese offices of reputable accountants. Substantially, Fininco has done no business since its formation. That is not to say that it has not developed somewhat grandiose schemes for the future. It has resolved to become a founder member of the Central African Stock Exchange, BVMAC. The documents show that there was a closing budget for the 2003 year which proclaimed that *"The foundations of the launch of Fininco .. have been laid. Thanks to the assistance of the parent company, the company has constituted a reliable patrimony (property and financial assets). The capital increase and capital payment operations in the 2002 financial year supported the equity capital of Fininco .. giving it the means of affirming itself as a "group leader" financial company."*
110. In the financial year 2003 Fininco established a French subsidiary [wholly owned]. For this purpose it used monies advanced to it by SNPC. It also acquired shares in BVMAC for 140 millions F.CFA. In fact for the 2003 year Fininco did no business as it was still *"in the process of setting up its operational structure."* In June 2004, there appears to have been a Board Meeting of Fininco's directors approving the final form of the accounts for the 2003 year. As a Miscellaneous item it was noted that the parent company would set up a unit to *"consider fiscal matters"* and that the unit would be instructed by the Board to *"take responsibility [for] training, the monitoring of legal and fiscal affairs and auditing."* There was also a need for collaboration in the area of accounts and finance and the Board *"pointed out that the organisation charts of the subsidiaries must be finalised and sent to the parent company for approval. Only then can the appointments take place."* Further *"the procedures relating to offices and interim responsibilities at subsidiary level: the requests relating to the offices of Managing Director of the subsidiaries must be sent to the Chairman of the Board. The interim memoranda stating the scope of powers must be initialled by the Chairman of the Board. The interim memoranda stating the scope of powers must be initialled by the Chairman of the Board."*
111. Mr Ikama produced a 'Programme of Activities' for the years 2004 – 2007.
- The following items were discussed:
- (1) The idea of Fininco issuing bonds *"to obtain funds from the public to meet the State's and the SNPC Group's finance requirements."*
 - (2) The design of *"cover products to protect the State's petroleum revenue and the group's activity against the volatility of the US dollar exchange rate, the flow of oil and the level of the interest rates"*.
 - (3) The setting-up of a second category *"micro-finance establishment the purpose of which would be to demonstrate to the Congolese more tangibly the use made of the national petroleum resources on behalf of the official banking sector."* It was proposed that it would apply for the necessary approval *"with the aim of becoming operational in March [2004]"*.
 - (5) Fininco is looking into the possibility of setting up an entity for wholesale trading in the currency markets.
 - (6) Obtaining finance for the members of the group.
 - (7) Financial Consultancy
 - (8) Centralised management of the group's funds.
112. The aim of the scheme was to make Fininco financially independent of SNPC. *"It should be stressed however, that the success of almost all these activities is linked to the favourable development of the activities of the parent company and the state development of the worldwide petroleum market"*.
113. At a board meeting held on 23 December 2003 the Board set Fininco the following major objectives: *"progressive transformation of the SNPC's group oil assets into financial assets; Control of an insurance company by 2005-2006; Control or creation of an "investment bank" type of financial banking establishment by 2006-2007."*
114. It is difficult to understand what benefit Fininco would receive from an investment in BVMAC, since, on the evidence, investment in a Stock Exchange, unless it is mature, does not create a positive return on the investment. This is the sort of investment one would expect the Government to do. The decision to acquire these shares cannot have been taken by Fininco on the basis that it was a good commercial investment from their point of view. In my judgment, this was an investment which the Government wanted and simply put the operation into Fininco and provided Fininco with the money to do it. The micro finance initiative was essentially part of the State's anti-poverty initiative. This was State money being used for State business. This is not a genuine business venture for a subsidiary company. Fininco, with SNPC money bought a building in Brazzaville which is let to an organisation called Agricongo, a quasi public NGO. This was a State investment using money from the State and is no different from SNPC's direct expenditures on behalf of the State. As to trading in the currency markets, Mr Ikama explained that this would be hedging currency fluctuations arising from SNPC's oil trades. If done, it would be no different from SNPC doing its own hedging. As to the suggestion that Fininco should act as a central cash pool within *"the SNPC group"*, Fininco's own business plan reveals that the main initiative would be to *"enable SNPC through the intermediary of Fininco to invest money on a short-term basis so that it will continue to be more readily available for use."* That speaks for itself.
115. I agree with M. Hinfray that Fininco enjoyed no financial independence in 2004 either. I also agree with M. Hinfray's evidence relating to administrative and managerial control. Not all the points carried significant weight, but taken overall I regarded the points he made as substantial. I reproduce below extracts from his cross-

examination; they reflect the essence of his evidence on this point. "I have analysed all the board meeting and the minutes of the shareholders' meeting which was submitted to me, in order to have an idea to what extent is there autonomy or not, of Fininco, toward SNPC. What I noted in, and what it is not usual in the board minute, that despite the board's power, which are mentioned in the company by-laws, they have full power, the board have full power, the managing director has a full power but, despite this full power, for every usual, every element of the company's life, they are requiring an authorisation, they are requiring to be the agreement of SNPC; they act as they had no autonomy" – Day 9 page 39.

116. He was asked about the action plan prepared by Mr Ikama which appeared to have been discussed at the Board. He replied:

A. *It is a plan, it is what the company wants to do, but, when I had a look to the financial statement, 2003, and when I had a look on the bank -- company bank's statement up to November 2004, I have not noted any of those transaction in the command that I have seen.*

Q. *Those transactions are all ...*

A. *So that is a long-term business plan.*

Q. *Those transactions are all, as I suggested to you a moment ago, no doubt partly because things take a lot longer to take effect in Africa than they do in Europe, those supposed transactions are still in the course of being set up, and they include the last one: to assume that the function of financial consultant to the parent company and other group companies -- you have seen that before, have not you?*

A. *Perhaps, I saw that decision, I saw that minute.*

Q. *And then there is some congratulations to the management for their initiative in the business plan and in relation to staff training. Now there is nothing there, is there, M. Hinfray, to suggest that before the board decided that those were the matters that the company was going to move forward with, that it had to go back to SNPC to obtain SNPC's approval for all those?*

A. *That is right, I do agree with you.*

Q. *You see, why do you not refer to any of those items in your paragraph 88 and following?*

A. *I have not referred to those decisions, as I explained to you, because what I had was -- the document that I had, it was a year 2002, 2003, and bank statement up to 2004. And I have not noted any of those operations so, I am asked by the court what I have noted in the documents submitted to me, to me, by which I will consider that Fininco is, has an autonomy or not from SNPC. In what I saw in the financial document, I saw none of them, so, I wrote and for my point of view, in the documents submitted to me, the company has not yet implemented, up to November 2004, any independent activity from SNPC. It is provided but it is not gone up to November 2004." Day 9 page 44 - 46*

117. And in relation, specifically to Fininco Board Minutes, M. Hinfray said:

A. *That is right, that I have attached to my report a full copy of the minutes, of the board minutes, since the minute was presented to the court. But what I was explaining in my report, that I note many, too many decisions which were subject to the SNPC approval; SNPC decision; SNPC acceptance and so on, for instance; and some decisions which are usual recruitment procedure; salary scale; appointment of legal advisor; review ...*

Q. *Let us just focus, again please, on what you say in paragraph 88. You say that from reading, after reading the minutes of the board meeting, you were surprised to note that "the approval of decisions of the Board of Directors is almost systematically submitted to the analysis, opinion or agreement of the parent company." Now M. Hinfray, I would suggest that by the use of the word "almost" you may be able to say to his Lordship: it happened in nine cases out of ten; but the truth is, is it not, that that statement, that the decisions were almost systematically submitted to the analysis, opinion or agreement of the parent, is simply not correct and not borne out by an analyses of all the entries in all the board minutes?*

A. *I agree that I have not done count of what decision has been taken independently, and what decision, how many decisions, are subject to the SNPC decision or agreement. When I wrote those minutes, I was surprised by such a wording, it is not usual to have a lot of points which remain subject to the mother company agreement. Specifically, in that situation, since Mr Itoua, which is President of Fininco, is at the same time managing director of SNPC so, usually in such a case, if Mr Itoua is presenting something to the board of Fininco, of course he had the agreement of SNPC, that it is nonsense to present something to the board of a subsidiary if you are the managing director of the mother company, and you tell the board: I will ask myself if I will agree such a proposal, as managing director of the other company; that is a nonsense. Day 9 page 47.*

To some extent, this evidence is confirmed by Mr Ikama's own evidence. Fininco purported to have shareholders' meetings but when asked about the voting of the different shareholders he appeared not to understand the idea that the voting rights of the shareholders did not all belong to SNPC [see the extract of evidence at paragraph 17 of this Judgment].

118. The fourth extract comes a few pages later when he said this, in what was not a responsive answer to a question but in response to a criticism that he was taking a piecemeal approach and that none of the points he was making were significant: "I have not issued any report on other company, which is not normal in the present case, in not one independent situation. What I explain in my report, that there is many different situations and that is not one of them, in most cases one of them is normal, several of them are usual; but when you add all those situations, the addition of all those situations is not normal. They have no autonomy in bookkeeping. They have no autonomy in recruitment. They

have no autonomy to fix the amount of the appointment and wages. They have no legal autonomy. It is the addition and how works the company which give me the impression, and on which I support my conclusion to say that from my point of view they have no managerial autonomy". Day 9 page 55.

119. Taking into account that M. Hinfrey was giving evidence in English, which was not his first language, it is reasonably clear what he is saying. He says that looking at the Minutes of Board Meetings overall, there are a number of indicators which suggest an unusual degree of control by a parent of a subsidiary. His conclusion, which I accept, is that Fininco had no financial, legal administrative or managerial autonomy. He also says that whilst there were elaborate plans being made there was no evidence from the accounts which he saw that any of these plans had been put into effect. Fininco was never in a position to own a bank or insurance company or trade in currency unless it was backed by SNPC, who could as well have done those things itself on behalf of the Government. The explanation put forward by Mr Flaux QC that things happen slowly in Africa may or may not be a sufficient explanation for the difference between form and reality. Having concluded that SNPC, while having the form of a company was simply being used as an organ of Government, it is a conclusion I am equally prepared to draw in the case of Fininco. It was in form a company with an independent mind; in reality it was simply a conduit pipe through which Government monies were channelled for purposes of which the Government approved. The pretence, as I think it is, that Fininco is a genuine commercial organization separate from Government is probably part of the game of cat and mouse to which I have referred.

Estoppel

120. It seems to me that the estoppel argument cannot succeed in relation to the French proceedings, if only because the issue whether SNPC was an emanation of the State is not the relevant issue in this jurisdiction. In any event, although I have concluded that Fininco, SNPC and the Congo are effectively one and the same entity, until that finding was made on the basis of the evidence before me, there could be no estoppel. The fact that on the application of English Law this court has reached the same conclusion, under a different umbrella, to a limited extent fortifies my conclusion on that issue. As to the Cayman Islands case I have to say, with the greatest of respect to the Judge there, that I am not sure upon what basis he arrived at his final conclusion that SNPC's assets should be made available to satisfy the judgment debt owed by Congo. But, again, I note that I have reached the same conclusion but for different reasons.

The Insolvency Act

121. Sections 423 and 425 of the Insolvency Act 1986 provide as follows:

"423 Transactions defrauding creditors

- (1) *This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another if:*
- (a) *he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to provide no consideration; or*
 - ...
 - (c) *he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.*
- (2) *Where a person has entered into such a transaction, the court may, if satisfied under the next sub-section, make such order as it thinks fit:*
- (a) *restoring the position to what it would have been if the transaction had not been entered into, and*
 - (b) *protecting the interests of persons who are victims of the transaction.*
- (3) *In case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose:*
- (a) *of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*
 - (b) *of otherwise prejudicing the interests of such a person in relation to the claim which is making or may make."*

"425 Provision which may be made by order under s.423

- (1) *Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows) –*
- (a) *require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;*
 - (b) *require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of money so transferred;*
 - ...
 - (d) *require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;*
 - ...

- (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charge on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.
- (2) An order under section 423 may affect the property of, or impose an obligation on, any person whether or not he is person with whom the debtor entered into the transaction; but such an order –
 - (a) shall not prejudice any interest in property which was acquired from a person other than the debtor and which was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and
 - (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction."

The Parties' submissions

122. Mr Trace QC made the following submissions:

- (a) The jurisdiction proceeds on the assumption, as it was put in the Cork Report [The Report of the Review Committee on Insolvency Law & Practice – Cmnd.8558, June 1982] that "persons must be just before they are generous and that debts must be paid before gifts can be made."
- (b) There are two basic elements that are required:
 - (i) that a transaction has been entered into for no consideration or at an undervalue and
 - (ii) that the purpose of the debtor in so doing was to defeat creditors' claims or in some other way prejudice their interests.
- (c) In relation to the first element, the wording of section 423 should not be construed so as to frustrate the purpose of the section: see *The Department for Environment Food and Rural Affairs v Feakins* [26 November 2004] per Hart J. at paragraphs 44 and 45.
- (d) As for the second element, the statutory purpose does not have to be the sole or the dominant purpose and dishonesty does not have to be proved. In *IRC v Hashmi* [2002] 2 BCLC the Court of Appeal confirmed that it must be established that it was a "real substantial purpose" of the transferor to put his assets beyond reach of creditors or otherwise prejudice the interests of such persons.
- (e) Applying those principles, there are a number of arrangements or transactions which fall within the section:
 - (i) The arrangements of setting up Fininco so as to divert to it assets belonging to Congo/SNPC so as to avoid creditors – comparable to the insertion of Olearius into the chain of oil sale transactions. Since Fininco is never going to be able to repay the monies advanced to it and since there is no intention that it should, Fininco has given no consideration for the advances made to them.
 - (ii) Jackson's shares were put into Fininco's name rather than into the name of SNPC or SNPC (UK) and this amounts to a transaction for which there was no or no significant consideration. It was based on monies from SNPC and was 'covered' by a letter which purported to confirm a loan which was an empty paper trail.
 - (iii) At the very least, the business opportunity of buying Jackson and acquiring a commercial property was worth something and the benefit of that opportunity was transferred to Fininco for no consideration.
- (f) The purpose of using Fininco to hold the assets was plainly for the statutory purpose, having regard to the way Fininco was incorporated, the fact that it was effectively managed and run by SNPC/Congo and that there is no valid reason why SNPC or SNPC (UK) should not own the shares themselves in their own name unless they were worried that their creditors would more readily be able to trace and get their hands on the assets.
- (g) As for the defence raised that section 423 is incapable of having extra-territorial effect, as a matter of law that is wrong. In a decision in the Court of Appeal in *Re Paramount Airways Ltd (in administration)* [1993] CH 223 at page 235, on section 238 of the Act, but in which section 423 was also considered, the Vice Chancellor [Sir Donald Nicholls] said:

"... on its face, the legislation is of unlimited territorial scope. To be within the sections a transaction must possess certain features. For instance, it must be at an undervalue .. If a transaction satisfies these requirements, the section applies, irrespective of the situation of the property, irrespective of the nationality or residence of the other party, and irrespective of the law which governs the transaction. In this respect, the sections purport to be of universal application. The expression "with any person" merely serves to underline this universality."

Thus, as the court made clear "siphoning money abroad .. is a typical case to which the new legislation must have been intended to apply." But in this case, the property is located here; Jackson is an English registered company; the acquisition of the shares was governed by English Law and Fininco was intended to be at least the nominal company which bought the shares. It was submitted to me that I should therefore be readily satisfied that Fininco is "sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element." [per Sir Donald Nicholls at page 239-40].

123. For Fininco, Mr Flaux QC made the following submissions:

- (a) In order to succeed, Walker would have to establish that Congo/SNPC and Fininco are one and the same.
- (b) Walker cannot establish that the substantial purpose of the transaction was to put assets beyond the reach of creditors. In *Hashmi* [paragraphs 39-40] Simon Brown LJ said that the court should ask

"Can the court be satisfied that a substantial purpose of the debtor's transaction was (putting it in shorthand) to escape his liabilities" but "if in fact the judge were to find in any given case that the transaction is one which the debtor might well have entered into in any event [for example, out of a wish to avoid inheritance tax], he should not then too readily infer that the debtor also had the substantial purpose of escaping his liabilities.

- (c) The test of whether the debtor had that intention is subjective and he must be shown actually to have the intention. In this case there is "simply no basis whatsoever for Walker's suggestion that the purpose (let alone the substantial purpose) of the relevant transaction was to enable SNPC let alone [Congo] to put assets beyond the reach of its creditors." [Skeleton closing submission paragraph 89].
- (d) The section only applies to transactions "at an undervalue". There must at least be some "gratuitous element". The court will take into account the reality of the benefit received and not merely what was expressed to be the consideration. The real transaction which Walker seeks to impugn is the acquisition of the shares in Jackson with monies advanced by SNPC without "interest". But the fact that a loan is provided interest free does not mean that it is a transaction at an undervalue. Thus, increases in commercial property values would enhance the value of the shares held by Fininco in Jackson. If SNPC had purchased the shares in their own name they would then have been responsible for the costs of managing and administering the property which are not inconsiderable. "It is difficult to see how it can be suggested that the consideration provided by SNPC was significantly less than that received, let alone involves a gift or a gratuitous element." – paragraph 92 of the Closing Submission.

Decision

124. With great respect to him, in my view Mr Flaux QC is wrong when he says that, as a precondition to the application of this section, the court must have first concluded that Congo/SNPC and Fininco were one and the same. On the contrary, had that been a necessary condition, the Claimants would have been entitled to succeed without the application of the section. It may be that this error stems from the fact that in their opening submissions, Fininco treated the transaction between Fininco and Jackson as being the relevant transaction. But that is a misunderstanding of how the section works in this case. The transaction that is being 'attacked' is that between SNPC and Fininco, namely 'putting' the shares into Fininco's name. It so happens that I have concluded that Congo/SNPC and Fininco are one and the same. The consequence is not that the section can now be considered; rather that a consideration of it is not necessary to my decision. However, in the light of the arguments addressed to me, I propose to deal with this part of the argument on the assumption that Fininco is separate and distinct from Congo/SNPC [but that SNPC is a Government Department rather than a State owned corporation].
125. Has a transaction been entered into at an undervalue? In my view, the 'transaction' is, essentially, that identified in paragraph 122(e)(ii), namely the 'putting' of the shares into the name of Fininco when Fininco effectively gave no consideration for the acquisition. The only suggestion that Fininco gave consideration is the existence of the compte courant and the letter apparently dated in January 2003 from Fininco purporting to evidence a loan from SNPC. I have already concluded that there was no prospect that Fininco could repay SNPC and I infer that there was no intention that it should do so, since Fininco had effectively earned nothing since its incorporation. The letter was probably written as part of the cat and mouse game and has no evidential weight. In any event, even had SNPC genuinely made a loan to Fininco, the loan was interest free and that made the transaction at an undervalue, since a commercial transaction even between parent and subsidiary would involve the parent receiving interest on monies lent, as the compte courant provided for. Fininco did not give and was never intended to give full value for the acquisition of the shares. They were bought with SNPC money which was never going to be repaid and which was interest free.
126. What was the purpose of the transaction? Unless SNPC wanted to hide their funds from their creditors' gaze, there was no sensible purpose for putting the property into Fininco's name. The original intention was to acquire premises for SNPC UK and when pressure came on SNPC in the litigation in Paris a decision must have been taken to 'put' the shares into a different and as yet unknown name. I have no difficulty in inferring, from all the circumstances outlined above, that the purpose of transferring the shares to Fininco was to put them beyond the reach of creditors such as Walker who were making claims against SNPC [for whom read Congo]. Fininco was 'inserted' into the transaction, just as Olearius had been in the Cayman Islands Case, in order to meet the aspirations outlined in the Cleary Gottlieb Memorandum; namely to avoid paying Congo's creditors.
127. Had this been the sole ground upon which Walker relied, I would have found in their favour upon it and used the court's powers under section 425 of the Act to require the shares to be vested in SNPC, which would then have become amenable to execution on the basis that Congo, the debtor was "interested beneficially" in both the shares and Jackson's property. When the parties have had a chance to read this judgment in draft, I will consider whether it would be appropriate to make any such order having regard to my finding that Fininco is simply an organ of the State, just like SNPC.

Conclusion

128. It follows, therefore, that I hold that Congo are beneficially interested in the shares of Jackson and Jackson's property. I will consider the form of order after hearing arguments from counsel.

ADDENDUM

Since writing my judgment and sending it to the parties for correction, I have had the chance to read the judgment of Cooke J in the matter of *Kensington International Limited v Republic of Congo & as third parties Glencore Energy UK Limited, Sphynx UK Limited, Sphynx (BDA) Limited, Africa Oil & Gas Corporation and Cotrade SA* [Folio 2002 Nos 1088, 1281,

1282 & 1357, judgment handed down on 28 November 2005.] In his judgment, as in mine, Cooke J. concluded that Congo had:

- (a) put forward dishonest oral evidence;
- (b) failed to disclose relevant documents;
- (c) relied on documents which did not evidence the true situation and were backdated.

These are serious matters. Witnesses who deliberately lie in court may be prosecuted for perjury. The creation of false and misleading documents for use in court may expose those who participate in it to prosecution for forgery. Deliberately trying to mislead the court may also involve proceedings for contempt of court. I simply express the hope that those who advise Congo/SNPC will take note of this for the future.

Mr Anthony Trace QC, Mr Richard Morgan and Mr Benjamin John (instructed by Allen & Overy LLP) for the Applicant
Mr Julian Flaux QC and Mr Simon Kerr (instructed by Russell-Cooke) for the Fininco and Jackson 31 Limited