Neutral Citation Number: [2007] EWHC 197 (Comm.)

Case No: 2005 - 190

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2007

**Before** :

**MR JUSTICE ANDREW SMITH**

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**Between :**

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| **DONEGAL INTERNATIONAL LIMITED** | **Claimant** |
| **- and -** | |
| **REPUBLIC OF ZAMBIA AND ANR.** | **Defendant** |

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**Anthony Trace QC, Benjamin John and Ciaran Keller**
(instructed by **Allen & Overy**) for the Claimant
**William Blair QC, Michael Sullivan, Hannah Brown, James Evans and James MacDonald**
(instructed by **DLA Piper**) for the Defendant

Hearing dates: 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22 and 23 May 2006, 1 August 2006 and 18, 19, 20 and 21 December 2006.

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# Judgment

**MR JUSTICE ANDREW SMITH:**

Introduction

1. In these proceedings the claimants, Donegal International Limited ("Donegal"), are claiming from the first defendant, the Republic of Zambia ("Zambia"), a debt of US$42,305,026.50 together with interest. The total claim is for more than US$55 million. It is made under a settlement agreement dated 1 April 2003 ("the Settlement Agreement") and signed by Mr Michael Sheehan on behalf of Donegal and Mr Emmanuel Kasonde, who was then the Zambian Minister of Finance. No substantive claim has been made against the second defendant, Mofed Limited ("Mofed", an acronym for Ministry of Finance and Economic Development), an English company owned by the Zambian Minister of Finance on behalf of Zambia, who were joined as a party to these proceedings simply for the purpose of supporting freezing relief against Zambia.

2. The proceedings arouse strong feelings. Zambia is a poor country and sees itself as being vulnerable to "vulture funds". They say that this claim for more than US$55 million is an improper attempt by Donegal to exploit their vulnerability, Donegal having originally become their creditors by buying debt from the Government of Romania in 1999 for some US$3.2 million. Donegal respond that their proper purpose is to make a profit, that it is legitimate to pursue their claim through these

proceedings against Zambia and that they are justified in doing so, Zambia having rejected their reasonable proposals for settling the indebtedness and having sought to evade their responsibilities. I am concerned, of course, with the legal questions that are raised by the applications before me and not with questions of morality or humanity.

3. The four applications before me are these:

   i) Zambia made an application ("the jurisdiction application") on 24 August 2005 under Part 11 of the Civil Procedure Rules ("CPR") for a determination that the court has no jurisdiction to try the claim because Zambia is a sovereign state and is entitled to assert state immunity in accordance with section 1 of the State Immunity Act, 1978.

   ii) Zambia applied on 11 October 2005 to discharge freezing orders made against them.

   iii) Donegal applied on 7 February 2006 under Part 24 of the CPR for summary judgment against Zambia.

   iv) Donegal applied on 2 June 2005 to vary their freezing orders against Zambia. They seek to include in the assets covered by the order the proceeds of litigation brought by Zambia in the Chancery Division, and the assets of Mofed on a worldwide basis.

4. During the parties' closing submissions, in view of constraints of time I suggested and the parties agreed that I should not decide in this judgment the two applications about the freezing orders (which would not need to be determined if I acceded to the jurisdiction application) unless I conclude that they should in any event be discharged (and neither continued nor renewed) for the sole reason that the evidence presented by Donegal when they were made was misleading or incomplete or both. Otherwise, I shall invite further submissions in light of this judgment.

5. The hearing of the jurisdiction application involved the disclosure of documents and hearing of oral evidence from witnesses of fact and expert witnesses (see J H Rayner v Dept of Trade and Industry, [1989] Ch 72 at pp.193-5, 252E/F), and it was common ground that all four applications should be determined upon the basis of that evidence.

The Settlement Agreement

6. Following a credit agreement between Romania and Zambia dated 17 April 1979, Zambia incurred indebtedness to Romania in respect inter alia of acquisitions of agricultural machinery. By an assignment agreement dated 19 January 1999 Romania assigned the debt to Donegal. In April 2003 Donegal and Mr Kasonde executed the Settlement Agreement which set out an agreement about the discharge of the debt.

7. The Settlement Agreement was introduced by a preamble in the following terms:

   "Whereas:

The Republic of Zambia owed to Romania the principal amount of US$29,834,368.04 together with interest pursuant to the Credit Documents.

Donegal acquired the rights of Romania to the Debt pursuant to an assignment agreement dated 19th January, 1999.

The Republic of Zambia acknowledged the assignment to Donegal and the registration of Donegal as current holder of the Debt by a letter to Donegal dated 12th February, 1999.

Donegal is owed the Debt by the Republic of Zambia pursuant to the Credit Documents and the Republic of Zambia acknowledges this obligation.

The Republic of Zambia and Donegal wish to reach an amicable settlement in relation to the Debt on the terms set out in Annex 1 [which principally comprised a schedule of payments] in accordance with this Agreement."

8. The "Debt" was defined as follows: "the entire amount of the debt owed by the Republic of Zambia to Donegal pursuant to the Credit Documents on the date of this Agreement being US$29,834,368.06 of principal and US$14,889,393.11 of accrued interest thereon for a total amount of US$44,723,761.17". (In Annex 1 to the Settlement Agreement the amount is stated to be US$44,792,421.09, being principal, or "face value", of US$29,834,368.06 and interest of US$14,958,053.03, being calculated at 12% pa to 31 March 2003: this apparent discrepancy was not explored in the evidence before me, but it seems likely that the interest figure in the definition of "Debt" was carried over from a previous draft of the agreement without being updated, whereas the figure in Annex 1 was amended. However, there is no suggestion that the Settlement Agreement should be rectified or that I should adopt the figure in the Annex rather than that in the definition as the amount of the underlying debt.)

9. The "Credit Documents" were defined as eight specified documents or categories of documents "which evidence the Debt", including statements of payment obligations issued by Romanian Foreign Trade Bank ("Bancorex"), confirming the amount of US$29,834,368.06; a statement sent by the Zambian Ministry of Finance dated 28 April 1994; a Credit Agreement dated 17 April 1979 and a further Governmental Agreement dated 4 August 1985 made between the Government of Romania and Zambia; a Memorandum of Understanding dated 18 December 1998, to which I shall refer in this judgment; and three export agreements made by Zambia in July 1979, to which I shall also refer later. They did not include what I shall refer to as the Banking Arrangement.

10. The agreement provided by clause 2.1 that Zambia should make 36 monthly payments to Donegal in the total sum of US$14,781,498.96, together with interest on the unpaid balance calculated at the rate of 6% pa in the sum of US$1,142,069.38, by amounts to be transferred between 4 April 2003 and 1 March 2006, and by clause 2.2 that

Donegal agreed to accept "the settlement amount in full and final settlement of the Debt". Zambia were permitted to postpone any payment due after July 2003 for up to 3 months, subject to a limit of one postponement in 2003 and three postponements in any one calendar year thereafter. The settlement amount was defined as:

> "the amount to be paid by the Republic of Zambia to Donegal in accordance with this Agreement being US$14,758,841.19 (calculated as 33% of the principal and interest owing in respect of the Debt on the date of this Agreement) together with interest on the unpaid balance of this amount calculated at a rate of 6% per annum".

11. When the Settlement Agreement was made, Donegal had, as I shall explain, brought (but not formally served) proceedings ("the BVI proceedings") against Zambia in the Eastern Caribbean Supreme Court in the British Virgin Islands ("BVI"). Clause 2.3(f) of the Settlement Agreement provided that, prior to Donegal serving a notice of default, "Donegal will not continue legal proceedings to recover the Debt".

12. Clause 2.3 of the Settlement Agreement was headed "Default" and provided that 21 days after Zambia defaulted upon any payment Donegal could elect to terminate the Settlement Agreement by a notice in writing. Clause 2.3 also provided as follows:

> "(d) Upon service of the Notice, this Agreement will be null and void and of no effect and Donegal will be entitled to judgement in respect of the Debt in full with interest at 8% per annum compounding quarterly having given credit for any amounts already received pursuant to Clause 2.1 above.
>
> (e) Upon service of the Notice, the Republic of Zambia hereby consents to the award of a judgement by the High Court in England for the full amount of the Debt together with interest both before and after judgement at a rate of 8% per annum compounding quarterly but after having given credit for any amounts already received pursuant to Clause 2.1 above."

13. Clause 3.1 of the Settlement Agreement, headed "Representations and Warranties of the Republic of Zambia", provided:

> "The Republic of Zambia makes the following representations and warranties to Donegal on the date of this Agreement.
>
> (a) Powers and authority
>
> It has the power and authority to enter into and perform, and has taken all necessary action to authorise the entry into, performance and delivery of, this Agreement.
>
> (b) Legal validity
>
> This Agreement constitutes its legal, valid and binding obligation.

(c) Authorizations

All authorizations required in connection with the entry into, performance, validity and enforceability of this Agreement have been obtained or effected and are in full force and effect.

(d) Non-reliance

The Republic of Zambia acknowledges and confirms that it is not entering into this Agreement in reliance upon any statement (other than expressly set out herein) or silence on the part of Donegal or its employees, advisers, agents, partners and representatives in connection with this Agreement."

14. Clause 6.3 provided that "Neither of the Debt or this Agreement may be assigned by the parties unless and until this Agreement is terminated under clause 2.3 above. For the avoidance of doubt, this Clause will not survive termination under Clause 2.3 above".

15. Clause 8, headed "Severability" provided:

"If a provision of this Agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, that shall not affect:

(a) the legality, validity or enforceability in that jurisdiction of any other provision of this agreement; or

(b) the legality, validity or enforceability in other jurisdictions of that or any other provision of this Agreement."

16. Clause 11 of the Settlement Agreement provided that it should be governed by and construed in accordance with English law.

17. Clause 12 was headed "Jurisdiction" and provided:

"12.1 Submission

(a) The Republic of Zambia agrees that the courts of England have jurisdiction to settle any disputes in connection with this Agreement and the Debt and accordingly submits to the jurisdiction of the English courts.

12.2 Forum convenience and enforcement abroad

The Republic of Zambia:

(a) waives objection to the English courts on grounds of inconvenient forum or otherwise as regards

proceedings in connection with this Agreement or the Debt; and

(b) agrees that a judgment or order of an English court in connection with this Agreement and Debt is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction.

12.3 Non-exclusivity

Nothing in this Clause 12 limits the right of Donegal to bring proceedings against the Republic of Zambia in connection with this Agreement or the Debt:

(a) in any other court of competent jurisdiction; or

(b) concurrently in more than one jurisdiction.

12.4 Waiver of immunity

The Republic of Zambia irrevocably and unconditionally:

(a) agrees that if Donegal brings proceedings against it or its assets in relation to this Agreement or the Debt, no immunity from those proceedings (including without limitation, suit, attachment prior to judgment, other attachment, the obtaining of judgment, execution or other enforcement) will be claimed by or on behalf of itself or with respect to its assets:

(b) waives any such right of immunity which it or its assets now has or may subsequently acquire, and

(c) consents generally in respect of any such proceedings to the giving of any relief or the issue of any process in connection with those proceedings, including, without limitation, the making, enforcement or execution against any assets whatsoever (irrespective of its use or intended use) of any order or judgment which may be made or given in those proceedings."

18. Zambia made payments under the Settlement Agreement on 29 April 2003, on 12 June 2003 and on 10 November 2003, and thereafter they made no further payments. By letter from their solicitors, Messrs Allen & Overy, dated 14 December 2004 Donegal exercised their option to terminate the Settlement Agreement.

19. Zambia emphasise and Donegal acknowledge that the claim that Donegal bring in these proceedings is for money due under the Settlement Agreement. This is so: in the Claim Form Donegal seek judgment against Zambia for US$44,723,761, "being the Debt owed to [Donegal] by [Zambia] under a Settlement Agreement dated 1 April 2003", together with interest under the Settlement Agreement. In the course of the

hearing they unambiguously disavowed any claim for monies owing to them in respect of the debt assigned to them by Romania.

20. Donegal accepted before me that before the Settlement Agreement Zambia would have had state immunity in respect of the assigned debt. They do so because, even assuming that the debt was of a commercial nature, before assignment it was a debt between states and Zambia would have had state immunity in respect of it. Donegal accept that, since the debt was assigned, in the conventional phrase, "subject to equities", it would have continued to attract immunity after assignment. The point having been conceded by Donegal, I did not hear argument about this from Zambia. It seems to me right as a matter of general principle that the assignment of a debt should not adversely affect the creditor's position in any way, but I confess that, as far as English law is concerned, I do not find it easy to find this in the wording of the State Immunity Act 1978 (see section 2(3): "This section [which provides that a State is not immune as respects commercial transactions entered into by the State] does not apply if the parties to that dispute are States…". However, the assigned debt was not governed by English law and there had been no agreement that claims to recover it were subject to English jurisdiction, and in these circumstances I must proceed on the basis that Donegal's concession was rightly made.

21. Zambia dispute the validity and enforceability of the Settlement Agreement and also submit that on its true interpretation they are entitled to assert, and have not waived, state immunity in respect of the claim brought by Donegal. Their arguments about validity and enforcement are, in broad outline, these:

   i) The Settlement Agreement is unenforceable against Zambia because it is tainted with illegality and corruption, and if the court were to enforce it, it would be assisting a claim arising ex turpi causa and in circumstances where its enforcement is inequitable. There are a number of aspects to these contentions. First, it is said that confidential information was improperly sought and obtained from government officials. Secondly, Zambia allege that there was interference with contractual arrangements made between Romania and Zambia. Then Donegal are said to have attempted improperly to promote their interests in their dealings with a civil servant called Mrs Chibanda and to exercise influence by promising a donation to a project called the Presidential Housing Initiative ("PHI") and other projects favoured by President Chiluba, who was the Zambian President until the end of 2001. It is also said a government official called Mr Chizyuka was offered and in due course paid a bribe by a Mr Fisho Mwale whose services were engaged by Donegal. In support of their argument that these matters vitiate the Settlement Agreement made by Donegal, Zambia say that Donegal, through Mr Sheehan, are to be imputed with so called "blind-eye" knowledge of them. They also say that Donegal are responsible for the actions of persons who were advancing their interests in Zambia, including, as well as Mr Mwale, Mr Philip O'Rourke and his company, Moreno International Limited ("Moreno") and Mr George Chilupe. In this context, Zambia contend that contractual arrangements that Donegal assert that they had with Moreno were a sham. Zambia also rely in support of their argument that the Settlement Agreement is unenforceable upon the way in which Donegal conducted the BVI proceedings.

ii) Mr Kasonde did not have (actual or ostensible) authority under the Zambian Constitution to execute the agreement. This contention is based upon article 54(3) of the Constitution, which provides that, "Subject to the other provisions of this Constitution, an agreement, contract, treaty, convention or document by whatever name called, to which Government is a party or in respect of which the Government has an interest, shall not be concluded without the legal advice of the Attorney-General, except in such cases and subject to such conditions as Parliament may by law prescribe". It is said that the Attorney General of Zambia had not given the requisite advice.

iii) Mr Kasonde executed the Settlement Agreement in reliance upon a misrepresentation about the Attorney General approving or agreeing to the execution of the Settlement Agreement or its terms, and that it is voidable for misrepresentation.

iv) Mr Kasonde executed the agreement by reason of a mistake because he did not know that the Attorney General had not agreed to the terms of the Settlement Agreement or that a document whereby Zambia had acknowledged the debt (the letter of 12 February 1999 referred to in the recitals) had been obtained by a bribe.

22. Zambia also say that the Settlement Agreement, properly interpreted, does not entitle Donegal in the circumstances that have arisen to sue for any sum under it, but only for the original debt assigned by Romania to Donegal. Further, in the context of Donegal's application for summary judgment they say that the provisions of a claim under clauses 2.3(d) and (e) of the Settlement Agreement, which are the basis of Zambia's claim, are penalty provisions and are therefore not enforceable. Zambia also seek to set off against Donegal's claim damages in respect of unlawful interference with their arrangements with Romania and in respect of the bribe that they say was offered and paid to Mr Chizyuka.

23. These proceedings were brought on 8 March 2005. On 7 March 2005, Langley J had granted, upon an application by Donegal without notice, freezing relief against Zambia and Mofed. That application was supported by an affidavit of Mr Michael Sheehan dated 4 March 2005. On 16 March 2005, at a hearing at which Zambia were not present or represented and at which Mofed appeared but did not oppose the order sought by Donegal, Cooke J continued the order of Langley J until "after judgment at trial or further order of the court".

Donegal

24. Donegal were incorporated in the BVI on 18 December 1997 by Debt Advisory International LLC ("DAI") of 1747 Pennsylvania Avenue, NW, Suite 450, Washington DC 2006. DAI are a Delaware company, which were established by Mr Sheehan in or about 1995, of which he has been the managing director since January 1996 and which he has described as a "specialist factoring company", specialising in providing debt advice on emerging market corporate and sovereign debt and working for debtors, creditors or investors. Mr Sheehan is now the sole owner of DAI, having since about August 1998 increased his 20% shareholding by buying out other investors.

25. Donegal's only asset is the claim against Zambia, they were acquired so that the debt could be assigned to them and it appears that they have never done any other significant business. Donegal are now owned by Select Capital Limited ("Select Capital"), a company registered in the BVI on 27 June 1997. Mr Sheehan used DAI and another Delaware company called DS Partners LLC to manage the business of Select Capital and the companies that Select Capital own: indeed DS Partners LLC were specifically set up for this purpose.

26. Select Capital specialise in emerging market debt recovery and conversion. Their business was more specifically described by Mr Sheehan in evidence given on 25 May 2005 at a hearing ("the American hearing") before the United States District Court for the District of Columbia. (The evidence was given under a subpoena issued pursuant to a request for mutual legal assistance made by Zambia to the United States, the request originating from the Zambian Task Force on Corruption.) His evidence was as follows: "The assets that Select buys are usually relatively large, highly distressed or defaulted emerging market, sovereign or corporate debts. And because the purpose of Select is to try to realize value out of those assets, either by trading them; or by swapping them for equity in emerging market companies owned by the debtors; or by restructuring them; or by, if necessary, litigating them to recovery, Select incorporates separate subsidiaries for each asset in order to avoid cross liability with respect to litigation."

27. The ultimate ownership of Select Capital is rather obscure, but it appears to be an offshore vehicle for investors. Mr Sheehan denied having any interest of his own: there is no evidence to the contrary and I accept this. He said in his evidence before me that there are three principal shareholders, including a company of a cousin of his who had bought the interest of shareholders associated with Croesus Capital Management ("Croesus"), a company which, I am told, has "gone out of business". Mr Sheehan said that there were also a few individual shareholders with very small positions. In his evidence at the American hearing, Mr Sheehan said "[t]he shares of Select Capital Limited are held by hedge fund investors and high net worth individuals, principally in New York. There's a few in California. All American basically. These are large funds." However, he also said that the reason that the fund was set up offshore was many of the investors were European and did not want to be subject to US tax.

28. Mr Sheehan and a Mr Peter Beresford became directors of Donegal on 30 January 1998. Mr Beresford was a managing director of DAI between at least 1997 and 1999. He has now retired. Between 23 August 2002 and 9 November 2004 Mr Mark Slater, a solicitor who had previously worked for Allen & Overy, was another director of Donegal.

29. Mr Sheehan is a qualified lawyer with extensive experience of litigation and also of doing business in Sub-Saharan Africa. After graduating from law school in Washington in 1987 he worked as a senior associate at Naegele & Associates, Washington DC, specialising in failed thrift acquisitions and bank receivership litigation. Between 1989 and 1991 he worked as a lawyer with Mitchell, Friedlander & Gittleman in Kinshasa, Congo, where he acted for a wide variety of corporate clients and not-for-profit organisations in relation to their investments and operations in Sub-Saharan Africa. Thereafter until 1995 he worked in Washington DC for an American not-for-profit corporation called Debt-for-Development Coalition, Inc.

30. DAI and Donegal did not have a local presence in Zambia. They were assisted in relation to the debt by Mr Mwale, a former Mayor of Lusaka, and Mr Chilupe. It is Donegal's case that they were provided with their assistance by Mr Philip O'Rourke or Moreno. Mr O'Rourke had worked in Africa for many years: he had participated in business ventures there, and advised on projects involving sovereign debt. I shall consider later in this judgment Donegal's arrangements with Mr O'Rourke and his companies, and their relationship with Mr Mwale and Mr Chilupe.

Zambia

31. The present President of Zambia is Mr Levy Mwanawasa SC, who came to office in elections held on 27 December 2001. He succeeded Dr Frederick Chiluba, who had been the President since 1991. There was, as I understand it, controversy towards the end of his Presidency arising from his wish to change the Constitution to allow him to have a third term of office, a proposal that was opposed by some members of his government and that was unsuccessful.

32. After President Mwanawasa came to office, there was established in July 2002 a Zambian Task Force on Corruption, the purpose of which, as I understand it, is or includes the investigation into possible misappropriation of monies from the government during the presidency of Dr Chiluba. Officers were seconded to it from the Anti-Corruption Commission, the police and other bodies. Its investigative work is assisted by foreign governments, including the governments of the United Kingdom and the United States. One result of its investigations is that there are criminal proceedings in the Zambian courts against President Chiluba and also a Mrs Stella Chibanda, who had been an official in the Ministry of Finance. President Chiluba and Mrs Chibanda are also defendants in proceedings brought by the Government of Zambia in the Chancery Division of this court under the number HC04C03129 and the name "The Attorney General of Zambia for and on behalf of the Republic of Zambia v Meer Care & Desai and ors".

33. Another of the Task Force's investigations to which reference was made in the evidence before me concerned a Serbian company called Fabfamos. An amount of a debt owed by the Zambian government was agreed in the sum of US$26.7 million. I was told by Mr Mark Chona, the Executive Chairman of the Task Force at the relevant time, that a number of senior government officials had created a forged agreement by changing a page in it, and that the Task Force found during this investigation that relevant documents in the Ministry of Finance were destroyed. I accept Mr Chona's evidence, and refer to it because documents relating to this case too are missing from the Ministry of Finance. In view of the evidence of Mr Chona about the Fabfamos and other investigations of corruption in Zambian government offices, I decline to draw any inference adverse to Zambia's contentions in this case from the fact that relevant documents appear to be missing from government files.

34. From March 1998 until July 1999 the Minister of Finance under President Chiluba was Ms Edith Nawakwi. From 8 January 2002 to 30 June 2003 the Minister of Finance under President Mwanawasa was Mr Kasonde. One of the duties of the Minister of Finance is to present the country's annual budget to Parliament, and this was done, certainly in 1999, at about the end of January. Ms Nawakwi explained, and I accept, that one of her principal concerns as Minister of Finance was to negotiate debt reduction and better debt repayment terms for Zambia with government

and commercial creditors, including the World Bank and the International Monetary Fund ("IMF").

35. The structure of the officials under the Minister at the Ministry of Finance and National Planning (to which I shall refer as the "Ministry of Finance") was, at the material time, this: the most senior official was the Secretary to the Treasury. In about September 1998 the Secretary to the Treasury was Professor Benjamin Mweene. Professor Mweene was succeeded by Mr Mtonga, who had previously been one of the Permanent Secretaries and then served as Acting Secretary to the Treasury, but it is not clear from the evidence quite when Mr. Mweene retired. Mr Mtonga held that position until March 2002.

36. Under the Secretary to the Treasury there were two Permanent Secretaries, one being the Permanent Secretary for Budget and Economic Affairs ("B&EA"). By the end of January 1999, the Permanent Secretary for B&EA was Mr Boniface Nonde. One of the senior officials under him was Mrs Chibanda, who was the Director of External Resource Mobilisation ("ERM"). There were three units in the ERM, the Multilateral Unit, the Bilateral Unit, and the Investments and Debt Management Unit. The main concerns of the Investment and Debt Management Unit were the management of government debt and investments.

37. Among those who were answerable to or reported to Mrs Chibanda were:

    i) The Head of Debt and Aid Data in the ERM. In late 1998 and early 1999 this position was held by Ms Patricia Nyirenda.

    ii) The Chief Economist of the Multi-Lateral Co-operation Unit. In late 1998 and early 1999 this position was held by Mr Richard Chizyuka.

    iii) The Chief Economist in the Investments and Debt Management Unit. In late 1998 and until 7 January 1999 this position was held by Mr David Ndopu.

38. There also worked at the Ministry of Finance a Treasury Counsel, a secondee from the Ministry of Legal Affairs, who assisted the Ministry of Finance to negotiate contracts to which it was party.

<u>Paris Club and international debt arrangements</u>

39. In the late 1990's, Zambia faced severe economic problems. The country was very short of foreign exchange. The price of copper, upon which the economy was heavily dependent, was very low and productivity was down. Ms Nawakwi told me that at that time the budget was "62% funded by the international community".

40. The Paris Club is an informal group of creditor governments largely from the developed world, which was founded in 1956 and whose Secretariat is in Paris at the French Ministry of Economics, Finance and Industry. Romania are not a member of the Paris Club. The purpose of the Club is to reach a consensus about what relief should be granted to debtor countries. The Club collectively conducts negotiations with individual debtor governments in relation to their external debt. Only bilateral government loans and export credits guaranteed by official bilateral agencies are eligible for restructuring through the Club. Neither multilateral organisations (such

as the World Bank and the IMF) nor commercial creditors belong to the Paris Club, although sometimes multilateral organisations attend meetings as observers.

41. At the end of their meetings, participating creditor countries and the debtor country usually sign an Agreed Minute of the negotiating session. These minutes are not legally binding, but delegations subscribing to them undertake to recommend their terms to their governments as a framework for bilateral agreements subsequently negotiated with debtor countries.

42. At the start the Paris Club negotiated rescheduling terms on a case-by-case basis. In the 1980's the Club began to adopt standard market-related terms, and from time to time the Paris Club members have met and agreed revised standard terms providing for greater debt relief. Thus, for example, under the "Toronto terms" of 1988 debt relief of 33% was to be granted and so-called "non-ODA" (non-official development assistance) debt repayment was to be over 14 years with eight years of grace. The "Naples terms", adopted by the Club in December 1994, increased debt relief to 67% for the most indebted countries, with the remaining 33% rescheduled subject to a maturity period of 23 years and a grace period of 6 years. Nonetheless it remains one of the stated 'rules and principles' of the Paris Club that it makes decisions on a case-by-case basis for individual debtor countries.

43. Since 1983 Zambia have negotiated with the Paris Club terms for the repayment of their debt, and over the years the Agreed Minutes governing Zambia's understanding with the Club have been reviewed from time to time. Specifically, it is recorded in minutes dated 28 February 1996 that debt of US$566 million should be treated on Naples Terms, and in minutes dated 16 April 1999 that debt of US$1,062 million should be so treated. The latter minutes authorise Paris Club creditors "on a voluntary and bilateral basis" to seek to exchange in the context of swap agreements, such as debt for development or debt for equity swaps, the full amounts of outstanding official development assistance loans and (subject to specified limits) the amounts of other credits. Throughout 1999 debt for equity swaps and other conversions were permissible under the relevant Paris Club minutes both for debt owed to Paris Club members and, subject to the principle of comparability of treatment, for debt owed to other creditors. Such a conversion arrangement would mean the debt being exchanged for local currency and the local currency being used for an agreed investment project in the debtor country. As Professor Francois Gianviti, an expert witness called by Zambia, explained, debt for equity swaps were generally viewed favourably to the extent that they reduced external debt and promoted growth within the country, although, he observed, in so far as they converted external debt into local currency, the money supply was increased.

44. Although only some creditor governments belong to the Paris Club, there is a principle of the Paris Club that it requires that debtor countries give undertakings of what has been termed "comparability of treatment", that is to say that debtor countries such as Zambia should commit themselves not to give creditors who are not members of the Club (whether commercial creditors or governments that do not belong to the Club) more favourable terms than those which they agree with members of the Club. Under the terms of the agreements reached with the Paris Club in February 1996 and April 1999, Zambia agreed to seek comparable treatment from their other official bilateral and commercial creditors. The Agreed Minutes of 16 April 1999 provided, "In order to secure comparable treatment of its debt due to all its external public or

private creditors, the Government of the Republic of Zambia commits itself to seek promptly from all its external creditors debt reduction and reorganisation arrangements on terms comparable in net present value to those set forth in the present Agreed Minute for credits of comparable maturity". They specifically referred to the possibility of external debt being treated by way of "debt buy backs".

45. Thus, with the encouragement of the World Bank and IMF and subject to the principle of "comparability of treatment", from about the mid-1990's Zambia began negotiations with creditors who did not belong to the Paris Club with a view to buying back debts and so improving their "balance sheet". In 1994 Zambia bought back most of what they owed to commercial creditors for 11% of the face value principal, using funds from the World Bank. By July 1995 Zambia had put in place a debt strategy policy in relation to debt owed to bilateral creditors who did not belong to the Paris Club: under it, Zambia would buy back debt at a discount. This strategy was still in place at the end of 1998 and the beginning of 1999, and was not discouraged or opposed by members of the Paris Club. (It appeared at one stage that Donegal suggested that the members of the Paris Club opposed that policy. I accept the contrary evidence of Ms Nawakwi.)

46. In 1996 the international financial community, including the World Bank, the IMF and the members of the Paris Club, introduced a scheme to provide exceptional debt relief for the least developed countries which was referred to as the Heavily Indebted Poor Countries ("HIPC") Initiative. The purpose was to enable such countries to reduce their external debt burden to sustainable levels and a trust fund was created to repay in part outstanding multilateral and Paris Club debt owed by them. In order to be eligible for such assistance, countries had to satisfy various criteria relating to their economic policies and other matters.

47. From the end of 1996 to the end of 1998 Zambia did not have an economic programme approved by the IMF. However, the policy of the Zambian Ministry of Finance was to manage the economy as if they had an approved programme in order to win the benefits associated with such programmes, including HIPC status. One requirement of such a programme was the negotiation of debt relief with Paris Club and non-Paris Club countries. On 26 March 1999, the IMF approved a three-year arrangement for Zambia under the Enhanced Structural Adjustment Facility ("ESAF"), equivalent to about US$349 million, to support the government's 1999/2001 economic and financial programme. The first annual loan of about $55 million was available in four equal instalments, of which the first was available on 31 March 1999. In December 2000 it was decided that Zambia qualified for assistance, and on 8 April 2005 Zambia qualified for the full measure of assistance committed by the IMF and International Development Association. Further, as Professor Gianviti said and I accept, "On 11 May 2005, the Paris Club Agreed Minute provided for a further reduction of Zambia's external debt to Paris Club creditors, which, together with additional bilateral assistance from Paris Club creditors, resulted in a total reduction of their claims on Zambia from $1.92 billion to $124 million, while Zambia agreed to seek comparable treatment from all its other external creditors (including other creditor countries as well as commercial creditors)."

<u>Witnesses</u>

48. Zambia called twelve witnesses of fact to give oral evidence, and Donegal called four. Both parties called expert evidence about sovereign debt and Zambian law.

49. Zambia's witnesses of fact were the following:

i) Mr George Kunda, who is the Zambian Attorney General, a position that he has held since 9 August 2002. Before that, he had been the Zambian Minister of Legal Affairs since January 2002. A witness called by Donegal, Mr Vincent Malambo, said that he knew Mr Kunda to be a meticulous lawyer, and he so appeared to me.

ii) Mr Mark Chona, who was until recently the Executive Chairman of the Task Force on Corruption. He was appointed to that position on 7 January 2003 by President Mwanawasa. He has previously spent 14 years as the Special Adviser to President Kenneth Kaunda during his period of office.

iii) Miss Patricia Nyirenda, who in 1991 started work for the National Commission for Development and Planning and then moved to the Ministry of Finance when the Commission merged with the Department in 1998. She worked for the ERM and was, as I have mentioned, answerable to Mrs Chibanda. In November 2001 she was appointed to the position of Head of Debt and Aid Data Unit.

iv) Miss Olive Chiboola, who has held various positions in the Ministry of Finance since December 1987. Between January and November 1998 she was a Principal Economist in the Investments and Debt Management Unit of the ERM. She left the Ministry in November 1998, but returned in September 2002 as the Acting Chief Economist in the Investments and Debt Management Unit. She is now a programme administrator for the Zambian National Response to HIV Aids Project.

v) Mr Gideon Lintini, who is now the Director of Planning and Information at the Ministry of Energy and Water Development, a position that he has held since May 2004. Previously he was Acting Director of the Investment and Management Unit at the Ministry of Finance. Although he was appointed to that position on 2 January 2003, he commenced those duties in February or March 2003 because he needed first to complete the Economic Review for 2003 before taking up his new responsibilities.

vi) Ms Nawakwi, who has been a Member of the Zambian Parliament since 1991. She is now the President of one of the Zambian opposition parties, Forum for Democracy and Development, but, as I have mentioned, between March 1998 and July 1999 she was the Minister of Finance.

vii) Dr Jacob Mwanza, who was the Governor of the Bank of Zambia from 1995 to 2002. He is now the Chancellor of the University of Zambia and the Chairman of the Board of Directors of Citibank, Zambia.

viii) Miss Rosemary Landu, who is a secretary employed by the Zambian Revenue Authority and who between 10 January 2002 and 19 February 2003 was on secondment to the Ministry of Finance where she worked as a secretary to the

Minister of Finance, Mr Kasonde. Miss Landu had previously worked for Mr Kasonde from May 1995 to January 2002 in his private business, Century Holdings Ltd.

ix) Mr Richard Chizyuka, who is the Permanent Secretary to the Ministry of Agriculture and Co-operatives and who was, as I have said, the Chief Economist in the Multilateral Co-operation Unit of the Ministry of Finance in late 1998 and early 1999. He is the brother-in-law of Mr Mwale.

x) Mr Michael Mwaanga, who is now the Acting Chief Economist for External Debt in the Ministry of Finance.

xi) Mr Emmanuel Kasonde, who was Minister of Finance from 8 January 2002 to about June 2003. (In his witness statement he said that his office ended on 30 June 2003, but although this was not challenged, it cannot, I think, be right because a letter dated 23 June 2003 refers to him as the former Minister of Finance.) He had previously been the Permanent Secretary at the Ministry from 1967 to 1972 and then went into the private sector and became Chairman of Standard Chartered Bank in Zambia. In 1991 he was appointed Minister of Finance for three years before he resigned, but he was re-appointed by President Mwanawasa.

xii) Mr Ronald Simwinga, who has been employed by the Zambian Ministry of Finance since 1994 and in August 1998 was an Economist in the Investments and Debt Management Department of the Ministry, where his duties were principally concerned with the general management of Zambia's external debt.

xiii) Mr David Ndopu, who is now the Director of the department of Economic and Technical Co-operation in the Ministry of Finance. He had previously been employed as a Chief Economist in the Department of Investments and Debt Management, but was suspended from his position from 7 January 1999. In 1998 Mr Ndopu served on the committees in the Ministry of Finance established to negotiate the settlement of debt owed to creditors who were not members of the Paris Club, in order that Zambia should meet their commitments to the IMF and World Bank.

xiv) Mr James Mtonga, who has now retired from the Zambian civil service. In 1984 he was appointed as the Permanent Secretary in the Ministry of Finance. In 1996, when the Ministry was restructured and two posts of Permanent Secretary were created, he remained as Permanent Secretary, reporting to the Secretary to the Treasury, a new post created to be the senior civil servant in the Ministry. In 1999, Mr Mtonga became the Secretary to the Treasury.

xv) Mr Dipak Patel, who was the Zambian Minister of Commerce, Trade and Industry. He had been a member of President Chiluba's Government in the same position until he resigned in February 1996, but he remained a Member of Parliament.

xvi) Mr Stephen Mbewe, who has worked for the Ministry of Finance since May 1998. He started as a Data-Entry Assistant and in June 1998 he was promoted to become an Economist in Debt Management below Miss Nyirenda. Since

November 1999, he has been a Principal Economist and is at present on an educational secondment in Boston, USA.

50. Donegal called four witnesses of fact. They were:

i) Mr Michael Sheehan.

ii) Mr Vincent Malambo, who under President Chiluba was the Minister of Legal Affairs from 1996 to May 2001, when he was dismissed from the Cabinet as a result of his opposition to the proposal to amend the Constitution to allow the President to stand for a third term. He continued to be involved in politics until October 2001 when he returned to private legal practice. He was appointed State Counsel in 2002.

iii) Mr Philip O'Rourke, who, as I have said, was himself or through one of his companies, engaged by Mr Sheehan to conduct enquiries in Zambia and to provide assistance in relation to the debt.

iv) Mr Fisho Mwale, who was Mayor of Lusaka from 1994 until December 1998.

51. There is a central issue between the parties that turns upon the evidence of Mr Chizyuka on the one hand and Mr Mwale on other hand and upon their credibility. I shall refer to this in the course of my judgment and indicate my views of these two witnesses in that context. My general view about the other witnesses are these:

i) I consider that the witnesses called by Zambia were seeking honestly to give truthful evidence and to assist the court. However, I have concluded that Mr Mbewe's evidence about the events of January and early February 1999 is confused and unreliable in some respects. Unsurprisingly, some of Zambia's other witnesses were vague in their evidence and I have had to consider carefully whether their recollection was reliable: this applies particularly to Mr Kunda and Mr Kasonde. Further, some of Zambia's witnesses, and particularly Ms Nawakwi, appeared anxious to argue Zambia's case and reluctant to confine themselves to giving evidence of fact, but in my judgment this did not detract from the reliability of the factual evidence that they did give.

ii) I consider that Mr Malambo was an honest witness, and have generally accepted his evidence.

iii) I found Mr Sheehan and Mr O'Rourke less satisfactory witnesses. For reasons that I shall explain I have been driven to conclude that they were at times being deliberately evasive and even dishonest. As far as Mr Sheehan is concerned, during his cross-examination he was asked about inconsistencies between his evidence at the hearing before me, what he said in an affidavit dated 4 March 2005 sworn in support of Donegal's application for freezing relief and his evidence at the American hearing, and he was unable to give satisfactory explanations for them.

52. The Zambian law experts were:

i) Mr Patrick Matibini, who was called by Zambia. He is a lecturer in law at the University of Zambia and a practising lawyer, having been an Advocate of the High Court of Zambia since 1984.

ii) Mr Michael Musonda, who was called by Donegal. He too is an Advocate of the High Court of Zambia and has in the past taught law at the University of Zambia and been a lecturer at the Zambia Institute of Advanced Legal Studies.

Both these witnesses were properly qualified to give expert evidence of Zambian law and both were undoubtedly attempting to assist the court. I am grateful to them for the material that they put before me and their opinions. In the end, however, it seems to me that the essential questions of Zambian law are issues of statutory construction; that there was no significant difference between the experts as to the principles and approach that I should adopt; and that those principles and approach are not significantly different from those of English law.

53. The expert witnesses on sovereign debt were:

i) Professor Francois Gianviti, who gave evidence for Zambia. He has most impressive academic qualifications, is a lawyer who was admitted to the Paris Bar in 1968 and was from 1987 to 2004 the General Council of the IMF.

ii) Mr Gary Kleiman, who gave evidence for Donegal. He has for many years been a partner in an American consulting firm, Kleiman International Consultants, which provides independent analysis and advice on developing and emerging economies and financial markets and has extensive personal experience of the Southern African Development Community region (including Zambia).

54. Professor Gianviti was well qualified to give expert evidence and he provided authoritative and useful background evidence about the dispute. I accept his evidence. Zambia criticised the evidence of Mr Kleiman, in particular because he stated in his report that in 1998 “Paris Club providers … opposed setting precedents by accepting buybacks”: it is said that this was misleading because when cross-examined he was able to support this only to the extent of saying that the providers did not positively endorse setting precedents. However, I need say no more about that because Mr Anthony Trace QC, who represents Donegal, told me that Donegal do not rely upon the evidence of Mr Kleiman, and are content that I should accept the evidence of Professor Gianviti.

55. Each party has submitted that the other did not call as witnesses persons who acted for them in relation to the debt and from whom, it is said, they might have been expected to have adduced evidence. Thus, Zambia point out that Donegal did not call evidence from Mr Beresford, Mr Slater (who, it appears, works in London) or Mr Fischer, who worked for DAI with Mr Slater and appears to have had dealings with Romanian officials. Donegal, for their part, emphasise that Zambia did not call either Mr Nonde or Mr Lukwasa, who was Treasury Counsel in 2003 and is now, it appears, the Principal State Advocate.

56. I do not attach any real significance to the fact that Messrs Beresford and Fischer did not give evidence. The fact that Mr Slater did not give evidence is of more

significance in that it means that there was no evidence from him to support Donegal's pleaded case about a meeting on 6 February 2002 to which I shall refer and he did not answer criticisms of an affidavit that he swore in the BVI proceedings.

57. The evidence of Mr Nonde and Mr Lukwasa would have been of interest. Specifically, Mr Nonde would have been able to assist about what Mrs Chibanda was doing in January 1999 and Mr Lukwasa could have assisted about the allegation that Mr Kasonde signed the Settlement Agreement in reliance upon his representation about Mr Kunda giving approval for it. However, in the end I have to decide the case upon the evidence that the parties have adduced, and in view of the controversial allegations of corruption and the background of political tensions, I do not consider it right to rely upon the fact that these persons were not called as witnesses.

58. Further, each party criticises the disclosure made by the other. Donegal point out that the documents which Zambia might have been expected to have had but have not been disclosed include the following (to all of which I shall refer later in this judgment): a letter from Ms Nawakwi to Dr Mwanza about the PHI dated 27 February 1999; a copy of a letter dated 12 February 1999 and signed by Mr Chizyuka (to which I shall refer as the "Acknowledgment"); a memorandum of Mrs Chibanda (filed as folio 254) written for Ms Nawakwi; copies of the Settlement Agreement; the documents attached to a letter from Mr Kunda to President Mwanawasa and dated 7 April 2003; a letter or memorandum written by Mr Chizyuka to President Mwanawasa probably in about March 2005; and, more generally, e-mails passing between Zambian officials.

59. Zambia respond to criticisms of their disclosure by referring to evidence that documents that they would have expected to have available have been removed from files, particularly within the Ministry of Finance. Mr Chona told me that those investigating the case found that "all the important documents, files, were destroyed". Mr Mbewe voiced similar suspicions. As I have already indicated, I accept this evidence and it does not seem to me that I can safely draw any inference from the absence of these documents from Zambia's disclosure.

60. Zambia's criticism of Donegal's disclosure is directed to three main points, although I observe that Zambia have made no applications for disclosure by Donegal that is outstanding.

61. First, it is said that Donegal have disclosed a curiously small number of e-mail communications and internal notes: in fact they have, I am told, disclosed only 14 e-mail documents, and, given the nature of their business and given that it appears that they often communicated by e-mail, I agree that it is surprising that there are so few. However, I am unable to attach any specific significance to this apparent failure and this criticism of Donegal has not assisted me to resolve any issue between the parties.

62. Secondly, Zambia point out that Donegal have not disclosed documents relating to their dealings with Romania before the debt was assigned to them. In the course of the hearing, documents were obtained by Zambia from the Romanian Government, and having seen them it seems remarkable that Donegal had not previously disclosed them. The following documents, to which I shall refer in the course of this judgment, exemplify this category: a document written by Mr Sheehan and dated 12 May 1997

about the pricing of the Romanian debt; a fax from Donegal to Romania and the Berliner Bank dated 11 September 1998 in which Donegal sought an extension until 15 January 1999 to complete the assignment of the debt; and a fax from Mr Beresford to Ms Liteanu dated 24 November 1998. (Rather surprisingly, Mr Sheehan claimed in cross-examination to have forgotten about the memorandum of 12 May 1997.) However, I can understand that the significance of these documents might not have been apparent when Donegal made disclosure and again I attach no specific significance to any failure to disclose these documents that, in my judgment, provides a proper basis for resolving any issue between the parties.

63. Zambia's third criticism of Donegal's disclosure is directed to documents relating to payments made by Donegal directly or indirectly for the services of persons in Zambia. In his witness statement dated 3 April 2006 Mr Sheehan had said that, "Fisho Mwale and George Chilupe were retained by Moreno, and would have been remunerated by Moreno". Mr Sheehan had also said in his evidence at the American hearing, when asked whether he or any of the corporations in which he had a role had a business relationship with Mr Mwale at that time, that Mr Mwale had recently been advising DAI, separately from Moreno, "concerning the brokerage of another debt". Mr O'Rourke said this in his witness statement dated 4 April 2006 (making reference to another company of his called Somerset Investments Inc. ("Somerset")): "Moreno (and as a matter of convenience, on occasion Somerset (for example, when Moreno did not have a funds (sic) to pay Mr Mwale but Somerset did: the arrangement was quite informal since I am the principal and sole owner of both Moreno and Somerset) therefore retained Fisho Mwale as its local consultant": there was no suggestion that Mr Mwale was ever paid by Donegal. Mr Mwale said in his witness statement dated 4 April 2006 that, "My contractual relationship has always been with either Moreno or Somerset. I have never been an agent of or authorised to represent Donegal or any related company". Nevertheless, when on 29 March 2006 Zambia requested disclosure of (among other documents) documents recording payments made by DAI, Donegal, Moreno and others, the request was rejected on 14 April 2006 on the grounds that this should be dealt with during cross-examination of Donegal's witnesses.

64. Although Donegal continued to resist disclosure on the grounds that the documents were irrelevant, on 9 May 2006 I ordered that Donegal disclose documents evidencing (a) payments made by Donegal or DAI to Moreno or any other local consultant or lawyer relating to the debt, including payments made directly or indirectly or in any way for the benefit of the recipient, and (b) expenses incurred by Select Capital in relation to securing payment or satisfaction of the debt. I shall refer later in this judgment to the documents disclosed following this order and their inconsistency with what was said in Donegal's witness statements. It is sufficient at this point to say that disclosure of documents relating to these payments should not have been withheld. The suggestion that they are irrelevant to any issue between the parties is inconsistent with Donegal themselves adducing evidence about what payments they were making to Moreno and how Mr Mwale and Mr Chilupe were being paid. The pattern of payments that was eventually revealed when the documents were disclosed undermined that evidence and showed a closer relationship between, in particular, Donegal and Mr Mwale than that described in Donegal's witness statements. I am driven to conclude that Donegal were aware that proper disclosure would reveal this

and were deliberately withholding documents because they contradicted the case that they were seeking to advance.

The Romanian debt

65. On 17 April 1979 Romania and Zambia concluded a Credit Agreement whereby Zambia were provided with a credit facility "to be used for exports to Zambia on the following goods: tractors, agricultural machines, vehicles, spare parts, training of personnel and service in amount of 15 million US dollars". There was no governing law provision. The deadline for concluding contracts financed under the agreement was 31 December 1980, and in July 1979 Zambia made export contracts with Astra Trading SA (Autoexportia), Universal Tractor SA and Auto Dacia SA.

66. Article 6 of the Credit Agreement provided that the credit should bear a fixed yearly interest of 5.5%, the interest to be calculated on the outstanding credit balance. There was no provision for penalty interest and no stipulation about what was to happen if Zambia failed to make timely payments. However, the Credit Agreement provided for the conclusion of a banking arrangement between the Romanian Bank for Foreign Trade and the Bank of Zambia "of the technical procedures in view of the application of the stipulations from the present Agreement", and on 8 September 1979 an agreement was concluded between the Romanian Foreign Trade Bank, the Bank of Zambia and the Zambia Commercial Bank Limited (the "Banking Arrangement"). Article 3 of the Banking Arrangement provided that, "The credit shall bear interest of 5.5% per annum …", and article 5 provided for additional interest at 2% over LIBOR for six month deposits of US dollars if a payment was not made on its maturity date stated in the letter of Currency Undertaking to be provided by the Bank of Zambia.

67. The Banking Arrangement included provisions about how and where payment was to be made, providing that the "three banks agreed that all payments in free convertible US dollars resulting from the implementation of the present Banking Arrangement to be made through Manufacturers Hanover Trust, New York". All disputes "regarding the interpretation and implementation of the present arrangement" were to be referred to the International Chamber of Commerce in Paris "according to its own rules, French law being applicable". The Banking Arrangement was to remain in force "until fulfilment of all payment obligations resulting from its implementation".

68. By an agreement dated 4 August 1985 Romania and Zambia agreed to the rescheduling of some of the amounts owed to Romania. Zambia were to pay a total of US$5,549,101.01 (representing the amount due to be paid under the Credit Agreement for the period between 1 June 1982 and 31 December 1983) by instalments spread over eight years. The payments were calculated on the basis that Zambia were to pay interest at 8% pa for the period between the initial instalment and the final instalment, and in the event that any payment was delayed, Zambia were to pay an additional 1% (or a total of 9%). The rest of the debt was not affected by this agreement.

69. In 1992 negotiations between Romania and Zambia about the debt were held in Lusaka. The Zambian delegation stressed that Zambia were committed to repaying all debts, but repayment was to be governed by the Paris Club Agreed Minute of July 1990, which reflected the Toronto terms of 1988. Both parties proposed a 40% reduction in the debt, with different repayment periods and interest rates. The final

resolution for the settlement of the debt was to be the subject of a Governmental agreement to be signed in Bucharest not later than 15 June 1992, but, as far as it appears from the evidence before me, no such agreement was signed.

70. By a letter dated 22 June 1993 the then Zambian Minister of Finance confirmed to the Romanian Ministry of Finance that Zambia were interested in reaching an arrangement agreeable to both sides and consistent with Zambia's ability to repay. Further discussions about the debt took place in Lusaka between 8 and 10 September 1993 at a session of the Zambia/Romania Joint Permanent Commission for Economic and Technical Cooperation. Zambia explained that their position was governed by terms imposed upon them by the IMF and the members of the Paris Club, but agreed in principle to a Romanian proposal that the debt be repaid through exports and investments in Zambia. The parties were still discussing a 40% reduction in the debt, and the amount of the debt was to be confirmed through consultations.

71. In a letter dated 28 April 1994 the Zambian Ministry of Finance acknowledged debt in the amount of US$15,467,566.05 (contrasting this with the slightly higher calculation of US$15,469,155.30 made by Romania).

72. There was another meeting of the Romania/Zambia Joint Commission in 1995, and in November 1995 Zambia confirmed their desire to buy back the debt.

<u>Negotiations between DAI and Romania to the end of 1998</u>

73. Mr Sheehan told the United States District Court in May 2005, and I accept, that DAI probably have more extensive records of government debts than anybody in the market, that they routinely call on Ministries of Finance around the world, that they were aware of Romania's debt profile, and that "If a debt hits the market, we know about it within hours". He started talking to the Romanians about their external debts in 1996 or early 1997, not initially about the Zambian debt, but about that of Guinea Conakry. He had contact in particular with Ms Aura Gereanu and Ms Gabriella Liteanu of the Romanian Ministry of Finance, External Debt Department.

74. By March 1997 DAI were putting forward proposals to acquire the Zambian debt. Revised proposals were sent under cover of a letter signed by Mr Sheehan, dated 12 May 1997 addressed to Mr Ionut Costea, who was described as the Romanian Deputy Finance Minister. (It is not clear from the evidence quite what positions Mr Costea held from time to time, although he undoubtedly held a senior position at all times: later, in and around September 1998, he was referred to as the "Secretary of State for Finance". Towards the end of 1998 and at the beginning of 1999 he was referred to as "Deputy General Secretary". I am uncertain whether these different titles reflect changes in his position or variations in how his title has been translated.) DAI offered to purchase "directly or on behalf of clients to be identified US$15.6 million of face value credits on Zambia held by yourselves" at a price of 11% of the face value. (At the same time DAI made further proposals to purchase the Guinea Conakry debts, and expressed interest in debts owed by Angola to Romania.) Their offer was conditional upon DAI's "verification" of the credits. They contemplated that DAI would verify the credits "with the relevant authorities in Zambia".

75. In an accompanying memorandum supporting the proposal Mr Sheehan wrote of Zambia's external debt, referring to the re-purchase of commercial debt in 1994 at

11% of principal face value and Zambia's Paris Club arrangements reflecting the Naples terms. He continued, "We understand that Zambia is not currently servicing its debt to Romania and has not made any serious attempts to reschedule these claims in many years. Furthermore, Zambia is not likely to resume servicing its obligations to Romania in the near term. Zambia's economic situation remains dire, and the country's unsustainable external debt burden makes it one of the countries likely to benefit from the Highly Indebted Poor Countries (HIPC) initiative undertaken jointly by the World Bank, the IMF, and the Group of Seven industrial countries. Under the HIPC initiative, Zambia will receive additional debt reduction from its bilateral creditors (both within and outside of the Paris Club). In particular, bilateral creditors may need to write off up to 90% of their Zambian claims and reschedule the remaining 10% over 23 years or more. It is the practice of the Paris Club to require African governments to agree a minute to the effect that they will not afford any other sovereign creditor better rescheduling terms than they have afforded the Paris Club. Consequently, we believe that there is very little chance that Romania can expect to obtain more in net present value terms than we are presently offering. The net present value of the receipts from such a rescheduling, which has already been agreed in principle by the Paris Club, would be substantially less than 11% of the original principal amount."

76. I mention by way of parenthesis that according to Mr Sheehan, "… our experience and that of others in this business is that you always eventually recover. You have a legal claim. Eventually if you litigate and work hard enough, you will always recover a sufficient amount to cover your costs". Mr Sheehan and his companies were apparently experienced litigators.

77. It is not clear from the evidence how Romania responded to this proposal. However, at about the same time by a Note Verbale dated 9 May 1997 Romania proposed to Zambia that a delegation visit Zambia in June 1997 to conduct negotiations about the debt.

78. As I have mentioned, on 18 December 1997 Donegal were incorporated, and the intention was that the Zambian debt to Romania should be assigned to them. At the same time DAI set up two other companies with a view to having debts owed to Romania by Angola and Peru assigned to them. The directors were Mr Sheehan and Mr Beresford. The companies were described as special purpose vehicles ("SPVs). Mr Sheehan explained that one of the advantages of holding the debt in an SPV was that the ultimate purchaser could purchase the SPV rather than the debt itself, which would enable that purchaser effectively to take direct representations and warranties from the original sovereign creditor (Romania) and, further, once the creditor (Zambia) had been notified in writing of the assignment to the SPV, no further notices would be required if the SPV was sold. Around December 1997, as I accept, an understanding was reached in principle between DAI and Select Capital that Select Capital would buy the debt through Donegal.

79. On 27 January 1998 DAI wrote to Ms Liteanu enclosing a further proposal to purchase the Zambian debt, together with an assignment agreement covering the purchase of a debt owed to Romania by Mozambique. The proposal itself, wrongly (as both parties accept) dated 27 January 1997, was addressed to Mr Costea and it contemplated that DAI, or another entity designated by DAI, would purchase the Zambian debt at 11% of face value principal and capitalised interest under an escrow

arrangement. This was expressed to be contingent upon a satisfactory review by DAI of the nature and background of the debt and all documents related to it, satisfactory verification by DAI of the debt, and agreement upon acceptable terms of assignment. It was contemplated that Romania would deposit copies of the underlying documentation with an escrow agent with completion to take place when Donegal had satisfactorily carried out their due diligence on and verification of the debt. Later the same day, Mr Beresford forwarded to Ms Liteanu a draft assignment agreement expressed to be between Romania as seller, "a subsidiary of DAI" as purchaser and Berliner Bank AG ("Berliner Bank") as escrow agent.

80. By this time DAI had also negotiated the purchase of debts owed to Romania by Angola and Peru. On 4 February 1998, Mr Beresford had written to Berliner Bank explaining that DAI had agreed the purchase from Romania of the Zambian debt, that the assignment agreement would be signed together with materially identical agreements in respect of the Angolan and Peruvian debts and that Donegal would be the DAI company purchasing the Zambian debt.

81. On 16 July 1998 Ms Gereanu sought information about the Zambian debt from Bancorex, and in reply on 22 July 1998 Bancorex said that it stood at $15,574,639.55 as at August 1997, providing a breakdown of the debt. On 27 July 1998 Romania decided to approve the "cession" to Donegal of debt owed by Zambia, and at the same time it gave similar approval in respect of cession of debt owed by Angola and Peru to other companies set up by DAI. This resolution was published as Government Resolution no 429 in the Official Gazette of Romania on 29 July 1998.

82. By an agreement dated 7 August 1998 made between the Government of Romania, Donegal and Berliner Bank, Romania assigned the Zambian debt to Donegal. The "face value" of the debt was said to be US$15,468,067.05, a sum that included capitalised interest, and the price paid by Donegal was to be 11% of the face value or US$1,701,487.37. The assignment was conditional: Romania agreed to deliver certain documents to Berliner Bank within 20 business days of the date of the agreement and Donegal agreed to pay the price into the escrow account within 35 days of receiving notice from Berliner Bank of the receipt of the documents. Upon notice from Berliner Bank that Romania and Donegal had complied with their obligations, the assignment was to become effective. Within three business days of giving that notice, Berliner Bank were to deliver notice of the assignment to Zambia. Section 3 of the agreement recorded that Romania were to provide "as soon as practicable any other documents which it has or may have in the future which relate to the "Debt"". As a result of this agreement, the Romanian debt was said to have been taken "under mandate" by DAI. Similar arrangements were made between Romania and DAI about debts owed by Peru and Angola

83. There is no evidence that Zambia were ever told about this arrangement, and I conclude that they were not. Mr Sheehan said at the American hearing that as far as he is aware Zambia were not told of it, and indeed that it would not have been usual for Zambia to have been told as such arrangements are customarily kept very confidential until the debt had actually been assigned.

84. On 14 August 1998, Bancorex wrote to the Romanian Ministry of Finance stating that their records showed that the Zambian debt as at 7 August 1998 was US$15,524,851.88, comprising debt of $7,526,173.75 that had been rescheduled

under the agreement of 4 August 1985 and non-rescheduled debt of US$7,998,678.13. Bancorex pointed out in relation to the former that Zambia had paid only two of the instalments due under the Rescheduling Agreement and so were liable to pay 9% penalty interest on the overdue unpaid instalments; and for this reason in fact more than US$15,524,851.88 was owed by Zambia. After further enquiry by Ms Gereanu, Bancorex wrote again on 18 August 1998 annexing a number of documents and confirming that the interest on the rescheduled debt was $6,472,563.38 as at 31 July 1998. Bancorex stressed that the calculation of the total payment under the transfer agreement (to Donegal) should take this interest into account in view of the "considerable" discount already allowed to Donegal.

85. The assignment did not proceed in accordance with the timetable contemplated in the agreement of 7 August 1998. On 17 August 1998 Russia announced that they would allow the rouble's value to fall and default on some of their debt. This had an adverse effect on the emerging debt market and in the aftermath participants in DAI became insolvent (or at least, as Mr Sheehan put it, "went under") and Mr Sheehan began to buy out over two and a half years from August 1998 the other shareholders in DAI so as to become the sole owner of the company. On 11 September 1998 Donegal sent a fax to the Government of Romania referring to "recent events [having] had an adverse effect on the market for emerging market debt" and requesting an extension of time to 15 January 1999 to complete the assignment.

86. By a letter dated 30 September 1998, Romania agreed to an extension of time to 31 December 1998. They required Donegal to pay LIBOR interest for the period of the delay, that an additional sum of $56,784.89 be added to the face value of the debt, and "the negotiation with the Zambian Government the payment of the interests as calculated by Bancorex according to the banking arrangements and contractual terms". The request for an extension of time had given Romania the opportunity to revisit the question of penalty interest, raised by Bancorex after the August Agreement. By a fax dated 6 October 1998, Mr Beresford agreed to the Romanian terms for the extension and noted that, with regard to the question of interest, "[w]e understand that these amounts are in addition to the amounts you have previously detailed for us. For us to negotiate on a best efforts basis with Zambia on this matter we will obviously need to fully understand what the banking arrangements and agreed contractual terms are." On 8 October 1998 Mr Beresford wrote to Ms Liteanu attaching a draft amendment letter to the assignment agreement (and similar amendments in relation to the agreements relating to the Peru and Angola debts), providing for an extension of the date for completion of the assignment to 31 December 1998. Although no signed copy of this amendment agreement is in evidence, I conclude that the amendment was agreed, or at least Donegal and Romania proceeded on the basis that it was.

87. On 14 October 1998 Bancorex wrote to Ms Gereanu referring to the calculation of penalty interest at 9% in relation to rescheduled amounts. By a letter dated 21 October 1998, Ms Gereanu explained to Mr Beresford how penalty interest had been calculated under the rescheduling agreement dated 4 August 1985.

88. On 24 November 1998 Mr Beresford wrote to Ms Liteanu that, "with regard to the Zambian $15.468 million of Zambian debt, there are two things that it would be very useful for Zambia to confirm in writing. These are: (i) The debt was borrowed by Zambia for commercial purposes. (ii) The amount of $15,468,067.05 represents

principal (original principal plus capitalized interest) and that interest on this amount accrues at an interest rate of [ %] per annum from [DATE]. …". As I have mentioned, this letter was not disclosed by Donegal in these proceedings, but was obtained by Zambia from the Romanian Government in the course of the hearing.

89. Mr Beresford wrote again to Ms Liteanu on 2 December 1998 listing certain points upon which he sought clarification. In relation to Zambia, he requested a copy of the Banking Arrangement dated 8 September 1979, and attached a schedule with amended wording to reflect the additional (penalty) interest on the figures that had been included to that date. Zambia observe that this was being done before they agreed to the amount of penalty interest, pointing out that Mr Beresford's earlier fax of 24 November 1998 suggested that DAI were looking to Romania to obtain that agreement from Zambia, rather than leave it to DAI to negotiate with Zambia, as Mr Beresford apparently previously contemplated. I see no significance in this. The amendment did not purport to quantify the amount of late payment interest, and in any case the proposal made by Mr Beresford did not affect whether any and if so what interest was due.

90. There is no written amendment to the August Agreement extending the time for completion of the assignment beyond 31 December 1998. According to Mr Sheehan's evidence, in a telephone conversation with Ms Liteanu at the end of December 1998, he was told that there was no need to extend the "mandate" and that Romania were still willing to sell the debt on the same terms. I am unable to accept that evidence, which is inconsistent with the exchanges between Donegal and Romania in early January 1999: if there had been such a conversation, Donegal would surely have referred to it when replying to Romania's assertion that the time for completing the transaction had "elapsed". Although Mr Sheehan sought to explain this on the basis that it would have been tactless to refute this when dealing with a government, I am unable to accept that, if the conversation described by Mr Sheehan had taken place, DAI would not have alluded to it both in their letter of 6 January 1999 (to which I shall refer later in this judgment) and later when Romania sought a higher price for the debt from DAI or Donegal. It would also be remarkable that Ms Gereanu did not refer to it in her note of 8 January 1999, to which I shall also refer. (As I have said, I reject this evidence of Mr Sheehan because it seems to me inconsistent with the documents. In the course of closing submissions, a question arose about whether this part of his evidence was challenged during his cross-examination. I consider that it was: the apparently inconsistent correspondence was put to him and it was clear from his answer that Mr Sheehan understood that this was by way of challenge to his evidence about the telephone conversation.) However, before I come to these exchanges, I shall explain the negotiations that took place in 1998 between Zambia and Romania.

<u>Zambian proposal to buy back the debt</u>

91. In February 1998 the Romanian Ministry of Industry and Commerce had written to Ms Gereanu at the Ministry of Finance proposing that the Minister contact Zambia and Angola seeking immediate payment of their outstanding debts "considering that currently Romania is facing financial difficulties". Possibly as a result of this, on 6 April 1998 Romania sent a Note Verbale about the outstanding debt to the Zambian Ministry of Foreign Affairs. In the Zambian Ministry of Finance it was the responsibility of the ERM under the director, Mrs Chibanda, and of the Investment

Management Unit of the ERM under Mr Ndopu, to manage the Romanian debt, and in June 1998 the Romanian representative at their Embassy in Lusaka visited Mr Ndopu asking for details of the offer that Zambia had made in November 1995 to buy back the debt. (Mr Ndopu recalled that his meeting was with Mr Traian-Ionel Popescu. Donegal point out that it appears that Mr Corneliu Balan might have been the Economic Secretary at the Romanian Embassy in Lusaka in June 1998 and replaced by Mr Popescu later that year or in 1999, and suggest that Mr Ndopu's memory might be flawed. The evidence about this is not entirely clear, but even if Mr Ndopu is mistaken about which representative he saw, I do not regard this as significant or reflecting upon his general reliability as a witness.)

92. At about this time Zambia were trying to reconcile and negotiate their debt with all their commercial creditors, and Ms Nyirenda and Mr Mbewe were involved in this exercise. Ms Nyirenda accepted that this was a difficult exercise because of missing information, and Mr Mbewe said that there were problems with most of the files concerning the Government's debts.

93. On 15 July 1998 a meeting of Ministry of Finance officials was held to discuss future negotiations with Romania about the debt. Those attending it included Ms Nyirenda, Ms Chiboola, Mr Ndopu, Mr Mbewe and Mr Patrick Malambo, who was a debt adviser at the Ministry. Mr Mbewe had prepared an analysis in which he calculated that the amount of debt was US$13,356,453.64 plus penalty interest of US$1,094.212.73. He had found when calculating the amount of interest that the files did not contain all the information that he required to prepare a fully accurate calculation. It was later found that the total indebtedness was much underestimated, and the debt was over twice what he calculated. (The reason for the error was explored in evidence, but inconclusively. I do not think that it matters for the purposes of this judgment. According to Mr Mbewe, Zambia had inaccurate or incomplete information about the dates of draw-downs. It also seems from his evidence that the calculation was erroneous because he used an interest rate of 1%, which was in fact only the penalty element of the interest agreed under the agreement of 4 August 1985 for the rescheduled debt, and had not taken proper account of the standard interest of 8% believing that this was already in the database figure from which he was working.) By a memorandum to Mr Ndopu dated 7 September 1998 Mr Mbewe pointed out that there was a difference between his calculation of the amount of the outstanding debt and the figures stated in previous documents, and he suggested asking the Romanians for copies of the agreement of 17 April 1979 and other documents. Mr Ndopu suggested that the figures be reconciled and then a draft letter to the Romanian Embassy be prepared to ask for documents, but in the event no such letter was sent.

94. Mr Malambo suggested at the meeting of 15 July 1998 that Zambia had two options for dealing with the debt. One was a buy back at 11% of the debt (but not of the penalty interest) payable within seven to fourteen days, which reflected the benchmark of the rate at which Zambia, funded by the World Bank, had purchased debt in 1994 from commercial creditors. This would have cost Zambia US$1,469,209, and the minutes of the meeting record, "The budgetary implications are that we need to have funding both in foreign exchange and local currency". (As I have mentioned, at one point it appeared that Donegal might be contending that a buy back arrangement by Zambia might in some way go against Paris Club principles. Mr

Kleiman wrote in his report, "Paris Club aid providers at that time opposed setting precedents by accepting buy-backs", but when challenged, Mr Kleiman did not support that proposition, and I reject any such suggestion.) The alternative option, reflecting the Paris Club Naples terms, was to offer to pay 33% of the debt over 23 years with 6 years' grace or over 33 years with no grace time.

95. Mr Mbewe prepared and Mr Ndopu sent a memorandum dated 23 July 1998 to Mr S S Banda, who was the Acting Director External Resource Mobilisation, for consideration by the Secretary to the Treasury, Professor Mweene. It proposed that the Romanians be offered 11% of the outstanding debt payable over one year, although, according to Mr Ndopu, it was appreciated that it might be necessary to offer payment within seven to fourteen days. The "fall-back" proposal was to be to offer terms for repayment at 33%. A draft letter reflecting the first proposal was attached to the memorandum.

96. In a letter to the Romanian Ambassador in Lusaka dated 10 August 1998 Professor Mweene referred to Romania's Note Verbale of 6 April 1998 and proposed that Zambia buy back the debt at a price of 11%, the debt being stated to be US$13,456,453.65. Professor Mweene's letter was forwarded by the Romanian Embassy to the Romanian Ministry of Industry and Commerce on 19 August 1998. Romania had, of course, already entered into the agreement with Donegal on 7 August 1998. On 20 August 1998 the Romanian Ministry of Industry and Commerce wrote to the Romanian Ministry of Finance requesting an analysis of the Zambian offer as soon as possible, "bearing in mind … Government Resolution no 429".

97. On 8 September 1998 the Romanian Minister for Industry and Commerce wrote to Mr Costea and requested that, in light of Zambian proposals to send a commission to Bucharest, and taking into consideration Government Resolution 429, Mr Costea consider the Zambian proposals and reply through the representative of the Ministry of Commerce and Industry in Lusaka "so that we can solve this problem".

98. On 16 September 1998, Mr Costea wrote to Professor Mweene to inform him that the Romanian Ministry of Finance was prepared to discuss the Zambian proposals. There is a manuscript note on that letter written by Mrs Chibanda, which states, "Mrs Chiboola, kindly inform them we are prepared to negotiate in the week beginning 30/11/98". Ms Chiboola told me, and I accept, that she prepared a draft reply in accordance with these instructions of Mrs Chibanda, which she submitted to Mrs Chibanda, but that document is missing from the Government's files.

99. By a letter dated 4 November 1998, Mr Shamutete, the Director of International Banking at the Zambian National Commercial Bank Limited, wrote to Mrs Chibanda enclosing copy correspondence from Bancorex, which calculated the outstanding debt "in the amount of about USD 15 million". Mrs Chibanda instructed Mr Ndopu to "act on this urgently" and to keep Mr Shamutete posted. Mr Ndopu in turn instructed Mr Simwinga to prepare a draft response to Bancorex.

100. On 17 November 1998 Mr Simwinga submitted a draft to Mr Ndopu, which may have formed the basis for the draft provided by Mr Ndopu to Mrs Chibanda the same day, under cover of a memorandum stating that "[Bancorex] has requested the Zambian government through the Zambia National Commercial Bank … to confirm the correctness of the debt figure Zambia owes to Romania. The Romanian government

has submitted a figure of US$15,581,637.33. This figure is in conflict with our figure of US$13,365,453.65". Mrs Chibanda wrote a manuscript note on this memorandum asking Mr Ndopu to check on the arrangements for the meeting and to provide her with feedback.

101. Mr Ndopu's evidence was that no further information was given to Mrs Chibanda about the amount of the debt before a Zambian delegation left for Bucharest in December 1998. There is no reason to doubt that evidence and I accept it. There is nothing to suggest that Mrs Chibanda was given any reason to suppose that the debt might be more than some $15.5 million.

102. A meeting between a Zambian delegation and Romanian representatives took place in Bucharest on 18 and 19 December 1998. In an internal memorandum dated 7 December 1998 Ms Gereanu referred to the Zambian delegation as being sent "to negotiate in view of the verification and conciliation of the level of debt that Zambia owes to Romania". The Romanian representatives were led by Ms Lucia Suhanec, the Deputy-Head of the External Claims Department. The Zambian delegation was Mr Ndopu, Ms Nyirenda, who had been exploring the options for managing debts of various counterparties including the Government of Romania, and Mr Malenga Lukwesa, a Senior Accountant. Mr Mbewe stayed in Zambia as a contact in Lusaka. The Cabinet Office had given its approval for the visit in writing, and although it has not been produced and appears to be missing from the Government's files, Ms Nyirenda's evidence was that she read it at the time and that it clearly stated that the purpose of the visit was both to reconcile the debt (that is to say, to agree upon the amount outstanding at a particular date) and to negotiate with the Romanians. Moreover, the members of the delegation had to obtain written authority to travel abroad on Government business, and Ms Nyirenda produced her authorisation, which specified the business as being in connection with "debt reconciliation and negotiations". The evidence of Ms Nyirenda was that the delegation had authority "to negotiate" and "to offer the Romanians the option of initially 11 cents to the dollar and we would proceed from there. But we would not – we did not have authority to conclude or to sign the agreement. That lies with the Minister of Finance". When Mr Mbewe was asked whether the Zambian delegation had authority to enter into a binding contract, he replied, "They did not bind the government at the time – for whatever they had reconciled they came back with a draft agreement that was initialled because the authority of contracting the Government of Zambia lay in the Minister of Finance…". Although neither witness was invited to distinguish between a settlement agreement, an agreement whereby Zambia obtained an option to conclude a settlement and a "lock-out" agreement whereby Romania agreed for a defined period not to sell the debt to others or not to carry on negotiations about the debt with others, I understood both of them to be rejecting any suggestion that the delegation had any authority to enter into a contract of any kind on behalf of Zambia.

103. I accept the evidence of Ms Nyirenda and Mr Mbewe. In doing so I recognise that Mr Ndopu said during his cross-examination that, while he did not have authority "to bind the country to pay or not to pay the debt", he did have authority to enter into other binding agreements on behalf of Zambia and did have authority to enter into a commitment on behalf of Zambia in the terms of the Memorandum of Understanding. It was not clear to me whether he considered that such an agreement would be a contractual commitment or whether he was referring to an agreement that he would

regard as binding as a matter of diplomatic convention between countries. If he meant the former, I reject his evidence: if he had been given authority to commit Zambia contractually, the ambit of his authority would have been defined with some care, and there is no suggestion that he was given any such distinctly defined authority. In any case, I prefer the evidence of Ms Nyirenda, who seemed to me a particularly impressive witness.

104. The outcome of the meeting in Bucharest was recorded in a Memorandum of Understanding dated 18 December 1998, which was signed by Ms Suhanec for the Romanians and by Mr Ndopu for the Zambian Government. The meeting was recorded as being held "in order to reconcile the outstanding debt and to negotiate the modalities for the settlement of Zambian debt owed to Romania." The Memorandum stated that the Romanians presented the amount outstanding as at 31 December 1998 as US$29,834,368.06 and the Zambians presented the amount as US$27,722,754.72. Both figures included principal and interest. According to the evidence of Mr Mbewe, which I accept, the difference reflected loans that were not recorded in the "Zambian debt data base": indeed, this is recorded in the Memorandum. The Zambian delegation was satisfied that their calculation of the debt should be increased by US$1,589,409.85 but they believed that the rest of the discrepancy, US$522,203, reflected a repayment that had not been brought into account by the Romanians. The Zambians agreed that they would seek to produce evidence of this repayment, and that, if they could not do so, they would accept the Romanian figure.

105. The Memorandum of Understanding also recorded Zambia offering to settle the debt for 11% of the figure due and the Romanians requiring payment of 12% of their figure. It stated, "Both parties agreed that until January 31, 1999, the Zambian party will confirm the terms proposed by the Romanian party and will present a Draft Agreement. The mentioned Agreement will come into force after its approval by the Romanian Government".

106. Romania's understanding of the negotiations is reflected in two documents. Although not herself present, Ms Gereanu signed a note of the meeting with Zambia. It confirmed that "the negotiations took place regarding the settlement of Zambia's debt to Romania", referring to a "first part of the negotiations" during which the parties agreed the documents presented by Bancorex (presumably including computer records for the calculation of penalty interest) and a "second part of the talks" during which there were "negotiations regarding the reglementation of Zambia's debt towards Romania" (in the wording of the translation placed before me). Ms Gereanu continued, "The Zambian commission agreed with the Romania proposal following that on 31.01.99 to confirm the proposed terms and send a Project of Agreement of reglementation of the debt owed to Romania", and she noted that the Zambian representatives "have shown reticence to the authorities to negotiate the reclamation of the country's debt with intermediaries companies".

107. The other note that sets out the views of the Romanian "Commission" appears to have been drafted for the signature of, among others, Mr Costea although no copy signed by him is in evidence. This too recorded that "the Zambian Government does not agree with using intermediary companies to recuperate the debentures". The note recorded the terms that it was contemplated might be reached between Zambia and Romania and stated, "These terms offer a better deal compared to the terms specified in the Cession Contract [sc the August agreement] signed with [Donegal/DAI] for

which there is pre-requisite for unilateral denunciation from the Romanian party due to not fulfilling the contract stipulations". The Commission's proposal was to renounce the agreement of August 1998 "as a result on non-fulfilment of the contractual duties", and to sign an agreement with Zambia "to initiate the recuperation procedures according to the proposals agreed during the meeting".

108. On 6 January 1999 Romania sent DAI a fax about the agreements for assignments of the Zambian and also the Angolan and Peruvian debts. They stated that the "term of 31st of December, 1998" had "elapsed" without Romania receiving any "acknowledgment" in respect of the agreements, that "The Romanian Government could not take into consideration any postponement" and that "In the mean time, some interesting offers have been received from the Governments of Peru and Zambia which are taken into consideration by our Government".

109. Mr Ndopu's evidence confirms that during the negotiations the Romanians made reference to the possibility of selling the debt to a commercial party in that they had told the Zambians that if Zambia did not accept their proposal by 31 January 1999, "then it would have no alternative but to sell the debt to commercial debt collectors". I accept that evidence. In a report of 4 January 1999, Mr Ndopu set out the result of the negotiations as follows:

> "It was further agreed between the two parties that the Zambian Government had up to 31st January, 1999 to confirm to the Romanian Government, whether their proposal of 12 cents to a dollar buy back proposal, repayable in one year was acceptable or not. In addition, the Zambian Government is expected to provide a draft debt rescheduling agreement for the consideration of the Romanian Government before 31st January 1999. …
>
> In the event that we do not confirm this position by 31st January 1999, the Romanian Government has cautioned us that they will have no other alternative but to sale [sic] the debt to commercial debt collectors; as it were in the case of Camdex. … In the light of the above mentioned observations, I strongly recommend that we confirm to the Romanian Government's proposal as outlined above before 31st January, 1999."

These terms would have enabled Zambia to buy back the debt for US$3,580,124, and the delegation regarded this as a successful result from the negotiations: as Ms Nyirenda put it, "The final outcome was better than we had dared to hope".

110. It is Zambia's contention that the Memorandum records a contractually binding agreement concluded between Romania and Zambia, and that Romania breached it by assigning the debt to Donegal. They plead that it was agreed that Zambia would be able to accept the Romanian offer until 31 January 1999 and that Romania would not in the meantime dispose of the debt to a commercial debt collector. This, it is said, was the purpose of specifying the deadline of 31 January 1999, and reflects Zambian concern about the debt being sold to a commercial company, the concern recorded in the Romanian notes. Thus, it is submitted that the agreement was in effect a "lock-

out" agreement concluding the parties' negotiations as to the "modalities for the settlement of the Zambian debt owed to Romania". Romania, it is said, agreed to give Zambia until 31 January 1999 to confirm whether the terms offered by Romania were acceptable to them and to present to Romania a draft agreement to "buy back" the debt.

111. This submission gives rise to three questions: whether Mr Ndopu or anyone else in the Zambian delegation had authority to conclude a contractually binding agreement of this kind on behalf of Zambia; whether Zambia and Romania evinced an intention to conclude a contractually binding agreement; and whether there was consideration for any undertaking given by Romania.

112. I do not consider that the delegation or any member of it had actual authority to conclude any relevant contractual arrangement, whether by way of agreeing when the debt would be paid or by way of concluding an option or "lock out" contract relating to the debt. This was the implication of the evidence of Ms Nyirenda and Mr Mbewe, which I accept. Nor, if it be relevant, did the Zambian government hold the delegation out as having any such authority so as to give them ostensible authority.

113. I am also unable to accept that the understanding recorded in the Memorandum of Understanding was intended by the governments who were party to it to create contractual relations, or that the delegations intended to conclude a contractually binding agreement. It was, in my judgment, at most a record of an understanding that each government might diplomatically expect the other to honour. I reject Zambia's submission that there would be little point in signing a memorandum unless the intention was to reach an agreement that was legally binding: the purpose was to record the point that had been reached in commercial and diplomatic exchanges. Nor am I able to discern, even if the Romanian delegation were properly to be understood to be indicating that the proposed arrangement would be available for acceptance by Zambia until 31 January 1999, that Zambia gave consideration therefor. (Donegal also argued that Romania would not have entered into a "lock-out" contract in December 1998 because they, Donegal, could still have exercised rights under the August 1998 agreement. In view of the note by the "Commission" that contemplates that Romania might renounce that agreement, I do not find that argument persuasive).

114. Accordingly, I conclude that no contractual arrangement was reached between the Romanian government and Zambia, whether by way of a "lock-out" agreement or of any other kind such as Zambia submit was concluded. Although the question whether the arrangements with Romania were contractual is to be determined objectively and I do not rely upon this consideration to reach my conclusion on this point, it is of some interest that when, as I shall explain, at the end of January 1999 Mr Mbewe drafted a form of agreement between Zambia and Romania and sent it to the Romanians under cover of a letter dated 28 January 1999, neither the draft agreement nor the letter purported to be pursuant to any earlier contractual arrangement.

Donegal's consultancy arrangements

115. Before going on to the dealings between Donegal, Zambia and Romania in 1999, I shall next consider the activities of those assisting Donegal in Zambia and the

arrangements under which they acted. By way of background, Zambia rely upon international concern about corruption of government officials and have drawn to my attention measures that have been taken to combat it.

116. First, they refer to the United States Foreign Corrupt Practices Act, 1977 ("the FCPA"), and in particular the "Anti-Bribery and Books & Records" Provisions of that Act. Mr Sheehan was familiar with the Act, and he referred in the course of his evidence to "our policies with respect to the FCPA", in particular with regard to engaging consultants.

117. The FCPA's anti-bribery provisions, to quote from the Department of Justice's General Explanation of the FCPA, "make it unlawful for a U.S. person … to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States". They apply, and United States jurisdiction extends, inter alia, to "domestic concerns" making corrupt payments to foreign officials, and the term "domestic concerns" is widely defined and would have included Mr Sheehan, Mr O'Rourke, DAI, Donegal, Select Capital, and Mr O'Rourke's companies. A domestic concern may be held liable for a corrupt payment authorised by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

118. The FCPA specifically prohibits corrupt payments through intermediaries, and (again I cite the General Explanation) it is unlawful to make a payment to a third party, "while knowing that all or a portion of the payment will go directly or indirectly to a foreign official". The term "knowing" includes "conscious disregard and deliberate ignorance". It is explained:

> "Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the U.S. firm should be aware of so-called "red flags", i.e. unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of

the potential governmental customer."

119. Zambia also refer to the International Chamber of Commerce's Rules of Conduct to Combat Extortion and Bribery in International Business Transactions (1996 edition), which include among the so-called 'Basic Rules':

i) Provisions forbidding enterprises from using techniques such as subcontracts or consulting agreements to channel payments to Government officials (Article 2(b));

ii) Provisions requiring enterprises to take "measures reasonably within their power" to ensure that any payment made to an agent is appropriate remuneration for legitimate services, that no part of any such payment is passed by the agent as a bribe or otherwise in contravention of the Rules and that a record is maintained of the names and terms of employment of agents retained by them in connection with transactions with public bodies or State enterprises, which should be available for inspection (Article 3);

iii) Provisions requiring proper and fair financial recording and accounting, and prohibiting the issuing of documents which do not properly and fairly record the transactions to which they relate (Article 4); and

iv) Provisions requiring that any political contributions be made in accordance with applicable law and properly disclosed (Article 6).

120. Zambia observe that the 1996 ICC Rules were reissued in 1999, with an introduction describing progress between 1997 and 1999 in relation to combating corruption.

121. Zambia also point to the United Nations Convention against Corruption, which came into force on 14 December 2005 after receiving the requisite number of ratifications. In particular they observe that it regards as bribery "The promise, offering or giving to a public official, directly or indirectly, of an undue advantage for the official himself or herself, or another person or entity, in order that the official act or refrain from acting in the exercise of his official duties". They say that that reflects internationally recognised standards of proper behaviour when dealing with governments and public officials.

122. Further, English common law regards it as a criminal act to bribe an officer to act contrary to his duty when he has a public duty to perform. "To induce him to shew favour or abstain from showing disfavour where an impartial discharge of his duty demands that he shews no favour or that he should shew disfavour is to induce him to act contrary to his duty; where this is done corruptly it is an indictable misdemeanour at common law which abhors corruption and fraud": R v Whitaker, [1914] 3 KB 1283 at p.1297. There is no evidence that the law of Zambia is different and I presume it to be the same.

123. Donegal do not have a local presence in Zambia, and in 1998 they engaged the services of, as Mr Sheehan put it, "Philip O'Rourke through his company Moreno International Limited". It is not clear what previous dealings Mr O'Rourke had previously had with Mr Sheehan or DAI, except that in May 1998 Mr O'Rourke, Mr

Sheehan and others had entered into a Shareholders' Agreement for a lottery venture through Gameco Partners Limited ("Gameco"), a company set up to obtain licences to run online lotteries in emerging markets.

124. Mr Sheehan's evidence was that Donegal retained Moreno to carry out "local due diligence" to check their information about the debt, to inquire whether Zambia had ever disputed it and to advise about the prospects for a "debt for equity type swap". He said that Moreno's role was "principally in respect of confirming that debt conversion was still an option that the Government of Zambia would consider". Moreno's instructions were to carry out such investigations without specifically identifying the Romanian debt and in such a way that "the connection would not be made". Mr O'Rourke, whether acting through Moreno or otherwise, retained two prominent Zambians to assist in relation to the debt. One was Mr Mwale and the other Mr George Chilupe, a former Attorney General of Zambia, who was to provide legal advice and advice about proposed debt conversions and similar arrangements and about "political concerns". Mr Chilupe died in August 2004.

125. It is Donegal's contention that their consultancy arrangements were proper, straightforward and unremarkable. They maintain that their contract was exclusively with Moreno and they were not party to any arrangement with Mr Mwale or Mr Chilupe. Mr Sheehan's evidence was that Mr Mwale and Mr Chilupe were retained by Moreno and would have been remunerated by Moreno, and Mr Mwale for his part stated that he had no contractual relationship with Donegal or any associated company. Mr O'Rourke also gave evidence that this was the structure of the arrangement.

126. Zambia challenge this. They say that Donegal are presenting a false picture in order to distance themselves from their agents and to avoid responsibility for what was being done. They submit that such agreements as were ostensibly entered into between Donegal and Moreno and any agreements made by Moreno with Mr Mwale or Mr Chilupe were part of a sham and a façade, in which Mr Sheehan, Mr O'Rourke and those in Zambia participated, designed to conceal the true facts. (By "sham" or "façade" Zambia mean that the shared purpose of introducing Moreno into the arrangements, either in September 2000 or earlier, was to disguise from third parties or the court the true nature of the relationship between Donegal and Moreno, and that the court, looking at the substance of the matter, should disregard the arrangements when determining Donegal's responsibility for what Mr Mwale and Mr Chilupe did: see Snook v London & West Riding Investments Ltd., [1967] 2 QB 786 at p.802E per Diplock LJ and Kensington International Ltd v Congo, [2005] EWHC 2684 (Comm).) In particular, the agreements were designed to disguise that Donegal were responsible for what Mr Mwale did by way of enquiries before the purchase of the Zambian debt from Romania, and in relation to the recovery or realisation of the debt. They argue that Donegal cannot be permitted to rely on such arrangements as a buffer between themselves and wrongdoing done by their local consultants, and that the arrangements were illegal and contrary to public policy.

127. The evidence presented by Donegal about the arrangements made between Mr Sheehan and Mr O'Rourke and about the arrangements made with Mr Mwale and Mr Chilupe is not satisfactory. The written evidence gives a picture that is at best incomplete and the evidence from the witnesses called by Donegal is vague and inconsistent. Moreover, no financial information is available concerning Moreno for

any material period. I have already referred to Donegal's apparent reluctance to make proper disclosure of documents about what payments they were making.

128. There is in evidence a "Consulting Agreement" made between Donegal and Mr O'Rourke on behalf of Moreno and dated 1 September 2000. By it Moreno agreed to "perform such services in connection with the Zambian debt … as may be agreed by Donegal and [Moreno] from time to time", the Zambian debt being defined as "face value principal and capitalized interest of US$29,834,368.06 evidenced by, inter alia, a Credit Agreement dated 17 April, 1979 between" Romania and Zambia and other specified documents. (It is of some interest, in view of the emphasis placed on it by Donegal in their dealings with Zambia, that the Consulting Agreement does not refer to the Acknowledgment of 12 February 1999, to which I shall refer.) Moreno were authorised "with the prior written approval of Mr Michael Sheehan as Director of Donegal, to retain third-party consultants to perform any necessary feasibility work relating to the Zambia Debt". Donegal undertook that while Moreno were "on location in Zambia", it should not "initiate its own settlement proceedings in respect of the Zambian debt, either by itself or through any of its subsidiaries". Donegal were to pay Moreno a fee of US$2,000 per month and a "bonus" that was to be agreed "based on the structure and amount of the settlement, provided that [Moreno were] instrumental in arranging and completing the settlement".

129. On 21 September 2001, a success fee of 15% was agreed: Donegal were to pay Moreno an amount equal to 15% of the net profit earned by Donegal in connection with the settlement of the debt "in the event that [Moreno were] instrumental in arranging and completing a full settlement of the Zambian debt". Mr O'Rourke said in evidence that the Consulting Agreement was extended to 31 December 2002 and thereafter was further extended by oral agreement.

130. However, after he had completed his evidence, Mr O'Rourke's solicitors produced a written Amendment to the Consulting Agreement. The Amendment was dated 23 May 2003, shortly after the Settlement Agreement and the first payment by Zambia under it. This was a surprising disclosure not only because of Mr O'Rourke's evidence but because in response to enquiries before the hearing Donegal's solicitors, Messrs Allen & Overy, had written in a letter dated 27 April 2006 that there was no written extension of the Consulting Agreement but "it is Mr Sheehan's understanding that there was a mutual understanding that the agreement would continue".

131. The Amendment provided for much increased monthly payments of US$8,000 by Donegal to Moreno. However, the only payment of US$8,000 made after the Amendment was made on 6 June 2005 by DAI to Mr Mwale. The only invoice from Moreno (although in fact it was in the name "Moreno International Inc") after the Amendment that has been disclosed was for US$14,000 and dated 2 December 2004. The Amendment document is the more curious because Mr O'Rourke had said in evidence that, after the Settlement Agreement was concluded and the first payment made, his role diminished.

132. Zambia submit that I should not accept the authenticity of this Amendment document. I decline to find that it is a forgery, but its purpose remains a mystery. It is unfortunate that it was disclosed only after Donegal's witnesses had been cross-examined, with the result that this misleading evidence of Mr O'Rourke and the misleading information from Mr Sheehan in Allen & Overy's letter of 27 April 2006

were not tested. This reinforces my conclusion that I cannot rely upon the evidence of Mr Sheehan and Mr O'Rourke about the role of Moreno and the relationship between Donegal and Mr Mwale. Further, the fact that this Amendment Agreement was made but payments were not made in accordance with it reinforces my conclusion that the records of arrangements between Donegal and Moreno were a façade and of no real substance.

133. According to Mr Sheehan, before the Consulting Agreement of 1 September 2000 "there was another agreement in place on roughly the same terms" between Moreno and Donegal (although he said that he believed that Moreno were not paid a monthly fee under it). Mr O'Rourke gave similar evidence. Neither Mr Sheehan nor Mr O'Rourke could say who signed the earlier agreement and no copy of it has been produced. Mr Sheehan told me that he was sure that a copy of it was sent to Croesus in New York, and that he believed that he then provided the original version to them for audit purposes, but this does not explain why no copy was retained by DAI or Donegal. Nor is this evidence consistent with the list of documents served by Donegal and dated 26 January 2006, the disclosure statement of which was signed by Mr Sheehan. There it was stated that previous consultancy agreements between Donegal and Moreno were "believed to have been discarded upon being superseded".

134. Mr O'Rourke said that he believed that the earlier agreement was made in about January 1999. Mr Sheehan said that he believed that a payment of US$372,486.59 that Donegal made on 1 March 1999 was made under the earlier agreement. However, Moreno, the BVI company, which was apparently party to the Agreement of 1 September 2000, was not incorporated until 29 September 1999, and so it cannot have been party to an agreement made at the time of the earlier agreement described by Mr O'Rourke and Mr Sheehan.

135. Mr O'Rourke said in cross-examination that he had had another company called also Moreno International Limited, which was incorporated on 8 January 1997 in the Irish Republic, and he later transferred his business from the Irish company and to the BVI company in order to reduce administrative charges. It seems that the Irish company had no premises and was dormant at all material times. The last activity shown in the company records is the presentation of the accounts to the year ended 30 April 1999 (when the auditors signed a disclaimer as to the accuracy of the financial statements), it has now been struck off the register, and there is no documentary evidence that links Mr O'Rourke with the Irish company. The shareholders were companies called Croxley Services Limited and Moulin Investments Limited, but neither has any recorded connection with Mr O'Rourke. Mr O'Rourke said that he never spoke to the directors of the company and did not know who they were. (I should add that there is information publicly available suggesting that a company called Moreno International Ltd was operating in Bucharest, but Mr O'Rourke denies any knowledge of this company, and there is no good reason to doubt this denial.)

136. Mr O'Rourke did not mention the Irish company in his witness statement, and he said that this was because he had forgotten about it. He said that he regarded himself as "beneficial owner" of the company and that he used it until he was advised by his Swiss lawyers, Froriep Renggli, that it would reduce administrative costs to use a BVI company. He was vague and, in my judgment, deliberately evasive in his oral evidence about which company might have been party to any agreement with Donegal made before September 2000.

137. Nor is the position elucidated by other contemporaneous documents. There is no documentation referring to Moreno until towards the end of 1999, after the BVI company was incorporated. No invoice, statement or receipt has been produced relating to the payment of US$372,486.59. After the BVI company was incorporated there were a small number of informally typed documents, and in particular invoices, but there is no contemporaneous correspondence to or from Moreno, and neither company appears to have had printed letter paper. The invoices to which I have referred used an address in Zurich, and the paper did not give any company's registered address or number.

138. Mr Sheehan said that under their agreement with Donegal, Moreno provided a certificate relating to the FCPA, and by it they represented and warranted that they and their agents were conducting their business in accordance with the FCPA and foreign legislation relating to bribery and other such practices. He also said that he believed that he asked for and received such a certificate that Mr Mwale had provided to Moreno. No certificates provided by Moreno themselves have been disclosed; there is no documentary evidence that they were provided and no evidence whether, if they were provided, they were from the Irish company or the BVI company.

139. As I have mentioned Mr O'Rourke owned another company called Somerset Investments, Inc ("Somerset"), a Delaware company, which gave their address as Suite 450, 1747 Pennsylvania Avenue, Washington DC. Somerset sub-leased these premises from DAI, taking 115 square feet of DAI's 6,000 square feet of office space. The lease was dated 1 February 1998, shortly after Donegal were set up to buy the Zambian debt from Romania.

140. Mr Mwale was retained by Mr O'Rourke in relation to the Romanian debt in the late summer of 1998. Mr Sheehan did not give prior written approval to Mr Chilupe and Mr Mwale being retained by Moreno as would have been required under the terms of the Consulting Agreement of 1 September 2000, and therefore under any previous agreement in like terms, although Donegal say that oral approval would have been given. Mr Sheehan said that although he knew that Mr Mwale and Mr Chilupe were acting as local consultants in Lusaka, he carried out no due diligence at all on their business activities. Nor indeed had he carried out any due diligence on Moreno.

141. In his witness statement Mr Mwale said that he had worked for Mr O'Rourke and his companies from time to time since 1987. He produced a Consulting Agreement dated 1 January 1998 between himself and Somerset. It provided that Mr Mwale would provide consulting services "with respect to certain transactions which may be described in more detail in Annexes to this Agreement that shall be prepared from time to time and agreed between Fisho [Mwale] and Somerset" and that he should be paid fees and entertainment, travel and similar expenses. The agreement was for a year with provision for automatic renewal thereafter unless notice of termination was given. It contained a provision that represented and warranted that it complied with the FCPA and any laws of other jurisdictions "relating to bribery, kick-backs and similar business practices".

142. Mr Mwale said in his witness statement that he believed that he "would have signed a similar document for Moreno". In his oral evidence, he said that he had in fact signed such a document.

143. Mr Mwale also said in his witness statement that he had "corresponded on behalf of Somerset and Moreno, using letterhead provided to me". However, in cross-examination he acknowledged that he had never had and never used Moreno writing paper, only that of Somerset.

144. Mr O'Rourke's evidence also was that there was an agreement between Moreno and Mr Mwale. He said that he did not keep a copy of it because for him it was not an important document, although he emphasised that before engaging Mr Mwale he required him to agree to comply with the FCPA. He said that the agreement between Moreno and Mr Mwale "replaced" that between Somerset and Mr Mwale.

145. Mr O'Rourke's explanation for having two companies, Somerset and Moreno, was that his purpose was to separate his domestic and his international business: that he used Somerset for his domestic business and trade finance business in the Balkans and he used the Moreno companies "specifically for the Donegal matter" and "something else in a related field". I am unable to accept this explanation. It is inconsistent with his evidence about the agreement with Moreno replacing that with Somerset and with the documentary evidence.

146. Firstly, whether or not a Consulting Agreement was made between Mr Mwale and Moreno, if Mr O'Rourke's explanation about the purpose of him using Somerset and Moreno were correct, there would be no reason for Mr Mwale to have an agreement with Somerset.

147. Secondly, Mr Mwale used Somerset letterhead when promoting Donegal's interests. In particular, he used it when he wrote a letter dated 3 February 1999 to Ms Nawakwi, to which I shall refer. Mr Mwale explained that this was simply because he used the wrong paper, and he had no Moreno letter paper. (In his witness statement he had also said that he might have been acting for Somerset, but in cross-examination he said that this was not the case.) However, again the fact that Mr Mwale should have been supplied with Somerset letter paper and had it available to use by mistake is inconsistent with Mr O'Rourke's evidence about Somerset being concerned only with business in America and the Balkans.

148. Thirdly, in any event Mr O'Rourke himself gave evidence that on occasions Mr Mwale had been retained through Somerset rather than Moreno, giving as an example of this occasions when Somerset, but not Moreno, had funds to pay him. This would appear to defeat the purpose in having two companies in the first place.

149. After he had been cross-examined Mr Mwale produced a "teaming agreement" dated 1 September 2000 between Moreno and himself, together with (i) an Annex A relating to the Zambian debt; (ii) an Exhibit A containing a FCPA certificate signed by Mr Mwale; and (iii) an Annex B dated 27 September 2003 setting out an agreed bonus for Mr Mwale. When Mr Mwale was asked during his cross-examination when he signed the agreement with Moreno to which he had referred in his witness statement, he was unable to say except to express the view that it was signed later than his agreement with Somerset. He never suggested that he had signed more than one agreement with Moreno. I conclude that he did not sign an agreement with Moreno before September 2000.

150. Zambia submit that I should also find that there was no written consulting agreement between Donegal and Moreno before September 2000. I accept that submission and reject the evidence of Mr Sheehan and Mr O'Rourke that there was an earlier agreement. Their evidence about it seemed to me contradictory, vague and evasive. Mr O'Rourke's evidence about separating activities between Somerset and Moreno was quite unconvincing. This conclusion is supported by the absence of any earlier agreement between Moreno and Mr Mwale and the use of Somerset's name by Mr Mwale. There is no evidence of any activity on the part of the Irish company and no documentary evidence of Moreno's involvement before September 2000 apart from some invoices from Moreno to which I shall refer. All of them were for services after the BVI company was incorporated, and they are not evidence of any agreement with the Irish company.

Payments by Donegal

151. As I have said, details of the payments made by Donegal, DAI and Select Capital emerged during the course of the hearing after I had made an order for disclosure by Donegal. The documents show that a total of just over one million US dollars (in fact, US$1,007,330.42) was paid by Donegal, DAI and Select Capital between March 1999 and April 2006, and that payments were made by Donegal, DAI and Select Capital not only to Froriep Renggli and Mr O'Rourke's personal bank account, but also to Mr Chilupe and Chilupe & Co and to Mr Mwale's company, Trade Factors International Limited ("Trade Factors"), and otherwise to Mr Mwale's benefit. The documents also show that during 1999 and 2000 Mr O'Rourke was not simply paid travel expenses by way of an advance in respect of a future success fee.

152. Had these documents not been produced, I would have been misled about the true position by the evidence in the witness statements of Mr Sheehan and Mr O'Rourke. Mr Sheehan said in his witness statement that "Fisho Mwale and George Chilupe were retained by Moreno and would have been remunerated by Moreno. The arrangements between Fisho Mwale and George Chilupe were a matter between Phillip O'Rourke and them". Mr O'Rourke said that "I believe I made ten trips to Zambia during that two year period between January [1999] and December 2002 in order to discuss investment opportunities, using Moreno's own money to pay for any disbursement and to pay Fisho Mwale and George Chilupe a consulting fee. It was agreed that travel expenses to Zambia would be advanced to me by Donegal against Moreno's share of future realisations, which were agreed to be 15% of Donegal's net profit on the debt (if any)". I am driven to conclude that Mr Sheehan and Mr O'Rourke deliberately gave false evidence in order to distance Donegal from the activities of Mr Mwale and Mr. Chilupe.

153. The first and by far the largest payment, the sum of US$372,486.59, was made by Donegal on 1 March 1999 to Froriep Renggli. According to Mr Sheehan's evidence, Donegal have no documentary record of the payment. It was not mentioned in the witness statements served by Donegal. According to a letter dated 14 May 2006 from Messrs Allen & Overy, the payment was made under "the original consulting agreement between Moreno and Donegal". They go on to say that the services for which Moreno were paid were for "due diligence in relation to the Zambia/Romania debt during the course of 1998 and to put Moreno in funds in order to carry out further consulting work in relation to the debt", and that the money would not have been paid had the assignment not been made.

154. Mr O'Rourke acknowledged in cross-examination that the money was paid to Froriep Renggli on his instructions and he said that it was for the benefit of Moreno. Mr Sheehan said that it was a "success fee on closing of 1 point something" of the sum of US$29.8 million, the amount of the assigned debt, and that the payment was not to be brought into account against the success fee to be paid under the consulting agreement of September 2000.

155. I accept that the payment was something by way of a success fee paid by Donegal and was calculated by reference to the amount of the assigned debt: the sum paid is very close to 1.25% of the assigned debt. (I acknowledge that at one point when cross-examined Mr Sheehan suggested that the percentage might be 1.7% of something, but he must, I think, be wrong about that.) I also accept, since there is no reason to think otherwise, that there was no intention to bring the payment into account against sums that Donegal were later to pay.

156. In other respects, however, this payment, as I conclude, demonstrates that I cannot rely upon what I was told by Mr Sheehan and Mr O'Rourke:

i) I am unable to accept that the money was paid under a consulting agreement between Donegal and "Moreno" (either the Irish company or the BVI company) or that it was paid for the benefit of Moreno. There are no documents showing the ultimate recipient of this sum. (Mr Sheehan said that he did not ask for an invoice, explaining that "we typically did not invoice for success fees in our business. We just paid them when due".) There is no evidence that the payment was received by the Irish company and I am unable to accept that it was received into their company accounts. The BVI company had not been incorporated in March 1999. Indeed, Mr Sheehan at one point in his cross-examination said that "most" of the funds paid to Froriep Renggli were paid "for his [Mr O'Rourke's] own personal [money]".

ii) Mr Sheehan referred in his witness statement to the success fee provided for in the September 2000 consulting agreement and said, "The 15% success fee is neither unusual nor high in the context of distressed sovereign debt, which is an extremely speculative asset. Of course the success fee was only payable should the transaction as a whole have been profitable." He did not mention that this 15% success fee was only part of what was being paid by way of a success fee, and his evidence is therefore misleading. Mr Sheehan was not being straightforward in his witness statement: I cannot accept that he had forgotten about the earlier success fee.

iii) The fact that Donegal were paying a success fee as early as March 1999 is inconsistent with the account in Mr O'Rourke's witness statement that Donegal were to pay only travel expenses against a future success fee.

157. Between December 1999 and March 2001 some seven further payments totalling some US$58,000 were made by Donegal to Froriep Renggli, either to their client account with Midland Bank or to their account with the Cantonal Bank of Zurich. They include payments against four invoices in the name of Moreno from a Zurich address. The first, which is dated 24 November 1999 and was for $9,670 in respect of "Negotiation of settlement terms in Lusaka, Zambia, October 15 – November 20, 1999", was addressed to DAI. The others (one for $10,000 dated 8 December 1999

for "Advisory services associated with debt conversion activities in the Republic of Zambia", one for $10,000 dated 4 January 2000 for "Advisory services relating to conversion of the debt owned by Donegal into equity investments in the Republic of Zambia", and one for $6,800 dated 1 March 2001 for "Advisory services, setting up meeting schedule, and revised negotiating strategies related to Zambia file, Lusaka meetings") had no addressee. The sums paid do not correspond to any payment contemplated in the consulting agreement of September 2000 and so would not have corresponded to any earlier agreement in similar terms.

158. However, Donegal also paid sums into Mr O'Rourke's personal account with Riggs Bank, Maryland against invoices in the name of Moreno dated in September 2000 and thereafter. From December 2000 until towards the end of 2002 Donegal made relatively regular monthly payments of US$2,000, the last such payment being made on 4 October 2002. When asked why some amounts were paid into his Maryland account and some to his Swiss lawyers, Mr O'Rourke said that it was a matter of convenience: if a payment went to Riggs Bank, it was for his operating costs and, "If it went for Froriep Renggli, then it might have been for a consultant". Indeed, two other payments to Froriep Renggli made in November and December 2000 in a total of US$11,500 were made against fee notes sent to Mr O'Rourke from Chilupe & Co. (There is no invoice relating to the seventh payment to Froriep Renggli.) The invoices from Moreno do not refer to consultants and indicate that the charge was for Moreno's own work. However no documents have been produced that show to whom these monies were dispersed, and Donegal have given no explanation for the payments against Moreno's invoices to Froriep Renggli that I can accept.

159. There were two further payments to Froriep Renggli in 2003: one for US$75,000 on 2 May 2003 and one for US$36,870 on 25 June 2003. In neither case has any supporting documentation been produced and again Donegal have given no credible explanation for them. It is to be observed that the first payment was made shortly after Zambia paid Donegal US$500,000 on 29 April 2003, and the second payment was made after Zambia paid Donegal US$500,000 on 12 June 2003.

160. Mr O'Rourke's solicitors, Messrs Hextalls, produced in the course of the hearing what they described as "a copy ledger from the client account at Froriep Renggli maintained for Moreno which addresses payments in and out further to receipts of the sum of $372,486.59". (Some entries were redacted: they were said to relate to "everyday trading business" and not to be payments to any Zambian individual or entity.) The entries run from March 1999 to November 2003. Although there is a heading "Moreno International Ltd", there is nothing to indicate a transfer to the BVI company (from the Irish company or anyone else). The document was not explained by any witness, and I do not consider that it provides any support for Donegal's case about the role played by Moreno. I also observe that it shows only three of the receipts from Donegal, that of $372,486.59, that of $9,670 and one of $10,000 in December 1999. It clearly is not a complete record of payments by Donegal to Froriep Renggli.

161. Seven payments totalling some US$24,000 were made by or on behalf of Donegal between April 2001 and July 2004 directly to Mr Chilupe's firm or his personal account, or in one case to a Kaoma Chilupe, presumably a relative of Mr Chilupe. In the three cases where a supporting fee note was produced, it was addressed to Mr O'Rourke.

162. There were also some 36 payments totalling some US$270,000 made directly by or for Donegal for Mr Mwale's benefit, to Trade Factors, to or for his son, Mr Sungani Mwale, and in one case on his instructions to a third party for rent or a deposit for an apartment. At the time of the hearing in May 2006, Donegal were continuing to make such payments. Mr Mwale accepted that he has a financial interest in the outcome of this litigation.

163. The first of these payments was made in November 2001 and is supported by an invoice from Mr Mwale for "Consultancy services rendered". The next of these payments, for which no invoice has been produced, was on 20 December 2002, shortly after, as I shall explain, Mr Diangamo, the (Acting) Secretary to the Zambian Treasury, had written on 17 November 2002 that Zambia were agreeable to a proposal made by Donegal to settle the debt and at a time when Mr Mwale was involved in meetings with officials at the Ministry of Finance. The other 34 of these payments were made after the Settlement Agreement had been signed.

164. Donegal have no assets of their own, but Mr Sheehan also told me that they did not submit a request to either Select Capital or DS Partners to make these payments. He said that in 1999 the accounts were kept by Croesus but that Croesus went out of business. However, until December 2002 all these payments were made, or at least remitted, by Donegal, rather than by Select Capital or another associated company. The first payments from any other company were made on 20 December 2002 and 10 April 2003 by Select Capital to Trade Factors in the sums of US$10,000 and US$6,000. The source of Donegal's funds to make these payments remains obscure.

165. Mr Sheehan sought to defend the evidence in his witness statement. He said that "once I paid [Mr O'Rourke], that was it. The payment was done", and he did not pay regard to how Mr O'Rourke or Mr Mwale used funds that were provided to them. Nor did he attempt to satisfy himself about how much Mr Mwale was being paid by Mr O'Rourke, but regarded it as a matter for Mr O'Rourke to structure his (and Moreno's) offshore accounting arrangements as he saw fit. As he said during his oral evidence, "We remitted wherever Moreno instructed us to remit". Consistently with this he said that the payments for Mr Chilupe and Mr Mwale were made for Moreno and were to be brought into account in respect of moneys payable to them by Moreno. I would have found it difficult to accept this explanation even if Donegal had produced any documents indicating that they were keeping records with a view to these payments being so brought into account, but they say that there are none.

166. There is in evidence an undated e-mail sent by Mr Sheehan to a Mr Mike Eckels of DAI. In it Mr Sheehan refers to Donegal paying fees to "Phil and local partners". Mr Sheehan told me that the reference to "local partners" was a reference to Moreno. This is not credible. Moreno were not "local", and there would be no question of fees being paid both to Mr O'Rourke ("Phil") and Moreno. The "local partners" were Mr Mwale and Mr Chilupe (and possibly others), and Donegal were referring to making a payment to them separately from the payment to Mr O'Rourke.

167. In any case, I regard the evidence in Mr Sheehan's witness statement that he and Donegal were "not privy" to the arrangements between Mr O'Rourke and Mr Chilupe and Mr Mwale as so incomplete as to be deliberately misleading, and a deliberate and misleading attempt to distance Moreno from Mr Mwale and Mr Chilupe. Mr Sheehan, Mr O'Rourke and Mr Mwale cannot have forgotten about Donegal's

payments to Trade Factors when they made their witness statements in April 2006. Such payments were made on 31 March 2006, 14 April 2006 and 27 April 2006. I add that Mr O'Rourke, as well as Mr Mwale, has a financial interest in the outcome of this litigation.

The activities of Moreno/Mr O'Rourke and Mr Mwale before the assignment

168. Mr Mwale was the Mayor of Lusaka, a position that he held from 1994 until December 1998. He was said to have had considerable experience of debt buy back arrangements over 20 years or so, although Mr Sheehan did not, according to his evidence at the American hearing, regard Mr Mwale as an expert in debt conversion or similar transactions. However, undoubtedly he had very good connections with the Zambian government, and in particular the Ministry of Finance, and with the business community. Mr O'Rourke said that he regarded Mr Mwale as his "man who had contacts with government officials", stating that "Fisho would report to us on the status of a particular file or how something is being looked at". It appears that he did not have any staff or facilities. He kept minimal records.

169. Mr Mwale did produce some documents during the course of the hearing. There were some extracts from a diary that he said he kept "briefly" in 2002. Although he said during his evidence that he would "surrender the diary", he has since declined to do so. He also provided bank statements of an account of Trade Factors with Investrust Bank for the period from 28 December 2000 to 13 May 2006 in so far as they show receipt of funds paid by Donegal, DAI and Select Capital. Zambia observe, justifiably in my judgment, that this disclosure is of limited value because, in particular, there is no information given about whether other money was received from other sources (such as Froriep Renggli) or into other accounts, and there is no disclosure about money received before December 2000.

170. There is no documentary evidence indicating when Mr O'Rourke (or Moreno) and Mr Mwale started to make enquiries about the debt in Zambia, and what work they did when they were first engaged. The first significant document was written after the debt had been assigned to Donegal, a letter from Mr Mwale to Ms Nawakwi dated 3 February 1999. Mr O'Rourke said that the instructions to Mr Mwale were "probably just verbal" and that he "seldom, if ever" gave him written instructions. He said that he could not recall receiving any written reports and when asked whether he provided written reports to Donegal, he replied, "Probably not, for the simple reason that I would just shout them to Mr Sheehan".

171. Mr O'Rourke's evidence was that during the second half of 1998, between August 1998 and November 1998, he and Mr Mwale, acting under his supervision and assisted by Mr Chilupe, had a number of informal meetings with present and former members and officials of the Zambian government and members of the banking community. The purposes were principally to confirm that the debt was regarded in Zambia as valid and to form a view about the prospects for arranging a debt for equity or debt for development conversion. Mr O'Rourke said that they heard nothing to suggest that the validity of the debt was questioned or that the Zambian government would not regard the debt as eligible for conversion. On the contrary, he learned that the debt was recorded as due and owing by the Bank of Zambia, and that as a result of his enquiries, he was "sure" that the debt was not disputed and "certain" that it was

valid. He also, he said, obtained an opinion from Mr Chilupe about whether there were new regulations affecting debt conversion.

172. Mr O'Rourke gave as one example of such discussions a meeting with the late Dr Felix Kani, a Director of Economics at the Bank of Zambia, "who confirmed that the Romanian debt was valid and appeared on Zambia's external debt list" and that the Zambian government acknowledged it to be due and owing. He said that Dr Kani showed him a computer print-out of the Government's debt position.

173. Mr O'Rourke also gave evidence of "talking with the people that were either – the little people, secretaries in the Ministry that was concerned, to find out from as many different sources as possible: are you disputing the debt, did you get value for your money, are you upset about that?" He said that by secretaries, he was referring to secretarial assistants to civil servants, although when asked about whether they would be entitled to disclose information, he sought to explain that they would not typically be of a clerical level. Mr O'Rourke said that Mr Mwale "would report to us on the status of a particular file or how something was being looked at". My understanding of Mr O'Rourke's evidence is that it was partly as a result of these enquiries that he became "sure" that the debt was not disputed by Zambia.

174. This evidence of Mr O'Rourke is consistent with Mr Sheehan's evidence that after making their enquiries Moreno advised Mr Sheehan that the possibilities for debt conversion were "very positive". Mr Sheehan said in his witness statement that Mr O'Rourke reported to him that neither Moreno nor Mr Mwale had any reason to believe that the Zambian Government disputed the debt and they advised him that there were good prospects for converting the debt into equity in investment projects in Zambia.

175. Witnesses called by Zambia also gave evidence about approaches made to them by persons seeking information about the debt. Mr Mbewe said that in the first half of January 1999 Mr Mwale asked him for details of the Romanian debt, and when Mr Mbewe refused to give them, Mr Mwale replied that he would "get the information off someone else". Ms Nyirenda recalled Mr Mbewe told her in early January 1999 that he had been approached by Mr Mwale who was seeking information about the Romanian debt.

176. Ms Nyirenda also gave evidence that at about this time Mr Chizyuka told her that people were interested in information held on the database in her department and that they should be given access to the office. Her response was that requests for information should be made to the Departmental Director, Mr Malambo. Another approach was made to her for information on the database by a Mr Ephrahim Mwenda, and again she refused to provide it and directed Mr Mwenda to Mr Malambo. Moreover, according to Ms Nyirenda, shortly after the delegation returned from Romania, Mr Alisand Singogo, then Treasury Counsel, had told her that Mr Mwale wanted to know why the delegation had gone to Romania. I accept that evidence of Mr Mbewe and Ms Nyirenda.

177. Mr Mwale's evidence was that he was engaged in 1998 to assist in "undertaking due diligence on the Romanian Debt and making enquiries as to whether there were likely to be debt for development opportunities available for the debt" if acquired. He said that he had numerous informal meetings about the validity of the debt with "various

government and banking officials", and he stated in his first witness statement dated 4 April 2006 that they included the following: Mrs Chibanda, Mr Chizyuka, Dr Mwanza, Dr Mwenda (the Deputy Governor of the Bank of Zambia), Professor Mweene and Dr Kani. The validity of the debt, he said, was not disputed.

178. In cross-examination Mr Mwale was asked about meeting Mrs Chibanda, a meeting that was said to have been in late 1998 or early 1999. His evidence was that she told him that the Romanian debt was still outstanding and was valid. He thought that Mr O'Rourke was present at least at an initial meeting with Mrs Chibanda at which there was discussion of the validity of the debt. According to Mr Mwale, Mrs Chibanda never indicated that any of the information that he sought was confidential.

179. In his first witness statement Mr Mwale also said that he discussed debt conversion opportunities, these discussions being with Mr Simwinga, whom he described as "Chief Economist at the Treasury", Mr Nonde, Mr Diangamo (then a Permanent Secretary, and later promoted to be Secretary to the Treasury), Mr Mwaanga and the Deputy Minister of Finance, Mr Newton Nguni.

180. Mr Mwale also said that he met Mr Mbewe and discussed "debt dismantling possibilities and possible debt investment opportunities". He disputed Mr Mbewe's evidence that he approached Mr Mbewe for information about the Romanian debt and was rebuffed.

181. Mr Mwale's evidence about his meetings was not satisfactory. It is inconsistent with that of Mr Simwinga, Mr Mwaanga and Dr Mwanza, as well as with the evidence of Mr Mbewe.

i) Mr Simwinga denied any discussion with Mr Mwale of debt conversion opportunities, pointing out that before April 2003 he was not a Chief Economist at the Treasury and in the autumn of 1998 he was an economist in the Investment and Debt Management Unit of the ERM under Mr Ndopu. Mr Mwale, while acknowledging that he was wrong in his witness statement about the position that Mr Simwinga held, insisted that the discussion took place.

ii) Mr Mwale said in his first witness statement that he also discussed debt conversion opportunities with Mr Mwaanga, whom he described as "Acting Economist Multilateral Debt". The implication clearly was that he had had such discussions before the assignment of the debt to Donegal. Mr Mwaanga has never held the position of Acting Economist Multilateral debt and was not employed by the Zambian Government until May 1999. When Mr Mwale gave his oral evidence, he indicated that the meeting was towards the end of 1999. Mr Mwaanga denied that he ever had a discussion such as Mr Mwale described.

iii) Dr Mwanza said that he did meet Mr Mwale when he was the Mayor of Lusaka. Mr Mwale raised government debt only in general terms and was told that that should be discussed with the Ministry of Finance and not the Bank of Zambia; there was no specific discussion about the Romanian debt.

182. As I have said, I accept that Mr Mbewe's evidence is essentially accurate, not least because it is corroborated by Ms Nyirenda, whom I regarded as an entirely reliable witness. I also prefer the evidence of Mr Simwinga, Mr Mwaanga and Dr Mwanza to that of Mr Mwale about what discussions took place. On Mr Mwale's own evidence, his witness statement was not accurate about these matters, and in any case I generally regard Mr Simwinga, Mr Mwaanga and Dr Mwanza as more reliable witnesses than Mr Mwale.

183. My impression that Mr Mwale was not reliable in his evidence about what meetings he held is fortified by a further conflict between his evidence and that of another witness for Zambia, Mr Patel. Mr Mwale's evidence in his first witness statement was that at some date, apparently after the assignment had taken place, he had a meeting in relation to investment opportunities for Donegal with "Deepak Patel, the Deputy Minister of Commerce". Mr Patel denied this. He also pointed out that, after resigning as a Minister in February 1996, he did not hold a ministerial post until he was appointed Minister of Commerce in 2003. Faced with this, Mr Mwale resiled from his witness statement in that he accepted that the discussions did not take place when Mr Patel was Deputy Minister of Commerce, but maintained that such discussions had taken place. Again I reject the evidence of Mr Mwale and I prefer that of Mr Patel, both because Mr Patel was a much more impressive witness and because again Mr Mwale's original account was, by his own admission, unreliable.

184. However, I do accept that in the latter part of 1998 and before the debt was assigned, Mr Mwale was, as he said, engaged in seeking information about the debt and how the Zambian Government regarded its validity from any sources within Zambian government or public life to whom he obtained access. The only significance of the inaccurate details that he gave about his activities is that it reflects adversely upon his reliability as a witness.

185. Mr Sheehan has presented a number of different accounts about the activities of Moreno and Mr Mwale before the assignment of the debt, and I do not consider that I can rely upon this part of his evidence where it is not confirmed by independent evidence. In his affidavit of 4 March 2005 sworn in support of Donegal's application for a freezing order he said that Donegal had been in discussions with Zambia before they acquired the debt "and one of the factors that influenced [Donegal]'s decision to buy the Assigned Debt was confirmation by Zambia that the Assigned Debt could be eligible for use in a debt conversion or similar transaction bringing investment to Zambia and, at the same time, reducing Zambia's debt burden in an affordable way". I find that Donegal had not been directly involved in any discussions with Zambia, and that Zambia had not provided any such confirmation.

186. On 25 May 2005 Mr Sheehan told the United States District Court that Mr Mwale played no part in the transaction before January 1999. (Mr Sheehan was asked, "To your knowledge, did Mr Mwale play any role in the transaction before January 1999" and he replied "No".) Moreover, Mr Sheehan was asked at the American hearing what due diligence was carried out before the debt was purchased, and he made no reference to enquiries by local agents or consultants in Zambia. (He was asked, "Did you have any contact with any Zambians during that time frame [sc. before the assignment in January 1999]?" and replied, "No". Then when asked "Did you have any contact with them [the Zambians] of any kind that you can recall concerning the Romanian debt?", he replied "No, not that I recall".) This evidence given on 25

May 2005 was inconsistent with his affidavit of 4 March 2005 and with the evidence at this trial. Mr Sheehan provided no credible explanation for this inconsistency and I am driven to conclude that he was misleading in his evidence at the American hearing. In coming to this conclusion, I do not overlook that when cross-examined before me, Mr Sheehan sought to explain that he had confined his answers at the American hearing to what he personally did: Mr Sheehan must have realised his responses gave a wholly false impression.

187. In a witness statement dated 7 October 2005, Mr Sheehan said that DAI carried out due diligence on the debt "including an analysis of the Romanian government's interest calculations and took legal advice concerning the validity of the debt". He did not refer to Mr O'Rourke and Mr Mwale's activities in Zambia. In another witness statement dated 4 April 2006 prepared for the hearing of the jurisdiction application, Mr Sheehan gave evidence to which I have referred of Donegal engaging the services of Moreno to carry out "local due diligence" and Moreno in turn engaging Mr Chilupe and Mr Mwale. He said that DAI and Donegal instructed Mr O'Rourke to carry out "discrete enquiries" in relation to the Romanian debt and "enquiries to advise on the prospects for using the debt for a debt for equity type swap". In his oral evidence he went further: he said that he had actually given instructions to Moreno not to identify the Romanian debt. He also said that as far as he was aware there had been no specific discussion of the debt conversion with respect of the Romanian claim, adding, "If there were, they were limited because we could not broadcast the fact that it was the Romanian claim that we wanted to convert". This, as it seems to me, is inconsistent with his affidavit of 4 March 2005.

188. Thus the evidence given by Donegal's witnesses about the relationship between Donegal and DAI, Moreno and Mr O'Rourke and Mr Mwale is confusing or contradictory, and so is their evidence about their activities. Donegal have, in my judgment, been deliberately obfuscatory about it, and have to some extent succeeded in obscuring the picture. However, from some time in 1998 Mr Mwale, and indeed Mr Chilupe, were acting in Donegal's interests to carry out "due diligence" in relation to the purchase of the Zambian debt from Romania and in relation to the prospects of realising that debt by way of entering into a conversion or other comparable arrangement with Zambia. Donegal later made payments to Mr Mwale's company and family and to Mr Chilupe or for his benefit. Donegal have not put forward any explanation for their arrangements with Mr Mwale and Mr Chilupe that I am prepared to accept that dispels the obvious inference that Mr Mwale and Mr Chilupe were acting as their agents and that Donegal are responsible for their actions as their principal. I conclude that there was no arrangement between Moreno and Mr Mwale before September 2000, and was never any arrangement at any time that was more than a façade that had no effect upon the true relationship between Donegal and Mr Mwale.

189. In notes that he wrote in October 2003 to the Secretary to the Treasury (to which I shall refer later in my judgment), Mr Mwale referred to Donegal as his "principals". I reject as dishonest his attempts to claim that in those notes he was referring to Mr O'Rourke in that way. It is clear from the notes that he was so referring to Donegal, that is how he regarded Donegal and that was in reality the position.

The Assignment to Donegal

190. On 6 January 1999 Mr Beresford sent a fax to Romania stating that DAI were in a position to complete the purchase of the Zambian debt, although they asked for an extension in respect of the Angolan and Peruvian debts. (In fact, according to Mr Sheehan's evidence at the American hearing no agreement was concluded about the Angolan or Peruvian debts.) He attributed the delay to difficulty in obtaining documentation evidencing the debt and reconciling the amounts claimed by Romania and to "the collapse of the emerging country market debt due to the Russian and Asian debt defaults". (This explanation for the delay is different from that given by Mr Sheehan in his affidavit of 4 March 2005, when he said that "representatives of [Donegal] were unable to travel to Romania to close the transaction until January 1999". In his oral evidence, Mr Sheehan accepted that that was inaccurate but gave a yet different explanation, that the delay was because he needed to confirm with the directors of DS Partners that Donegal should proceed to buy the debt, although they had previously given their approval, and because they were on holiday and travelling. I find it impossible to discern the true reason for the delay.)

191. Mr Beresford also wrote to Berliner Bank on 6 January 1999, seeking to complete the assignment of 7 August 1998, and Berliner Bank reported this to Romania by letter dated 7 January 1999.

192. According to Mr Sheehan's evidence, on 7 January 1999 he was told by Ms Liteanu that a government delegation from Zambia had visited Romania and the amount owing had been reconciled at US$29.8 million, thereby capitalising interest, and that Zambia had indicated an interest in buying back the debt at 11%. On 8 January 1999 Romania wrote to DAI stating that a government delegation from Zambia had negotiated a reconciliation of the debt and the face value of the debt had been recognised by the Zambian authorities to be only US$29,312,164.57. They continued, "The percentage recovery, proposed by the Zambian party is 12% and the payment will be made within 6 months. In case the terms offered by your company could compete those of the Zambia party we wait your answer - within the shortest delay – in order a decision to be taken". Mr Sheehan told me that he did not recall the apparent discrepancy between the figure of US$29.8 million stated by Ms Liteanu on 7 January 1999 and the lower figure stated by Romania the next day, which, of course, reflected the question unresolved in the Bucharest talks about the repayment of US$522,203.49. He was unable to say whether DAI's offer was based upon a debt of US$29.8 million or US$29.312 million.

193. On 8 January 1999 Ms Gereanu prepared a note about the Zambia debt. It stated that Donegal had requested "a prolonged deadline for the contract completion until 31.12.98", and referred to the negotiations with Zambia on 18 and 19 December 1998 and to Donegal's fax of 7 January 1999. (As I have indicated, there was no suggestion in the note that the deadline had been extended by oral agreement.) Ms Gereanu proposed to request of Zambia "the urgency of acquiring the permission to sign the Agreement and its coming into force by 31 January 1999", and to inform Donegal that Zambia had agreed the figure of $29,312,164 and that "under these circumstances the proposed terms are as follows: The acknowledgement value is: $29,312,164.57. The recuperation coefficient: 12%. The recovered value: US$3,224,338.11. The accrued interest for the period 15 October 1998 - 31 January 1999, US$50,977.60. Recuperation deadline: 31.01.99".

194. According to Mr Sheehan, the Romanian government expressed the view in a telephone conversation that DAI or Donegal had with either Ms Gereanu and Ms Liteanu that, although they had no contract with Zambia, they could not rightly accept less from a commercial interest than Zambia had indicated they were willing to pay. Mr Sheehan's evidence is that he telephoned Mr Costea, who had signed the agreement of 7 August 1998, to express his displeasure at this development. His stated view of the position, expressed in his witness statement, was that the Zambian officials engaged in "inept intervention" that effectively doubled the price that Donegal had to pay for the debt. It seems to me that, as Mr Trace submitted, Romania were skilfully exploiting their bargaining position to optimise the terms that they would receive in respect of the debt, and, as I shall explain, continued to do so. It is not for me to comment upon the propriety of this conduct on the part of a government.

195. Donegal did increase their offer in that on 8 January 1999 they told Romania that despite its increased value they were still prepared to purchase the debt at the "previously agreed price of 11% of face value" and to complete the transaction by 31 January 1999. They promised to pay the price to the escrow account with Berliner Bank by 15 January 1999 and to sign documentation "next week". Although Mr Sheehan told me that they had obtained the approval of investors before making the offer, no documents have been disclosed that reflect DAI's understanding of quite what they were offering to buy.

196. On 12 January 1999 Mr Popescu, who had replaced Mr Balan as Economic Secretary in Lusaka, sent to the Romanian Ministry of Finance and the Romanian Ministry of Industry and Commerce a report of a meeting at the Zambian Ministry of Finance on 12 January 1999 with Mr Mphande, who was said to be standing in for Mr Ndopu. (In fact, as I shall explain, Mr Ndopu had been suspended from his position on 7 January 1999, but Mr Popescu understood that he was on annual leave.) Mr Popescu said that Mr Mphande confirmed that "the Zambian party will accept the Romanian party's standpoint stipulated in the memorandum signed in Bucharest", showed him a draft agreement and indicated an expectation that an agreement would shortly be signed between the two governments. Mr Mphande confirmed that the sum owed by Zambia was $29,834,368.06. Accordingly, Ms Gereanu proposed that this higher figure should be included in the agreement with Donegal, which could be signed as soon as Romania had confirmation that Donegal had paid into escrow $3,580,124.00 (that is to say, an additional US$57,442.38 so that the total sum amounted to 11% of US$29,834,368.06 rather than 11% of US$29,312,164).

197. On the same day, 12 January 1999, Ms Gereanu sent Mr Costea a note in which she observed that Zambia lacked foreign currency resources, that the agreed payment period was long and that prompt payment could not be guaranteed. She proposed that the Romanians accept Donegal's proposal upon the basis that the payment of US$3,224,338.10 was received by 31 January 1999. Mr Costea endorsed his approval on the note on 13 January 1999.

198. Nevertheless, on 13 January 1999 Ms Gereanu wrote a letter to Mr Ndopu (presumably unaware of his suspension from office) from which it would have appeared that the Romanians intended to go ahead with the proposed deal with the Zambians, and was clearly intended to give that impression. She wrote, "As established during the negotiations between the representatives of the Ministry of

Finance of Romania and the representatives of the Ministry of Finance and Economic Development of Zambia, please send us the confirmation of the amount of USD 29,834,368.06, representing Zambia debt towards Romania, in order all necessary documents to be prepared." The reference to "all necessary documents" can only sensibly be read as a reference to the contemplated agreement between Romania and Zambia that Zambia buy back the debt. The Romanian Ministry of Industry and Commerce also seem to have been expecting that the deal with Zambia would proceed. On 14 January 1999 Mr Potru of that Ministry wrote to Ms Gereanu, attaching Mr Popescu's note of 12 January 1999, and asked her to inform Mr Popescu "that we welcome the Zambian commission, announced in the previous fax, who would finalise with you the negotiations referring to the debt payment".

199. On the same day, the Romanians were pursuing their negotiations with Donegal. On 14 January 1999 Romania sent to DAI by fax a copy of the Memorandum of Understanding of 18 December 1998 entered into by Zambia and Romania. Following a conversation between Ms Liteanu and Mr Slater, a revised final draft of the Assignment Agreement was sent to Romania on 15 January 1999. By a Note dated 18 January 1999, Ms Gereanu recorded that there remained an outstanding issue about the disputed repayment of US$522,203.49 but Donegal had paid 11% of US$29,312,164.57 into escrow. Accordingly, Ms Gereanu proposed that Donegal be informed that the outstanding question about the price needed to be clarified so that a deal could be concluded between Romania and Donegal.

200. On 19 January 1999, the Romanian Minister of Finance, Mr Decebal Trimis, wrote to the Romanian Prime Minister, Mr Radu Vasile, analysing the proposals from Zambia and Donegal in terms of price, payment period and security. Mr Trimis recommended that Donegal's proposal should be accepted. On the one hand, while the Zambian proposal was for 12% of US$29,834,368.06, amounting to US$3.52 million, it was "not secured and the due date is over one year" and that "[t]he results of the data obtained show that Zambia's financial situation is characterised by an acute lack of convertible currencies". On the other hand Donegal's offer, although lower, had a due date of 31 January 1999 and the payment was secured as the entire sum had been deposited into escrow to be released once the Romanian Ministry of Finance presented documents confirming the amount owed by Zambia and evidencing the underlying debt.

201. Mr Vasile accepted Mr Trimis' recommendation. Accordingly, the Zambian debt was assigned to Donegal by an Assignment Agreement dated 19 January 1999, and following examination of the documentation provided by Romania, on 21 January 1999 Donegal authorised Berliner Bank to release funds from escrow.

202. Romania appear to have been less than candid with Zambia about their decision. On 19 January 1999 Ms Gereanu wrote to Mr Popescu in Lusaka thanking him for his fax of 12 January 1999 and stating, "We are awaiting the project Agreement directly from the Ministry of Finance as promised by fax 312.42.84". However, by then Ms Gereanu clearly knew that the debt was to be assigned to Donegal, who had already paid the purchase price into escrow. She must also have known (either on that day or very shortly afterwards) that Mr Costea and Mr Sheehan signed the assignment to Donegal in Bucharest on 19 January 1999, and that the assignment was due to be completed on 22 January 1999.

203. Under the agreement of 19 January 1999 the price paid by Donegal was 11% of US$29,834,368.06, that is to say US$3,281,780. In general, the other terms of the assignment were similar to those of the agreement of 7 August 1998, but instead of Berliner Bank giving notice of assignment to Zambia within three business days of the assignment being completed, the terms of the assignment of 19 January 1999 gave Donegal control over the timing of notice of assignment being given to Zambia. Romania warranted by clause 6(b)(vi) that they were "the sole legal owner of, with good title to, the "Debt" free and clear from any liens, security interests, claims or other charges or encumbrances and it has not, directly or indirectly, made any prior sale, assignment or transfer of its interests in the "Debt""; and by clause 6(b)(vii) that "no other party has any rights, including without limitation any rights of subrogation, in or to the "Debt". There is no proper basis to conclude that there was an agreement between Donegal and Romania not to inform Zambia promptly of the assignment.

Zambia's response to the Memorandum of Understanding

204. After the Zambian delegation returned to Lusaka, Mr Ndopu spoke briefly to Mrs Chibanda and reported upon the negotiations in Bucharest in a memorandum to her dated 4 January 1999, to which I have referred. It had been prepared by Mr Mbewe, and stated: "…It was further agreed between the two parties that the Zambian Government had up to 31st January, 1999 to confirm to the Romanian Government whether their proposal of 12 cents to a dollar buy back proposal, repayable in one year was acceptable or not…" . It recommended that this proposal was the best option, and observed that the Romanian Government had warned that if Zambia did not confirm their agreement by 31 January 1999, they would have to sell the debt to "commercial debt collectors, as it was in the case of Camdex. A situation like this would be undesirable for Zambia since negotiation parameters with such debt collection, as experience, has shown will not be flexible". The reference to Camdex was, of course, a reference to the dispute that came to be litigated in this court: see Camdex International Ltd v Bank of Zambia No 2, [1997] 1 WLR 632.

205. Mr Ndopu gave evidence that, upon receiving the recommendation, Mrs Chibanda burst into his office at lunch time, screaming that she sent him to reconcile the debt and not to negotiate, a reaction that shocked him. She then handed back the file with this comment dated 6 January 1999 endorsed by her on the report: "Mr Ndopu, Your recommendations are not acceptable. We do not have a budget to cover this. Your role was to reconcile not negotiate."

206. Although undoubtedly this response took Mr Ndopu by surprise, Donegal submit that it was understandable in that the delegation had gone to Romania to reconcile a debt which Mrs Chibanda had been led to understand to be of the order of US$15 million and had agreed that it was about twice that amount. This was largely, as Mrs Chibanda later pointed out to Mr Mbewe, because of the amount of interest included in the consolidated debt for the purpose of calculating what Zambia were to pay.

207. I agree with this observation of Donegal as far as it goes, but it seems to me from the evidence that I have heard that neither of the two points made by Mrs Chibanda in her comment on the proposal was justified. First, while literally there was no budgetary provision specifically earmarked for the settlement that was proposed, her note that Zambia had no budget obscures the true position. Zambia's annual budget was not due to be presented until 31 January 1999 and provision could have been made in it

for the necessary funds. At the beginning of January 1999, no provision for the proposal was included in the draft budget, but Mr Mtonga explained that the budget could be adjusted at any time before it was presented to Parliament. In any case, as Mr Mtonga and Mr Ndopu explained, the budget was allocated on a block basis for debt repayments, and while if the proposed deal was accepted the Romanian debt might have to be given priority over other planned debt reductions, that was no reason to dismiss the proposal out of hand. Mr Mtonga also gave evidence that a provision would have been found to cover the proposed payments to Romania from contingency funding. Of course, the proposal would have budgetary implications, and of course, Zambia did not have funds readily available, but Mrs Chibanda seems to have been making a more specific point than that. Donegal also say that the problem would have been not only a matter of budgeting for the payments but funding in foreign exchange, but again that was not Mrs Chibanda's point.

208. Secondly, I cannot accept that the delegation was not sent to carry on negotiations but only to reconcile the amount of the debt. The evidence of Ms Nyirenda and Mr Ndopu that they were sent to negotiate was compelling and, for reasons that I have explained, I accept it. After all, although Mr Ndopu signed the Memorandum of Understanding, he did not purport to have bound Zambia to a particular deal to buy that debt or to make any payment: the delegation returned with an apparent opportunity to accept a Romanian proposal within a specific period of time. Moreover, the increase in the amount that it was contemplated Zambia might have to pay in fact resulted from the amount of debt found to be owing to Romania when the parties reconciled the accounts rather than the delegation adopting a novel approach in negotiations with Romania.

209. Zambia argue that Mrs Chibanda obstructed the proposed settlement by not referring it to her superiors, and decisively rejecting it herself. Ms Nawakwi, then the Minister of Finance, said that it would be "a great omission in the calls of duty for an officer at that level to let this pass". I accept that Mrs Chibanda should have advised her superiors about the outcome of the discussions with Romania and the delegation's recommendation and referred the decision to them, her superiors being Mr Mtonga, who was then the Secretary to the Treasury (or possibly the Acting Secretary to the Treasury – the evidence is not entirely clear), and Mr Nonde, who had recently been appointed as the Permanent Secretary for Budgetary and Economic Affairs. I find that she did not do so. I accept Mr Mtonga's evidence that he did not learn of the proposed deal with Romania at the time, and that, had Mrs Chibanda informed him, the proposed settlement with Romania would have been concluded. I also accept the evidence of Mr Mbewe (to which I shall refer shortly) that he informed Mr Nonde of the proposed deal and the deadline of 31 January 1999 for accepting the terms to which the Romanians were willing to agree. As I understand it, he did so at least a week after 6 January 1999 and if Mrs Chibanda was going to refer the proposal in Mr Ndopu's note to Mr. Nonde, it is likely, in my judgment, that she would already have done so. My impression when I heard the evidence was that the implication of what Mr Mbewe said was that when he spoke to Mr Nonde, Mr Nonde was unaware of the delegation's proposal. However, on reviewing the evidence, this does not appear clearly from it, and I do not consider that there is a proper basis for finding that Mrs Chibanda did not mention the delegation's proposal to Mr. Nonde at all. However, I do find that she did not refer the decision about it to him or to Mr. Mtonga as she

should have done. Had she referred it to Mr. Nonde he would surely have discussed it with Mr. Mtonga.

210. Donegal submit that the evidence indicates that in any event Mrs Chibanda discussed the proposal with Ms Nawakwi. This submission is founded on an internal memorandum setting out the history of the debt and written in late 2001, in anticipation of further negotiations with Donegal, by Mr C W Ng'omalala, a principal economist. He wrote: "The Zambian Government confirmed acceptance of the outcome of the discussions and submitted a proposal for the debt-buy-back in a letter to the Romanian Government on 28 January 1999 (see folio (228) Romanian Rescheduled Loans, Part II). However, in a minute to the Minister of Finance, the then Director (ERM) [that is, Mrs Chibanda] pointed out that the Zambian delegation that negotiated the debt-buy-back proposal did not have the official mandate to do so (see folio (254)). As a result the proposal was not finalised." Ms Nawakwi has no recollection of seeing the minute from Mrs Chibanda.

211. The minute of Mrs Chibanda is not in evidence and is, I am told, missing from the Ministry of Finance files. Clearly Mrs Chibanda wrote some minute to Ms Nawakwi about the proposal, but because the document is not available, two matters are uncertain: first, it is impossible to say what Mrs Chibanda said about the proposal although apparently she continued to take an unfavourable view of it. Secondly, there is some doubt about when Mrs Chibanda wrote her minute, but it seems to me from the folio number of the minute that it is more likely to have been written after 31 January 1999 than before that date. In reaching this conclusion, I accept that, as Donegal submit, the file keeping in the Ministry was poor and the folio numbers are a fragile basis for dating a document. However, a document given folio number 227 was dated 1 February 1999 and one given folio number 228 was dated 28 January 1999. It is prima facie probable that folio 254 was written some time after that. This seems to me a more telling indication of the date than Donegal's argument that the wording of the memorandum indicates that Mrs Chibanda's minute was written before 31 January 1999 in that it states that "As a result" the proposal was not finalised. The wording is ambiguous as to whether the words "As a result" are intended to mean that the proposal was not finalised because of Mrs Chibanda's minute or because the delegation did not have the necessary mandate.

212. I therefore conclude that the response of Mrs Chibanda to the delegation's recommendation was not justified. Zambia submit that I should infer that it reflects that she was not acting bona fide and had been suborned by Donegal or those for whom they are responsible. In support of this submission, they refer first to allegations made against Mr Ndopu, which I am asked to infer were orchestrated by Mrs Chibanda, and secondly to evidence that Donegal were prepared to make a donation to the PHI and this was made known to Mrs Chibanda. I must therefore set out the facts relating to these matters, although this requires me in the latter case to digress into the later history of this dispute.

<u>The allegations against Mr Npodu</u>

213. On 7 January 1999 Mr Npodu was suspended from his employment by a letter signed by Mr Mtonga. The background was that on 21 October 1998 he had been charged by the Zambian Police with a theft involving four transfers between 20 May and 30 June 1998 of US$80,000 from an account of the Ministry of Finance. He had

appeared in court in October 1998 in respect of the allegations. His suspension was in accordance with a General Order that provided that any public servant so charged should be suspended. During the period of his suspension between January 1999 and September 2003, Mr Ndodu was paid only 50% of his salary.

214. On 16 January 2002 Mr Ndopu was found not guilty of these allegations, and he was reinstated in his employment on 3 September 2003. It is right to record that there is no suggestion in these proceedings that he was guilty of any offence.

215. According to Mr Ndopu, the allegation arose from the loss of a Government Project cheque book from his office and the transfers had been made using cheques from that chequebook. (Mr Ndopu said that the loss was in July 1998 when he was away in Brussels with a Zambian delegation. The date is not consistent with other documents which refer to the theft being in May or June 1998, but this is not important for present purposes.) Apparently it was said against Mr Ndopu that he had "confirmed" the transactions. The matter was reported to the police by Mrs Celestine Kakalu, then a Permanent Secretary at the Ministry of Finance. Mrs Chibanda had been involved with this matter since at least October 1998 when she had had discussions with the police. The police wrote a letter to the Ministry of Finance dated 11 November 1998. The copy of the letter that is in evidence was apparently sent and received by the Ministry of Finance only on 7 January 1998: the original of the letter could not be traced in the Ministry and Mrs Chibanda requested a copy of it. It prompted the Ministry's Human Resource's management to have Mr Ndopu suspended: they sent Mr Mtonga a memorandum and draft letter, explaining that the Acting Director for Human Resources was away and "hence no under flying seal as usually done". There was some suggestion that the want of a flying seal is suspicious but this seems to me unwarranted speculation.

216. Zambia submit that it is to be inferred that Mr Ndopu's suspension was part of Mrs Chibanda's attempt to block the proposed deal with Romania. As I understand their argument, there is no suggestion that a memorandum from Mrs Chibanda orchestrated the charges laid against him. The evidence is that they resulted from a complaint by Mrs Kakalu and a police investigation. Indeed, Mr Ndopu's evidence was that before he returned from Romania, Mrs Chibanda displayed no hostility towards him. Zambia's allegation is that Mrs Chibanda, having taken no action about the matter in October 1998, decided to use it to have Mr Ndopu removed when he supported the proposed deal with Romania.

217. Donegal argue that there is no credible evidence that Mrs Chibanda, or anyone at the Ministry, knew of the charges and Mr Ndopu's court appearance before he went to Romania, and that had they been it is unlikely that he would have been permitted to lead the delegation. I am unable to accept Donegal's contention. Mr Ndopu said that his court appearance was known at the time at the Ministry and specifically that Mrs Chibanda was so aware, and it seems to me inherently improbable that Mr Ndopu could have kept his court appearance secret from others at the Ministry. I cannot tell from the evidence before me why Mr Ndopu was not suspended earlier than he was. It might be that it was thought important that he should go on the delegation to Romania and his suspension was therefore delayed until his return, but that is conjecture.

218. However that may be, I decline to infer, as Zambia ask me to do, that Mrs Chibanda was motivated to have Mr Ndopu suspended by her wish to block the proposed deal. (It is possible that she was influenced by anger or disappointment about the report of the negotiations, but that is a different matter.) There is simply insufficient evidence to support such a serious allegation. After all, Mr Mphande, who was Mr Ndopu's replacement under Mrs Chibanda, told Mr Poposcu at their meeting on 12 January 1999 according to the Romanians' record that "the Zambian party will accept the Romanian party's standpoint stipulated in the memorandum signed in Bucharest", and showed Mr Popescu a "[draft] agreement between governments of the countries which, at the end of this week, will sign the summary of approvals". This meeting took place, presumably, with the authority of Mr Mphande's superiors, including Mrs Chibanda. There is no indication that Mrs Chibanda sought to restrict communications between Romania and Zambia or to prevent Mr Mphande from supporting the proposal in his discussions with Mr Popescu.

The Presidential Housing Initiative

219. On about 7 or 8 January 1999, shortly after Mr Ndopu was suspended, Mr Mbewe asked Mrs Chibanda why she opposed proceeding with the proposal to buy back the Romanian debt. She said that interest should not have been included in the consolidated debt for the purposes of the buy back arrangement. (Mr Mbewe pointed out that this was not a cogent reason since in fact interest is generally brought into account in such arrangements, including arrangements under Paris Club terms, but I do not find Mrs Chibanda's comment remarkable given the amount of interest included in what was owing to Romania and reflected in the proposed settlement figure.) Mr Mbewe's response was that anyone purchasing the debt would seek to enforce a payment of more than US$3.5 million, but he was not able to advance the matter with Mrs Chibanda. He told Ms Nyirenda of this conversation, who agreed that Mrs Chibanda's stance did not make sense.

220. Mr Mbewe also gave evidence that Mrs Chibanda told him to "let go" because other people were interested in buying the debt and that they would make a contribution to a housing investment project, and they were discussing with the President buying the debt and investing in Zambia. I accept that this was a reference to Donegal suggesting that they might make a contribution to or provide support for the PHI. I find that Mr O'Rourke or Mr Mwale had made it known to Mrs Chibanda before the debt was assigned that Donegal might support the PHI.

221. In reaching this conclusion I do not overlook that at one point in his cross-examination Mr Mwale was unable firmly to say whether reference was made to the possibility of a donation to the PHI in meetings before the debt was assigned, but thought that it would be too early for that to have been mentioned before 19 January 1999. However, he acknowledged that before writing the letter of 3 February 1999 to which I shall refer, he would have "checked it out" with Mrs Chibanda and other officials, and I conclude from Mr Mbewe's evidence that he did that before the assignment of the debt.

222. The PHI was a project that was established in about November 1998 and was in principle a straightforward scheme to provide subsidised housing and privatise existing government owned housing. It seems that it emanated from President Chiluba, but it is clear from the evidence of Mr Malambo that it was discussed in the

Zambian Cabinet and supported at least initially by the Government. Ms Nawakwi explained that the PHI "had no legal persona" and that "there was no legal framework for PHI". Donegal fairly observe in their closing submissions that it might in the end have been used in a corrupt manner. I cannot form any view about these questions. It suffices to say that there is no reason to suppose that it was inherently an improper scheme or that it was set up with improper motives or that Donegal did or should have supposed at any relevant time that the PHI was other than a worthy scheme.

223. In a letter dated 3 February 1999 Mr Mwale indicated to the Zambian government that Donegal were willing to support the PHI. The letter was addressed to Ms Nawakwi and headed "Funding of Presidential Housing Initiative". It was written on the letter paper of Somerset, their address being given as Suite 450, 1747 Pennsylvania Avenue, Washington DC. Mr Mwale signed himself as an "Executive Director". In cross-examination, he acknowledged that he held no such position with Somerset. He denied intending to deceive or mislead, but he provided no explanation for this description of himself. Another curious feature of the letter is that, having said that Mr Sheehan would be coming to Lusaka on 17 February 1999, Mr Mwale continued, "My managing director, Mr O'Rourke, will be accompanying Mr Sheehan". He said that he so described Mr O'Rourke "for lack of a better expression", again an inadequate explanation for misleading the Minister. The letter also referred to the "Lusaka Office P.O.Box 32605", the Post Office Box of Trade Factors.

224. Mr Mwale was deliberately exaggerating his connection with Somerset, but I am not able to discern why he should have done so. Mr O'Rourke must have provided the letter paper to Mr Mwale. Mr Mwale was unable to provide any credible explanation that I can accept as to why this letter was written in Somerset's name.

225. Mr Sheehan's evidence was that it was Mr O'Rourke's idea to indicate possible support for the PHI, and that he (Mr Sheehan) did not want to send a letter on Donegal letter paper about the PHI because, although he considered it a good project, he was concerned that it would associate the debt too closely with President Chiluba's government and so "politicise" it. In the event, the letter had been written on the letter paper of a company that used DAI's address. Mr Sheehan's evidence was that he was annoyed about this and he took up with Mr O'Rourke both the support for the PHI generally and the use of Somerset's address in particular, but that Mr O'Rourke's response was that he was not too concerned and that there was nothing wrong with the PHI.

226. I reject Mr Sheehan's evidence that he was reluctant for Donegal to be associated with the proposed contribution to the PHI for political reasons. Shortly afterwards, on 18 February 1999 he signed a letter to Mr Donald Chanda, President Chiluba's Special Assistant for Economic Affairs. It was sent from "Donegal International Limited, c/o Somerset Investments, Inc.", and attached a memorandum referring to the PHI and suggested a donation to it. Further in an undated e-mail sent by Mr Sheehan to a Mr Mike Eckels of DAI he said that a deal for realising the debt was "going to get done for political reasons because we are going to discount a bunch of whatever we get to the President's favourite charity". There is no support for the suggestion that Mr Sheehan was concerned about "politicising" the debt at any stage of Donegal's dealings with it.

227. In the letter of 3 February 1999 Mr Mwale said that he believed that he and his "associates" could "offer creative sources of finance" for the PHI. He said that they had identified a donor that would make a donation of "several million dollars in local currency to finance the project on an accelerated basis". He continued, "Moreover, we have identified an independent self-financing and on going revenue stream to expand the [Presidential Housing Initiative] indefinitely". The proposal was that Donegal would donate two million dollars of the Zambian debt, this debt being surrendered to the Bank of Zambia in exchange for kwacha to be spent on the project. Donegal would convert the rest of the debt into local currency and invest it, over time and in consultation with the Zambian Government and Bank of Zambia, in projects approved by the Zambian Government, including the PHI. The letter continued, "Similarly our affiliate, Gameco Partners CI ("Gameco") has reached agreement with a major operator of lotteries in emerging markets, Canadian Bank Note ("CBN") to jointly operate an on-line national lottery system", and said that Gameco and CBN had indicated that "a significant percentage of the total gross income from an on-line lottery … can be earmarked for the PHI". Mr Mwale requested that Mr Sheehan, Mr O'Rourke and a Mr Michael Dolan, who was described as the Chief Finance Officer of Gameco, might have a meeting with Ms Nawakwi and her officials.

228. Ms Nawakwi sought advice from Dr Mwanza, the Governor of the Bank of Zambia, about the proposal: it appears from the terms of his reply that she did so by letter dated 25 February 1999 although no copy of that letter has been found. Ms Nawakwi believes that, when she received the letter from Mr Mwale, she did not appreciate that the debt had already been assigned by Romania. Although the letter referred to Donegal as "a major creditor of Zambia", Ms Nawakwi apparently did not pick up the significance of this. I accept her evidence. It is clear from Dr Mwanza's reply that he too did not appreciate that the debt was already assigned and he cannot have been told this by Ms Nawakwi: I cannot believe that she would not have mentioned this in her letter of 25 February 1999 if she had been so aware.

229. Dr Mwanza responded by letter dated 4 March 1999, stating it was unusual to assign sovereign debt without the consent of the debtor country, and that it would be preferable to attempt to negotiate with Romania. He also commented unfavourably upon the proposals made by Mr Mwale, describing the proposed donation to the PHI as "a sweetener with no real value" which would require the Bank of Zambia to print money, and which therefore would create inflationary pressures and not be consistent with Zambia's debt reduction strategy. He gave evidence expressing those same views, adding that the Central Bank had to produce money in line with benchmarks stipulated in the IMF programme and provide data about money supply levels fortnightly to the IMF, and that Donegal's proposal sought to obtain an advantage over other creditors. (It is apparent that Dr Mwanza was concerned about inflationary pressures in the sense that the money supply would increase. Professor Gianviti explained that the IMF more commonly referred to inflation in this sense rather than an increase of prices. The investment might, as Mr Sheehan maintained, have generated growth which would prevent inflation in the latter sense.) Ms Nawakwi told me, and I accept, that she shared Dr Mwanza's unfavourable view of Donegal's proposal. However, I observe that she thought it right to take the advice of Dr Mwanza and did not regard the proposal as one which she should dismiss out of hand.

230. I therefore find, as I have said, that Mrs Chibanda was aware, before the debt was assigned by Romania to Donegal, that the purchasers of the debt had indicated that they might contribute, or that they proposed to make a contribution, to the PHI. I also conclude that she was made aware of this by Mr Mwale or Mr O'Rourke. However, there is no reason to suppose that that information was given to Mrs Chibanda covertly and on the basis that Mrs Chibanda would keep the information secret, and it is apparent from Mr Mbewe's evidence that she did not keep that information secret. It has been suggested that the information was given to Mrs Chibanda in order to influence her to obstruct the delegation's proposal, and so was something in the nature of a bribe or improper inducement that created a conflict between her duty to the Government and her interest. I am unable to accept that. The mischief of bribes, or secret commissions, is that they are secret. It might be that Mrs Chibanda thought that the prospect of support for the PHI was attractive, and it might be that the sounder view was that of Dr Mwanza and Ms Nawakwi. It might be that Mrs Chibanda thought that the potential benefit to Zambia of having finance for housing those on low incomes was something properly to be weighed when deciding upon the relative benefits of Zambia buying back the debt and allowing it to be bought by a third party. I am unable to conclude that it was in itself improper for Mrs Chibanda to be made aware of the possibility that Donegal might contribute to the PHI.

Mr Mbewe's attempts to "rescue" the buy back proposal

231. When he learned of Mrs Chibanda's opposition to the proposed agreement to buy back the Romanian debt, Mr Mbewe tried to "rescue" it at a meeting with Mr Popescu. Mr Mbewe's evidence was that he sought to persuade Mr Popescu to move the deadline for accepting the proposed settlement of the debt from 31 January 1999 to the end of February; but that Mr Popescu's response was that Zambian officials were not interested in the deal and the Romanian Government could wait no longer: if no response was received from Zambia by 31 January 1999, Romania would sell the debt to a commercial buyer, and thereby receive the same as they would from the Zambian Government. According to Mr Mbewe, Mr Popescu explained that there were senior officials in the Zambian government who wanted to buy the debt for their own benefit, but he would not disclose who they were. Mr Mbewe and Ms Nyirenda decided not to tell others at the Ministry about Mr Mbewe seeing Mr Popescu.

232. Mr Mbewe said that this meeting took place in mid-January 1999 but was uncertain about the date. It is possible that it took place before the meeting between Mr Popescu and Mr Mphande on 12 January 1999, and this would explain the otherwise curious feature of Mr Mbewe's account that Mr Popescu did not mention to him what Mr Mphande had said. However, it also seems strange that Mr Mbewe was concerned in the first half of January to obtain an extension of the deadline of 31 January. After all, if he was to achieve his purpose of having Zambia accept the delegation's proposal, he would wish to persuade his superiors of this before the budget was finalised at the end of January.

233. I regard Mr Mbewe as an honest witness, and generally I find his evidence reliable, but I am unable entirely to accept this part of his account. Mr Popescu did not report to the Romanian government upon a meeting with Mr Mbewe, although he does report upon his meeting with Mr Mphande, and I would have expected some report of

a meeting such as Mr Mbewe described in which a request for an extension of the 31 January 1999 deadline was sought.

234. I am willing to accept Mr Mbewe's evidence that he had some meeting with Mr Popescu, but I cannot accept his evidence about what was said. There is no evidence that "senior officials in the Zambian government" were interested in buying the debt for their own benefit (whatever that might mean). Mr Mbewe made it clear in his evidence that he did not suggest that Mrs Chibanda was involved in such a plan. There is no suggestion of any such interest on the part of officials in reports from the embassy in Lusaka to the Romanian government (or indeed in other documents disclosed by the Romanian government) and I cannot believe that there would be no reference to such an expression of interest. Nor can I accept that Mr Popescu told Mr Mbewe that senior officials were interested in buying the debt for their own benefit if they were not. Although it is not easy to discern precisely the negotiating ploys of the Romanian government and although undoubtedly they were exploiting to their advantage the competing offer from Donegal and interest expressed by the delegation in buying back the debt, it seems to me improbable that Mr Popescu would have told an untruth of that kind.

235. Whatever was said at the meeting between Mr Popescu and Mr Mbewe, Ms Nyirenda and Mr Mbewe were still concerned about how this matter was being handled by Mrs Chibanda, and agreed to approach Mr Nonde, who had recently been appointed to be the Permanent Secretary for Budget and Economic Affairs. Mr Mbewe provided Mr Nonde with the Memorandum of Understanding and a draft agreement, and explained that he thought that Mrs Chibanda would frustrate the deal going through. (He said that he also reported that Mr Popescu had spoken of Zambian officials trying to purchase the debt for themselves, but that too I am unable to accept.) Mr Nonde said that he would speak to Mrs Chibanda, but there is no evidence whether he did so and if so what was said. Although Mr Nonde told Mr Mbewe that he thought the deal a good one, there is no indication that he concluded that the view of the proposal taken by Mrs Chibanda or her response to it was so outrageous that she was in breach of her duties.

236. Later that day or on the next day, Mr Nonde asked Mr Mbewe to prepare a letter accepting the proposal in the Memorandum of Understanding with Romania. Mr Mbewe prepared a draft letter for signature by Mr Nonde, which was to be sent to the Romanian Minister of Finance together with a draft agreement, and he took the documents to Mr Nonde's office. Mr Nonde did not sign the letter immediately, and Mr Mbewe was unable to see him over the next few days, because Mr Nonde was busy preparing the budget. Accordingly, concerned that time was running out and in an attempt to save the deal for Zambia and to safeguard Zambia's position, at some time before the end of January 1999 Mr Mbewe and Ms Nyirenda sent by fax to Romania an unsigned letter of acceptance to Romania together with the draft agreement. Their evidence is that they did so from a hotel in Lusaka because the only other machine available to them was in Mrs Chibanda's office. As far as appears from the evidence before me, no acknowledgment or reply was received.

237. Thereafter, according to Mr Mbewe, Mr Nonde telephoned Mr Mbewe and asked him for a re-dated copy of the letter. On 28 January 1999 Mr Mbewe brought him a copy of the letter dated 28 January 1999 and Mr Nonde signed it. Mr Mbewe sent it to Romania by fax. He also took the original to Mr Popescu, but Mr Popescu said that

the Romanian Government had already sold the debt. On learning this, Mr Mbewe, disheartened, gave up his attempts to rescue the deal: he cannot remember whether he reported to Mr Nonde what Mr Popescu told him but thought that he had not done so.

238. The timing of these events is difficult to work out. Mr Mbewe said that Mr Nonde signed the letter on 28 January 1999. However, on 8 February 1999 Mr Popescu sent a copy of the letter and draft agreement by fax to the Romanian Ministry of Finance and Ministry of Trade and Commerce. In his covering note he wrote, "The Letter was recently signed (yesterday) because the Zambian party has searched (with no success so far) to find the reason for which the Bank of Zambia did not pay to Romania in 1986 the amount of 522.203.49 USD, although it (the Bank) issued instructions for this purpose." It seems unlikely that Mr Popescu would have told Mr Mbewe that the debt had been sold before 1 February 1999 because at that time the Romanian Embassy in Lusaka still understood that the debt was to be bought back by Zambia from Romania: on that date Mr Popescu wrote a note to the Zambian Ministry of Finance informing them of a forthcoming Economic and Information Mission to Zambia, including officials of the Romanian Ministry of Industry and Commerce. He requested an appointment for them to discuss "bilateral economic relations, as well as, the last measures for the settlement of Zambia's debt to Romania".

239. The picture is obscure. It is not impossible that Mr Nonde's letter was signed in February 1999 and dated (Friday) 28 January 1999 so that it would have a date before the deadline of (Monday) 31 January 1999, but there is no proper basis for finding that the letter was back-dated and rejecting Mr Mbewe's evidence about when it was signed, and I decline to do so. Further, there was no reason for Mr Mbewe to have delayed faxing the letter once it had been signed. I conclude that the letter was signed and faxed on 28 January 1999 and the copy brought to Mr Popescu on 7 February 1999. Admittedly this leaves unanswered questions: why did Mr Popescu have the impression that the letter had been signed only on 7 February 1999? Why did Mr Mbewe not protest, when told by Mr Popescu that the debt was already assigned, that the letter had been faxed before the deadline of the end of January? Why should Mr Mbewe not have reported his conversation with Mr Popescu to Mr Nonde? Mr Mbewe explained that by this stage he felt so demoralised in his attempt to "rescue" the delegation's proposal that he gave up the struggle and this might go some way to explain these curiosities. But whatever the answer to these questions, I conclude that it is probable that Mr Nonde's letter was faxed to Romania on 28 January 1999.

Notice of the Assignment

240. As a matter of international convention, assignments of debt between sovereign countries, at least in cases such as this, require the consent of the debtor state. This was the evidence of Dr Mwanza and is reflected in his letter to Ms Nawakwi dated 4 March 1999, and I accept this evidence. Zambia did not, of course, consent to the assignment of the debt, and I accept Dr Mwanza's evidence that had it been sought, consent would not have been given. However, it is not suggested that there is any legal restraint that prevented the assignment of the debt without Zambia's consent.

241. After the assignment Donegal obtained from Mr Chizyuka a letter dated 12 February 1999 and addressed to Mr Sheehan in his capacity as a director of Donegal. (In this

judgment I refer to this letter as the "Acknowledgment"). It was headed "Assignment of US$29,834,368.06 of face value principal and capitalised interest and all accrued interest thereon from Government of Romania to [Donegal]….". Under the heading it read:

> "Dear Sir,
>
> We refer to the above-mentioned Debt, originally borrowed by Government-owned companies for commercial purposes.
>
> The Ministry of Finance and Economic Development (the "Ministry"), acting for and on behalf of the Republic of Zambia, hereby acknowledge the assignment of the Debt to Donegal International Limited ("Donegal") and confirm that we will duly register your firm in our accounts as creditor and beneficial holder of the Debt.
>
> In the event that we receive written notice from Donegal or subsequent holders that the Debt has been assigned, this Ministry will forthwith confirm in writing to the relevant assignees that such assignees have been registered as beneficial holders of the Debt.
>
> Please advise should you require any additional clarification from this Ministry.
>
> Sincerely"

It was signed by Mr Chizyuka above the words, "Acting Director (ERM) for Permanent Secretary (EA&B)" (sic, not B&EA, standing for Budget and Economic Affairs).

242. There is some uncertainty about how and when Zambia first learned of the assignment and Donegal gave notice of it. The resolution of this question is not of direct importance to what I have to decide, but it is of some relevance by way of background to when Donegal requested, and, more importantly, in what circumstances they obtained, the Acknowledgment.

243. There is in evidence a Notice of Assignment dated 22 January 1999. It reads as follows:

> "1. [Romania] as owner with full title guarantee of the "Debt" gives notice that upon 19th January 1999, [Romania] assigned to [Donegal] all its rights and claims in the "Debt" with effect from January 22nd, 1999.
>
> 2. Description of the "Debt": US$29,834,368.06 of face value principal and capitalized interest obligations owed by the Republic of Zambia to the Government of Romania and related interest thereon …
>
> 3. We request [Zambia] acknowledge and register [Donegal] as legal holder of all rights and claims under the "Debt" …5.

> Please confirm registration of [Donegal] as holder of the "Debt" and of the rights and claims thereto and acknowledge receipt of this "Notice of Assignment" to…"

It states that the Notice was governed by English law.

244. The chronology over this period is difficult to piece together from the documents that are available and the evidence. There are two letters signed by Mr Costea, in both of which it was said that the Romanian Government "approved the recovery of the Zambian Debt by [Donegal], a company which has bought our rights of claim from Zambia and assured payment of the recovered value of our claims up to January 31, 1999". One version was addressed to the Zambian Ministry of Finance for the attention of Mr Ndopu and dated 27 January 1999; the other was addressed to the Zambian Minister of Finance, and there are various copies of it bearing either a stamped date of 2 February 1999 or a manuscript date of 5 February 1999. Ms Gereanu sent the second version to the Lusaka Embassy on 12 February 1999, under cover of a note that explained that Donegal "assures better recovering conditions for the Romanian party compared to the conditions proposed by the Zambian Ministry of Finance and Economic Development". Under cover of a Note Verbale dated 29 March 1999 the Romanian Embassy sent the original letter dated 5 February 1999 to the Ministry of Finance, stating that the letter had been sent to the Ministry of Finance.

245. It is clear from the Note Verbale that the Romanian Government was treating the letter of 5 February 1999 as the official communication although a copy of the letter dated 27 January 1999 was also among the documents provided by the Romanian Government for the purposes of these proceedings. No version of the letter of 27 January 1999 was on Zambia's files and, according to Mr Mbewe, Zambia only recently obtained a copy of it from the Romanian Government in the course of these proceedings. That version of the letter has some curious features: it is not on official paper, and the telephone number that it bears appears, according to Mr Mbewe's evidence, to be that of a private individual. (I have already observed that on 1 February 1999 the Romanian Embassy seems to have been unaware of the assignment.)

246. I conclude that the version of the letter dated 27 January 1999 was never sent to Zambia. It is likely that the Romanians gave Zambia notice of the assignment by the letter of 5 February 1999 and that it was sent to the Ministry of Finance at or about that time.

247. Donegal too gave Zambia notice of the assignment in the form of a document from both Donegal and Romania and dated 22 January 1999. There is more uncertainty about when Donegal gave Zambia this notice. On 1 February 1999 Mr Sheehan sent a fax to Ms Liteanu advising her that notice of assignment had been delivered to the Zambian government and that she or Mr Costea was likely to receive a call from the office of the Attorney General to verify that Donegal were a valid assignee. This, according to Mr Sheehan, reflected what he had been told by Mr Mwale via Mr O'Rourke.

248. According to Mr Sheehan's evidence at trial, Donegal sent Zambia a notice of the assignment by fax although in the course of his cross-examination he seemed to

become less certain about whether he had done so. No copy of the fax has been produced, and Mr Sheehan's account is inconsistent with Donegal's pleaded case that there was a delay in Donegal giving Zambia notice of the assignment because Mr Sheehan, knowing that he was going to Zambia in early February 1999, decided to deliver the notice personally. On the other hand, in his evidence at the American hearing Mr Sheehan had said that he thought that the notice had been faxed to Lusaka.

249. It seems to me unlikely that Mr Sheehan would have told Ms Liteanu that notice of assignment had been delivered unless it had been, and despite the tentative tone of Mr Sheehan's evidence about notice being sent by fax before his trip to Lusaka, I conclude that it probably was, and conclude that Donegal told Zambia of the assignment on or about 1 February 1999. I therefore conclude that that was when Zambia first learned that the debt had been assigned to Donegal.

250. Mr Sheehan also gave evidence consistent with Donegal's pleaded case that he delivered to Mrs Chibanda an original copy of the notice of assignment dated 22 January 1999 at a meeting on or about 8 February 1999 at which he, Mr Mwale, Mrs Chibanda and Mr Chizyuka were present. He said that he left a copy of the Notice of Assignment on the table upon leaving the meeting.

251. Mr Sheehan said that at this meeting he requested an acknowledgment "recognising Donegal as creditor", that he was asked what form it should take, and that accordingly he told the meeting how it should be worded. Mr Sheehan did not say that he asked Zambia to confirm that it would register any future assignee of the debt in its books as the owner of the debt. However, he did, as he told me, ask Mr Chizyuka to acknowledge the commercial nature of the debt. (He denied that this was done with a view to disputing any potential claim to state immunity, but said that he had in mind "the IDA [International Development Agency of the World Bank] buy-back programme", which sometimes allowed the use of funds to buy back government debts that were of a quasi-commercial nature. Zambia challenge this explanation on the basis that Mr Sheehan had written in his memorandum of 12 May 1997 to Romania that Zambia had completed a World Bank funded buy back of US$200 million of external bank and trade debt in 1994. However, this matter was not fully explored in evidence and I decline to determine it. The important point, as it seems to me, is Mr Sheehan's evidence that he prompted the reference to the commercial nature of the debt in the Acknowledgment.)

252. Mr Sheehan's evidence must be considered in light of accounts of this meeting that he had given previously. In his affidavit of 4 March 2005, Mr Sheehan gave evidence that he had delivered the notice to Mrs Chibanda on or about 8 February 1999. However, when he gave evidence at the American hearing on 25 May 2005 he said that he was unsure to whom he delivered it, although he did deliver it at the Ministry of Finance, adding, as I have mentioned, that he believed that it was also sent by fax to the Ministry. Mr Sheehan explained this inconsistency when cross-examined before me on the basis that he went to the meeting and left the notice on the table with those present, and this slipped his mind when giving his evidence to the United States District Court.

253. Mr Mwale too gave evidence of a meeting on 8 February 1999 attended by Mr Sheehan. It had been arranged in advance and he and Mr Sheehan went to Mrs Chibanda's office and joined Mrs Chibanda, Mr Chizyuka and other officials. At the

meeting, Mr Mwale said, Mr Sheehan delivered the notice of assignment and requested an acknowledgment of the assignment. The form of the proposed acknowledgment was discussed, and Mrs Chibanda said that, because she was about to go abroad, Mr Chizyuka would prepare the document. According to Mr Mwale, the officials regarded this as a formality that presented no difficulty. He said that the Ministry of Finance representatives were taking notes as Mr Sheehan explained the type of document that was being sought, which might suggest that after the meeting they would have drafted the Acknowledgment on the basis of their notes of the discussions and typed it in the Ministry for Mr Chizyuka's signature.

254. Mr Chizyuka's account was that at some time during the first ten days of February 1999 Mrs Chibanda called him into his office and he found his brother-in-law, Mr Mwale, there. In a brief discussion Mrs Chibanda explained to him that Donegal had purchased the Romanian debt, that Mr Mwale represented them and that Donegal would be providing documents giving proof of the purchase. Mr Chizyuka said that it was possible that another person was present, but he did not think that it was Mr Sheehan. (He thought that he did not meet Mr Sheehan until some weeks later he had dinner in Washington with him, Mr O'Rourke and Mr Mwale. It appears that that was a social occasion: Mr Chizyuka said that at that meeting "nothing substantive" was discussed.) Mr Chizyuka was firm in his denial that he was present at a meeting when anyone representing Donegal presented the notice of assignment.

255. There is an important conflict between the evidence of Mr Mwale and Mr Chizyuka about the circumstances in which Mr Chizyuka actually signed the Acknowledgment. Mr Mwale's evidence was that he collected the Acknowledgment for Donegal from the Ministry of Finance, but he did not see Mr Chizyuka when he did so. He was simply told that the Acknowledgment was ready and collected it. Having done so, Mr Mwale faxed the Acknowledgment from the Greenwich Centre in Lusaka on 15 February 1999. A copy of the letter in evidence confirms that it was sent by fax from the "Greenwich Centre" in Lusaka, but it does not indicate to whom it was sent.

256. According to Mr Chizyuka, a few days after the meeting at which Mrs Chibanda told him that Mr Mwale was representing Donegal, Mr Mwale came to his office and asked for assistance in relation to the debt. He told Mr Chizyuka that, "there will be something in it for all of us", and Mr Chizyuka interpreted this to mean that he would be paid for his assistance. He did not ask how much he was to receive. Mr Mwale produced the letter for him to sign, saying that Donegal needed it to be signed quickly because they had to "hedge the bet" or to "hedge our position". Mr Chizyuka signed the letter and it was returned through his office. He told me that he felt apprehensive and suspicious about being asked to sign the letter, and that at the time he thought that it might not be the right thing to do.

257. Mr Mtonga's evidence was that a letter of this kind should not have been written by an official of Mr Chizyuka's level, but by the Secretary to the Treasury or a Permanent Secretary. It is true that he was acting in Mrs Chibanda's stead and was effectively the director of the ERM in her absence, but this does not answer Mr Mtonga's point. I accept Mr Mtonga's evidence.

258. Zambia submit that I should accept the evidence of Mr Chizyuka about whether the Acknowledgment was prepared in the Ministry of Finance. In support of this submission they rely upon both the contents of the document, in that, as they say, it

was carefully drafted to Donegal's advantage, and its style and presentation that, they say, show that it was not prepared within the Ministry. They also observe that, according to the evidence of Ms Nyirenda, which I accept, the letter was not to be found on the relevant file in the Ministry, but in view of the evidence about other documents missing from the Ministry files, I do not regard this as significant.

259. As for the document's contents Zambia point out that:

i) The letter referred to the total amount of the debt as being US$29,834,368 constituting "face value principal and capitalised interest", although, Zambia say, there had been no agreement between Zambia and Romania about interest being capitalised.

ii) It stated that the debt had been "originally borrowed by Government-owned companies for commercial purposes".

iii) It acknowledged the assignment to Donegal.

iv) It confirmed that Zambia would register Donegal in their accounts "as creditor and beneficial holder of the Debt".

v) It confirmed that, if Donegal "or subsequent holders" gave written notice that the debt had been assigned, the Ministry of Finance would "forthwith confirm in writing to the relevant assignees that such assignees have been registered as beneficial holders of the Debt".

260. I do not find this part of Zambia's argument persuasive. The purpose of the letter was to acknowledge the assignment and the reference to Donegal being the creditor and the beneficial owner adds nothing significant. Nor do I attach importance to the reference to subsequent holders, given that the debt was transferred to a SPV to avoid the need for further assignments if it was decided to transfer the debt. While I accept that no concluded agreement had been reached between Romania and Zambia about interest being capitalised, Donegal were not party to those discussions and given what they were told by Ms Liteanu and since the phrase "face value principal and capitalised interest" was used in the notice of assignment, it is unremarkable that it was also used in the Acknowledgment.

261. Donegal argue that the reference to "commercial purposes" is explained by Mr Sheehan's request that this point be included in the Acknowledgment at the meeting with Mrs Chibanda. However, as I shall explain, I reject the account of Donegal's witnesses about a meeting on 8 February 1999, and prefer Mr Chizyuka's evidence about that. Nevertheless, this does not mean that Donegal did not make some contribution to the contents of a letter drafted in the Ministry. (I note that, in any case, this would not have assisted Donegal with regard to Zambia having state immunity in respect of the debt if Mr Trace is right in his concession that Zambia retained after assignment the immunity that they enjoyed in respect of debt between states.)

262. I consider that there is more force in the points made by Zambia about the style and presentation of the letter.

i) First, I accept the evidence of Ms Nyirenda that the Ministry of Finance usually used a different font from that in which the Acknowledgment was typed.

ii) Secondly, I accept the evidence that a letter drafted in the Ministry would normally have used the full titles "External Resource Mobilisation" and "Budget and Economic Affairs" (rather than the initials).

iii) Thirdly, if the letter was typed in the Ministry, the name of the Ministry would usually have been written under the position of the author.

iv) Further, the letter described Mr Chizyuka as signing the letter as "Acting Director (ERM) for Permanent Secretary (EA&B)". The initials are not in the proper order to stand for Budget and Economic Affairs, and, it is suggested, betray unfamiliarity with the structure of the Ministry. (Those representing Donegal spotted that Mr Mtonga in his witness statement at one point referred to the Permanent Secretary for "Economic and Budgetary Affairs" – which might be abbreviated to "E&BA" – but even these were not the initials used in the Acknowledgment.)

v) Mr Chona pointed out that the heading of the letter has been placed above the words "Dear Sir". The usual style of the Ministry (which, Mr Chona explained, was inherited from the British Colonial Service) was to place the heading beneath the words of address.

vi) Finally, the letter is signed under the single word "Sincerely". Mr Chona told me, and I accept, that Ministry letters use the style "Yours faithfully" or "Yours sincerely".

263. Zambia also point out that Mr Chizyuka was Chief Economist in the Multilateral Co-operation Unit of the ERM, not Acting Director, but since, as Donegal would say, he was signing the letter because Mrs Chibanda was away, I do not consider that there is any significance in that point.

264. I recognise that the letter was typed on letter paper of the Ministry of Finance. This does not persuade me that it was unlikely to have been prepared by Mr Mwale or by someone else outside the Ministry. Mr Mwale himself said that he spent a great deal of time at the Ministry and walked around the Ministry freely, and it is unrealistic to think that he would not have had access to Ministry letter paper.

265. Taken individually, none of Zambia's points is of sufficient weight to demonstrate that the document was not prepared within the Ministry and an unusual style or presentation happened to be adopted. However, taken together, they persuade me that the letter was prepared outside the Ministry and presented to Mr Chizyuka for his signature. I accept Mr Chizyuka's evidence that Mr Mwale brought a draft with him to the Ministry and obtained his signature upon it.

266. There is a further point that reinforces my conclusion that I should accept Mr Chizyuka's account of the background against which he came to sign the Acknowledgment and which makes me the more cautious about accepting the account of Donegal's witnesses. In his letter of 3 February 1999 Mr Mwale told Ms

Nawakwi that Mr Sheehan would be in Lusaka from 17 February 1999. There is no documentary indication that he changed his travel plans. It appears unlikely that he was in Lusaka on 15 February 1999 because if he were there is no obvious reason that Mr Mwale would have sent the Acknowledgment by fax rather than simply have given it to Mr Sheehan. I do not regard as reliable the evidence that Mr Sheehan was attending a meeting in Lusaka on 8 February 1999 and prefer the evidence of Mr Chizyuka that Mr Sheehan was not present when he saw Mr Mwale with Mrs Chibanda.

267. Mr Chizyuka's evidence was that not only did Mr Mwale indicate to him that he would be paid for providing this letter, but that in due course he was paid. His evidence was that Mr Mwale came to his home and paid him US$4,000 in cash, making it clear that this was by way of payment for the assistance that he had given over the Romanian debt. In his witness statement, Mr Chizyuka said that he could not remember when he received this payment, but when cross- examined he said that it was in 2004 after he had ceased to work for the Ministry of Finance on 15 June 2004. According to Mr Chizyuka, Mr Mwale told him that he had received money from Donegal and he was passing on some of it. As I shall explain, by this time Donegal had received from Zambia payments amounting to some US$2.4 million.

268. There is no dispute that Mr Mwale did indeed give US$4,000 to Mr Chizyuka. Mr Mwale's evidence is that he paid this money to Mr Chizyuka at his home in around November 2004. His explanation was that this was a family gift made when Mr Chizyuka had been suspended from his job because he was being investigated for corruption and was in financial difficulties. Mr Mwale explained in his witness statement, "This sympathy and solidarity is expected in our society, and from experience, we know in Zambia that once you are thus accused, the Government takes your passport, you are stigmatised by the accusations and it is difficult to engage in business and these cases take years to conclude. So it's not unusual, and indeed expected, for friends and relatives to "chip in"."

269. Mr Chizyuka denied that he was ever suspended from his position in the civil service. He explained that on 15 June 2004 he ceased working for the Ministry of Finance and between 15 June 2004 and 25 March 2005 he was not working but was waiting reassignment to another position: he remained a civil servant and a permanent secretary. He received full pay: a civil servant who is suspended receives only half pay. He kept his government car and received other emoluments of his position. He also retained his passport, and travelled abroad with the authority of the Secretary to the Cabinet. I accept Mr Chizyuka's evidence about this.

270. Mr Mwale acknowledged that, despite the impression that his witness statement gives, he knew that Mr Chizyuka had not had his passport taken away. However, he maintained that, although receiving his civil service pay, Mr Chizyuka was facing some financial difficulty because he was not allowed to travel on official business and therefore not receiving the "per diem" allowance paid to civil servants when on official business, which might be as much as $500 a day for a permanent secretary.

271. There is another point of difference between the accounts of Mr Mwale and Mr Chizyuka about this aspect of the case. Mr Mwale gave evidence that Mr Chizyuka told him by telephone that he had been approached by Mr Chona three times, and on each occasion Mr Chona had pleaded with him to say that the Acknowledgment was a

forgery, and that he, Mr Chizyuka had refused to do so, saying that although he did not draft the letter, he signed it and was authorised to do so. Mr Chizyuka denied telling Mr Mwale this.

272. Both Mr Chizyuka and Mr Chona accept that they had met while Mr Chona was carrying out investigations for the Task Force on Corruption: Mr Chona said that there was one such meeting, and Mr Chizyuka believed that there were more than one. Both deny that they had any conversation such as Mr Mwale described as being reported to him by Mr Chizyuka. I accept this evidence of Mr Chona and Mr Chizyuka: there was no question of the Acknowledgment being a forgery in that there is no dispute that Mr Chizyuka signed the letter of 12 February 1999 and there is no proper basis to believe that Mr Chona would behave so dishonestly as to suggest to Mr Chizyuka that he should say untruthfully that the letter was forged.

273. I have found it difficult to resolve the dispute about whether Mr Mwale indicated to Mr Chizyuka before he signed the Acknowledgment that he might receive money. On the one hand, I have rejected the evidence of Mr Mwale on a number of related matters, including the issues about whether Mr Sheehan met Mr Chizyuka at a meeting where the Acknowledgment was discussed and who prepared the Acknowledgment itself, that is to say upon issues of some significance to what happened at the very meeting at which it is said that Mr Mwale told Mr Chizyuka that "there is something in it for all of us". Indeed, I generally found Mr Mwale to be a witness whose evidence I do not trust. Although as a matter of impression, I did not find Mr Chizyuka a compelling witness as he gave his evidence, he did seem generally to be more reliable than Mr Mwale. However, I must make a more objective assessment of Mr Chizyuka's evidence on the crucial issue.

274. Donegal rightly point out that, as Mr Chizyuka accepted when cross-examined, before he made a witness statement on 3 April 2006, he had not alleged that Mr Mwale had bribed him or admitted that he had taken a bribe, and the bribery allegation emerged as part of Zambia's case only in March 2006. This means that he did not refer to it when he was interviewed by the Task Force on Corruption about the debt to Donegal. It also means that Mr Chizyuka did not refer to this when he wrote a memorandum for President Mwanawasa about the Acknowledgment. It is pointed out that despite his claim to have been bribed, Mr Chizyuka holds the senior position of Permanent Secretary in the Ministry of Agriculture, and Donegal suggest that, particularly given the eagerness of the Task Force in particular and the Zambian authorities generally to pursue corruption, this indicates official doubt about Mr Chizyuka's account.

275. The question that turns upon the difference between the accounts is whether Mr Chizyuka was given an inducement to sign the letter so that the principles of law about the consequences of obtaining a document as a result of a bribe or secret commission are engaged. Mr Chizyuka was not paid a bribe before he signed the Acknowledgment. Zambia plead that he was offered one, and it is well established that the offer or promise of a bribe is tantamount to the payment of a bribe: see, for example, Shipway v Broadwood, [1899] 1QB 369. However, as it seems to me, what Mr Chizyuka claims he was told by Mr Mwale cannot properly be described as an offer or a promise. It was, as Mr Chizyuka described what was said and as he understood it, a prediction that he would receive money or was likely to do so. (I cannot accept Mr Trace's suggestion that the words that Mr Chizyuka said were used, "There's something in it for all of us", might have meant that Donegal's plans would

benefit the whole of Zambia.) Nevertheless the mischief to which the law is directed is conduct designed to create a conflict between an agent's duty and his own private interest, and, on Mr Chizyuka's account, Mr Mwale was creating just such a conflict. As Lawrence Collins J said in Daraydan Holdings Ltd v Solland International Ltd, [2004] EWHC 622 (Ch), [2005] Ch 119, "An agent should not put himself in the position where his duty and interest may conflict". The law adopts a robust approach to conduct that creates such a conflict. It is, of course, irrelevant whether Zambia have shown that the conduct influenced what Mr Chizyuka did because it is irrebuttably presumed that it did: see Hovenden and Sons v Milhoff, (1900) 83 LT 41 at p.43 per Romer LJ. It is also irrelevant whether the person who gave the inducement was acting with a corrupt purpose: see Daraydan (loc cit) at para 53. Mr Mwale's conduct as described by Mr Chizyuka cannot be distinguished, in my judgment, from a simple promise or offer of a bribe. I observe that Bowstead & Reynolds on Agency, 18th Ed, 2006, refers to an arrangement to receive money, rather than an offer or a promise.

276. Donegal rightly emphasised that the allegation of bribery against Mr Mwale is a serious one, perhaps the more so in view of his political standing as the Mayor of Lusaka until December 1998, and submit that such an allegation requires properly convincing proof. However, I do not consider that in this case that this is a consideration of great weight. The question remains one of the balance of probabilities, albeit typically, as Ungoed-Thomas J put it in In re Dellow's Will Trusts, [1964] 1 WLR 415,455 (cited by Lord Nicholls in In re H, [1996] AC 563 at p.586H), "The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it". In this case, there is evidence that there was at the relevant time a significant amount of corruption in Zambian public life: indeed, as I shall explain, in proceedings brought by Donegal against Zambia in the BVI, Donegal themselves presented evidence of corruption and bribery in Zambia and relied upon it in support of their application to serve the proceedings out of the jurisdiction. I am not persuaded that in this case it is inherently unlikely that a person in Mr Mwale's position would act as Mr Chizyuka described, and I consider whether Zambia have proved their case on the balance of probabilities on this basis.

277. The essential question that I have to decide does not depend upon whether the 4,000 dollars was paid by Mr Mwale because he had signed the Acknowledgment or whether it was an act of generosity and family goodwill. However, this part of the evidence seems to me in some ways to sit somewhat uneasily with Zambia's case and Mr Chizyuka's account. First, the payment was made at some time after 15 June 2004. That is to say, it was over five years after the Acknowledgment was signed, and, perhaps more importantly, over a year after Donegal had received a payment from Zambia under the Settlement Agreement and Mr Mwale had started to receive regular and significant payments from Donegal. There is no explanation as to why, if Mr Chizyuka was to be paid for signing the Acknowledgment, the payment was not made earlier.

278. Secondly, it is Mr Chizyuka's account that he was troubled and uncomfortable about what Mr Mwale had said to him in February 1999. Nevertheless, he accepted the payment of $4,000 although he understood it to be by way of a reward for signing the Acknowledgment and although, as he told me, he was not in financial difficulties. I

add that in view of what Mr Mwale was receiving from Donegal in 2004 the sum of $4,000 seems to me a very modest payment if the Acknowledgment had the value to Donegal that Zambia assert.

279. Donegal criticise Mr Chizyuka's evidence. They point out that Mr Chizyuka stated in his written evidence that Mr Mwale "made an intimation" that he would benefit if he assisted, saying "There will be something in it for all of us", but when cross-examined he was uncertain quite what the intimation was. He did not ask and was not told how much would be paid or when he would be paid, and said that the payment of money, or the nature of the benefit that he was to receive, was not actually mentioned. He said that if he asked for clarification, it would appear as if he was soliciting for a bribe. Having seen and heard Mr Chizyuka explain why he did not ask any questions about what Mr Mwale was saying, I found this part of his evidence unconvincing.

280. In his witness statement, Mr Chizyuka's account was that when Mr Mwale said that Donegal needed the document quickly because they had to hedge the debt, he was "a little apprehensive about the speed with which the matter was progressing, but I knew Mr Mwale well". When he was cross-examined, his evidence had a markedly different emphasis. He spoke of being "very suspicious, very very suspicious, very apprehensive" about the Acknowledgment. This change in itself makes me the more cautious about accepting Mr Chizyuka's account. However, it also raises the question why on Mr Chizyuka's account Mr Mwale should have given an intimation of this kind. There is no suggestion that he gave it only when Mr Chizyuka showed reluctance to sign the document, and the intimation would only have aggravated Mr Chizyuka's concerns about whether it would be right to sign the document. I can understand that Mr Mwale might, had he been inclined to bribe his brother in law, have made a specific and tempting offer. But I find it difficult to believe that he would have raised his brother-in-law's concerns about the propriety of signing the document without holding out a more concrete and tempting prospect than Mr Chizyuka describes, or at least that he would have done so before he had any reason to assume that in order to procure Mr Chizyuka's signature it was necessary to hold out the prospect of a reward. If nothing else, Mr Mwale struck me as too shrewd to act in this way.

281. I conclude that the evidence of Mr Chizyuka is simply not sufficiently convincing and robust for me to accept the allegation that Mr Mwale told Mr Chizyuka "there is something in it for all of us" or spoke other such words amounting to a prediction or offer that he would receive payment. I appreciate that it might seem unlikely that a man in Mr Chizyuka's position, or anybody, would give the account that he did unless it was true, but against that it seems to me that Mr Chizyuka on any view was in a difficult position when asked to explain why he signed the Acknowledgment. I cannot say whether he has convinced himself that something of the kind that he described was said by Mr Mwale, but, as I conclude, his evidence does not satisfy me that it was. I add that the evidence does not enable me to conclude, and it is not necessary for me to conclude, whether the letter was provided to Mr Mwale at a meeting between him and Mr Chizyuka or whether Mr Mwale simply collected it from the Ministry, but were it necessary I would be bound to conclude that Zambia have not proved that there was a meeting between Mr Mwale and Mr Chizyuka at which the Acknowledgment was handed over.

Conclusions about Zambia's allegations about assignment and Acknowledgment being improperly obtained

282. The activities on the part of those representing Donegal up to and including the time when the Acknowledgment was provided to Donegal about which Zambia complain are these:

    i) that they improperly sought and obtained confidential information ("the confidential information allegation");

    ii) that they unlawfully interfered in contractual arrangements between Zambia and Romania ("the unlawful interference allegation");

    iii) that those acting for Donegal improperly influenced Mrs Chibanda to obstruct the proposal to buy back the debt from Romania on the terms agreed in December 1998, and so to act in breach of her fiduciary duties as a public official ("the improper influence allegation");

    iv) that those acting for Donegal improperly influenced the Zambian Government by offering support to the PHI ("the PHI allegation"); and

    v) that they indicated to Mr Chizyuka before he signed the Acknowledgment that he would receive payment ("the bribe allegation").

283. I conclude that the first of these complaints is justified, and reject the others. I have already explained why I reject the PHI allegation and the bribe allegation. I should say something more about why I reject the unlawful interference allegation and the improper influence allegation.

284. As for the unlawful interference allegation, for reasons that I have already explained, I do not consider that Zambia had entered into any contractually binding agreement with Romania (and Mr William Blair QC, who represented Zambia, made it clear that Zambia did not advance any alternative case that Donegal improperly interfered with Zambia's commercial relationship with Romania if no contract was concluded). It is of interest that Zambia apparently never complained to Romania that they had broken any contractual arrangement.

285. Even if I had concluded that Zambia had entered into any relevant contract with Romania, I would have rejected Zambia's contentions that Donegal improperly interfered with it: I am not satisfied that Donegal intended to cause Zambia economic harm either as an end in itself or as a means to some other end: see Douglas v Hello! Ltd., [2005] EWCA Civ 595, [2006] QB 125 at para 223.

286. Zambia seek to argue that this case is analogous to the Kuwait Oil Tanker case [2000] 2AER (Comm.) 271 (to which Lord Phillips M.R. referred in Douglas (loc cit) at para 217) in that the debt could be assigned to Donegal only by diverting it from being bought back by Zambia. I do not find the analogy compelling. In the Kuwait Oil Tanker case it could properly be said that the very income that the defendants acquired "should have gone to the claimants" (per Lord Phillips MR, loc cit). Here Zambia assert only a "lock-out" agreement. Indeed if they had asserted more and asserted that they had acquired a contractual right to discharge the debt upon agreed

terms, they could, no doubt, be met by the answer that their contractual rights were not affected by the assignment because the assignment was "subject to equities".

287. As for the improper influence allegation, I confess that I find Mrs Chibanda's entrenched opposition to the proposed "buy back" arrangement difficult to understand. However, it is only fair to bear in mind that among the documents missing from the Government files is the minute that Mrs Chibanda wrote to Ms Nawakwi when she was still the Minister of Finance in which she said that the delegation did not have authority to negotiate the buy back proposal. Moreover, it is easy to understand that the report about the level of the debt, and therefore the amount of any realistic settlement, would have come as a shock. Curious though Mrs Chibanda's reaction appears with hindsight, it is right to observe that the delegation's proposal did not strike Mr Nonde as so obviously advantageous that he should immediately seize the opportunity that seemed to be available; nor is there any basis for supposing that he considered Mrs Chibanda's response to be so unreasonable as to be suspect. Equally, whenever Mrs Chibanda wrote her minute to Mrs Nawakwi, it does not appear to have excited suspicions on the part of the Minister. I decline to conclude that Mrs Chibanda's opposition to the delegation's proposal was improperly motivated, or to conclude that Mrs Chibanda was improperly influenced by Donegal, Mr O'Rourke or Mr Mwale.

288. I am reinforced in this conclusion because there is no evidence that after the assignment had been completed Mrs Chibanda provided any support for Donegal in their proposals to realise the assigned debt. On the contrary, the evidence indicates and I accept that she opposed them. It suffices to refer to two documents. In an email to Mr Michael Smith of DAI dated 3 March 1999 Mr Sheehan wrote to Mrs Chibanda was "predictably negative" about the proposal that Donegal invest in the state lottery and make a donation to the PHI. In a letter dated 5 September 2000, Mrs Chibanda wrote to Mr Sheehan in discouragingly uncompromising terms about Donegal's proposals.

289. As I have said, I consider that the confidential information allegation is justified, and conclude that Mr O'Rourke and Mr Mwale sought and obtained information from public officials in the Government and the Bank of Zambia which was confidential and which should not have been disclosed by them. The information that Zambia have shown that Mr O'Rourke and Mr Mwale sought and obtained before the assignment was information about how the Romanian debt was regarded by the government officials and bank officials and whether it was considered to be a valid debt. This is established by the evidence of Mr O'Rourke about the meetings which he had, and, as I understand his evidence, Mr Mwale had, with officials of the Ministry of Finance, including "the little people"; by the evidence about obtaining a print-out from Dr Kani; by the evidence of Mr Mbewe and Ms Nyirenda about Mr Mwale approaching them directly or indirectly for information; and by Mr O'Rourke's evidence that he was able from the information that he obtained to be sure that the debt was regarded as valid. I also accept on the basis of the evidence of Ms Nyirenda about her conversation with Mr Singogo that Mr Mwale was seeking information about the purpose of the delegation's visit to Romania, but Zambia have not shown that Mr Mwale in fact obtained any information about that.

290. It seems to me obvious that the Government officials' and Bank officials' views about the validity of the debt, and indeed about the delegation's purpose, were of

commercial, political and potentially diplomatic sensitivity, and that such information was of its nature confidential and should not properly be disclosed informally by an official in any event, the more so when it was being sought on behalf of a third party with commercial interests adverse or potentially adverse to those of Zambia. Moreover, it seems to me that Mr O'Rourke was effectively accepting that he was seeking confidential information when he gave evidence that he was seeking to learn about the debt from civil servants of relatively low rank. In seeking to obtain information from a variety of sources within the Ministry, Mr O'Rourke clearly was not seeking simply to learn the official view (if there was an official view) about the debt, but was seeking to glean the individual views of different persons within the Ministry. I find it impossible to believe that civil servants, whether of a secretarial or more senior level, were entitled to make such disclosure to a third party who was acting not for the purposes of the Zambian government but to exploit the debt.

291. The evidence confirms that, as I should in any event have concluded, information of this kind was confidential:

i) Mr Kunda's evidence was that the details of information about Government debt and negotiations about it are confidential and not publicly available.

ii) Dr Mwanza confirmed that Dr Kani should not have disclosed to a third party the computer print-out showing Zambia's external debt list because the information was confidential. Mr O'Rourke said that it was "common knowledge" that the Bank recorded the debt as due and owing, but even if that is so, I do not accept that the printout, which presumably showed the Bank's understanding of the amount of the debt, was properly shown to a third party.

iii) The evidence of Mr Mbewe and Ms Nyirenda was that they were being asked for information that they could not properly disclose.

292. In so far as Donegal's witnesses sought to justify their conduct on the basis that such discussions are usual and that information about external debt is not confidential, I reject that evidence, and I prefer and accept the evidence of Zambia's witnesses to which I have referred. Mr Sheehan said that "the secondary debt markets would grind to a halt" if it were "somehow illegal to request information from Ministry of Finance officials with respect to their debt" and he and Mr Mwale said that it was common for the market to obtain information from the Ministry. However, these generalised comments did not engage with the complaint that those acting (whether directly or indirectly) for Donegal were seeking information about the Zambian government's internal view of the validity of the debt from officials who had no authority to divulge such information, and in at least some cases were too junior for anyone to suppose that they had.

293. I also conclude that Mr O'Rourke and Mr Mwale were aware that they were seeking information from public officials that the officials should not properly disclose to them because it was confidential. This would have been obvious to anyone with any familiarity with official life, and this was confirmed by Mr O'Rourke's evidence about approaching "the little people" and by the evidence that Mr Mwale, when properly refused the information by Mr Mbewe, made it clear that he would continue with his efforts to obtain it.

294. My conclusion about those acting for Donegal being willing to obtain and to use confidential information is reinforced by them later obtaining a letter from Mr Kunda to Mr Kasonde dated 17 March 2003, to which I shall refer later in this judgment.

Donegal's proposals to realise the debt

295. Donegal complain that the discussions between Zambia and Romania enabled Romania to secure a higher price from them for the debt. They say that they had been conducting their negotiations in the knowledge that under the World Bank buy back programme for Zambia, the International Development Agency of the World Bank and bilateral creditors were prepared to fund buy back arrangements of external debt owed to commercial creditors at up to 11% of the face value of the debt, and typically transactions were effected on the basis of the face value of both principal and interest. Under the August 1998 arrangement Donegal had hoped to buy the debt at about 6% of the face value of principal and interest and to sell it to Zambia at up to 11%, thereby affording them profit and allowing Zambia to pay a lower price than they could negotiate with Romania. Alternatively they might have realised the debt by converting it and using it for development programmes in Zambia, so that Zambia would receive 11% by way of funding from donors and the World Bank in exchange for Zambia paying a 50% premium in local currency. Because of the higher price that Romania were able to demand for the debt, and because Zambia had agreed with the World Bank that they would not purchase external commercial debt in hard currency at more than 11% of face value, it was no longer feasible for Donegal to sell the debt at a profit and it also reduced their opportunities for profitable debt conversion.

296. Nevertheless, Donegal decided to buy the debt for 11% of the US$29.8 million face value. According to Mr Sheehan, they considered that, although Zambia's economy was weak and the country was short of foreign investment, nevertheless Zambia had an active privatisation programme and that they could still fund profitable debt conversion arrangements. According to Donegal, after acquiring the debt, they therefore made considerable efforts to reach arrangements with Zambia with a view to bringing new investment to Zambia: they instructed Moreno to investigate formally opportunities for debt conversion arrangements and put forward a number of proposals between February 1999 and September 2000. To this end, they say, Mr Mwale held meetings with members of the Government, including President Chiluba, and with officials.

297. I have already referred to Mr Mwale's letter to Ms Nawakwi of 3 February 1999 in which he sought a meeting for Mr Sheehan and Mr O'Rourke with Ms Nawakwi about Gameco's interest in the state lottery, to Mr Sheehan's letter of 18 February 1999 to Mr Chanda and to Zambia's response to the suggested support for the PHI. Mr Mwale described that letter as "the only offer which was officially made". Despite their initial reception, however, Donegal pursued the proposal. According to Mr Sheehan's evidence (which I accept), he attended several meetings with government officials to discuss that potential project of converting the debt into local currency and using some of the capital for the PHI. No documents about these meetings have been disclosed.

298. In his letter of 18 February 1999 Mr Sheehan described Donegal as "an investment company focused on investing in emerging markets", a description that disguises that

it was incorporated solely to purchase the Zambia debt. Mr Sheehan said that Donegal had two related initiatives in Zambia, namely a debt conversion programme and an online national lottery, and that Donegal had "created a joint venture with two experienced players in the international lottery market, Canadian Banknote and Gameco Partners, C.I. and has committed to provide startup financing for a new online national lottery project program in Zambia". Donegal have not produced any documents evidencing their involvement with any joint venture of this kind or any commitment to provide such financing. Further, the claim that Gameco were an experienced player in the international lottery market was not justified: it never conducted any business and while, as Mr Sheehan told me, Gameco tried to negotiate a number of lottery operating agreements, it never in fact operated one: Mr Sheehan knew this when he wrote his letter of 18 February 1999. Mr Sheehan's letter emphasised that significant payments were being promised to the PHI, both by way of a direct donation from Donegal of not less than US$3 million of the debt, and also by way of 5% of the gross local currency revenues of the online lottery.

299. In an e-mail dated 10 March 1999 to Mr Michael Smith of DAI (to which I have already referred) Mr Sheehan described that the purpose of the donation would be "to kick start the PHI with local currency conversion proceeds" and "also to garner support from State House for the Gameco lottery proposal". He said that it was to be a donation, not an investment, and I consider that this was indeed the true nature of the proposal.

300. On 1 April 1999, Mr Sheehan sent Mr Mwale a fax asking him to send to Mr Sichinga, the Principal Secretary at the Zambian Ministry of Commerce, a formal debt conversion proposal and related analysis. (I note in passing that a copy of the fax was sent by Mr Sheehan to Somerset, not Moreno). The lottery proposal was not pursued in this document. The proposal involved Donegal donating "a substantial sum of debt" to the PHI, and, after writing off 30% of the remaining debt, converting the rest into promissory notes which could be used for investment in privatisation programmes approved by the government.

301. On 15 April 1999, Mr Sheehan sent a similar proposal and memorandum to the Ministry of Finance. Mr Sheehan said in the proposal that DAI's "client", referring to Donegal, would be "pleased to donate a substantial sum of debt to the PHI". The main part of the proposal was that Zambia should issue dollar-denominated promissory notes for an amount equal to 70% of the outstanding debt, convertible into equity in connection with specific investment or privatisation projects approved by the Zambian Government, and it referred to DAI's confidence that this project would attract "substantial investment" into Zambia. Mr Sheehan also expressed the view that the proposal was more favourable to Zambia than "any proposal currently on offer from Zambia's sovereign creditors". No specific investment was identified.

302. There are in evidence two draft conversion agreements, dated 21 June 1999 and 12 October 1999. It appears that they were written for Donegal's internal purposes. They are similar and contemplated that, upon delivery of a conversion notice, the Zambian Government would convert debt into permitted investments with a value in kwacha. The Zambian Government would issue promissory notes or conversion certificates, and they would be released to Donegal by an escrow agent if Zambia defaulted. The draft notes or certificates contained a waiver of state immunity.

303. In August 1999 Mr Sheehan wrote to Mr O'Rourke stating, "Some numbers follow showing various yields to the fund if the fund simply restructured the debt into a series of dollar denominated promissory notes payable in dollars quarterly. … We are running additional numbers on the T [Treasury] bill scenario and I will have the memo for Fisho [Mwale] and George [Chilupe] ready on Monday. …". In the undated email to Mr Mike Eckels of DAI (which was probably written at about this time, but in any event between February 1999 and February 2000) Mr Sheehan stated, "I am writing a memo for our local partners in Zambia on potential deal structures for the Zambian asset held by Select. … The deal is going to get done for political reasons because we are going to discount a bunch of whatever we get to the President's favourite charity, hence the discounts we afford them will be less than they would otherwise expect if they were Paris Club comparable." It also referred to "tak[ing] out another two million of notes for our local partners". As I have already explained, the "local partners" were Mr Mwale and Mr Chilupe, who were to be rewarded by a "success fee". The proposal was that at least one possible way in which they might be paid for their services was by a transfer of some of the debt.

304. By the end of 1999 Mr Sheehan was considering a feasibility study for the proposed acquisition of a bank in Zambia and contemplating the purchase of a business called Kafue Textiles. In 2000 Donegal had discussions with Government officials to determine the feasibility of using debt to acquire the Government's equity in a bank called the Development Bank of Zambia. On 14 January 2000 Mr Sheehan, writing as the Managing Director of DAI, sent to Mr Katele Kalumba, who was then the Zambian Minister of Finance, debt conversion proposals for funding an investment bank and for acquiring and operating Kafue Textiles. Both proposals referred to DAI's "client" as "Donegal Investments Limited". Donegal say, and I accept, that this was a mistake for Donegal International Limited: there is no evidence or proper reason to suppose that there was a company called Donegal Investments Limited. Again, the proposals would have involved Zambia in issuing promissory notes or treasury bills denominated in US dollars. Under the proposal for an investment bank, the bank would have been created by Donegal and their "partners", and in exchange for debt the Zambian Government would deliver bills to be used as reserves for the bank. Under the Kafue Textiles proposal, in exchange for US$9 million of the debt, Donegal would have received Zambia's equity in the company and US dollar notes redeemable in kwacha with a view to those funds being used for capital improvements.

305. In 2000 Donegal indicated that they would support other projects with which President Chiluba was associated. As with the PHI, Zambia suggest that in the same way Donegal were improperly trying to ingratiate themselves with the Zambian regime. However, there is no proper reason to regard these initiatives as underhand or covert, and I am unable to regard them, or the fact that Donegal made them, as significant to any question that I have to decide. The various proposals put forward by Donegal found no favour, and in the event Donegal made no contribution and provided no support to the PHI or any other project associated with the Zambian government or President.

306. In a fax sent on 14 February 2000 to Mr Malambo, who was then the Minister for Legal Affairs, Mr O'Rourke said that he believed that Donegal would donate debt with a value of US$2 million to another project associated with President Chiluba, the

Frederick J T Chiluba Centre Institute of Democratic and Industrial Relations Studies. He explained that the purpose of such a donation would be to "demonstrate [Donegal's] commitment to Zambia and of course create goodwill", and asked Mr Malambo to pass "this concept" to State House "and perhaps someone there will let me know if there is interest". Mr Malambo's evidence was that he took no action upon receiving the letter.

307. On 28 April 2000 Mr Sheehan, when putting forward to the Ministry of Finance a proposal similar to that of 15 April 1999, indicated that Donegal would make a donation of US$2 million to a "charity or not for profit institution of the Government's choosing". This proposal would have involved the Government issuing dollar denominated certificates for an amount equal to 60% of the outstanding debt, said to be US$27.8 million (after taking into account the contemplated donation of US$2 million). The certificates would be "authorised for use as offset or security against obligations owed [by] the Government". Dr Mwanza pointed out, and I accept, that although the letter suggested that Zambia would enjoy benefits in terms of taxes, employment and exports created by the investments, the proposal involved no fresh money being invested in the country

308. By August 2000 Mr Sheehan was canvassing various options involving the PTA Bank. These included a suggestion that DAI purchase the debt from the fund (Select Capital) for US$6 to US$7 million and then sell it back-to-back to PTA Bank for US$8 to US$10 million, sharing the resulting profit of some US$2 or US$3 million with Loita Capital Partners.

309. None of these proposals found any favour with Zambia. As I have said, they were opposed by Mrs Chibanda, and also, as I conclude, others in the Ministry of Finance.

310. It is Zambia's contention that having acquired the debt, Donegal sought to exploit it by putting forward a series of proposals that would have brought no benefits to Zambia, and allege that Donegal improperly sought to attract the Zambian Government to their proposals by making offers to charitable causes that they knew found favour with the regime. I shall refer to this as the "realisations allegation". I am not in a position to judge whether the various schemes that Donegal suggested would have been of advantage to Zambia and I express no view about that. However, the proposals that Donegal made, including the proposals that they should make donations to charitable or public causes, were made openly. Their offers were not akin to secret commissions. It was for the Zambian Government to decide whether or not they could properly bring such considerations into account when evaluating Donegal's proposals, but I am not persuaded that the conduct of Donegal in making the proposals was improper in any legally significant way.

311. There was relatively little discussion of conversion proposals after about September 2000, but, as I read the correspondence, Donegal made it clear that they were still willing to pursue such proposals. For example, on 29 March 2001 Mr Mtonga wrote to Mr Sheehan referring to discussions with Mr Sheehan in the Ministry of Finance the previous day and to Donegal's conversion proposals of April 2000: he stated that Zambia were agreeable in principle to Donegal's proposals, but were prevented by budgetary constraints from starting "dismantling the debt" that year. Zambia also proposed a greater discount and longer repayment period than Donegal had proposed. On 4 April 2001 Mr Sheehan responded by lowering the redemption rate to 55% of

"the US$29.8 million principal amount" and agreeing that repayments should not start until January 2002. He also agreed that the investments after conversion would be in "priority sectors of mining, finance, housing and agriculture". Mr Mtonga proposed discussions in a letter dated 20 June 2001, and Mr Sheehan suggested dates in July. The Zambians' response was to suggest dates in September or October 2001, but this proposal was apparently disrupted by the bombings in America on 11 September 2001.

The exchanges leading to the proceedings in the British Virgin Islands

312. However, at some stage Donegal determined that they should seek a cash settlement of the debt or litigate to recover it rather than seek to realise it through conversion schemes. Mr O'Rourke placed this change at the end of 2000 or the beginning of 2001. Zambia's pleaded case is that it was at the time of the end of Dr Chiluba's presidency, that is to say at the end of 2001, that Donegal abandoned plans to realise the debt by means of a conversion scheme. The documents do not indicate an abrupt change of approach but I conclude that from fairly early in 2001 Donegal were increasingly interested in a cash settlement. On 4 April 2001, Mr Sheehan sent Mr Mtonga not only his response on conversion proposals but also a fax in which he confirmed that he was authorised to discuss a settlement in "hard currency" but not at less than 35% of principal and interest accrued to the date of purchase and payable over a period of two years. He also confirmed that Donegal were willing to donate US$2 million "to a priority project (commercial or charitable) of the Government's choice".

313. In October 2001 Mr Malambo, having left politics, accepted instructions from Donegal to try to obtain a cash settlement of the debt. To this end he held a number of meetings with successive Secretaries to the Treasury, Mr Mtonga, Mr Nonde and Dr Musokotwane. By a letter dated 8 November 2001, Mr Malambo, who had now returned to private legal practice as a partner in Malambo & Silwamba, a Lusaka firm of Advocates and Notaries, wrote to Mr Mtonga that Donegal had abandoned their plans for investment and called for immediate cash settlement at 37% of the principal debt, which was said to be US$29,834,368.06. Mr Malambo referred to the debt being "acknowledged by your Ministry shortly after the acquisition", clearly a reference to the Acknowledgment. He threatened litigation in the absence of a response within seven days.

314. In reply to this, by a letter dated 13 November 2001 Mr Mtonga said that the Government would like to meet Donegal. On 21 November 2001 Mr Malambo sent Zambia a draft settlement agreement to be considered before any meeting took place. This was the first draft of what eventually was signed as the Settlement Agreement. It referred in the recitals to the Acknowledgment of 12 February 1999. It contemplated settlement in the amount of 37% of not only the principal debt (as did the letter of 8 November 2001) but also interest, and payment of the settlement amount in five instalments. In the event of default for 21 days, Donegal were to be entitled upon giving notice terminating the agreement to judgment "in respect of the Debt in full with interest…". There were terms of this draft agreement that Donegal would not bring legal proceedings to recover the debt before serving a notice terminating the agreement, and that Zambia were to waive state immunity in respect of any proceedings relating to the agreement or the debt.

315. The Ministry of Finance referred the proposal to Treasury Counsel in the note that mentioned Mrs Chibanda's minute to Ms Nawakwi, one of the documents that, as I have explained, is missing from government files. On 26 December 2001, Mr Mtonga responded to Mr Malambo proposing a 90% reduction by analogy with the 90% reduction being given to Zambia under the Enhanced HIPC Initiative. Mr Malambo rejected this as "completely unacceptable" in a letter of 3 January 2002, and again threatened litigation, in a jurisdiction outside Zambia.

316. On 6 February 2002 there was a meeting in Lusaka between Donegal and Zambia. Donegal were represented by Mark Slater, Mr Malambo, Mr Mwale and Mr Patrick Mitchell, Donegal's or DAI's South African legal counsel. Zambia were represented by Mr Nonde, the Secretary to the Treasury, and members of his staff. The meeting had, as Mr Malambo told me, been arranged by Mr Mtonga before Mr Nonde took over from him as Secretary to the Treasury. According to Donegal's pleaded case, at the meeting of 6 February 2002 "Donegal proposed to simplify the [calculation of interest] for the purposes of settlement discussions by adopting a single rate. Donegal proposed and Zambia agreed the discount rate used at the time by the World Bank for severely indebted lower income countries of 12%.". Between the conclusion of the evidence and closing submissions, Donegal modified their position, and by a letter from Messrs Allen & Overy dated 1 December 2006, they stated their "position with regard to whether an on-going interest rate of 12% … was agreed at the meeting on 6 February 2002…". They wrote that "Donegal does not formally contend (as it does not need to do so) that there was concluded (at the meeting on 6 February 2002) a binding agreement that an on-going interest rate of 12% would be applied", although at the same time they wrote that Donegal did not accept that it was not agreed. The letter continued, "What [Donegal] does positively contend … is this: the 12% unitary interest rate was proposed by Donegal and discussed at the meeting on 6 February 2002. It was never questioned or gainsaid, at any point, by Zambia." It is of some importance to observe that this letter is concerned with the "on-going interest rate". I do not understand it to be directed to what was said at the meeting about how much Zambia then owed by way of interest already accrued.

317. No evidence was given by Mr Nonde or any other Zambian representative at the meeting.

318. Mr Sheehan said in his witness statement that "preliminary" terms of settlement were agreed, including "an agreement on the aggregate amount referred to in the Acknowledgment of the Assigned Debt plus interest (calculated at 12% per annum, being the then prevailing World Bank discount rate for severely indebted lower income countries such as Zambia)". In oral evidence he explained that the phrase "prevailing World Bank discount rate" was intended to refer to no more than the discount factor typically used by the World Bank for its projects.

319. Mr Mwale did not give detailed evidence about this meeting and gave no evidence of an agreement being reached. He described the meeting as one of a number of "failed negotiations".

320. Mr Malambo also said that no settlement agreement was reached at the meeting. He said that the discussion centred around a draft agreement sent by Donegal, and that Mr Nonde "dealt with the issues of what the principal was and what the interest accrued to date was", and said in that context that just below US$10 million had

accrued. The meeting examined that figure and saw that it was "calculated on the basis that it was 12% accruing as at that date, the end of December of 2001. So all the issues that they were dissatisfied with were dealt with". Then in negotiations Mr Nonde persuaded Donegal to reduce the proposed level of settlement from 37% to 33%. Mr Nonde needed the concurrence of the IMF to make such an agreement. However, Mr Malambo also said that no interest rate as such was agreed: by that I understand him to mean that while the parties were in agreement that the amount then owing should be the amount calculated on the basis of a 12% pa interest rate to the end of December 2001, there was no agreement about what interest should continue to accrue thereafter.

321. Mr Slater did not give evidence before me, but in the BVI proceedings Donegal's Statement of Claim, which was verified by Mr Slater, pleaded that "the aggregate amount of the principal and interest of the debt was agreed based on a rate of 12 per cent on the amount of principal and capitalised interest acknowledged by [Zambia]. In return, [Donegal] agreed it would not pursue proceedings against [Zambia] for a couple of months". In an affidavit sworn in those proceedings in support of Donegal's application to serve them out of the jurisdiction Mr Slater said this: "At [the] meeting there appeared to be a willingness on the part of [Zambia] to settle the Debt and preliminary terms of such settlement were agreed with the Secretary to the Treasury. These terms included an agreement on the aggregate value of the Debt, being the amount referred to in the acknowledgment of the Debt [of 12 February 1999] plus interest calculated at 12%, being the then prevailing World Bank discount rate for Zambia. In return for the agreement of these preliminary terms, I agreed on behalf of [Donegal] that proceeding against [Zambia] would not be commenced for a couple of months to give the Secretary to the Treasury the opportunity to accommodate the terms of the proposed settlement within the terms of Zambia's budget".

322. On 15 February 2002 Mr Malambo wrote to Mr Nonde to record the understanding of Donegal's representatives of the position reached at the meeting: that the Government would "consider settling this matter at 33% of the face value of the debt at time of settling". He said that Donegal's position was that "the period over which the instalments will be paid will be contingent on the down payment the Government would be ready to make at the time of the signing of the agreement. It was further intimated that a longer period would attract an interest charge on the declining balance". The letter concluded, "We shall be grateful, if you could confirm that we can draw the final agreement on the results of the basis of our first meeting". The letter did not refer to an agreement about interest. The letter was copied to Mr Sheehan and to Mr Slater.

323. On 21 February 2002, Mr Nonde replied that "the negotiations did not lead to any conclusion over this matter as this was still subject to reaching an agreement with the [International Monetary] Fund in view of the HIPC conditionality".

324. By letter dated 28 March 2002, Mr Malambo wrote threatening proceedings within ten days. On 6 June 2002, he sent a draft agreement to the Ministry of Finance giving the amount of the debt, including interest at an unspecified rate, as US$42,026,679.81. The settlement price in this draft was based on 33%, including interest of 5% pa on the declining balance outstanding. There was no reference to an interest rate of 12% pa.

325. The correspondence does not support any suggestion that a contractual agreement was concluded on or about 6 February 2002, nor does it support any contention (if this be the suggestion in Allen & Overy's letter) that Zambia indicated by silence that they would not resist a proposal for continuing interest at the rate of 12% pa.

326. My conclusions about the meeting of 6 February 2002 are these:

i) No contractually binding agreement of any kind was reached. Mr Nonde made it clear that Zambia needed the concurrence of the IMF before they could conclude an agreement.

ii) The parties were in agreement about the amount owed by Zambia and both parties understood that it had been calculated on the basis of a 12% pa interest rate to 31 December 2001.

iii) Donegal indicated that they would agree to settle the debt for 33% of its value.

iv) No agreement was reached about the rate of future interest.

v) Donegal indicated that they would not bring proceedings for the debt immediately, but they did not specify the period for which they would forbear.

The proceedings in the British Virgin Islands

327. In the absence of an acknowledgment of his letter of 6 June 2002, on 4 July 2002 Mr Malambo wrote stating that steps were under way to bring litigation against Zambia to recover the sum of US$42,026,679.81, plus interest of 5% pa. On 22 July 2002 Mr Lukwasa, Treasury Counsel for the Secretary to the Treasury, sent Malambo & Co a letter advising that Zambia should be sending a favourable response to a proposed settlement "by the end of next week". However, a meeting on 1 August 2002 failed to bring about any agreement between Donegal and Zambia.

328. On 2 August 2002 Messrs Harney Westwood & Riegels ("Harneys"), a firm of lawyers in the BVI acting for Donegal, wrote to the Ministry of Finance referring to the Acknowledgment and stating that Donegal were prepared to grant Zambia "one final extension of 28 days" to pay the debt "on condition that you make payment of the Debt to the Company's bank account" of which they attached details. The details required Zambia to make payment by sending funds to JP Morgan Chase Bank, New York, for the credit of an account at JP Morgan Chase Bank, Tortola, BVI.

329. On 9 August 2002, Harneys wrote again demanding payment of US$42,931,655.64 by 30 August 2002, and requiring payment be made to Donegal's account at JP Morgan Chase Bank, Tortola.

330. By a letter dated 11 September 2002 to Mr Kasonde, a copy of which was sent to Mr Kunda, Mr Malambo wrote that, although Donegal had opened negotiations with the Ministry of Finance and submitted various proposals, no progress had been made and Donegal had resorted to litigation: they still preferred, however, to resolve the matter without litigation and asked that the Government let them know whether this could be achieved. Mr Kasonde told me that this letter never reached him, although it had

been addressed to Mr Kasonde himself and he should have seen it personally. I accept his evidence. The letter did, however, reach his Ministry, and on 16 September 2002 a Deputy Minister at the Ministry of Finance drew it to the attention of the Secretary to the Treasury.

331. On 20 September 2002, Donegal began proceedings against Zambia in the Eastern Caribbean Supreme Court in the BVI. The claim form was verified by a certificate of truth signed by Mr Slater. Donegal claimed US$43,100,725.06, being an "aggregate principal amount" of US$29,834,368 plus US$13,266,357 claimed as interest due to 16 September 2002, and interest "at the rate of 12% pa (being the agreed rate) from 16 September 2002 to judgment or sooner payment". I understand that the sum of US$13,266,357 was calculated on the basis that interest at 12% accrued both before and after 31 December 2001 until the proceedings were issued. Zambia complain that the claim form was inaccurate in that:

i) Zambia had not agreed with either Romania or Donegal that penalty interest should be capitalised, and

ii) There was not an agreement for on-going interest at 12% pa.

I accept the validity of both criticisms, although I also accept that Donegal believed that Zambia had agreed with Romania that penalty interest should be capitalised. I will return to Donegal's belief about the rate of interest later in my judgment.

332. Donegal's Statement of Claim was also dated 20 September 2002 and verified by a statement of truth of Mr Slater. Zambia criticise this too as inaccurate and misleading.

i) In paragraph 1, Donegal pleaded that they were "carrying on business as a factor", which was not, Zambia say, an accurate description of their business.

ii) In paragraph 8, Donegal pleaded as follows: "On or about 18 and 19 December 1998, representatives of Romania and [Zambia] attended a meeting in Bucharest with a view to reconciling their calculations and negotiating a method for agreeing the amount outstanding. As a result of the meeting in late December 1998, [Bancorex] … prepared summary statements for the payment obligations owed by [Zambia] to Romania as at 31 December 1998, confirming principal and capitalised interest of US$29,834,368.06 …". Zambia criticise the assertion that the meeting in Bucharest was held "with a view to reconciling their calculations and negotiating a method for agreeing the amount outstanding", pointing out that the Memorandum of Understanding (a copy of which Donegal had) states that the purpose of the negotiations was not so limited, being "to reconcile the outstanding debt and to negotiate the modalities for the settlement of Zambian debt owed to Romania". Further, Bancorex did not prepare summary statements of the amount outstanding "as a result of the meeting in late December 1998": it had done so beforehand and for the purpose of that meeting, and its figures were annexed to the Memorandum. Moreover, the Bancorex figures did not "confirm principal and capitalised interest of $29,834,368.06": Bancorex could not unilaterally impose capitalised interest, and in any case the summary annexed to the Memorandum shows that interest was not capitalised at the meeting,

distinguishing between, and adding together, sums outstanding and penalty interest. It would have been beside the point for Zambia and Romania to agree that interest be capitalised because the parties were negotiating terms to extinguish the debt.

iii) In paragraph 12 of the Statement of Claim, Donegal pleaded (in the terms that I have already set out but that I repeat for convenience) that, "At a meeting held on or about 8 February 2002, the aggregate amount of the principal and interest of the debt was agreed based on a rate of 12 per cent on the amount of principal and capitalised interest acknowledged by [Zambia]. In return, [Donegal] agreed it would not pursue proceedings against [Zambia] for a couple of months". Zambia say that there was no such agreement.

The first two criticisms are, in my judgment, justified (subject, of course, to my finding that Donegal believed that the interest had been capitalised in December 1998). The third criticism is justified in as much as the pleading suggests that there was any contractual agreement about the aggregate amount of the debt or the rate of interest, and also in so far as it suggests that Donegal agreed to forebear from bringing proceedings for a specific period of time. I add that the prayer to the Statement of Claim reflected the Claim Form, and therefore reflected the inaccuracies in it.

333. Zambia also point out that the Statement of Claim made no reference to the Banking Arrangement dated 8 September 1979, which was intended to affect the rights and obligations of Romania and Zambia pursuant to the Credit Agreement. For my part, I see no reason that the Statement of Claim should have referred to that arrangement.

334. Before leave to serve the proceedings out of the jurisdiction had been sought or obtained, the proceedings were delivered by Mr Malambo to the Ministry of Legal Affairs on 27 September 2002. Mr Malambo told Mr Kunda that he did not need to act formally on the claim and Donegal were merely giving advance notice of it. Although the proceedings were not being formally served, they were delivered under cover of a letter from Harneys to the Secretary to the Treasury dated 20 September 2002 that said that the documents were important and "If you do nothing, judgment may be entered against you without further warning". Despite Mr Malambo's evidence, it seems to me clear that Donegal intended to impress upon Zambia that the BVI proceedings were being vigorously pursued. Later in a letter dated 22 January 2003 (which was drafted, or redrafted, by Mr Slater) Malambo & Co said that this "advance copy" of the BVI proceedings was provided "in an effort to be courteous", but this purpose was not explained in the letter of 27 September 2002 or reflected in its vigorous language.

335. According to Mr Malambo, Mr Kunda spoke to him by telephone on 23 October 2002 and said that he was himself keen to settle the BVI proceedings. Mr Kunda denied this, explaining that the Government had by then instructed BVI lawyers to represent them, and understood that they would have proper grounds to challenge service of the proceedings on the basis of forum conveniens. Mr Malambo made no note of the conversation. He was in contact with Mr Slater and said that he would have mentioned the conversation to him, but he did not report it in writing and did not follow up with Mr Kunda his apparent interest in a settlement. In these circumstances, while I am prepared to accept that Mr Kunda might have made some

passing general remark to Mr Malambo about hoping that the matter might be settled, I cannot accept that he said anything of any significance.

336. By a letter dated 25 October 2002 Mr Kunda informed Mr Malambo that he had not accepted service of the proceedings, that no order for service out of the jurisdiction had been obtained, and that he was not aware of the time limits for service of a defence.

337. On 15 November 2002 Donegal were given leave by the Eastern Caribbean Supreme Court to serve the BVI proceedings against Zambia out of the jurisdiction on the Ministry of Finance in Zambia. Their evidence in support of the application was an affidavit sworn by Mr Slater and dated 7 October 2002. They also put before the BVI court a skeleton argument dated 30 October 2002 and signed by Mr T L Clarke, a solicitor with Harneys. Zambia complain that both the affidavit and the skeleton argument were misleading.

338. Some of the complaints about the affidavit echo complaints made about the pleading, which I have accepted: that Mr Slater described Donegal as "carrying out business as a factor"; that he characterised the negotiations between Romania and Zambia in December 1998 as having been "with a view to reconciling their calculations and negotiating a method for agreeing the amount"; that he asserted that Bancorex had prepared statements "confirming principal and capitalised interest" of $29,834,368; that he stated that the Zambians had agreed an interest rate of 12% on that total figure at the meeting in February 2002.

339. Zambia make further criticisms of the affidavit:

i) Mr Slater asserted that Donegal "had been in discussions with [Zambia] before it acquired the Debt and one of the factors that influenced [Donegal's] decision to buy the Debt was confirmation by [Zambia] that the Debt would be eligible for use in a debt conversion". Although I accept that there had been discussions about debt conversion, Zambia had given no such confirmation.

ii) Mr Slater stated, in support of Donegal's contention that the place of payment of the debt was in the BVI and that therefore the Court could properly assume jurisdiction, that, "It is important to note that the terms of the Credit Agreement fail to provide a place for payment". No mention was made of the Banking Arrangement, and the provision therein about payment through Manufacturers Hanover Trust, New York. Moreover he went on to say, "in consideration for [Donegal] granting one final extension for payment of the Debt [Donegal] required [Zambia] to perform the Credit Agreement in the British Virgin Islands by making payment at [Donegal's] bankers. In the absence of any express provision and in light of the demand letter of 2 August 2002, I am advised that [Zambia] should seek out and pay [Donegal] at its place of business in the British Virgin Islands". Thus, Mr Slater was suggesting that by the letter of 2 August 2002, Donegal had effectively imposed upon Zambia an obligation to make payment in the BVI, although I cannot see how it could be said that Zambia agreed to such a variation in the terms of the debt. Moreover, the letter of 2 August 2002 in fact required Zambia to pay funds to JP Morgan Chase Bank, New York, albeit for the credit of an account in the BVI, and this was not mentioned in Mr Slater's

affidavit, although it is right to observe that the letter of 2 August 2002 was included in the exhibit to it.

iii) As for the law governing the transaction, Mr Slater correctly observed said the Credit Agreement did not contain a governing law clause. He referred to the possibility that the underlying sale contracts concluded pursuant to the Credit Agreement were relevant, albeit they were between parties other than Zambia and Romania, but said that copies were not available. He even suggested that the governing law of the Credit Agreement might be that of the assignment to Donegal. But again he made no reference to the Banking Arrangement which included a clause providing for ICC arbitration in Paris, French law being applicable.

iv) Mr Slater referred to publicly available information that he had collated to support his assertion that corruption in both Zambia and Romania constituted sufficiently special circumstances to bring it about that justice required the trial of the claim on the debt to take place in the BVI. He did not refer to other possible forums, such as New York which was arguably the place of payment, or to the possibility of arbitration in Paris.

340. Zambia point out that Mr Slater referred to the Acknowledgment in his affidavit, and included it in the exhibit. He relied upon it (among other purposes) to answer any limitation defence that Zambia might be said to have to the claim.

341. As for Mr Clarke's skeleton argument, Zambia point out that it too asserted that the "Credit Agreement is silent as to the place of repayment of the debt" without making reference to the Banking Arrangement. Further, reflecting the affidavit, Donegal asserted this: "… there are very real risks in this case that a fair trial would not be obtained in either court [sc. Romania or Zambia]. In particular, the risks of corruption, lack of independence, bribery, delays and gross and prejudicial inefficiency catalogued in the [evidence of Donegal] would potentially be compounded in this matter because the Defendant [Zambia] is a state entity. In the circumstances, restricting the parties to either of the potential foreign courts creates so strong a risk of injustice that the foreign courts should not be regarded as suitable alternative forums." In submitting that Donegal had a serious issue to be tried, Donegal relied upon the Acknowledgment as verifying the debt and Donegal's standing as Zambia's creditor, in order to demonstrate that the claim related to "ordinary commercial activities of the state … as opposed to governmental acts", and to support the submissions that "there is no limitation point available to [Zambia] given that the debt was acknowledged by it in February 1999".

342. I cannot regard all these criticisms of the affidavit and skeleton argument as justified. It seems to me extravagant to complain of a failure to canvass New York as a possible forum or to contemplate Paris arbitration or to invite consideration of whether the transaction was governed by French law. However, I do consider that Zambia's other points have merit. In particular, it seems to me that the Banking Arrangement should have been disclosed upon the application to serve out of the jurisdiction.

343. I should mention one further observation, although this is not a criticism of Donegal that has been made by Zambia and not a matter that I shall hold against Donegal. As I have said, Mr Trace has accepted that because Donegal accepted an assignment of

debt between states and the debt was assigned subject to equities, Zambia enjoyed state immunity in respect of the assigned debt. This point was not drawn to the attention of the court when Donegal applied for leave to serve the BVI proceedings out of the jurisdiction. On the basis of Mr Trace's concession and unless the law of the BVI differs from English law, it should have been.

344. Thus, Zambia submit that Donegal presented incomplete and misleading information to the BVI court in the claim form, the statement of claim and the affidavit so as to bring a claim on the assigned debt and they assert that Donegal, in the person of Mr Slater, did so knowingly. (Zambia did not pursue any distinct complaint about the skeleton argument). I shall label this allegation the "BVI proceedings allegation". I have found that the complaint that Donegal provided the BVI court with incomplete and misleading information is justified in significant respects. I have to consider whether Zambia have shown that Mr Slater signed a claim form or the pleading knowing that they contained statements that were false or knowingly gave false evidence in his affidavit or knowingly presented improperly incomplete information to the BVI court.

345. Zambia did not plead in their Points of Challenge to the Jurisdiction that Donegal or Mr Slater knowingly misled the court, the allegation was not made in their written or oral opening submissions before me and it was not, I think, made before the evidence was heard. Donegal did not call Mr Slater to give evidence. However, Zambia have made this allegation in their closing submissions, and Mr Trace has raised no objection to Zambia making it at that stage and has not suggested that Mr Slater would have given evidence had it been made earlier. I must, I think, in these circumstances deal with it on its merits, but I am troubled that such a serious allegation, one amounting to perjury and perverting the course of justice on the part of a solicitor, should emerge in this way.

346. One consequence of the fact that this allegation is not pleaded is that it is not entirely clear in what respects Mr Slater is said to have misled the BVI court knowingly. However, I understand this complaint is in respect of (i) the failure to draw to the court's attention the Banking Arrangement and (ii) what was said about the agreement with regard to 12% pa interest. (If there are other aspects to this criticism, I would not accept them.)

347. As I have already said when considering the bribery allegation, when determining allegations as serious as these the court will consider whether such misconduct is inherently improbable and if it is, will take account of that when weighing the evidence. I approach these allegations on the basis that it is inherently improbable that a solicitor will mislead a court (whether a court of this country or an overseas court). I also am entitled, I think, to recognise that experience shows that lawyers (and others) can mistakenly mislead the court in a way which appears with hindsight to be glaring but which is the result of an honest mistake.

348. As for the complaint about the non-disclosure of the Banking Arrangement, as I have said, that should in my judgment have been referred to in Mr Slater's affidavit or otherwise put before the court when the application for leave to serve the proceedings out of the jurisdiction was presented to the court. However, I am willing to accept that Mr Slater and others acting for Donegal did not appreciate the significance of the Banking Arrangement, and did not deliberately withhold it from the court. It is true,

as Zambia point out, that it still determined the interest to be paid on the part of the assigned debt that was not re-scheduled in 1985, but the rate of interest is also stated in the annexes to the Memorandum of Understanding between Romania and Zambia of December 1998. It is of some interest that, while Zambia now place great emphasis on the Banking Arrangement, in 2002 and 2003 they did not require that it be mentioned as a "Credit Document" in the Settlement Agreement, although those documents had been defined consistently in all the drafts of the Settlement Agreement from the first draft of November 2001.

349. With regard to what was said about 12% pa interest, there are two aspects to the complaint: the implication that the parties had reached a final and contractual agreement about the rate of interest, and the implication that the agreement applied to interest accruing after 31 December 2001. In both these respects the criticisms of the claim form and the statement of claim are justified. Mr Slater had, of course, been at the meeting of 6 February 2002 at which Donegal and Zambia had discussed settlement on the basis of agreement about the amount of the debt, that amount being calculated by reference to interest on the debt accruing at the rate 12% pa to 31 December 2001, but they had not concluded any settlement agreement. If Mr Slater had focused on the point, he would, in my judgment, have realised that Zambia did not contractually commit themselves to paying interest at the rate of 12% pa even in respect of the period up to 31 December 2001, still less thereafter. However, it is fair to observe that Mr Slater stated the position more accurately in his affidavit, and there is no reason to think that Mr Slater saw Mr Nonde's letter of 21 February 2002 in which he said that the negotiations led to no concluded agreement. I think it likely that he and others were lulled by the discussions to think in terms of interest on the debt being at a rate of 12% pa and did not focus on what had actually been agreed. Mr Slater, I think, should have done especially since he is a lawyer, but that is very different from concluding that he certified the truth of documents that he knew or believed to be inaccurate. I conclude that the errors in the claim form and statement of claim about an agreed interest rate are the product of sloppy thinking and I reject any suggestion that Mr Slater subscribed to a misleading statement deliberately.

350. I reject the submission that Mr Slater and Donegal knowingly misled the court in the BVI proceedings.

351. I need hardly add that I should not be understood to make any criticism of Mr Clarke personally: I do not know what information or instructions he had. Further, it is not necessary for me to express a view as to whether had the matter been properly presented to the court of the BVI, leave to serve the proceedings in Zambia would still have been granted, and I decline to do so.

The Negotiations before March 2003

352. From about September 2002 there were discussions between Donegal and Zambia to try to settle the dispute: Mr Mwale said that he did not attend the initial meetings, but he did arrange some of them. I accept that evidence, but I am unable to accept his evidence that he was told by Mr Chizyuka and Mr Simwinga that, whilst Mr Kunda was to provide legal advice, the debt management was the sole responsibility of the Ministry of Finance. Mr Simwinga specifically denied any such conversation with Mr Mwale and indeed explained that in September 2002 he was not dealing with debt

management but was dealing with government investments and would not have been involved in this matter.

353. Having been sent a copy of the BVI proceedings before leave to serve them out of the jurisdiction had been obtained, on 25 October 2002 Mr Kunda wrote to Mr Malambo explaining that he was taking instructions about the proceedings but in the meanwhile he put it on record that he had not accepted service. This was when the Attorney General became personally involved in the matter. Notwithstanding the Attorney General's obvious involvement from this point, and the fact that proceedings had been issued since his previous letter of 11 September 2002, Mr Malambo continued to deal with Mr Diangamo, the (Acting) Secretary to the Treasury: for example, they had a meeting on 1 November 2002.

354. On 5 November 2002 Mr Malambo sent Mr Diangamo a draft settlement agreement. It reflected the draft first sent to Zambia in November 2001: it referred to the Acknowledgment in the recitals, it contemplated payment by instalments with the provision that, in the event of default, Donegal might serve a notice and become entitled to judgment in respect of the debt and interest, and it contained a provision whereby Zambia waived state immunity. It referred to principal of US$29,834,576.26 and "accrued interest thereon" of US$14,012,208.20, a total of US$43,846,576.26. Interest was calculated at the rate of 12% pa. The letter said that Zambia were expected to make the first payment of US$500,000 on 1 December 2002, but thereafter no further amount was to fall due until 1 April 2003. Mr Malambo said that this was designed to allow Zambia to make provision for the scheduled payments in the budget that was to be approved by Parliament in late March 2003. On 17 November 2002 Mr Diangamo replied that "we are agreeable to your proposal which will allow the Zambian Government to meet its obligations to your client in the National Budget", and proposed that, while Zambia would endeavour to make the first payment during the first week of December 2002, the execution of the agreement be deferred to the third week of December.

355. Mr Kasonde told me that the letter of 17 November 2002 did not necessarily mean that he approved the terms of the agreement, but he acknowledged that he did not recall this matter in detail. At all events, in fact no payment was made by Zambia following this exchange.

356. On 6 December 2002 Mr Mwaanga wrote an internal memorandum in which he stated, "The initial payment is now due and I recommend that as a show of good faith we settle this amount. Moreover, the creditor has shown a lot of goodwill in agreeing a settlement of 33% of the face value of US$43,846,576.26". The memorandum attached a draft counter-proposal which, it was suggested, might be presented to Donegal. Mr Mwaanga was pressed in cross-examination to agree that Donegal's offer was a good one from Zambia's point of view, but he explained that in his opinion Zambia could properly seek a better one: hence the counterproposal. I accept that that was his view.

357. Mr Mwale's diary extracts show that by December 2002 he was involved in meetings between Donegal and Zambia. An entry for 3 December 2002 suggests that Mr Sheehan was expected in Lusaka and appears to refer to a meeting with Mr Diangamo. An entry on 9 December 2002 refers to a meeting with Mr Mbewe. An entry on 17 December 2002 refers to a meeting with Martin (presumably Lukwasa)

and Richard (presumably Chizyuka), but no notes appear about what was discussed. An entry on 18 December 2002 refers to Mr Mbewe, and records inter alia that "Donegal will sign an amendment allowing for a 3 month delayed payment at 1% per month/ 12% per annum …". On 20 December 2002, $10,000 was transferred from Select Capital's account with the Bank of Butterfield in Grand Cayman directly into Mr Mwale's account in Lusaka. Again there is no supporting documentation for this payment, nor is there any indication as to what it was used for by Mr Mwale in Zambia. The inference is that Mr Mwale was being well paid for his work at about this time.

358. On 6 January 2003, Mr Lukwasa, the Treasury Counsel, acting on Mr Kunda's instructions, wrote to Mr Malambo stating that the Minister of Legal Affairs and Attorney General had conduct of the matter and the Ministry of Finance could not deal with him directly. On 8 January 2003, Mr Kunda wrote a "without prejudice" letter to Mr Malambo expressing his disappointment that Mr Malambo had been negotiating directly with the Ministry of Finance, knowing that he had conduct of the matter. He continued, "To this extent any agreement purportedly made with the Secretary to the Treasury is invalid and unconstitutional (Article 54(3) of the Constitution)", and requested that all future correspondence on the matter be directed to him. He also asked, among other things, that Donegal "Justify the escalation of the alleged debt from US$5,549,101.01 as pleaded to US$43,100,743.06", and specifically whether the figure included compound interest and if so at what rate and whether an agreement justified it. Mr Malambo confirmed during his oral evidence that his understanding of these two letters was that the Attorney General would now take sole conduct of the matter, and he accepted that was the basis upon which matters would henceforth proceed. (When he was cross-examined, it was pointed out to Mr Kunda that it would have been apparent to him from the letter of Malambo & Co to Mr Kasonde dated 11 September 2002, a copy of which was sent to Mr Kunda, that Donegal were dealing directly with the Ministry of Finance, and he was asked why he did not then protest that he should have had conduct of the discussions. Mr Kunda said that he distinguished the position where those negotiating with the Government had engaged a lawyer to conduct them. In any case, since he made the Government's position clear by his letter of 8 January 2003, it seems to me of no consequence whether he might consistently have raised earlier his complaint that the discussions should have been with his Ministry and not the Ministry of Finance.)

359. On 10 January 2003 Mr Malambo confirmed Donegal's willingness to meet for "without prejudice" discussions. A draft of the reply that was to be sent by Malambo & Co to Mr Kunda's letter of 8 January 2003 has been disclosed. It said that they had "taken note" of the disappointment expressed in the letter, and continued: "Your records should reflect a memorandum signed on 18th December 1998 between the Government of Romania and the Government of the Republic of Zambia where the Parties acknowledge and agreed the sum due (principal and interest) as US$29,834,638.06 with the interest rate of 12%. (Our clients are in possession of this Agreement.) … Interest has continued to accrue as agreed and it stands to reason that the debt outstanding since 1985 would now reflect the figure you seek to contest". Of course, the Memorandum of Understanding did not in fact include any agreement about the interest rate.

360. In the reply dated 22 January 2003 that was in fact sent to Mr Kunda's letter, Malambo & Co referred to an unfortunate misunderstanding whereby Donegal had continued to negotiate with the Ministry of Finance. They explained that they had understood that the Ministry of Finance were solely responsible for rescheduling the external indebtedness of Zambia, and that this reflected the law of Zambia. However, they said that if they had been told by the Ministry of Finance that they should negotiate with the Attorney General, they would have done so, "as we are now doing". They also said that they were aware of the requirement in the Zambian Constitution for contracts to be reviewed by the Attorney General but that they viewed the provision as "a matter of internal regulation and not one which vitiates agreements and obligations explicitly undertaken by Zambia in commercial negotiations".

361. The reply referred to the Acknowledgment of 12 February 1999 stating a principal figure of US$29,834,368.06, a figure which, Malambo & Co said, had not been disputed in four years of negotiations. The letter also said that interest accruals since that date were "based on the capitalisation of interest agreed in the negotiations for the buy back of the debt by [Zambia and Romania] that took place over the course of 1998", claiming that "capitalization is acknowledged in the acknowledgment of debt and consent to assignment" of 12 February 1999. The letter continued to say that interest since the date when Donegal acquired the debt had been calculated as simple interest of 12% pa, and that Zambia's "acquiescence to this interest calculation is based on the fact that the penalty interest provisions applicable to this debt on its original terms would result in a higher amount owed". It also referred to the Acknowledgment as accepting that the notice of assignment was governed by English law.

362. Zambia make criticisms of the letter that essentially reflect the criticisms of how Donegal presented their case in the BVI proceedings. They include the observation that Donegal's calculation of the debt involved the retrospective application of an interest rate of 12%, justified on the basis of some kind of acquiescence on Zambia's part. (In so far as the argument of acquiescence is based on the suggestion that the rate of 12% justified was to Zambia's advantage, Zambia dispute this). I do not consider Zambia's criticisms justified. Although the interest rate of 12% pa had not been contractually agreed at the meeting of 6 February 2002 or at any meeting, there had been a calculation of the sum owed by Zambia on the basis of this interest rate. During the time that had passed since the meeting, or at least since Mr Malambo sent the draft agreement on 6 June 2002, the parties had not disputed that this was a proper calculation. Mr Mwaanga's memorandum of 6 December 2002 shows that Zambian officials believed it to be so. This does not mean that Zambia were legally bound by their "acquiescence", but I do not read the letter from Malambo & Co as suggesting that they were.

363. On 5 February 2003 Messrs Allen & Overy wrote to Mr Kunda a letter marked "without prejudice" in which they said that they had been instructed to take over all negotiations between Donegal and the Zambian Government, stating "All such negotiations should be conducted through us in London from now on". However, on 17 February 2003 Mr Sheehan wrote to Mr Kunda stating that it had been indicated that they should meet to discuss the matter directly and welcoming the suggestion. On 24 February 2003, Mr Kunda wrote to Malambo & Co, explaining that he could

deal only with a Zambian registered law firm and saying that they were in a position to "explore the possibility of an ex curia settlement", proposing dates in March to "agree on the final terms of settlement". On 4 March 2003 Mr Malambo wrote that his clients were willing to travel to Zambia for a meeting on 13 and 14 March 2003, and on 10 March 2003 Mr Kunda wrote that he had arranged 13 March 2003 at 10.00pm in his office "for the first meeting in this matter".

364. On 24 February 2003 Mr Kunda also wrote to President Mwanawasa, explaining that he had ascertained that Donegal were willing to settle the debt of US$43,469,370.17 for US$14,469,370.17 to be paid in instalments, and expressing the hope that Donegal would agree to a further reduction. In cross-examination Mr Kunda accepted that at that stage Mr Kunda thought that Donegal had a valid debt for US$43 million.

365. On 10 March 2003 Mr Kunda wrote to Mr Lukwasa that he had arranged to meet Donegal at his office on 13 March 2003 at 10.00 am, and asking Mr Lukwasa to attend with the Secretary to the Treasury "so that the mode of settlement may also be agreed". Mr Kunda again referred to the amount of the debt as US$43,846,576.26, and again he acknowledged in his evidence that he still regarded the debt as valid.

The meeting(s) of March 2003

366. It is common ground that in March 2003 representatives of Donegal met representatives of the Zambian Government in Lusaka. Donegal were represented by Mr Sheehan and Mr Malambo, and Zambia were represented by Mr Kunda, Mr Lukwasa, Mr Lintini and Miss Chiboola. Mr Kasonde explained that, while at one stage the Ministry of Finance played a leading role in the negotiations over the debt and indeed he himself had telephoned the Romanian embassy in Lusaka and obtained their confirmation that Donegal were the assignees of the debt, thereafter Mr Kunda had told him that he would take charge of the negotiations with Donegal and he had instructed the Treasury Counsel to attend the negotiations, not to take a leading role in them but simply to report back to Mr Kasonde.

367. There is an issue upon the evidence about what meetings were held and whether at the end of the discussions matters were left (as Donegal say) simply on the basis that Mr Kunda would be in touch with Donegal or whether (as Zambia say) it was arranged that the discussions should be postponed for fourteen days. This difference is, as it seems to me, of fairly peripheral importance to what I have to decide because, although Donegal's case is that Mr Sheehan and Mr Malambo considered that by the end of the meetings on 14 March 2003 the negotiations had successfully identified terms upon which the parties would agree, it is not contended that any final agreement was reached at these meetings.

368. The only attendance note of the meetings is one made by Mr Kunda on 14 March 2003. (It is in fact dated 15 March 2003. However, he explained that was when his note was put before him for signature after it had been typed.) At the start of the hearing before me, Zambia had disclosed only a redacted version of the note, claiming legal privilege for the redacted passage, but during the hearing and before oral evidence was called, they disclosed the note in its entirety.

369. Mr Kunda's note records a meeting in the Ministry of Legal Affairs on 14 March 2003 at which there was discussion of the possibility of the debt being reduced to

US$14,469,370.17 from US$43,846,576.26 and (as Mr Kunda's note put it) "even further". But at 4.00pm the meeting was postponed because Donegal did not agree to a further reduction, and the draft agreement presented at the meeting contained two provisions to which Mr Kunda did not agree: a provision that US$43,446,576.26, which Donegal claimed was the full amount of the debt, would become due in the event of default, and a clause waiving immunity over the assets of the Government. The meeting reconvened at 5.20pm, but the difference over these two clauses could not be resolved and after further discussions it was agreed to postpone the meeting for at least 14 days to allow for consultations. Mr Kunda promised to revert to Donegal.

370. In the part of the note that had been redacted when it was first disclosed, Mr Kunda recorded that, in the absence of the Donegal representatives, he had advised the Zambian officials that "since we admitted the debt and the amount we could not escape liability. In this regard some letters had been written by Mr Diangamo, former Acting Secretary to the Treasury committing Government to the debt and instalment payments". The letter of 17 November 2002 was such a letter.

371. Mr Kunda's evidence before me was that a meeting was held at the Ministry of Finance on 14 March 2003 between the persons to whom I have referred. He said that the Attendance Note was inaccurate in recording the meeting as being at the Ministry for Legal Affairs. Mr Kunda could not recall a meeting on 13 March 2003, but he was also unable to recall any reason that the meeting arranged for that day should not have taken place. He said that there was a draft agreement under discussion, but had no recollection of Donegal revising the draft by introducing provisions for postponing the payment of instalments.

372. Mr Kunda said that the meeting on 14 March 2003 was inconclusive because Donegal would not agree to a reduction in the debt below US$14,469,370.17 and further accrued interest, and he, Mr Kunda, would not accept the proposals of Donegal about default and waiver of immunity to which his note referred. He described Mr Sheehan's attitude during the meeting as very aggressive, while Mr Malambo was quiet. He recalled saying that he was keen to avoid litigation and asking the Ministry of Finance whether they could make the payments envisaged by the proposed agreement. There was a brief adjournment of the meeting, but the differences between the parties were not resolved, and then the meeting was adjourned for at least 14 days on the basis that Mr Kunda would come back to Donegal. (Mr Kunda did in cross-examination refer on occasion to the meeting being adjourned "for 14 days", but I did not understand him to mean when he used that expression that the adjournment was arranged to be for exactly that period.) In cross-examination Mr Kunda said that the two points about the purported default provision and waiver of immunity were "deal breakers". However, he accepted that when the meeting broke up, he felt that the Government really had no option but to accept the proposed agreement as long as the instalments could be paid.

373. Mr Lintini recalled a meeting that lasted for a day with breaks between sessions. He did not have a detailed recollection of the meeting, but he considered that Mr Kunda's attendance note was substantially accurate. He recalled that there were provisions in the draft agreement to which Mr Kunda would not agree, and that the meeting was adjourned without agreement to allow further consultations. He denied in cross-examination the suggestion that at the end of the meeting Mr Kunda asked him whether the Ministry of Finance could manage the payments that were proposed. Mr

Lintini's evidence was that he did not remember any discussion at the meeting that he attended about allowing more time in the event of late payment before there was an event of default, or about an amended draft being produced.

374. Miss Chiboola's evidence was that she attended a meeting in the offices of the Attorney General: she was not able to state the date, but she did not attend meetings on two different days and she did not attend a meeting with Donegal at the Ministry of Finance. She confirmed the accuracy of Mr Kunda's Attendance Note, and said that the meeting was inconclusive because Mr Kunda objected to the default provision and the waiver of immunity clause proposed by Donegal. Miss Chiboola did not remember an offer by Donegal's representatives to delay payments in order to help liquidity problems. She recalled discussion of only one version of the draft agreement, and said that it was agreed to postpone the meeting for at least 14 days and Mr Kunda was to come back to Donegal to resume discussions.

375. Mr Malambo told me that, although he attended as Donegal's legal representative, he did not make an attendance note: he said that neither he nor Mr Sheehan took notes. His evidence was that the first meeting was held on 13 March 2003 in the Attorney General's chambers at 10.00am and was attended by Mr Kunda, Mr Lukwasa, Miss Chiboola and Mr Lintini, and by Mr Sheehan and himself representing Donegal. Mr Malambo described the meeting as "heated", and said that Mr Sheehan argued for and Mr Kunda opposed including in the agreement a provision waiving state immunity and a term that in the event of default the whole debt should become due. Mr Sheehan did not give ground, except to propose a clause allowing Zambia to postpone payment (and so to avoid being in default) in the event of a temporary cash flow problem.

376. After that meeting Mr Malambo said that he and Mr Sheehan went to his office and revised the draft agreement. The meeting reconvened on 14 March 2004: it was arranged for 4.00pm but in fact Mr Kunda was late. Mr Kunda took the revised draft and said that he would come back to Donegal, but did not speak of postponing the meeting for 14 days. Had he done so, Mr Malambo told me, he would have noted that in his diary. (This reasoning was apparently directed to the suggestion that the meeting was to be postponed for exactly 14 days. Mr Kunda's evidence and Miss Chiboola's evidence was of a postponement of at least 14 days.) Mr Malambo anticipated no further negotiations and thought that Zambia would accept the proposed agreement. He accepted, however, that Zambia did not say at the meetings that they accepted the proposed agreement.

377. Mr Sheehan's evidence was that on 13 March 2003 he and Mr Malambo represented Donegal at a meeting at the Attorney General's chambers, the meeting being presided over by Mr Kunda and attended also by Mr Lukwasa, Mr Lintini, and Miss Chiboola. Mr Sheehan spoke for Donegal and Mr Kunda for Zambia. Mr Sheehan said that Mr Kunda's main focus was the amount of debt that Donegal would forgive, the position with regard to state immunity, and Donegal's contention that the debt should all become due in the event of default; and that Donegal did not compromise on those points, except to allow Zambia to postpone payments in the event of temporary illiquidity.

378. According to Mr Sheehan, after the meeting, Donegal submitted a revised draft of the proposed agreement to reflect the agreed changes. There were then two further

meetings at the Ministry of Finance on 14 March 2003 when the Attorney General pressed further on the same points as on the previous day, but Donegal confirmed their position that these matters were "deal breakers". He said that most of the negotiations took place on 13 March 2003, and that on 14 March 2003 there was not too much discussion. His evidence therefore is that the substance of the negotiations all took place on one day.

379. He said that at the end of the meetings on 14 March 2003 Mr Kunda said that he would "come back to" Donegal. But Mr Sheehan said that he did not really understand about what Mr Kunda would be in touch about. He denied that there was mention in his presence of the meeting being postponed for 14 days. He said that by the end of the meeting he thought that Donegal had secured a deal. He accepted, however, that Mr Kunda did not indicate that Zambia would waive state immunity or that they would be liable to pay the entire amount of US$43.8 million in the event of default.

380. Mr Sheehan said in his oral evidence (although this is not in his witness statement) that he took notes at the meeting, but that these were in a briefcase that was later stolen together with his laptop computer and diary at Johannesburg airport. According to Donegal's list of documents for disclosure, this theft did not take place until December 2004. Mr Sheehan gave no reason for such notes being carried in his briefcase some 20 months after the meeting. I prefer the evidence of Mr Malambo and reject Mr Sheehan's evidence that he took notes at the meeting.

381. There is in evidence a draft of a settlement agreement dated 14 March 2003. It provided for payment of US$15,915,128.72 (including interest) by monthly instalments between March 2003 and February 2006. It is a revised, "track-changed", version of the November 2002 draft of the proposed agreement. Among the changes marked are an increase in the interest, and so of the total debt and proposed settlement amount at 33% of the total debt. There were also additional provisions permitting Zambia to postpone payments (other than the first two instalments of US$2,500,000 in total) on specified terms, paying interest at the rate of 12% pa. According to Donegal, the changes reflect the discussions held on 13 March 2003 and before the parties reconvened on 14 March 2003.

382. Zambia dispute this, and dispute that the revised draft is evidentially significant. They argue that changes from the draft dated November 2002 do not reflect discussions that Donegal's witnesses said took place at the meeting on 13 March 2003, and they specifically refer to changes to the date and figure for interest; to the rate of interest on the declining balance being increased from 5% to 6%; to an increase to 6 months in the period after any default by Zambia to make payment before Donegal might elect to terminate the agreement; to the addition of details for notices on Donegal; and to a new clause 13 providing for amicable settlement. They also point out that provisions introduced into the draft providing for postponement of instalments by Zambia for 3 months apparently reflect the note in Mr Mwale's diary on 18 December 2002, and submit that it appears that this matter was agreed before March 2003 and negotiations about it would have been unnecessary.

383. This is true so far as it goes, but it does not, it seems to me, fully answer Donegal's point. It may be that not all the revisions to the draft agreement were discussed for

the first time in negotiations with Mr Kunda. It may be that the note in Mr Mwale's diary shows that Mr Sheehan was wrong in his evidence in that he said that the provision for a "leeway on payment" (as he put it) was not discussed until the March meetings. But Donegal are justified in pointing out that the revised draft included matters that, as Mr Kunda's attendance note shows, were discussed during the negotiations, and invites the inference that it reflects the discussions.

384. I conclude that Mr Kunda must be mistaken in recalling meetings on only one day, and that negotiations took place between Donegal and Zambia on 13 and 14 March 2003. The letter of 10 March 2003 arranged for the negotiations to start on 13 March 2003, and I conclude that they did so. It does not matter where the meetings took place, but I think that it is probable that the meeting on 13 March 2003 was at the Ministry of Legal Affairs and that on 14 March 2003 at the Ministry of Finance. It is probable that after the first day of meetings, the Donegal representatives made some revisions to the draft agreement.

385. I also conclude that during the negotiations, Mr Kunda sought unsuccessfully to negotiate a reduction in the settlement amount. He objected to Donegal's proposals about Donegal's rights in the event of Zambia defaulting upon a payment and about Zambia waiving state immunity. Mr Sheehan insisted upon the inclusion of these clauses, and the parties did not resolve these points. The meetings were concluded on the basis that negotiations were postponed for at least 14 days to allow for internal consultations and Mr Kunda was to make contact with Donegal.

386. I conclude therefore that when the negotiations were postponed on 14 March 2003 Mr Sheehan and Mr Malambo understood that Mr Kunda retained conduct of the negotiations for Zambia and the expectation of both parties was that Mr Kunda would reconvene the negotiations after 14 days or longer. However, I also accept the evidence of Mr Malambo and Mr Sheehan that by the end of the meetings they thought it likely that Zambia would sign the proposed agreement. Equally Mr Kunda considered that Zambia really had no alternative but to do so.

Mr Kunda's advice

387. As Mr Kasonde explained, he had continuing discussions at this time with Mr Kunda about the debt and the negotiations with Donegal. Mr Kasonde said that Mr Kunda was particularly interested in whether the Ministry of Finance could afford to make the payments contemplated. In a letter to Mr Kasonde dated 17 March 2003 Mr Kunda reported on the meeting of 14 March 2003, explaining that the Government had difficulty with the default and waiver provisions but that Donegal were adamant that if their proposed settlement was not accepted, they would pursue the litigation for US$43,846,527.26 in the BVI court. Mr Kunda told Mr Kasonde that accordingly the negotiations had been postponed for 14 days to allow for consultations. He expressed his worry that the Government might not be able to meet monthly instalments, and that the whole debt might become due because of their default, but at the same time Donegal threatened to pursue the litigation. Mr Kunda concluded, "Since the negotiations are postponed I urge you to re-examine this matter closely and come up with proposals on the way forward. It appears we may just have to sign the agreement in which case you will have to make a solid repayment plan." It was not suggested to Mr Kasonde that, whatever was said in his discussions with Mr Kunda between 14 March 2003 and the execution of the Settlement Agreement, Mr Kunda

said more by way of accepting or approving the proposed agreement than is stated in the letter of 17 March 2003, and I find that he did not do so: indeed, Mr Kasonde said that at this stage the proposal "was not itself agreed to".

388. According to Mr Kunda's evidence, while he was giving advice about the proposed agreement in his letter, he was not expressing his approval of it: he intended to await Mr Kasonde's response and if his concerns were answered he would then have given his approval. But in the event there was no response to this letter, and so he did not give his approval to the proposed settlement.

389. Mr Kasonde wrote on a copy of the letter, "Mr Lukwasa and Mr Lintini, please see me with [Mr Chizyuka]". He said that he wanted to ask them whether the contemplated payments could be met. The letter was stamped as received in Mr Lintini's office on 18 March 2003, and in the office of the Treasury Counsel on 19 March 2003. However, it would not, as Mr Lintini confirmed, have been a matter for Mr Lukwasa to consider whether payments could be afforded. Mr Lintini also said that he had not handled budgeting issues or worked in the budget office, and there was a Director of Budget in the Ministry. His evidence, that I accept, was that he did not see this letter until much later, and he was not able to see Mr Kasonde with Mr Chizyuka at this time.

390. Donegal obtained a copy of the letter of 17 March 2004. Although the evidence about when it was obtained is not consistent, there is no reason to think that it was obtained by Donegal or anyone acting for them before the Settlement Agreement was concluded. According to Mr Sheehan, he believes that Donegal received it from Mr Chilupe in the spring of 2004, but he does not know how Mr Chilupe obtained it. His evidence was that he was shocked by its contents and asked Mr Mwale how it had been obtained, but Mr Mwale told him that Mr Chilupe would not say. He did not think it his duty to inquire further. He considered, he said, that the Government of Zambia had waived privilege in the document.

391. Mr Mwale, for his part, said that he received the letter a few weeks, maybe two or three weeks, after the Settlement Agreement had been signed, and sent it to Mr Sheehan. He acknowledged that the writer of the letter had not intended that Donegal should see it, but, contradicting what Mr Sheehan said, he did not ask Mr Chilupe how he obtained it. He explained the circumstances in which it was obtained as being, as Mr Chilupe told him, "because of his relationship with the Ministry of Justice, he learned that there was controversy where the Minister or the Attorney General was refusing to be party to this whole settlement agreement".

392. I prefer the evidence of Mr Mwale about this, and am unable to accept that Mr Sheehan was being honest in this part of his evidence. I cannot accept that Mr Sheehan, with his legal background, his experience and his shrewd business acumen, would really have believed that the Government waived privilege in a letter such as this, and if privilege had been waived, there would have been no reason for Mr Chilupe to have been reticent about where he obtained the letter. Further, while I am not in a position to conclude how it was obtained, I cannot accept that it was properly disclosed to Mr Chilupe or anyone acting for Donegal. While I am conscious that Mr Chilupe's death deprives Donegal and the court of his account of how the letter was obtained, I find it impossible to believe that anyone could have thought that the Zambian government assented to the letter being made available to Donegal. It was

obviously confidential and being disclosed in breach of that confidentiality. I am also driven to conclude that Mr Sheehan and Donegal deliberately refrained from enquiries about the provenance of the letter because they expected that this would be confirmed and they preferred not to have such confirmation.

393. At the start of the hearing before me, Zambia asserted that the letter was privileged, that they had not waived their privilege and that Donegal should not be permitted to deploy it in evidence. However, as I have indicated, towards the start of the hearing, they abandoned this contention. They do, however, rely upon the fact that Donegal obtained this letter in support of their complaint that Donegal and those acting for them indulged in improper practices in order to realise the debt owed by Zambia. I shall call this complaint the "AG's letter allegation", and I consider it justified.

The Execution of the Settlement Agreement

394. After the meetings on 13 and 14 March 2003, Mr Malambo spoke to Mr Lukwasa and requested that he should seek to bring the negotiations to a conclusion before Mr Sheehan left Zambia. Mr Sheehan remained in Lusaka and was in touch with the Ministry of Finance through Mr Mwale.

395. Mr Mwale's evidence was that he was in contact with Mr Lukwasa, Mr Lintini and Mr Chizyuka virtually every day. I accept that there was contact between the parties between 14 March 2003 and 5 April 2003. It included a meeting in Mr Chizyuka's office at which Mr Lukwasa and Mr Lintini were present, and this meeting resulted in the repayment schedule being adjusted to spread over a number of months the second payment that was to have been paid on 1 May 2003: a draft of the settlement agreement dated 31 March 2003 shows those changes made in manuscript. Mr Kasonde confirmed that the Ministry of Finance considered that Zambia were able to make the payments under the amended schedule.

396. Zambia complain about Mr Mwale and others having dealings with the Ministry of Finance between 14 March and 5 April 2005 on the basis that they knew that Mr Kunda as Attorney General was in charge of the negotiations. (I shall call this complaint the "unauthorised negotiations" allegation.) However, Mr Kasonde acknowledged that consideration of the change to the payment schedule was within the remit of the Ministry of Finance and reflected an understanding that Mr Lintini and Mr Lukwasa had reached with Donegal. It was not a negotiation going to any point of principle in the Settlement Agreement, and there is no evidence that other matters of any significant kind were the subject of exchanges between 14 March and 5 April 2003. I also observe that there is no evidence to suggest that Donegal engaged their own lawyer, Mr Malambo, in these exchanges. I do not consider that there is any basis for the unauthorised negotiations allegation. In any case, it was for the Ministry of Finance officials to decline to enter into discussions about any matters within the exclusive remit of the Attorney General.

397. There is a dispute between the parties about the circumstances in which the Settlement Agreement was signed on Saturday 5 April 2003. Mr Kunda played no part in arranging this meeting or indeed any meeting between the Government and Zambia after 14 March 2003 (although the 14 days period from 14 March 2003 had, of course, elapsed). He was informed of the Settlement Agreement by officials of

his Ministry only after it had been signed, when they had received a copy of it from the Ministry of Finance. He believed that he received it under cover of a letter from Mr Lukwasa dated 7 April 2003.

398. Donegal's pleaded case about how the parties met to sign the agreement is that Mr Lukwasa telephoned Mr Sheehan, said that the terms of the Settlement Agreement were acceptable to Zambia and asked Mr Sheehan to print out the agreement in final form and "bring it over". However, Mr Sheehan's and Mr Mwale's accounts in evidence are rather different. According to them, Mr Mwale was telephoned on 4 April 2003 by Mr Lukwasa, and told that Mr Kunda had approved the Settlement Agreement and said that the Ministry of Finance should sign it provided the payments could be met, and that the Ministry of Finance would therefore sign it.

399. Zambia invite me to reject the account of Mr Mwale and Mr Sheehan as to the exchanges between them and Mr Lukwasa. They say that their evidence is unreliable, and that its implication is that Mr Lukwasa was misleading Mr Mwale about the Attorney General giving approval to the Settlement Agreement. I agree that I cannot rely upon Mr Mwale's account of the exact words used by Mr Lukwasa and I am not prepared to find that Mr Lukwasa did refer to the approval of the Attorney General. However, I see no reason to reject the evidence that on 4 April 2003 Mr Sheehan was invited by Mr Lukwasa to go to the Ministry of Finance the next day with a view to the Settlement Agreement being signed. It is impossible for me to say on the basis of the evidence before me what phraseology was used by Mr Lukwasa when he asked that Mr Sheehan attend, but I have no proper basis for supposing that Mr Lukwasa was behaving improperly or misrepresenting anything.

400. Mr Sheehan was asked why Mr Malambo did not attend the signing of the Settlement Agreement. At first Mr Sheehan said that he tried to contact Mr Malambo but could not do so, observing that Mr Malambo usually went to his farm at weekends. He then said he could not remember whether he had in fact spoken to Mr Malambo before or after the signing. Donegal's pleaded case is again different from the evidence: it is that Mr Malambo had said that his attendance was unnecessary. It became clear in cross-examination that Mr Sheehan had no reliable recollection about this.

401. Zambia submit that Mr Sheehan's evidence about Mr Malambo's absence from the meeting where the Settlement Agreement was signed is unsatisfactory. They say that there was no proper reason that Mr Malambo, rather than Mr Mwale, should not have been involved at this stage – Mr Mwale had not attended the meetings earlier in March, whereas Mr Malambo had done so. They argue that Mr Malambo would have realised that the summons directly to the Ministry of Finance to sign the Agreement was inconsistent with the arrangement that Mr Kunda would reconvene the meeting after a period of reflection or consultation, and that the inference is that Mr Malambo was deliberately excluded by Mr Sheehan. I decline to draw this inference. Unsatisfactory though the evidence is about why Mr Malambo was absent when the Settlement Agreement was signed, it would be unwarranted speculation to pretend that I can properly discern some sinister reason for it. After all, Donegal were not being asked to go to further negotiations but to conclude the agreement, and there was no real reason for Mr Malambo to attend.

402. At all events, Mr Sheehan and Mr Mwale attended the Ministry of Finance on Saturday 5 April 2005. Mr Sheehan's account of what happened when he attended the Ministry is as follows: he was shown to an outer office (which was variously described as a "waiting area" or "conference room"). After about half an hour, Mr Lukwasa appeared and went to see Mr Kasonde in his private office. Mr Lukwasa emerged from the private office and went on his way. A considerable time later Mr Kasonde came from his office, asked Mr Sheehan whether he was "the gentleman from Donegal", told Mr Sheehan that signed copies of the agreement would be brought to him and left. Later, Mr Kasonde's secretary brought out six signed copies of the Settlement Agreement that had been initialled by Mr Kasonde on each page. Mr Sheehan then signed the agreements, initialling each page. He was at the Ministry for about two or two and a half hours in all. Mr Sheehan denied that he ever went into Mr Kasonde's office and denied that he was ever in the presence of Mr Kasonde and Mr Lukwasa at the same time.

403. Mr Mwale's account was generally similar to that of Mr Sheehan: he and Mr Sheehan attended the Ministry of Finance on 5 April 2003, and saw Mr Lukwasa in the reception area. Mr Lukwasa then took some files to the Minister, and, according to Mr Mwale, they did not see Mr Lukwasa again that day. After a while, Mr Kasonde appeared and asked Mr Sheehan whether he was from Donegal. Mr Kasonde told them that his secretary would bring out signed copies of the agreement, and he returned to his office. Six signed copies of the agreement were brought out, and Mr Sheehan countersigned them and was given some copies to take away.

404. It seems to me that this would have been an extraordinary way for the Government to conclude an important agreement reached after extended negotiations. I reject Mr Mwale's evidence that it "looked very normal". Mr Sheehan said that "We thought it was an unusual way of signing", although he had "signed on deals in a similar fashion". Mr Kasonde described the account given by Mr Sheehan and Mr Mwale about how the Settlement Agreement was signed as "most unusual and certainly not in accordance with the normal practice in the Ministry of Finance". I also heard evidence from Miss Landu, who had been a secretary working in Mr Kasonde's private office until February 2003. She was familiar with how Mr Kasonde usually signed agreements such as this. In her experience Mr Kasonde always followed the procedure of signing them in the presence of the Treasury Counsel and of the other party to the agreement. She had previously been Mr Kasonde's personal secretary in private employment and he followed the same procedure then. She had not known him leave it to her as his secretary to obtain the other party's signature.

405. Mr Kasonde gave evidence that the agreement was signed by him and Mr Sheehan when they were both together in his office with Mr Lukwasa. He was surprised to find Mr Lukwasa and Mr Sheehan in his waiting room on 5 April 2003 because it was a Saturday when the office would normally not be open to the public. He went into his office with Mr Lukwasa and he asked Mr Lukwasa whether all the discussions had been concluded effectively and the Attorney General had approved the agreement. Mr Lukwasa confirmed that that was the case. Mr Sheehan was invited into the Minister's private office and Mr Kasonde repeated these questions of Mr Lukwasa for Mr Sheehan's benefit, and received the same reply. There is no suggestion that Mr Sheehan or Mr Mwale commented upon this. They sat in a semi-circle around a table, with other officials present. Mr Lukwasa presented Mr Kasonde with the Settlement

Agreement for signature, and he signed the copies. He recalls distributing three copies of the Agreement, one to Mr Sheehan and two to Mr Lukwasa, although it is possible that he signed more copies and retained them in his office. He signed the agreement only after receiving Mr Lukwasa's assurance that "everything had been agreed with the Attorney General".

406. On 7 April 2003 Mr Lukwasa wrote to Mr Kunda sending him an original copy of the Settlement Agreement that had been signed and stating that the Minister of Finance had retained two copies, one to be kept with the Secretary to the Treasury and one with Treasury Counsel. Mr Kasonde explained that it was usual for the Ministry of Finance to take photocopies of such agreements and so this letter does not indicate that more than one original agreement was retained by Zambia. An original copy was sent to the Attorney General's office in accordance with a Presidential directive that the Department of Legal Affairs should be the Central Depository of all agreements to which Zambia were a party.

407. Mr Lukwasa did not give evidence. Although he still works for the Zambian Government, I decline to infer that his evidence would contradict that of Mr Kasonde or to speculate about why he was not called. It is only fair to Mr Lukwasa to make it clear that no allegation of dishonest conduct has been made against him.

408. The only direct evidence before me about the circumstances in which the agreement was signed was that of Mr Sheehan, Mr Mwale and Mr Kasonde. There is no independent evidence or objective yardstick that enables me to decide between the different accounts of the signing of the Settlement Agreement. In saying this, I do not overlook that Mr Kasonde recalled that only three copies of the Settlement Agreement were distributed, and said that he was confident that one was given to Donegal. It is clear that more copies were signed: Donegal disclosed three copies, and at least one copy, and according to Mr Kasonde's recollection two copies, were kept by Zambia. I do not consider that this shows that Mr Kasonde's account is generally unreliable.

409. I have already indicated that I find Donegal's account of how the Government signed the agreement inherently improbable. Donegal submit that there are also inherent improbabilities in Zambia's account. In particular they say that it would have been extraordinary for Mr Kasonde to ask Mr Lukwasa to repeat in the presence of Mr Sheehan and Mr Mwale that Mr Kunda had given his approval of the execution of the Settlement Agreement. I do not accept that argument. After all, the matter had been left, as far as Donegal were concerned, on the basis that Mr Kunda would consider the proposed agreement further, and it would be natural for the explanation to be given to Donegal that Mr Kunda was now content for it to be signed.

410. Next, Donegal justifiably point out that Zambia's case about the representation has changed. The case originally pleaded was that Mr Lukwasa told Mr Kasonde that the "Settlement Agreement reflected the terms agreed by the Attorney General on 15 March 2003". Leaving aside the (understandable and inconsequential) error about the precise date when the Donegal representatives met Mr Kunda, Mr Kasonde gave evidence in his witness statement that supported this contention. However, this was not his evidence as it emerged during cross-examination. He said that what he asked Mr Lukwasa was whether "all the discussions had been effectively concluded" and whether "the agreement had been approved by the Attorney General". That, he said,

is what Mr Lukwasa confirmed both before Mr Sheehan and Mr Mwale came into his office and in their presence. Although Donegal understandably urge that this is significantly different from the pleaded case, the major difference is that Mr Kasonde did not maintain that he had been told that the Attorney General had expressed his approval or agreement at a meeting with Donegal in March 2003. While that difference makes me cautious about accepting Mr Kasonde's evidence about the precise words used in the exchange between him and Mr Lukwasa - indeed Mr Kasonde acknowledged some uncertainty about his recollection of details, saying "I think I can remember the important aspects of what happened" - I do not consider that this change in his evidence indicates that his basic account should be rejected as untruthful or imagined.

411. I therefore consider that it is inherently improbable that the Settlement Agreement was signed in the circumstances described by Mr Sheehan and Mr Mwale. I also regard Mr Sheehan and Mr Mwale as generally unsatisfactory witnesses, whereas my assessment is that the general picture painted by Mr Kasonde in his evidence is reliable, although his recollection of the details of what happened is hazy and might well be at fault. I therefore accept Mr Kasonde's evidence that the Settlement Agreement was signed with representatives of both parties present in his private office. I also accept that before it was signed he and Mr Lukwasa spoke about the view of the agreement taken by the Attorney General in the presence of Mr Sheehan and Mr Mwale.

412. However, this leads to the question of what precisely was said by Mr Lukwasa. The view taken by Mr Kunda of the proposed agreement, reflected in his letter of 17 March 2003, was that Donegal were adamant in their insistence that the Settlement Agreement should include a provision that upon default the full amount of the debt should be paid and a waiver of state immunity. Mr Kunda also believed, as I have said, the debt was valid and Zambia owed some US$43 million. And he appears to have thought that the Ministry of Finance would have to come up with a plan to meet the payments required by the Settlement Agreement because there was no alternative to concluding it.

413. I can discern no reason that Mr Lukwasa should have misled Mr Kasonde about Mr Kunda's view of the matter, and none has been suggested. After all, the contact between Mr Kasonde and Mr Kunda was clearly so close that Mr Kasonde was bound to learn of Mr Kunda's views shortly after signing the agreement. Mr Lukwasa must have known that. Mr Lukwasa could perfectly accurately have told Mr Kasonde that Mr Kunda saw no point in further negotiations, and that, in that sense, discussions with Donegal were over. Mr Lukwasa could also properly have said that Mr Kunda saw no chance of improving upon the terms of the proposed Settlement Agreement, and that he accepted the legal terms of the proposed agreement. It is impossible to know, as it seems to me, precisely what words were used in the exchanges between Mr Kasonde and Mr Lukwasa before Donegal's representatives came into the Minister's office or in their presence. However, it seems to me that the differences between what Mr Kasonde now recalls was said and what Mr Lukwasa might properly and accurately have said about what Mr Kunda thought are relatively small. Whatever precisely was said, I decline to find that Mr Lukwasa misled Mr Kasonde about Mr Kunda's views either deliberately or otherwise. There was no purpose in

him doing so, and given Mr Kasonde's vague recollection of the finer details of the meeting, there is no proper basis for finding that he did so.

Payments under the Settlement Agreement

414. On 7 April 2003 Mr Kunda wrote to Mr Lukwasa, saying that after the negotiations the Ministry of Finance were "supposed to revert to me with firm proposals on how the debt would be settled" and asking for a report about this as a matter of urgency. On the same day he wrote to President Mwanawasa, and this letter reflects that, when he wrote it, Mr Kunda did not know that the Settlement Agreement had been signed: he explained the proposed terms, including the default provision, and continued: "Knowing the capacity of the Ministry of Finance in settling debts, we may end up paying the entire US$43,846,576.26. Be that as it may we seem to have no alternative. In fact the Ministry of Finance and National Planning have already admitted the debt in writing….We have no alternative but to sign the Agreement". Mr Kunda confirmed that he was referring to what Mr Diangamo had written to Donegal.

415. On 9 April 2003 the Attorney General's office received the letter from Mr Lukwasa dated 7 April 2003 enclosing an original and two copies of the signed Settlement Agreement. Mr Kunda wrote to Mr Kasonde on 11 April 2003 recording that the Settlement Agreement had been signed without final clearance from him, and that for Donegal's representatives to have called directly on the Minister of Finance and signed it was contrary to what was agreed when the meeting had been postponed in March 2003. He concluded "The normal procedure would have been for us to reconvene the negotiating meeting". Mr Kasonde's evidence was that he does not recall seeing that letter before this litigation.

416. On or about 29 April 2003, Zambia paid US$500,000 under the Settlement Agreement. A second payment of US$500,000 was made on 12 June 2003. The payments were authorised by Mr Chizyuka, who was then the Permanent Secretary for Budget & Economic Affairs at the Ministry of Finance. Mr Lintini was also involved in making the payments: he said that he thought that Zambia were obliged to make the payments because the agreement had been signed, and while he had some concerns about whether the approval of the Attorney General had been obtained, Mr Lukwasa had assured him that it was right to make the payment.

417. On 23 June 2003 Mr Kunda wrote to Malambo & Co saying that he understood that "the former Minister of Finance and National Planning" (clearly referring to Mr Kasonde) had dealt directly with Donegal and signed the Settlement Agreement and asking for notice of discontinuance of the BVI proceedings. The documents before me do not contain any response to the letter, but Mr Malambo explained that no notice of discontinuance was sent because the BVI proceedings were not served on Zambia.

418. Mr Chizyuka issued an instruction for the payment of US$1 million in early September 2003. However, on 2 October 2003 the Bank of Zambia wrote to the Ministry of Finance that they were unable to process it "as Romania … are under investigation by the Task Force on Corruption". On 10 October 2003 Mr Sheehan wrote to the Ministry of Finance that Zambia were in arrears under the Settlement Agreement in the amount of US$3,725,335.15, and, while expressing a preference for an amicable resolution, he threatened that Donegal's lawyers were instructed to

pursue the matter vigorously if payment and a proposal for the settlement of the arrears were not forthcoming.

419. At about this time Mr Mwale left at the Ministry of Finance a note for Secretary to the Treasury asking for a meeting to discuss the outstanding payments. He wrote "I am concerned that your Ministry's approach is resulting in my principals deciding a default by next week…". In a further note to the Secretary to the Treasury dated 14 October 2005, Mr Mwale wrote "My principals have been holding back further action". Mr Mwale said in cross-examination that by his "principals" he was referring to Mr O'Rourke. I reject that evidence as untruthful. He was clearly referring to Donegal, who had power to declare a default and to take "further action". Indeed Mr Mwale signed the latter note over the name "Donegal".

420. On 20 October 2003, Allen & Overy wrote to the Ministry of Finance giving notice that unless payment of the arrears was made by 22 October 2003, their instructions were to serve notice of default under the Settlement Agreement.

421. On 3 November 2003 Mr Chizyuka wrote to the Bank of Zambia advising that payments of US$1,418,784.67 (representing the instalments due under the Settlement Agreement on 1 June 2003 and 1 August 2003) should be processed and further payments should be made in favour of Donegal until the Ministry of Finance ordered otherwise. US$1,418,734.76 was paid to Donegal on 10 November 2003. On 14 November 2003, Allen & Overy wrote acknowledging receipt of the payment of US$1,418,734.67 but stating that US$2,746,702.93 was in arrears. Nothing further was paid under the Settlement Agreement.

422. By letter dated 14 December 2004 Allen & Overy gave Zambia notice of default under the Settlement Agreement in these terms: "Twenty one days having expired since your failure to complete several of the transfers as prescribed in clause 2.1 of the Settlement Agreement, you are in default under its terms and [Donegal] is entitled to elect to terminate the Settlement Agreement by notice in writing … pursuant to clause 2.3(a) thereof. Accordingly, we give you formal Notice of [Donegal's] termination of the Settlement Agreement pursuant to clause 2.3(a) thereof".

423. On 9 March 2004 Mr Chizyuka wrote to the Governor of the Bank of Zambia that no further payments should be made to Donegal until further written instructions were given, explaining that there was an investigation by the Task Force "on economic plunder and corruption". He told me that he wrote this letter on his own initiative and I accept his evidence.

424. On the same day, Allen & Overy wrote to Zambia that if Zambia did not remit US$4,450,640.50, said to be the amount outstanding under the Settlement Agreement, proceedings would be brought in the English Courts.

425. On 15 March 2004 Mr Kunda replied to Allen & Overy in the following terms:

> "Please be advised that criminal investigations have commenced here in Zambia concerning the Donegal International Loan. The Task Force on Corruption is investigating the validity of the debt and possible corruption in how it was procured. Hence the instalment payments due

> towards the purported settlement agreement have been suspended. Please note that the settlement Agreement was signed without final approval and clearance from my office. In other words the signing of the Agreement contravened the Constitution of the Republic of Zambia. This being the case liability to settle the debt is denied. The Government of the Republic of Zambia cannot honour this debt until investigations are completed."

426. As I have already mentioned, Donegal obtained a freezing order from this court against Zambia and Mofed on 7 March 2005, and these proceedings were brought on 8 March 2005.

The State Immunity Application

427. Zambia are a foreign or commonwealth State for the purposes of section 14 of the State Immunity Act, 1978. A foreign or commonwealth State has both jurisdictional immunity and procedural privileges under the 1978 Act. The basic rule of jurisdictional immunity is set out in section 1(1) of the Act in the following terms: "A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act". Section 2 provides, "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom. (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement…".

428. The burden of proof on an issue of this kind is upon the party asserting that a State is subject to the jurisdiction of the English court: see Fox, The Law of State Immunity (2002), p.177. Donegal contend that the Settlement Agreement is a "prior written agreement" to which effect should be given under section 2(2) of the Act, and they rely upon the waiver of immunity contained in clause 12 of the Settlement Agreement. The question whether Zambia can claim state immunity depends upon whether Donegal have shown on the balance of probabilities that Zambia have so submitted to the jurisdiction of this court with regard to Donegal's claim. This in turn depends upon whether the Settlement Agreement is valid, enforceable and applicable to this claim.

429. Donegal pleaded an alternative point based upon section 3 of the 1978 Act, that provides that a State is not immune as respects proceedings relating to "a commercial transaction entered into by the State", and at one stage argued that therefore the court has jurisdiction even if they cannot rely upon clause 12 of the Settlement Agreement. However, in the course of the hearing before me, they abandoned that contention.

430. Zambia contend in their pleading that "The subject matter of these proceedings is the exercise by Zambia of its sovereign powers…Such matters are not governed by legally enforceable obligations, but incorporate non-legal considerations or "moral suasion". The subject matter of the present proceedings is therefore such that the English court should decline to adjudicate upon the Claimant's claim in any event". This contention was not pursued by Zambia, and I reject it.

Mr Kasonde's authority to enter into the Settlement Agreement

431. I come to the question whether Mr Kasonde in his capacity as the Minister of Finance had (actual or ostensible) authority to make the Settlement Agreement on behalf of Zambia. The Zambian Minister of Finance (Incorporation) Act 1958 constitutes the Minister of Finance of Zambia as a corporation sole with power (inter alia) "to enter into agreements binding on himself and his successor in office". Section 4(2) of that Act provides: "Every document purporting to be an instrument made or issued by the Minister of Finance and to be sealed with the seal of the Minister of Finance … or to be signed by an officer authorised under sub-section (1) shall be received in evidence and deemed to be so made or issued without further proof, unless the contrary is shown".

432. However, it is the contention of Zambia that Mr Kasonde was not entitled to enter into the Settlement Agreement and he did not bind Zambia to it because of article 54 of the Constitution of Zambia Act, Chapter 1 of the Laws of Zambia (the "Constitution"). This article provides as follows:

> "(1) There shall be an Attorney-General of the Republic who shall, subject to ratification by the National Assembly, be appointed by the President and shall be-
>
> (a) an ex-officio member of the Cabinet: and
>
> (b) the principal legal adviser to the Government.
>
> (2) Without prejudice to the general functions under clause (1), the function of the Attorney-General shall be to-
>
> (a) cause the drafting of, and sign, all Government Bills to be presented to Parliament:
>
> (b) draw and peruse agreements, contracts, treaties, conventions and documents, by whatever name called, to which the Government is a party or in respect of which the Government has an interest:
>
> (c) represent the Government in courts or any other legal proceedings to which Government is a party: and
>
> (d) perform such other functions as may be assigned to him by the President or by law:
>
> (3) Subject to the other provisions of this Constitution, an agreement, contract, treaty, convention or document by whatever name called, to which Government is a party or in respect of which the Government has an interest, shall not be concluded without the legal advice of the Attorney-General except in such cases and subject to such conditions as Parliament may by law prescribe….."

433. It is common ground that the Settlement Agreement is a contract or agreement to which article 54(3) applies and that the Minister of Finance (Incorporation) Act 1958 is not an exception to the Constitution falling within the provision that the advice of the Attorney General could be dispensed with upon "…such conditions as Parliament may by law prescribe". The Constitution is the supreme law of Zambia and if any other law were inconsistent with it, that other law would be invalid to the extent of the inconsistency.

434. The Constitution does not expressly provide what is the effect of a breach of article 54(3). Zambia contend that because Mr Kunda had not given "legal advice" within the meaning of, and as required by, article 54, Mr Kasonde did not have authority under the Constitution and other relevant enactments to conclude the Settlement Agreement on behalf of Zambia. Donegal dispute that contravention of article 54 would affect the validity of the Settlement Agreement, contending that, even if article 54 were contravened, Mr Kasonde would still have had actual authority to enter into it, and arguing in the alternative that he would have had ostensible authority to do so.

435. It is common ground between the parties, and I consider it rightly acknowledged by both parties, that the question of actual authority is governed by the law of Zambia and the question of ostensible authority is governed by the law of England and Wales.

436. These issues were considered by Mr Matibini and Mr Musonda. Mr Matibini expressed the opinion that the effect of article 54 of the Constitution is that the Settlement Agreement would be invalid and unconstitutional if it was negotiated and agreed without the approval of the Attorney General. Mr Musonda's opinion is that by reason of the Minister of Finance (Incorporation) Act an agreement entered into by the Minister of Finance cannot be impugned or challenged on the basis that the advice of the Attorney General had not been secured in relation to an agreement such as the Settlement Agreement, and a document purporting to be an instrument made or issued by the Minister of Finance cannot be challenged (except, of course, by way of challenge to the genuineness of an apparent signature of the Minister). The experts' written reports also considered whether Mr Kasonde had ostensible authority to enter into the Settlement Agreement, but, as I have indicated, those parts of their reports go to a question that is not governed by Zambian law. Moreover, although their views about the meaning and effect of article 54 were interesting and illuminating, it is apparent that the principles of statutory interpretation are, unsurprisingly, the same under English and Zambian law and I can reach my conclusions on these issues by applying principles of English law.

437. The following questions have arisen between the parties in relation to this point:

i) Whether the Constitution requires that the Attorney General's advice be in writing.

ii) Whether the Constitution is properly to be interpreted as requiring the Attorney General not only to advise about any agreements and contracts to which article 54 refers but also to give his approval to them.

iii) Whether the Constitution requires only that the Attorney General give his "advice" or approval with regard to legal questions about the agreement or contract in question.

iv) Whether in the absence of such approval, the Minister of Finance has authority to enter into an agreement or contract such as the Settlement Agreement on behalf of the government.

I understand that there is no Zambian case law that directly considers any of these questions.

438. The first question can be answered shortly. Although Zambia at one stage maintained that the Attorney General's advice had to be written, this argument was rightly not pursued. There is nothing in article 54 (or elsewhere in the Constitution) that indicates that written advice is required. Mr Matibini acknowledged that, although it would be good practice for the Attorney General to give his advice in writing, this is not stipulated in the Constitution and is not mandatory.

439. It was Mr Matibini's view that, although the Constitution refers to the Attorney General giving legal "advice", the provision should be given a purposive construction and the Constitution requires that the Attorney General should have given "positive" advice or approval before an agreement is concluded: the requirement of article 54(3) would not be fulfilled if the Attorney General's advice were against the execution of an agreement, and his advice must indicate that he approves of Zambia making the proposed contract. In Mr Matibini's opinion, this follows from the application of the uncontroversial principle that the experts express in their joint memorandum as follows: "whenever a strict interpretation of a statute gives rise to an absurdity or unjust situation, the Judges can and should use their good sense to remedy it by reading words in it if necessary so as to do what Parliament would have done if they had the situation in mind". Such an approach is, of course, familiar to the English court.

440. Mr Musonda disagreed with Mr Matibini about this. In his opinion, the requirement is that the advice of the Attorney General be obtained, not that it be followed: in other words that his advice, not his approval, is required.

441. I prefer Mr Musonda's view on this point. In my judgment, the interpretation for which Mr Matibini contends involves an unwarranted gloss on the wording of article 54(3) which the clear wording of the article does not require. It does not seem to me that this departure from the article's wording is required in order to give it purpose. Indeed, it seems to me that it would be surprising if the Constitution effectively took a decision whether to conclude a particular contract from the responsible Minister and gave the Attorney General something almost akin to a veto over all government contracts. As it was vividly put in Donegal's closing submissions, the interpretation for which Zambia contends "elevates the advising lawyer to the status of client". Nor am I persuaded that, as Zambia submit, it is "absurd" if a contract can be concluded against the advice of the Attorney General. No doubt if the Attorney General disapproved of a particular contract, he could make his views known within the Government and the decision whether to make it would be taken by governmental process.

442. In cross-examination Mr Matibini was asked whether, in his view, the Attorney General is required to give approval to agreements in so far as they might give rise to legal issues or whether more general approval was required. I did not find his response entirely clear, but he was inclined, as I understood it, to confine the

requirement of positive advice to legal issues. Mr Matibini also accepted that the question whether Zambia were or would be in a financial position to make payments under an agreement is not a legal matter but a policy question for the relevant department.

443. Certainly if article 54(3) were to be interpreted as requiring that the Attorney General give his approval of the contract, I would interpret that requirement as being confined to any legal questions that might arise. However, this in itself seems to me a further reason to reject the interpretation for which Zambia contends. It seems to me that there is not a clear dividing line between what is and what is not a legal matter to be approved before a contract is concluded. I find it difficult to accept that the question whether article 54 has been observed should depend upon whether a particular aspect of a contract is to be categorised as a legal matter.

444. I therefore conclude that the requirements of the Zambian Constitution were satisfied before Mr Kasonde signed the Settlement Agreement. Mr Kunda had given legal advice about the proposed agreement both in his letter of 17 March 2003 and between the meetings on 14 March 2003 when, in the words of his attendance note, he "advised [the] team of officers from the Ministry of Finance and National Planning that since we had admitted the debt and the amount we could not escape liability". Indeed, if necessary, I would conclude that Mr Kunda had given "positive advice" or approval as far as any legal matter was concerned, his remaining reservation being about whether Zambia could make budgetary provisions to meet the scheduled repayments.

445. I also accept Donegal's further argument that even if the Attorney General had not given the requisite advice, Mr Kasonde would have had authority to enter into the Settlement Agreement: in Mr Trace's terminology, article 54(3) is, in my judgment, directory rather than mandatory, and a failure to comply with it would mean merely that the Attorney General had not done as the Constitution requires. Certainly, as I have observed, the Constitution has no specific provision indicating that article 54(3) restricts the authority of ministers and officials to conclude contracts and it does not seem to me either necessary or natural so to interpret it. Indeed, such an interpretation seems to me to give rise to practical difficulties. In reality, as is surely inevitable, the Attorney General does not advise about every routine contract entered into by the Government. (For example, to use the instances mentioned during the cross-examination of Mr Lintini, he does not advise about "the purchase of a bunch of office equipment or employment of cleaners".) Although I can readily see that article 54(3) is to be interpreted as contemplating that the Attorney General has some discretion as to what advice is required in any particular case, this in itself, it seems to me, makes it more difficult to interpret the article as fettering the authority of others.

446. Although any judge will approach the task of interpreting the constitution of another country with diffidence, it seems to me that Mr Musonda's interpretation is in line with the Zambian Constitution's structure. Article 54 is in Part IV of the Constitution which is entitled "The Executive" and more particularly in a series of articles that set out what government officers there should be and their roles and duties. Article 54 concerns the Attorney General and article 55 concerns the Solicitor General. It is to be observed that article 55(5) provides that "any duty or power imposed on the Attorney General by the Constitution or any other written law may be exercised or performed by the Solicitor General … [in defined circumstances]". This lends some

support, it seems to me, to the view that article 54(3) is directed to duties of the Attorney General rather than any limitation on the authority of any other minister or official.

447. I therefore conclude that Mr Kasonde had authority to enter into the Settlement Agreement on behalf of Zambia. It is therefore not necessary to consider whether, if he had not had actual authority, he would have had ostensible authority to do so. However, I should briefly express my views about this issue.

448. Zambia say that Mr Kasonde did not have ostensible authority to enter into the Settlement Agreement because Mr Sheehan was "on notice" that Mr Kasonde had no authority to sign the agreement, and Mr Sheehan was aware of the limitations on Mr Kasonde's authority to conclude the negotiations for the Settlement Agreement and to enter into it.

449. I reject that submission. Zambia's argument about this rests upon their case that Mr Sheehan was present when Mr Lukwasa misrepresented to Mr Kasonde that Mr Kunda had approved the Settlement Agreement and that Mr Sheehan had "blind-eye" knowledge of the misrepresentation. I have already rejected the former proposition and, as I shall explain, I also reject the latter proposition; and therefore I do not consider that Mr Sheehan had any reason to suppose that Mr Kasonde might not have authority to conclude the agreement.

450. However, I see a different difficulty facing Donegal's contention that, even if he did not have actual authority to make the Settlement Agreement, Mr Kasonde had ostensible authority to do so, that is to say that he was held out by the Zambian Government as having authority to do so. As explained in Bowstead & Reynolds on Agency 18th Ed, para. 8-044, "apparent authority may be extremely difficult to prove in a Crown or public agent". It is true that in Marubeni & South China Ltd v Government of Mongolia, [2004] ECHC 472 (Comm.), [2004] 2 Lloyd's LR 198 Cresswell J held that a Minister of Finance would have had ostensible authority to sign a guarantee had he not had actual authority, and I respectfully agree that on the facts the Minister would have had ostensible authority, but in that case there was a distinct and identified act of holding out by the Deputy Minister of Justice. Here I can identify no such act of holding out.

451. Donegal's argument seems to be that the ostensible authority of Mr Kasonde derives from his usual authority as Minister of Finance, but this does not seem to me to answer an objection that his usual authority was restricted by the Constitution. This is not a case like Robertson v Minister of Pensions, [1949] 1 KB 227, which Donegal cite in their submissions, where Denning J could say at (p232) of a subject's dealings with a government department, "He does not know, and cannot be expected to know, of the limits of its authority". Here Donegal could be expected to know and, having received Mr Kunda's letter of 8 January 2003 clearly did know, of article 54 of the Constitution, and could properly be taken to be aware of its effect. I would not have accepted Donegal's case based on ostensible authority had I rejected the case on actual authority.

452. If I had concluded that when Mr Kasonde signed the Settlement Agreement he was acting without authority because of article 54(3), I should have had to consider a

further argument that Donegal advance. They say that, after it was signed, Zambia ratified the Settlement Agreement and waived any defect in Mr Kasonde's authority.

453. Certainly Mr Kunda, when he was cross-examined, said that when he learned that the agreement was signed in April 2003 he had not written to Donegal to raise the question of Mr Kasonde's authority, because "at that stage that irregularity we were prepared to waive but not what we later discovered". He said that Zambia were content for the Settlement Agreement to be performed and treated as valid. Against that background Mr Kunda wrote to Malambo & Co on 23 June 2003 about notice of the BVI proceedings being discontinued and payments were made under the Settlement Agreement.

454. Against this, it is submitted on behalf of Zambia that, when Mr Kunda wrote to Malambo & Co and the payments were made, those acting for the Government did not know full details of Donegal's communications with Mr Lukwasa and Mr Chizyuka in the period between the March 2003 negotiations and the execution of the Settlement Agreement, and did not know that, as Zambia contends, Mr Kasonde was induced to sign the Settlement Agreement by Mr Lukwasa's misrepresentation. It is, of course, the case that a person ratifying an unauthorised act must have "full knowledge of all the material circumstances in which the act was done unless he intended to ratify the act and take the risk whatever the circumstances may have been": see Bowstead and Reynolds on Agency, 18th Ed, 2006 article 16, para 2-067.

455. I have found that Mr Lukwasa did not make any misrepresentation to Mr Kasonde. However I see no sufficient reason to suppose that there were any exchanges between Donegal and Mr Lukwasa that might have been relevant to any decision to ratify the Settlement Agreement or to waive any defect in Mr Kasonde's authority to sign it. I reject this answer to Donegal's contention that any defect was waived and the agreement was ratified.

456. However, there is another matter upon which I should have sought further assistance from counsel if my decision had turned upon this point. The ratification or waiver argument assumes that a breach of the Constitution can be set aside in this way, and assumes that Mr Kunda and the persons arranging the payments themselves were entitled to waive the contravention of the Constitution. These questions were not explored during submissions, and while I readily recognise that they might not provide any answer to Donegal's contentions, I prefer to put my decision on the basis simply that Mr Kasonde had authority to execute the Settlement Agreement, and not to express any concluded view about the ratification or waiver argument.

<u>Misrepresentation</u>

457. Zambia also argue that they are not bound by the Settlement Agreement because Mr Kasonde entered into it in reliance upon a misrepresentation. They submit that before signing the Settlement Agreement on 5 April 2003, in the presence of Mr Sheehan Mr Kasonde asked Mr Lukwasa, "Has everything been agreed, is this the document you agreed?", and "whether everything had been agreed with the Attorney General", and that Mr Lukwasa replied affirmatively. It is Zambia's contention that Mr Lukwasa's statement, however the precise words are interpreted, was not true; that Mr Kasonde concluded the Settlement Agreement in reliance upon it; and that Zambia are therefore entitled to avoid the Settlement Agreement.

458. I have found that Zambia have not established that Mr Lukwasa made any misrepresentation to Mr Kasonde. It follows that this challenge to the Settlement Agreement fails. I should, however, briefly express my conclusions about other issues between the parties on this part of the case.

459. Zambia put their argument that a misrepresentation by Mr Lukwasa entitles them to rescind the Settlement Agreement against Donegal on two bases. First they say that, because Donegal did nothing to correct what Mr Lukwasa said, they are to be taken to have adopted it and themselves to have made representations to the same effect as Mr Lukwasa. Secondly, they say that even if Donegal did not adopt the representation, in the circumstances Mr Lukwasa's misrepresentation means that the Settlement Agreement induced by it is voidable against Donegal.

460. However the argument is formulated, Zambia acknowledge that it cannot be advanced unless Donegal either knew that Mr Lukwasa was misrepresenting the position to Mr Kasonde or had constructive notice that this was the case. Their allegation is that Mr Sheehan was at least put on inquiry as to the circumstances in which the Attorney General was said to have provided his approval of the Settlement Agreement; that Mr Sheehan failed to take reasonable steps to establish the true position; and Donegal through him therefore had constructive notice of Mr Lukwasa's misrepresentation.

461. Thus, Zambia do not allege that Mr Sheehan (or Donegal) actually knew that what Mr Lukwasa said was untrue. I see no reason that Mr Sheehan should have suspected that Mr Lukwasa might be misinforming Mr Kasonde about Mr Kunda's views or stated position and I reject the suggestion that Mr Sheehan could reasonably have been expected to have made further enquiry about the position or that he should have harboured or expressed suspicions about what Mr Lukwasa said.

462. Zambia submit that it would have seemed odd to Mr Sheehan that Mr Kasonde had approved the agreement despite the impasse reached in the negotiations in March 2003 meetings, and that the exchange between Mr Kasonde and Mr Lukwasa must have made it clear that Mr Kunda had not directly told Mr Kasonde that he gave his approval to the execution of the agreement. Nevertheless, Zambia argue, Mr Sheehan did not ask why the course contemplated at the end of the negotiations, reconvened discussions between himself and Mr Kunda, was not being pursued. It is said that in these circumstances a straightforward businessman would have obtained Mr Kunda's written or at least oral agreement before entering into the Settlement Agreement. Thus it is submitted that Mr Sheehan was at least put on inquiry about whether the Attorney General had indeed given his approval.

463. I cannot accept that submission. Mr Sheehan had gone to the Ministry on the understanding that Zambia had in the end decided to accept the terms that Donegal offered. The Minister of Finance was himself signing the Settlement Agreement and in Mr Sheehan's presence satisfied himself about the Attorney General's views. I see no reason that Mr Sheehan could be expected to insist upon further confirmation of them. In the absence of the exchange between Mr Kasonde and Mr Lukwasa, there was no reason for Mr Sheehan to doubt that Mr Kasonde could properly sign the agreement, and there was no reason that the exchange between Mr Kasonde and Mr Lukwasa should have excited his suspicions: on the contrary, it would properly have provided reassurance had reassurance been needed.

464. I also reject the legal basis for Zambia's argument based upon misrepresentation. This case is far removed from the sort of tripartite transaction considered in Barclays Bank v O'Brien, [1994] 1AC 180, and, as Lord Nicholls said in Royal Bank of Scotland v Etridge (No 2), [2002] 2AC 773 at p.803C, "… the decision in O'Brien is directed at a class of contract which has special features of its own".

465. There are also insuperable obstacles facing the argument that Donegal by their silence adopted and so themselves made the representations that Mr Lukwasa made. The general position is that, "Tacit acquiescence in another's self-deception does not in itself amount to a misrepresentation, provided that it has not previously been caused by a positive misrepresentation": Chitty on Contracts, 29th Ed., (2004) para 6-013. In any case, this argument is not open to Zambia in view of clause 3(1)(d) of the Settlement Agreement: there is no reason that effect should not be given to this provision: see Peekay Investment Intermark Ltd v New Zealand Banking Group Ltd, 2006] EWCA 386 at paras 56-57 per Moore-Bick LJ.

466. Finally, however Zambia's case in misrepresentation is put, I see no answer to Donegal's argument that Zambia affirmed the Settlement Agreement after they knew the relevant facts. On 11 April 2003 Mr Kunda wrote to the Minister of Finance noting that the Settlement Agreement had been signed without "final clearance" from him. President Mwanawasa wrote a letter dated 22 April 2003 recording that the Attorney General had complained to him that the Agreement was signed "without briefing him and without waiting for his legal opinion". Nevertheless, in April, June and November 2003 Zambia made payments under the Settlement Agreement without purporting to rescind it or reserving their position, and on 23 June 2003 Mr Kunda wrote to Malambo & Co stating that the Settlement Agreement had been executed by the Minister of Finance and accordingly requesting notice of discontinuance of the BVI proceedings.

467. Zambia respond to this argument by submitting that a party cannot affirm and lose his right to rescind a contract for misrepresentation unless he knows the relevant facts and that he has a right to rescind. This is undoubtedly so: Peyman v Lanjani, [1985] Ch 457. They go on to argue that nobody who was involved in the acts upon which Donegal rely as acts of affirmation had that knowledge. I accept the submission as far as the letter of 23 June 2003 is concerned. However, Mr Lukwasa was involved in the decision to make the payments, or at least the first two payments. I would, if this part of the case had turned upon the affirmation argument, have concluded that he had the requisite knowledge, including, given that he is a lawyer, knowledge of the right to rescind. It is relevant to add that Zambia do not allege that Mr Lukwasa was acting improperly. In these circumstances, even if at one time it would have been open to Zambia to avoid the Settlement Agreement for misrepresentation, it would no longer have been open to them to do so.

Mistake

468. In their pleaded case Zambia also assert that the Settlement Agreement was made by Mr Kasonde when he was mistaken on two points:

i) Mr Kasonde did not know that before the Settlement Agreement was signed Mr Kunda had not "agreed to the terms of the Settlement Agreement as signed,

and in particular that he (the Attorney General) had not agreed …to the Acceleration and Waiver of Immunity Clauses".

ii) "Mr Kasonde did not know that Mr Chizyuka had signed the Acknowledgment [of 12 February 1999] having been offered a bribe by Mr Mwale to do so."

In their submissions Zambia made only brief reference to their argument based upon mistake and I too can deal with it briefly.

469. The argument about mistake as to Mr Kunda's agreement underwent a comparable change in the course of the hearing to that in the misrepresentation argument in that initially it was pleaded that Mr Kunda had not agreed to the terms of the Settlement Agreement at the March 2003 meeting. The reasoning that leads me to reject Zambia's argument based on misrepresentation also leads me to reject the argument based on mistake about Mr Kunda's view of the Settlement Agreement and stated position on it. Moreover, even if Mr Kasonde in some way misunderstood Mr Kunda's view and stated position, I am not persuaded that this misunderstanding was material to Mr Kasonde's decision to sign the agreement. He had received Mr Kunda's legal advice and that advice dealt with any legal questions that arose about the proposed Settlement Agreement. The decision whether to sign it depended upon a view as to whether the payments could met, and that was a decision for the Minister of Finance advised by his officials.

470. In their closing submissions Zambia refer to the decision of the Court of Appeal in Geo Wimpey UK Ltd v Wimpey Homes Holdings Ltd, [2005] EWCA Civ 77. They allege that Donegal knew of or were reckless as to Zambia's mistake and took advantage of it. I have rejected that contention: it does not seem to me that Donegal behaved unconscionably or were otherwise at fault in that regard. Moreover, the argument that Zambia later affirmed the agreement also answers this part of the case based on mistake.

471. I also reject Zambia's argument that they can avoid the Settlement Agreement because of some mistake on Mr Kasonde's part about how the Acknowledgment came to be given. I have rejected Zambia's contention that Mr Chizyuka was offered a bribe. Moreover, there is no reason to suppose that Mr Kasonde had the Acknowledgment in mind at all when he concluded the agreement. Indeed, rather than rely simply upon the Acknowledgment, in 2002 Mr Kasonde had himself telephoned the Romanian Embassy in Lusaka and had it confirmed that Donegal was indeed entitled to deal with the Romanian debt. I also accept Donegal's submission that Mr Kunda and Mr Kasonde (if and in so far as they were influenced by past admissions by Zambia rather than their own judgment about the debt) were concerned about Mr Diangamo's concessions during the exchanges in 2002 rather than by Mr Chizyuka's Acknowledgment in February 1999. The Acknowledgment was in itself of no legal effect, and it was not required to give legal efficacy to the assignment. Any mistake about the Acknowledgment would not go to the terms of the Settlement Agreement, and accordingly, does not invalidate or vitiate the contract: see Chitty on Contract, 29th Ed, 2004, vol 1 para 5-065.

Illegality and Public Policy

472. Zambia's argument that the Settlement Agreement should not be enforced because it would be contrary to public policy to do so or because their claim arises ex turpi causa is based upon contentions that I have labelled the confidential information allegation, the unlawful interference allegation, the improper influence allegation, the PHI allegation, the realisations allegation, the BVI proceedings allegation, the AG's letter allegation and the unauthorised negotiations allegation. For reasons that I have explained, I accept the confidential information allegation and the AG's letter allegation. However, I do not conclude in relation to the AG's letter allegation that Donegal sought or obtained the letter before the Settlement Agreement was made and therefore, as it seems to me, it cannot vitiate the agreement or make it unenforceable. I accept the BVI proceedings allegation only in that I accept that the documents presented in the proceedings were in some respects misleading, but I conclude that Mr Slater and Donegal did not deliberately present misleading documents. I have rejected the other allegations. I must consider whether the confidential information allegation prevents Donegal from enforcing the Settlement Agreement, and shall also consider whether other complaints would have done so had I upheld them.

473. In support of their case that these complaints prevent Donegal from relying upon the Settlement Agreement, Zambia point to the relationship between Donegal and those acting for them and say that Donegal are responsible for what Mr O'Rourke (whether himself or through one of the Moreno companies or Somerset), Mr Mwale and Mr Chilupe were doing. They also say that the nature of this relationship itself prevents Donegal from relying upon the Settlement Agreement, and specifically to rely upon it in support of their case that Zambia have waived state immunity. It is convenient to deal with this argument first.

474. Zambia have called this argument "the Lemenda point" because they rely in support of it upon the decision of Phillips J in Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd, [1988] 1 QB 448, a so-called "sale of influence" case. They say that the arrangements between Mr Sheehan (on behalf of Donegal), Mr O'Rourke and Mr Mwale envisaged and involved an attempt to exercise improper influence over the political process in Zambia and to obtain confidential information of use to Donegal both before and after the assignment. Thus they say that what Mr O'Rourke, Mr Mwale and Mr Chilupe did is clear evidence of what they were instructed to do by Donegal (and specifically Mr Sheehan) and of the true nature of their role, which Zambia say included the following: that they were to use their influence and contacts to obtain relevant information regardless of whether it was confidential, to offer donations to the PHI and other causes associated with President Chiluba as an incentive to benefit Donegal, to obtain the Acknowledgment without regard to whether the signature of such a letter was in the interests of Zambia, to negotiate with the Ministry of Finance between 14 March 2003 and 5 April 2003 when the Attorney General was in charge of the negotiations, and to seek to ensure that Zambia made payments under the Settlement Agreement.

475. I accept that Mr O'Rourke, Mr Mwale and Mr Chilupe were to do these things, although apart from the purpose of obtaining confidential information, I do not regard these activities as improper in themselves. I have already explained my views about the PHI allegation and the realisations allegation. In so far as there were discussions between Mr Mwale and the Ministry of Finance between 14 March and 5 April 2003, they were not about matters outside the proper remit of the Ministry. There is no

reason that those acting for Donegal should be deterred from seeking the Acknowledgment simply out of concern for Zambia's best interests and no reason that persons acting for Donegal should not seek to have the payments made under the Settlement Agreement paid.

476. With regard to the obtaining of confidential information, Zambia allege that Mr Sheehan and Donegal had (at least) "blind eye knowledge" of Mr Mwale's activities. That is to say, they allege that Donegal in the person of Mr Sheehan suspected that these activities were taking place and took a decision to do nothing to find out whether or not they were: see Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd, [2001] UKHL 1 at para 112 per Lord Scott. In this context, it is relevant to observe that Mr Sheehan and others acting for Donegal believed that Zambia faced problems of corruption in public life. Mr Sheehan accepted in cross-examination that in 1998/99 he was aware that he needed to be circumspect in dealings in Zambia because of possible corruption. In his affidavit dated 7 October 2002 sworn in the BVI proceedings Mr Slater referred to Zambia being ranked in a report as "one of the world's most corrupt nations".

477. I accept the allegation of "blind eye knowledge". As I have explained, before the assignment was made, Donegal wished to ascertain whether the debt was regarded as valid, and I cannot accept that Donegal expected to obtain or were only interested in obtaining Zambia's official views about that. They were interested to know government officials' private views, and were not concerned about whether those disclosing such views were entitled to do so. If there were any doubt about this, Mr Sheehan's and Donegal's attitude to confidential information is confirmed by their willingness to receive and to use Mr Kunda's letter of 17 March 2003.

478. In Lemenda the claim was for payment under a contract under which the defendants were to pay a commission if the claimants procured the renewal of a contract for the supply of oil by the national oil corporation of Qatar. It was official Qatar Government policy to prohibit agreements for commission in respect of oil supply contracts. The court refused to enforce the commission agreement, which was conceded to be governed by English law and was to be performed in Qatar, because (i) it is generally undesirable that a person in a position to use personal influence to obtain a benefit for another should charge for using that influence, particularly if his pecuniary interest was not apparent to the person being influenced; (ii) it is undesirable for intermediaries to charge for using influence to obtain benefits from a person in a public position; and (iii) while the employment of intermediaries to lobby for contracts and other benefits is sometimes a recognised and respectable practice, in that case the influence was to be exercised on the controlling minister of a state owned corporation in circumstances in which it was essential for the minister to be unaware of the claimants' pecuniary interest, and the sums involved were enormous.

479. Donegal argue that this case is not analogous to Lemenda. They say that the application of the principle identified in Lemenda must be kept within its proper limits and rely upon the judgment of Jack J in Tekron Resources Ltd v Guinea Investment Co Ltd, [2003] EWHC 2577. In that case the court enforced a "representation agreement" made with persons thought to have a good relationship with a Government Minister involved in commercial negotiations. Jack J said (at para 101) that cases such as Lemenda "were concerned with what I may call the sale of influence and only influence, and in circumstances on which it could be considered

that the use of such influence would involve some impropriety". It is of some interest to this case that Jack J observed (at para 19): "On any view the payments provided for by the representation agreement are very large. Some may find them objectionable on moral grounds that such large sums should be earned … for services such as here provided, particularly in the context of an impoverished state such as Guinea. That is not something with which this court is concerned. The size of the figures is, however, a reason for the court to look with special care at the purpose of the agreement".

480. Both Lemenda and Tekron were concerned with the enforcement of agreements for the payment of commission and other sums to persons who were to negotiate with or exercise influence over public officials. It is not Zambia's purpose that I should determine whether Mr Mwale or Mr Chilupe's estate could enforce in the English courts any arrangements that they had with Donegal or with Mr O'Rourke or one of his companies, and I do not propose to do so. (There is no reason to think that any such arrangements are governed by the law of England or are likely to come within the jurisdiction of this court.) Zambia's argument is that if those arrangements are tainted, other connected transactions may also be tainted. "The maxim *ex turpi causa non oritur actio* is …applied to the case of an apparently innocent contract to which it is merely collateral – the illegality of the latter tainting the former": Chitty on Contracts, 29th Ed, 2004, vol I para 16-160.

481. The principle that a contract might be tainted by the illegal nature of another contract with which it is associated is exemplified by the decision of Megarry J in Spector v Ageda, [1973] Ch 30, in which the claimant had loaned the defendant money so that the defendant might repay a loan incurred to a third party under an unlawful moneylending transaction, the claimant knowing that it was to be so used. Megarry J held that a loan knowingly made in order to discharge previous illegal lending is itself tainted with illegality. He cited the decision of the Court of Exchequer Chamber in Fisher v Bridges, (1854) 3 E&B 642 where the defendant had promised to pay to the claimant money remaining due from a purchase by way of an illegal lottery. The judgment of the court was delivered by Jervis CJ who said, "It is clear that the covenant was given for payment of the purchase money. It springs from, and is the creature of, the illegal agreement; and, as the law would not enforce the original illegal contract so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality".

482. It is not necessary in this judgment to consider whether the application of those decisions and the scope of this principle are restricted to any extent by what was said by the House of Lords in Tinsley v Milligan, [1994] 1 AC 340 (to which I shall refer later in this judgment). I shall assume that they are not. Even on this basis I would not consider the connection between the Settlement Agreement and the arrangements involving Mr Mwale and Mr Chilupe was such that any illegality or impropriety involving the latter would taint the former and make it unenforceable.

483. In Spector v Ageda and Fisher v Bridges the claims were in respect of obligations incurred by defendants in order to relieve themselves of the pressure of indebtedness, which indebtedness arose from dealings that were tainted with illegality and for reasons of public policy could not be enforced against them. To allow the claims would have undermined the public policy that led to the underlying debt being unenforceable and the protection afforded to debtors in their position. Donegal's

claim under the Settlement Agreement has no comparable connection with the arrangements with Mr Mwale and Mr Chilupe that are said to be tainted because they involve the "sale of influence". Still less does the Settlement Agreement have any connection with the aspect of those arrangements that is said to be tainted. It seems to me that if there is any justified complaint of "sale of influence" about those arrangements, it is that Donegal (directly or indirectly) engaged the services of persons who were able to use, and did use, their "influence" or standing to obtain confidential information. It does not seem to me that there is any justified complaint that they improperly used their influence or standing to have Mr Kasonde sign the Settlement Agreement. The policy that improper "sales of influence" should not be enforced does not call for the Settlement Agreement to be treated as tainted: the Settlement Agreement has no relevant connection with any justified complaint about the "sale of influence".

484. I come therefore to consider Zambia's argument that the Settlement Agreement is tainted with illegality or that Donegal's claim under it arises ex turpi causa because of the confidential information allegation. Because of my conclusions about the nature of the arrangements with Mr O'Rourke, Mr Mwale and Mr Chilupe and about Mr Sheehan's knowledge about their activities, Donegal are responsible for what they did with regard to seeking and obtaining confidential information. I am also prepared to assume, because Donegal did not argue to the contrary, that given the information was indeed confidential as I have held it to be, it was an unlawful or immoral act deliberately to seek out such information from public officials.

485. Donegal rely upon the decisions of the House of Lords in Tinsley v Milligan, (cit sup) and the Court of Appeal in Standard Chartered Bank v Pakistan National Shipping Corp, [2000] 1 Lloyd's LR 218. They submit that these cases establish that illegality is no defence where a cause of action is not founded on an immoral or illegal act, or, in other words, a claimant does not need to rely upon the underlying illegality in pleading or proving his case. They argue that the law was correctly stated by Aldous LJ in the Standard Chartered Bank case at p. 231-2 as follows: "There is in my view but one principle that is applicable to actions based upon contract, tort or recovery of property. It is, that public policy requires the Courts will not lend their aid to a man who founds his action upon an immoral or illegal act. The action will not be founded upon an immoral or illegal act if it can be pleaded and proved without reliance upon such an act".

486. This does not, however, mean that the question whether illegality defeats a claim can be answered simply by an examination of the claimant's pleadings. The test of whether a claim is founded on an unlawful or immoral act is less mechanical than that. However, a claim will not be regarded as founded on an unlawful or immoral act because there is some remote causative connection between the claim and an unlawful or immoral act on the part of the claimant. It is not enough to show that Donegal would not have been able to make their claim but for improper conduct on their part: see Sweetman v Nathan, [2003] EWCA Civ 115, [2004] PNLR 89 at para 65. The court will disregard unlawful or immoral conduct if the illegality or immorality is collateral to the facts relied upon in support of the claim: see Hewison v Meridian Shipping Services PTE Ltd, [2002] EWCA Civ 1821 esp. at para 43 per Clarke LJ and at para 50 per Tuckey LJ.

487. Adopting therefore the formulation of the test suggested Tuckey LJ in Hewison's case (cit sup) at para 51, I ask myself whether Donegal's claim under the Settlement Agreement is based substantially and not merely collaterally or insignificantly upon the seeking and obtaining of confidential information from officials of the Zambian Government and Central Bank. In my judgment it is not. The most that can be said is that Donegal relied in part upon confidential information in reaching their decision to accept the assignment of the debt from Romania, but that would not in my judgment be sufficient to prevent them from bringing proceedings on the assigned debt before the Settlement Agreement was concluded. A fortiori it does not prevent them from bringing their claim on the Settlement Agreement.

488. With regard to the BVI proceedings allegation, my conclusion that Donegal and Mr Slater have not been shown knowingly to mislead the BVI court means that Donegal were not guilty of illegal or immoral conduct in that regard either by way of perjury or perverting the course of justice or in any other respect.

489. With regard to the unlawful interference allegation and the PHI allegation, I would not have regarded either of these as alleging an unlawful or immoral act so as to engage these principles, but had I done so, I would have held the illegality or immorality to be collateral and not to prevent a claim upon the Settlement Agreement. I would take the same view, subject to "the Lemenda point", about the improper influence allegation and the realisations allegation. Even if I had concluded that Mr Kunda's letter had been obtained before the Settlement Agreement was concluded, and assuming as with the confidential information allegation that it amounts to an allegation of illegal or immoral conduct, I would have regarded it as collateral to the claim on the Settlement Agreement, and I would also have so regarded the complaint made in the unauthorised negotiations allegation.

490. I should say something more about the bribery allegation even though I have not accepted Mr Chizyuka's account and Zambia's case about the factual basis for that. Zambia submit that an agreement may be invalidated by a bribe if it is given to procure an ancillary document rather than the agreement itself. In support of this proposition they rely upon Shipway v Broadwood, [1899] 1 QB 369. In that case the defendant agreed to buy two horses from the claimant provided they were passed as sound by a veterinary surgeon engaged by the defendant, and after they had been so certified, the defendant gave the claimant a cheque for the price. The defendant found the horses were unsound. It transpired that the veterinary surgeon had been offered and accepted money from the claimant, that is to say had been paid a bribe. The claim failed because of the bribe. The contract of sale was binding only when the certificate was provided, and therefore it could be said, "The plaintiff cannot succeed in this action without relying on the certificate…" per Collins LJ at p.373.

491. In contrast, here it cannot be said that Donegal's claim depends upon the Acknowledgment of 12 February 1999. The Acknowledgment was not a document that Donegal would have had to rely upon in order to bring a claim for the assigned debt, still less is it a document that they require in order to bring a claim under the Settlement Agreement. It is true that Donegal or those acting for them repeatedly referred to the Acknowledgment when pressing Zambia over the assigned debt and it was no doubt a document that was useful, even important, to Donegal in pressing their claim in negotiations and in litigation. It is also true that there was reference to the Acknowledgment in the recitals to the Settlement Agreement. But this does not

mean that Donegal's claim is founded on the Acknowledgment and I cannot accept that Zambia have shown any sufficient connection between the Acknowledgment and the claim to support this part of their argument. As Zambia point out, it is not necessary for the corrupt inducement to be promised or offered specifically in connection with the impugned transaction: Daraydan Holdings Ltd v Solend International Ltd, [2004] EWHC 622 (Ch), [2005] Ch 119 at p.132 para 52. But this is not to the point. Mr Chizyuka did not negotiate or conclude the Settlement Agreement.

Estoppel

492. Donegal plead that Zambia are "estopped from disputing the validity of the assignment of the Debt from Romania to Donegal. In particular, Zambia is estopped from alleging any interference with contractual relations … between Zambia and Romania". The thrust of Donegal's contention, as I understand it, is that Donegal and Zambia conducted their exchanges between February 1999 and April 2003 on the basis that the debt and its assignment were valid and it is not open to Zambia now to resile from that position.

493. In view of my findings on other issues, Donegal do not need to rely upon any such argument. It seems to me that any argument of estoppel must be based upon an estoppel by convention. I accept that in the exchanges between Donegal and Zambia from February 1999 to April 2003 it was indeed assumed that the debt and its assignment were valid, and as far as the unlawful interference allegation is concerned, Zambia were then in a position to challenge the validity of the assignment if they chose to do so. If the unlawful interference allegation was a valid complaint, I would have concluded that it is inequitable for Zambia now to rely upon it in order to challenge that Settlement Agreement.

494. However, despite the form of their pleading, I understand that Donegal contend that Zambia are estopped from relying upon their other allegations, apart from the bribe allegation, to challenge the validity or enforceability of the debt that was assigned to them by Romania or of the assignment. I reject any such contention because Donegal have not shown that Zambia knew at the relevant time of the facts giving rise to their allegations other than the unlawful interference allegation. I acknowledge that in the course of his cross-examination Mr Lintini said that at a meeting with Mr Kunda, Mr Lukwasa and Ms Nyirenda that he attended in February 2003 it was recognised that the debt had been assigned "but improperly assigned", and that the "transaction was not handled in an above board manner" and was "not transparent", but that evidence was far too general to establish any relevant knowledge on the part of Zambia.

495. In so far as Donegal seek to assert an estoppel by representation (and I reject Donegal's submission that an estoppel by convention is a form of estoppel by representation and there is no relevant distinction between the two concepts: see Chitty on Contracts, 29$^{th}$ Ed, 2005 para. 3-103), they point only to the Acknowledgment of 12 February 1999. I do not accept that that gives rise to any estoppel by representation because it contains no relevant representation of fact, and Donegal have adduced no sufficiently specific evidence of reliance upon any representation upon the Acknowledgment.

The "Inequity" Issue

496. Zambia also plead that "the Settlement Agreement was sufficiently connected with such illegality and/or corruption so as to render it inequitable for Donegal to [be] permitted to enforce the Settlement Agreement against Zambia in this jurisdiction or at all, whether or not Donegal knew or was responsible for, or was party to, such conduct". Zambia did not develop this point in their submissions except to draw it to my attention that in Armagas Ltd v Mundogas SA, [1986] 1AC 717 at p.745C Robert Goff LJ expressly reserved "the question whether a party to a contract induced by the bribery of his servant by a stranger, or indeed a party to a contract induced by the fraud of a stranger, should not be entitled to rescind the contract on the discovery of the bribery or the fraud, on the basis that it would be inequitable for the other party, though innocent, to hold him to a contract so procured". As I understand it, this pleading was directed to an argument that Zambia would advance if Donegal were not responsible for improper conduct on the part of Mr O'Rourke, Mr Mwale or Mr Chilupe, and so, on the findings that I have made, this point does not arise. I therefore only say that if Zambia are relying upon any more general equity, I do not recognise the principle on which they rely.

Construction of the Settlement Agreement

497. There is a dispute between the parties about the proper interpretation of the Settlement Agreement. Zambia maintain that upon its true interpretation clause 2.3(d) entitles Donegal, upon service of a notice, to set aside the agreement and to take judgment upon the debt assigned to them by Romania. However, Zambia argue, if Donegal take this course, they are treating the Settlement Agreement as null and void and of no effect and cannot take advantage of it: they cannot invoke the provisions of clause 12 about jurisdiction and waiver of immunity, and they cannot rely upon the agreement to define the amount of the debt for which they are entitled to judgment.

498. This interpretation of the Settlement Agreement is, as Zambia argue, dictated by the wording of clause 2.3(d) which entitles Donegal to enter judgment "in respect of the Debt". There is no room for dispute about the meaning of "the Debt" – the term is used to refer to what Zambia owed to Romania and after assignment to Donegal consistently in the recitals to the Settlement Agreement and in clause 2.2 whereby Donegal agreed to accept the Settlement Amount "in full and final settlement of the Debt".

499. Zambia properly observe that the Settlement Agreement was drafted by Donegal and they are therefore able to invoke the principle of construction contra proferentem if there can be said to be a real ambiguity as to its intended meaning. However, I cannot accept that there is. The import of the provision that upon service of a notice the agreement is null and void and of no effect is that it determines the agreement that payment of the settlement amount should discharge Zambia's entire liability for the debt. In one sense, of course, it could be said that the proceedings are brought for the payment of the monies owed by Zambia by way of the original debt owed to Romania and assigned, but the claim is made under the new contractual undertakings in the Settlement Agreement for payment of those monies and in particular the undertaking that upon service of a valid notice Donegal should be entitled to judgment in respect of the full amount of the Debt. In my judgment clause 2.3(d) is not to be interpreted as providing that upon service of a notice no term of the agreement is of any further

application. For example, I cannot accept that the representations and warranties given by Zambia in clause 3 were thereupon spent, and the governing law clause survives service of a notice. The proper approach is to examine whether the parties are, in light of the robust wording of clause 2.3(d), to be taken to have intended that any particular provision should survive. In my judgment their clear intention was that the provisions about jurisdiction in clause 12 should continue to have effect after the service of a notice. After all, the terms of clause 12.1 are that the courts of England should have jurisdiction to settle any disputes "in connection with this Agreement *and the Debt*" (emphasis added) and similarly clause 12.4, the provision dealing with waiver of immunity, referred to proceedings brought "in relation to this Agreement *or the Debt*". I note that unlike clause 6.3, clause 12 does not expressly provide that it does not survive termination under clause 2.3.

500. In my judgment, therefore, the Settlement Agreement entitles Donegal in the events that have happened to judgment in accordance with clause 2.3(d) and Zambia have waived state immunity in respect of this entitlement of Donegal.

501. Conclusion upon the Jurisdiction Application

I therefore reject all the various arguments that Zambia advance by way of challenge to the validity and enforceability and applicability of the Settlement Agreement and Clause 12 thereof. I conclude that Zambia have agreed in writing that they should not be immune as respects the claim that Donegal bring in these proceedings. Subject to further submissions as to the precise order that I should make, I dismiss the jurisdiction application.

Donegal's application for summary judgment

502. In their claim form, Donegal seek judgment for US$44,723,761 "being the Debt owed to [Donegal] by [Zambia] under a Settlement Agreement dated 1 April 2003" together with interest, but giving credit for the payments made by Zambia amounting to US$2,418,734. On this basis Donegal claim that they are entitled to judgment in the sum of US$55,568,545.74. That sum represents the sum of US$44,723,761.17 (being the debt as at 1 April 2003) together with interest of 8% pa calculated with quarterly rests to 31 August 2006, giving credit for Zambia's payments on the date that they were paid.

503. I must therefore consider what judgment Donegal are entitled, upon the true interpretation of the Settlement Agreement, to enter under clause 2.3(d). They are entitled to judgment "in respect of the Debt", and by clause 2.3(e) Zambia consented to the award of a judgment by this court "for the full amount of the debt" together with interest as specified in the clause. The question is whether this entitles Donegal to judgment in the sum of US$44,723,761.17 or whether they are entitled to judgment in such sum as was in fact owed by Zambia at the date of the Settlement Agreement. This turns on the definition of "Debt" in the Settlement Agreement, and upon whether the parties are to be understood to be agreeing that the debt is to be taken to be US$44,723,761.17 or whether this sum and the ingredients thereof by way of totals for principal and interest are mentioned simply to identify which indebtedness is being referred to and without crystallising its amount.

504. The Debt is defined in terms of "the entire *amount* of the debt owed by the Republic of Zambia to Donegal" (emphasis added). That provides an obvious reason for the parties to specify the exact amount owing at the date of the agreement. Moreover, it is to be expected, I think, that in a provision such as clause 2.3(d) the parties would provide for judgment in a defined or readily ascertainable amount. In my judgment, by agreeing upon the definition of "Debt" Donegal and Zambia agreed upon the amount of the Debt. Upon the true construction of the agreement, they agreed that in the events that have happened Donegal might enter judgment for US$44,834,368.17 together with interest.

505. Zambia oppose Donegal's application for summary judgment on grounds that Donegal seek to rely upon provisions of the Settlement Agreement that are penal and therefore unenforceable, and that they have counterclaims that they are entitled to deploy by way of set-off against Donegal's claim. The counterclaims are in respect of their allegations of interference with their contractual relationship with Romania and of an inducement being offered to Mr Chizyuka, and it is convenient to consider them first.

506. I have already held that Zambia did not conclude a contract with Romania, and in any case Donegal did not interfere with any contract with the requisite state of mind for their conduct to be tortious. I consider that there is no real prospect of Zambia proving otherwise. (Donegal also say that Zambia have suffered no loss from any interference by Donegal in their dealings with Romania, but the evidence about that is unclear and I would not have regarded it as satisfactory to make a summary determination about that.)

507. As for the argument that Zambia have a defence of set-off based upon the allegation of a corrupt inducement offered to Mr Chizyuka, I have rejected Zambia's case that there was such an inducement, and, while that issue would not normally be suitable for summary determination, all the evidence about it has been presented in the course of the hearing of the jurisdiction application after disclosure of the relevant documents, and it would be an abuse of process for Zambia to seek to have the factual issue re-opened at a trial of this action. Accordingly this provides no answer to Donegal's application for summary judgment. In any case, Zambia have not identified any loss resulting from this complaint.

508. There is, in my judgment, a further answer to Zambia's contention that they can rely upon these defences of equitable set-off. Even assuming that their contentions could not be met by a defence of limitation (a controversial question about which the parties did not make submissions and about which therefore I shall not express any view: see Chitty on Contract, 29th Ed, 2004, Vol I para 28-123), and even assuming, which I doubt, that the connection between Donegal's claim under the Settlement Agreement and any claim that Zambia might have for interference with contractual relations or in respect of corruption of Mr Chizyuka in early 1999 is sufficiently close to give rise to an equitable set-off, nevertheless it seems to me that a defence of equitable set-off is impliedly precluded by the wording of the Settlement Agreement. It is inconsistent with Zambia consenting under clause 2.3(e) to judgment being entered against them "for the full amount of the Debt".

509. I therefore come to the argument that clauses 2.3(d) and (e) are penal. A sum payable on breach is not a penalty if it is a genuine pre-estimate of the loss that the

innocent party is likely to suffer as a result of the breach. Zambia rely upon well established principles, summarised by Peter Gibson LJ in Jeancharm Ltd v Barnet Football Club Ltd, [2003] EWCA Civ 58 at para 27: when deciding whether a contractual provision for a payment by a party in default is penal, the court looks at the substance of the matter and decides, construing the contract at the time that it was made rather than the date of breach, whether the provision is a genuine pre-estimate of the loss resulting from default or whether it is extravagant and unconscionable in amount in comparison with the prospective loss and is to be seen as a payment required in terrorem of the party in default. With regard to interest payable on overdue debts, Jacob J said in Jeancharm (loc cit) at para 16, "That one can have an increased rate of interest as a valid clause in some circumstances appears from the decision of Colman J in Lonsdale Finance plc v Bank of Zambia, [1996] QB 752. In that case there was an uplift of 1% for late payment of a debt. That was held to be a genuine pre-estimate on the basis that it indicated that the borrower was a risky borrower. There is nothing in the decision which suggests anything other than what Colman J called a "modest increase" would do."

510. Zambia say that the amount for which Donegal would be entitled to enter judgment under article 2.3(d) is not a genuine pre-estimate of loss that might result from their default for these reasons:

i) First, Donegal are entitled to judgment in the sum of US$44,758,841.17, some three times the amount that was to be paid under the Settlement Agreement in full discharge of the debt.

ii) Secondly, the rate of interest is increased from 6% pa to 8% pa.

iii) Thirdly, interest is to be compounded with quarterly breaks rather than simple.

iv) Fourthly, Donegal calculate their claim on the basis that they are entitled to the increased rate of interest compounded with quarterly breaks from the date of the Settlement Agreement and not, for example, from the date of the notice of default. (I express no view as to whether upon the true interpretation of clause 2.3(d) they are so entitled. Zambia did not make submissions on the point, and it is not necessary for my decision to resolve this question.)

511. Thus, Zambia are able to illustrate their argument that the provision is penal by pointing out that had they defaulted in making the last payment of US$363,019 after paying 35 instalments in due time, Donegal would be entitled to judgment of over US$29 million.

512. Donegal do not dispute that this is the effect of the Settlement Agreement. However, they say that the principles of law about penalties do not apply in these circumstances, because the effect of clause 2.3 is that upon default and notice being served, Donegal's original rights and Zambia's original obligations revive. They refer to Thompson v Hudson, (1869) 4 HL 1 in which the House of Lords refused to treat as a penalty a provision reserving the right to have full payment of money actually due on an existing contract should there be a failure to pay a smaller sum on a specific date. Lord Hatherley said this (at p.15):

> "I take the law to be perfectly clear upon these matters which we have to consider with reference to this and the subsequent agreements, namely, that where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable, and be paid, in either of those cases Equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that Equity regards the contemplated forfeiture which might take place at Law with reference to the estate as in the nature of a penal provision, against which Equity will relieve when the object in view, namely, the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which Equity will relieve.
>
> Now, that being clear on the one hand, it is equally clear on the other that where there is a debt due, and an agreement is entered into at the time of that debt having become due and not being paid, in regard to farther indulgence to be conceded to the debtor, or farther time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some future time which may be named, and the creditor is willing to allow him certain advantages and deduction from that debt, as well as to extend the time for its payment, if adequate and proper security in the mind of the creditor be afforded him as his part of the bargain in respect of which he is to make these concessions, then it is perfectly competent to the creditor to say: "If the payment be not made *modo et forma* as I have stipulated, then forthwith the right to the original debt reverts, and it is to be open to me to proceed with reference to the original debt, and to exercise all those powers which I possess for compelling payment of the original debt; in other words, I am entitled to be replaced in the position in which I was when this agreement; which has been not broken, was entered into"."

513. Lord Colonsay said (at p.33):

> "It is the reservation of an existing right. It is not the emergence of a right that was never in existence at all except on the violation of the agreement which was made. It is merely the reservation of what is the just and honest right of the party, which he was willing to waive to a certain extent, provided his debtor would do certain things, but if the debtor fails in doing those things, then that right which belongs to the creditor shall continue to belong to him, and he may enforce it".

514. Zambia do not dispute the principle stated in Thompson v Hudson. It was applied in cases arising after the settlement by many Names of the Lloyd's litigation. In Society of Lloyd's v Twinn, The Times, 4 April 2000, Sir Richard Scott VC said at para 54:

> "In considering whether a provision is a penalty, the law will look at the substance not to the form. The substance of the Settlement Agreement is that the Name is offered a benefit, namely, the settlement credits, as an offset against his underwriting liabilities, provided he pays the balance by a specified date. If he does so, he discharges his liability. If he does not, his original liability revives. This is the reverse of a penalty. It is a conditional benefit. If, of course, the sum specified in the finality statement as the amount of the Name's underwriting liabilities were an arbitrary sum, the conclusion might be otherwise. It is clear, however, and the contrary has not been suggested, that the underwriting liabilities sum specified in the finality statement was a bona fide calculation of the amount of the Name's underwriting liabilities to Lloyd's. Whether or not the sum was agreed by the Name as being correct, it was the result of a genuine attempt by Lloyd's to quantify the Name's current liabilities. The question of a penalty simply does not arise".

515. Zambia argue, however, that the principle in Thompson v Hudson does not apply because the Settlement Agreement does not provide for "the reservation of an existing right" (per Lord Colonsay) or that "the original liability revives" (per Sir Richard Scott V-C).

516. First, Zambia say that the sum of $44,723,761.17 was not contractually due from Zambia before the Settlement Agreement because this sum results from a calculation that involves the capitalisation of penalty interest as at 31 December 1998 and interest from 22 January 1999 being calculated at 12% pa. As I have explained, in my judgment Zambia did not agree to penalty interest being capitalised as at 31 December 1998 (either with the Romanian government in the meetings of 18 and 19 December 1998 or with Donegal after the assignment) and had not entered into a contract (at the meeting on 6 February 2002 or at any time) to pay interest at the rate of 12% pa from 22 January 1999. However, this does not prevent Donegal from relying on the principle established in Thompson v Hudson. As is clear from the passage of the judgment of Sir Richard Scott V-C which I have cited, the question is whether the parties have made a "bona fide calculation" of the amount of the indebtedness already existing when the Settlement Agreement was made. In my judgment, they did do so. The amount of the "Debt" as defined in the Settlement Agreement reflected what Mr Kunda acknowledged was his understanding of the amount that Zambia owed, and it seems clear from (for example) the memorandum of Mr Mwaanga of 6 December 2002 that Mr Kunda's understanding was shared in the Ministry of Finance. As for Donegal, they were not, of course, present at the meetings in Bucharest in December 1998, and I accept that they were led by Romania to believe that it had been agreed that the debt should be capitalised in the sum of US$29,834,368.06. I also accept that they believed after the meeting on 6 February 2002 that it was common ground between them and Zambia that, for practical

purposes, the parties should calculate interest that had already accrued as being simple interest on the debt at the rate of 12% pa, and both parties were content that interest to date should be so calculated.

517. However, Zambia have other arguments that the Settlement Agreement did not simply preserve the parties' respective existing rights and obligations. They rely upon the provisions about interest, the waiver of immunity, the provision that the debt should be governed by English law, the agreement to the jurisdiction of the English court and the agreement that Zambia consented to judgment being entered against them in clause 2.3(e).

518. Zambia have not indicated how the governing law provision affected the substance of the parties' rights and obligations in any way, and I cannot accept that it did. Nor do I consider the provisions about how Donegal might enforce their rights in the jurisdiction clause and in clause 2.3(e) bear upon the substance of the parties' rights and obligations.

519. However, I conclude that clause 2.3(d) and (e) did not simply preserve the parties' rights and obligations or confer equivalent rights and obligations to those that they had before the Settlement Agreement. First, the provision for compound interest at 8% pa, including the provision for quarterly rests, gave Donegal new rights and imposed on Zambia new obligations. Under the contractual arrangements before the Settlement Agreement, interest was simple and was accruing at the rate of 9% on the debt that had been rescheduled in 1985 and at the rate of LIBOR plus 2% on the debt that had not been rescheduled. There had been no agreement that future interest should be at any other rate or that it should be compounded. The question is not whether the interest arrangements were themselves penal, but whether the provision in clause 2.3(d) preserved existing rights. It did not, and therefore Donegal cannot rely upon the principle in Thompson v Hudson to answer Zambia's argument that it is penal. (Donegal did not argue that they could rely upon clause 8 of the Settlement Agreement and, ignoring the interest, enter judgment for the Debt under clause 2.3. This would involve treating clause 2.3(d) as constituting a number of separate "provisions" within the meaning of clause 8, whereas in reality it was a single provision.)

520. I also consider that clause 2.3(d) cannot be said simply to provide for Donegal to preserve their existing rights because Donegal acknowledge that their existing rights were subject to Zambia's right to state immunity in respect of them. Clause 2.3(d) confers upon Donegal rights in respect of which Zambia have waived their state immunity in relation to proceedings against them and enforcement against their assets. That waiver is effective at least in the English courts, the forum which Zambia agreed should have jurisdiction to settle any disputes in connection with the agreement and the Debt. The waiver affects the parties' rights and obligations and enhances the value of Donegal's rights, and, in my judgment, takes this case outside the principle stated in Thompson v Hudson.

521. Of course, the doctrine of state immunity provides immunity from suit, not an exemption from law: see Fox, The Law of State Immunity, 2002, p.19. However in so far as it is objected that therefore the waiver of state immunity does not affect the nature of Donegal's rights, I do not consider that this answers Zambia's contentions. The question whether a provision is penal depends upon the reality of the matter and

not upon legal forms, and in my judgment the question does not turn upon whether the immunity affects the creditor's rights or the remedies to enforce his rights. In reality the fact that the debt under the Settlement Agreement does not attract State Immunity makes Donegal's rights considerably more valuable.

522. I add that the fact that Zambia do not have immunity in respect of Donegal's rights under the Settlement Agreement but would have been able to assert a claim to immunity in respect of the assigned debt is not simply a procedural matter removed from the nature of their substantial obligations but is an incident of the fact that previously their obligations were in respect of the assigned debt whereas Zambia's obligations now arise under the Settlement Agreement. Because of this, the rights in respect of which Donegal now claim are not rights which were originally owed between states and which were therefore subject to state immunity even though relating to commercial transactions and even though assigned to Donegal. They are new and distinct. These new rights were never owed between states, and it appears to me strongly arguable that they relate to commercial transactions. If so, regardless of any waiver, they would not attract state immunity. Donegal would have been able to argue that Zambia could not claim state immunity in respect of Donegal's claim because new rights arise under the Settlement Agreement even in the absence of the waiver in clause 12.

523. In my judgment, therefore, Zambia have a real prospect of defending the claim on the basis that the provisions of clauses 2.3(d) and (e) are penal. Moreover, Donegal, rather than seeking the opportunity to re-argue these questions at a trial, ask that I determine whether these provisions are penal, realistically recognising that their argument would not be advanced if there were a trial of the question. I determine that they are.

524. I shall therefore invite submissions about what order I should make in light of my conclusions. My provisional view is that Donegal are entitled to some relief in respect of what Zambia agreed to pay under the Settlement Agreement, but, while Mr Trace made reference to this in his closing submissions, I have not heard submissions from Zambia about this. (In Jobson v Johnson, [1989] 1 WLR 1026, esp. at p.1040 it was said that the innocent party may sue upon a contractual term that is penal but the term will not be enforced beyond his actual loss. In Scandinavian Trading Tanker Co AB, [1983] 2 AC 694, 702F/G Lord Diplock said that the "classic" form of relief was to award the common law measure of damages for breach, but he had in mind a case where the primary obligation was in damages, not in debt.)

The freezing order applications

525. Zambia argue that the freezing order made against them by Langley J on 7 March 2005 and continued by Cooke J on 16 March 2005 should not have been made and have applied for it to be discharged. The grounds of their application to discharge the orders are:

i) Criticism of Mr Sheehan's affidavit of 4 March 2005, which was the evidence relied upon by Donegal when they applied without notice to Langley J. Although in their notice of application the complaint is presented as one of non-disclosure, as it was developed in submissions it is not only that Donegal failed to make disclosure but that parts of the evidence were wrong.

ii) An argument that there is not evidence, or adequate evidence, of a risk that Zambia will dissipate their assets.

526. These are not the only points raised by Zambia in argument. For example, citing the judgment of Waller LJ in Kensington International Ltd v Congo, [2003] EWCA 709, para 12, they argue that the court will be slow to grant freezing relief when the claim is for "an old debt assigned where difficulties with enforcement were well understood and had been well understood for years…". However, for reasons that I have explained, in this judgment I deal only with the questions whether because of the criticisms of the affidavit, the orders should be discharged and Donegal refused all relief by way of freezing orders, and otherwise the argument upon the freezing order applications are to be heard at a hearing after the parties have considered this judgment. Other points are for later argument unless these complaints alone resolve the freezing applications.

527. However, I first should record that when Donegal obtained their freezing order from Langley J on 7 March 2005 and Cooke J extended it on 16 March 2003, Donegal did not disclose their own accounts or reveal anything about their financial position. Donegal have maintained that position, and Mr Trace specifically confirmed during the hearing before me that the freezing order applications are to be considered on the basis that Donegal refuse to disclose that information.

528. I come, therefore, to the criticisms that have been made of the evidence that Donegal presented in support of their application for a freezing order. Mr Sheehan described Donegal as "a company that invested in emerging markets debts, primarily with a view to negotiating debt-for-equity swap arrangements with the debtor". As I have said, in fact Donegal were incorporated as a special purpose vehicle specifically to acquire the Romanian debt. They have no assets other than the claim in this litigation. When he was cross-examined, Mr Sheehan accepted that, while he said that they had bought and sold other debt, they had not invested in any other debt conversion, at least when the affidavit was presented to Langley J. Mr Sheehan gave a misleading picture of Donegal, which is the more concerning because they still decline to put any financial information about themselves before the court.

529. In his affidavit, Mr Sheehan stated that he set out "the entire history of the debt". Zambia complain that the history that he gave was inaccurate in a number of ways.

530. First, he said that Romania and Zambia met in Bucharest in December 1998 "with a view to reconciling their calculation and negotiating a method for agreeing the amount" of the debt. Zambia complain that the purpose of the meetings was wider than that. I agree that it was, but the context in which Mr Sheehan made this statement was part of an explanation about how differences emerged about Romania's and Zambia's calculations of the amount owing and how they were resolved. The Memorandum of Understanding, which states the purpose of the meetings, was included in the exhibit to Mr Sheehan's affidavit. I cannot accept that Mr Sheehan mis-stated the purpose of the meetings in any significant respect, and I reject this criticism of the affidavit.

531. Next, Zambia criticised this sentence of Mr Sheehan's affidavit, "As a result of the meeting in late December 1998 [between Romania and Zambia] [Bancorex] acting for and on behalf of the Ministry of Finance of Romania, prepared a summary statement

of the payment obligations owed by Zambia to Romania as at 31 December 1998, confirming principal and capitalised interest of US$29,834,368.06". Mr Sheehan included a copy of the statement in the exhibit to his affidavit. Zambia point out that this statement was not produced as a result of the meeting in Bucharest. This is true as far as it goes, but it is not to my mind a point of any importance. (There was a similar error in the Statement of Claim in the BVI proceedings, and presumably it derived from there). More important is the statement, or at least clear implication, that Zambia had agreed to the interest being capitalised, but, while I have concluded Zambia did not so agree, I also accept that Mr Sheehan and others at Donegal believed, and on the information that they had been given understandably believed, that this had been agreed between Romania and Zambia.

532. Mr Sheehan then said in his affidavit that in 1998 Romania asked DAI to find a buyer for the debt by the end of the year, but "although DAI identified [Donegal] as a buyer for the debt owed to Romania in early December 1998, representatives of [Donegal] were unable to travel to Romania to close the transaction until January 1999". Zambia criticise this passage as suggesting that it was Romania's initiative to approach DAI to find a buyer for the debt whereas in fact DAI approached Romania. I do not agree that the implication of the passage is that DAI made the first approach. However, the passage was misleading in other respects: first Mr Sheehan accepted that he used "loose language" in referring to DAI identifying Donegal as a buyer for the debt in December 1998, and explained that he had in mind the identification of a buyer for Donegal's shares. Secondly, the delay was not attributable to representatives of Donegal being unable to travel, and this inaccuracy was not explained. These two criticisms of the affidavit are justified, although in themselves they do not relate to anything of any real relevance to the application for freezing relief.

533. Then Mr Sheehan said in his affidavit that, when Zambia offered Romania a higher "price" to discharge the debt than Donegal had previously agreed with Romania, Donegal "matched the higher price". This again was inaccurate in that Donegal were offering to buy the debt for 11% of its value and Zambia were offering to discharge it for 12% of its value. (I observe in this context that Mr Sheehan explained that, "Details of the consideration paid by [Donegal] to Romania to acquire the debt are commercially sensitive and accordingly have been redacted from" the version of the notice of assignment that was exhibited.) Mr Sheehan accepted in cross-examination that he was guilty of using "imprecise language" but sought to explain it on the basis that Donegal's offer compensated for the lower "price" by including other more attractive terms. The fact remains that what he said in the affidavit was wrong.

534. Zambia also criticise a passage of the affidavit headed "Subsequent Negotiations" in which Mr Sheehan described the proposals made by Donegal to realise the debt through conversion or similar projects. They make, I think, two main points, both of which I consider to be justified.

i) First Mr Sheehan said that before they acquired the debt "[Donegal] had been in discussion with Zambia" and "one of the factors that influenced [Donegal's] decision to buy the Assigned Debt was confirmation that the Assigned Debt could be eligible for use in a debt conversion or similar transaction bringing investment to Zambia and, at the same time, reducing Zambia's debt burden in an affordable way". This is inconsistent with Mr Sheehan's evidence during

the trial and, as I conclude, contrary to what happened. The affidavit reflects a passage of Mr Slater's affidavit in the BVI proceedings to which I have referred, and was apparently drafted on the basis of what was said there. However, Mr Sheehan (unlike Mr Slater) was involved in Donegal's decision to buy the assigned debt, and, as I infer, knew what influenced that decision.

ii) Secondly, in this passage of the affidavit, Mr Sheehan referred to the proposals about the National Lottery Board, and the Kafue Textiles plant, and continued, "Similarly, [Donegal] considered converting the Assigned Debt into local currency to create a low to medium income housing project in Zambia, and met with several government officials to discuss this potential project". This was a reference to the proposal to contribute to the PHI, but it is a distortion to suggest that this proposal was similar to those about the National Lottery Board and Kafue Textiles. Donegal's idea was to donate a small part of the debt to the PHI and Mr Sheehan himself had so described it in his e-mail to Mr Eckels.

iii) At one point it appeared that Zambia made a third criticism of this passage of the affidavit: that Mr Sheehan stated that Donegal proposed conversion projects only to have Mrs Chibanda reject them "stating categorically that the government would only consider a buy-back of the assigned debt at 11 per cent of face value". It was indicated in the cross-examination of Mr Sheehan that Zambia would dispute this on the basis that Mrs Chibanda indicated that conversion proposals could work if Donegal showed that the cost to Zambia would be about what was called "the World Bank benchmark figure" of 16.5%, but this point was not pursued and I do not criticise Donegal about that evidence.

535. When referring to the meeting of February 2002, Mr Sheehan said that "preliminary terms of … settlement were agreed with the Secretary to the Treasury. These terms included an agreement on the aggregate value of the Assigned Debt, being the amount referred in to the [Acknowledgment] … plus interest calculated at 12% per annum, being the then prevailing World Bank rate for severely indebted countries such as Zambia… In return for the agreement of these preliminary terms, I agreed on behalf of [Donegal] that proceedings against Zambia would not be commenced for a period of some months to give the Secretary to the Treasury the opportunity to accommodate the terms of the proposed settlement rate within the constraints of Zambia's next annual budget."

536. It seems to me that two criticisms can properly be made of this passage of the affidavit.

i) First, the reference to a "prevailing World Bank rate for severely indebted countries" suggests that there was a recognised or commonly used World Bank interest rate. There was not, and the various explanations put forward by Donegal and their witnesses to explain the 12% pa interest rate by reference to the World Bank were unconvincing. I see no reason to reject Mr Sheehan's evidence that the World Bank sometimes used 12% pa as a discount rate in respect of projects, or even that they "typically" did so, but that is very different from what Mr Sheehan said in his affidavit. He is certainly well familiar with the difference between an interest rate and a discount rate, and no

explanation that I can accept has been given for the reference to a "prevailing World Bank rate".

ii) Secondly, Mr Sheehan stated that he agreed on behalf of Donegal that proceedings would not be commenced for some months. He was not at the meeting in February 2002 (although he did not explain this in his affidavit), and there is no suggestion that he made any such agreement after the meeting. The affidavit gives the impression that this was agreed by Mr Sheehan as part of the "preliminary terms" or in consideration of Zambia accepting them. Again, there was no satisfactory explanation of this error.

537. Zambia also say that in setting out the "full history of the debt" Mr Sheehan failed to mention matters that should have been disclosed.

i) When referring to the BVI proceedings, the affidavit stated that, "Neither the Credit Agreement nor the Repayment Agreement [as Mr Sheehan described the agreement of August 1985] contained a jurisdiction clause and accordingly proceedings were issued in the BVI court on the basis that the BVI was the place of payment of the debt as set out in the letter of 2 August 2002". Despite this, Mr Sheehan did not refer in his affidavit to the Banking Arrangement. Since the explanation for starting the proceedings in the BVI was put in these terms, I agree with the benefit of hindsight that it would have been right to refer to the Banking Arrangement, but I do not consider that this was an important omission, and it is one which, in itself, I would readily excuse. In so far as it is said that the Banking Arrangement provides for a place of payment, that was not in point in that the Settlement Agreement provided that Zambia accepted English jurisdiction. As I have already observed, in so far as it is said that the Banking Arrangement shows the interest rate that Zambia were to pay on the part of the debt that was not re-scheduled in 1985, the rate was also recorded in the Memorandum of Understanding between Romania and Zambia. (I have pointed out that in fact the letter of 2 August 2002 required Zambia to remit funds to New York, but Zambia have made no complaint on that basis.)

ii) The affidavit did not refer to the involvement of Mr O'Rourke, Moreno, Mr Mwale and Mr Chilupe. I am not persuaded that this was an omission for which Donegal are to be criticised.

iii) Mr Sheehan stated that the claim that the Settlement Agreement was made with the final approval and clearance from the office of the Attorney General was "not true as a matter of fact". Zambia criticise him for not referring to the discussions after the meeting with Mr Kunda and for not mentioning that the way in which the agreement was signed was, as he described it in his evidence, "unusual". However, while Mr Sheehan so described the circumstances in which, on his account, the agreement was signed, he also said that, "I have signed deals in similar circumstances". I have rejected Mr Sheehan's account of how the Settlement Agreement was signed and it follows, I think, that he cannot be criticised for not giving it in his affidavit. Nor do I accept that the affidavit is to be criticised because there was no reference to Mr Mwale, rather than Mr Malambo, attending when the agreement was signed.

iv) Zambia also point out that although Mr Sheehan referred to, and relied upon, Mr Kunda's letter of 17 March 2003, he said nothing about how it was obtained, and did not mention that it might well be privileged. In my judgment, he should have done so. I have rejected his evidence that he believed that privilege had been waived, but even if he believed that it had been, he should have explained how Donegal came to have that letter and to have referred to the question whether it might be, or have been, the subject of legal privilege.

538. Zambia make two other criticisms of the affidavit, about evidence which, as I understand it, was designed to go to the argument of a risk that Zambia might dissipate their assets or seek to evade enforcement of any judgment against them.

539. First, they complain that "Zambia has a history of trying to avoid paying its debts", without making any reference to the background that the assigned debt was bilateral sovereign debt, and, while Romania were not a member of the Paris Club, the principle of comparability of treatment applied. Undoubtedly Mr Sheehan was fully aware of this principle and its implications: indeed, in his memorandum of 12 May 1997 to Romania he relied upon these considerations in support of "The Rationale for Our Proposed Pricing of 11% of Face Value".

540. Donegal submit that this information goes to nothing of real significance, and there was no duty to refer to it in the affidavit or on the application. It is fair to observe that Mr Sheehan does not rely directly upon the fact that the debt had been outstanding since 1979 in support of Donegal's contention that there was a risk that Zambia would dissipate assets or deal with them so as to avoid a judgment being enforced against them. In these circumstances, I am not persuaded that Donegal were at fault in not referring to these matters, and certainly this criticism is so much less significant than some other points that Zambia make that I need say no more about it.

541. Secondly, Zambia complain that Mr Sheehan averred in his affidavit that Donegal had "evidence that Zambian governmental and state institutions [had] taken steps to avoid meeting obligations to other creditors in a similar position to that of [Donegal]"; and in support of this they referred to the Camdex case in terms that Zambia say are misleading. The account of which Zambia complain is this:

> "In 1995, a company called Camdex International Limited ("Camdex") commenced proceedings against the Bank of Zambia … in connection with a debt owed by it. That resulted in a number of reported judgments. In Camdex International Limited v Bank of Zambia (No. 2) …, the Court of Appeal considered a post judgment Mareva injunction obtained by Camdex. … Sir Thomas Bingham MR referred to the decision of the judge at first instance who stated that "he was faced with a judgment debtor who had decided to make enforcement as difficult as possible". A note of the judgment of Mr. Justice Newman (given at first instance on 12 April 1996) is exhibited … The judge came to the conclusion that the Bank of Zambia was acting "deliberately with the intent of delaying, and so far as is possible, not meeting the Judgment, save to any extent it chooses to…"

542. As Zambia observe, the Court of Appeal decision was not by way of an appeal from the decision of Newman J, but was from a decision of Morison J. In fact the judgment of Newman J continued (as was apparent from the attendance note recording his judgment that was included in the exhibit to Mr Sheehan's affidavit, but not from the citation in the affidavit itself) as follows: "but it is doing so in my judgment … from a misconceived assessment of its legal obligations". Perhaps more importantly, in fact the Court of Appeal allowed the appeal by the Bank of Zambia from the order of Morison J and in giving the leading judgment Sir Thomas Bingham MR made this observation (at [1997] 1 WLR 632 at p.637G):

> "It would seem to me that the defendant, grievously short of funds as it plainly is, cannot be at fault if it seeks to pay its creditors on a pro rata basis, even if that means that each of them recovers very little. It must be a legitimate concern of the defendant to try and ensure that the repayments due to the World Bank and the International Monetary Fund are not the subject of default. This seems to me a setting so unlike that in which the ordinary Mareva jurisdiction falls to be exercised, that the judge did fall into error in failing to recognise this new dimension of the problem with which he was confronted."

543. It seems to me that, given reliance was to be placed on the Camdex case by Donegal, these matters should have been drawn to the Judge's attention. That said, again, this does not seem to me the most serious of Zambia's criticisms, because I could not accept (were it to be suggested) that there was any intention on the part of Mr Sheehan or those acting for Donegal to mislead the court about the Camdex case and in any event the case is so well known that I am confident that a judge of this court would not have been misled about what it said, and indeed that an applicant could have assumed this to be the case.

544. I therefore consider that a number of the criticisms that Zambia make of the evidence about Donegal's business and the history of the debt are justified and require me to consider whether they should disentitle Donegal from having the benefit of freezing relief. The justified criticisms are not about matters of central importance to the application and I consider it likely that Langley J would have granted the order had these matters been fully and accurately stated. On the other hand, while I do not consider that Mr Sheehan deliberately presented untruthful evidence, he did mis-state matters which were in his own knowledge (in particular, the nature of Donegal's business, the claim that Donegal "matched the higher price" of Zambia's proposal, the description of "subsequent negotiations", and the evidence about the meeting of 6 February 2002) and the number and nature of points about which the affidavit is rightly criticised shows to my mind that he was not merely careless but cavalier in presenting his evidence.

545. This being my assessment of the criticisms of the affidavit, I must consider whether in these circumstances the order obtained from Langley J on the basis of it should be discharged and whether it should prevent Donegal from being granted further

freezing relief. The relevant principles were summarised by Ralph Gibson LJ in Brink's Mat Ltd v Elcombe, [1988] 1 WLR 1350 at p.1356. If there has been material non-disclosure or material misrepresentation, the court will be astute to ensure that the applicant gains no advantage from his breach of duty. In assessing whether the breach is such as to justify or require the discharge of any order obtained and whether it is such as to preclude the applicant from further relief, it is relevant to consider the importance of the matter that was not disclosed or misrepresented, and also to consider whether the breach of duty was innocent in the sense that the deponent and applicant were unaware of the error or omission, or unaware in the case of non-disclosure of the relevance of what was not disclosed.

546. I have concluded that the court should discharge the order made by Langley J upon the basis of this evidence, and should discharge the order of Cooke J when he continued it. However, given that I have not concluded that the errors were deliberate and given that they were not about matters of central importance, I do not consider that in themselves they should preclude Donegal from obtaining further freezing relief. It will be for argument whether, if Donegal do apply for a new freezing order, I should take into account this history and if so what weight I should give it. I add that I shall not discharge the order presently in force until Donegal have had a reasonable chance to make such an application.

Conclusion

547. Therefore:

i) I reject Zambia's jurisdiction application.

ii) I shall hear argument about what order I should make upon the summary judgment application in light of the conclusions that I have reached.

iii) I shall discharge the freezing order, but hear argument about whether I should grant Donegal new freezing relief if they apply for it.

548. I should like to express my gratitude to counsel for their helpful and detailed submissions, which were of great assistance to me.