

[COURT OF APPEAL]

TRENDTEX TRADING CORPORATION v. CENTRAL BANK
OF NIGERIA
[1975 T. No. 3663]

[See also [\[1977\] Q.B. 529](#) (*this opinion*) and [\[1982\] A.C. 679](#) (H.L.) and [\[1980\] Q.B. 629](#) (C.A.)
(*Trendtex Trading Corp. v. Credit Suisse*)]

1976 Oct. 6, 7, 8, 11, 12, 13, 14, 15, 18;
1977 Jan. 13

Lord Denning M.R., Stephenson
and Shaw L.JJ.

Conflict of Laws - Sovereign immunity - Bank - Commercial transaction for supply of cement to Nigerian state - Central bank issuing irrevocable letter of credit - Action to enforce payment - Status of bank - Whether department of state - Whether immunity in respect of commercial transactions exists
International Law - Recognition - Effect - Whether incorporated into English law - Whether rule of stare decisis applicable in England - Central Bank of Nigeria's claim to sovereign immunity

The Central Bank of Nigeria was incorporated in 1958 by a Nigerian statute as a central bank modelled on the Bank of England. It issued legal tender and acted as banker and financial adviser to the Government of Nigeria. It also acted as banker for other banks and its affairs were under considerable governmental control.

In July 1975 the Central Bank issued an irrevocable letter of credit for over \$14,000,000 in favour of the plaintiff, a Swiss company, to pay for 240,000 tons of cement which the plaintiff had sold to an English company. The cement was to be shipped to Nigeria where it was to be used to build government barracks. The plaintiff shipped the cement to Nigeria but there was congestion in the port of discharge and the Central Bank declined to make payments claimed to be due for the price and for demurrage.

By writ of November 1975 the plaintiff claimed against the Central Bank for payments due in respect of the bank's breaches and repudiation of the letter of credit. Mocatta J. granted the plaintiff an injunction ordering the bank to retain \$13,968,190 within the jurisdiction until the trial of the action or further order. Donaldson J., on the bank's application, set aside the writ and stayed further proceedings in the action on the ground that the bank was a department of the State of Nigeria and was therefore immune from suit.

On the plaintiff's appeal: -

Held, allowing the appeal, (1) that the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore not entitled to immunity from suit (post, pp. 371D, 373H-374A, 375H-376A, 382A, 385B-C).

Baccus S.R.L. v. Servicio Nacional Del Trigo [1957] 1 Q.B. 438, C.A. and *Mellenger v. New Brunswick Development Corporation* [1971] 1 W.L.R. 604, C.A. distinguished.

Krajina v. Tass Agency [1949] W.N. 309; [1949] 2 All E.R. 274, C.A. considered.

(2) That (*per* Lord Denning M.R. and Shaw L.J.) even if the bank were part of the Government of Nigeria, since international law now recognised no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature, it was not immune from suit on the plaintiff's claim in respect of the letter of credit (post, pp. 369D-E, 371E, 386B-D, 389A-B).

Per curiam. The modern principle of restrictive sovereign immunity in international law giving no immunity to acts of a commercial nature is consonant with justice, comity and good sense (post, pp. 367H, 380E, 385G-H, 386B-C).

Per Lord Denning M.R. and Shaw L.J. International law knows no rule of stare decisis (post, pp. 365H, 388H).

Per Stephenson L.J. The Court of Appeal is bound by previous decisions to hold that absolute sovereign immunity is a rule of international law until the House of Lords or Parliament declares to the contrary (post, p. 381G, H).

Dicta of Lord Mansfield C.J. in *Triquet v. Bath* (1764) 3 Burr. 1478, 1481 applied.

Reg. v. Keyn (1876) 2 Ex. 63; *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W. L.R. 1485, C.A. and *The Philippine Admiral* [1976] 2 W.L.R. 214, P.C. considered.

(3) That since the bank was not entitled to immunity from suit the injunction preserving funds within the jurisdiction to satisfy the plaintiff's claim should be continued (post, pp. 371G, 382E-F, 389C).

Decision of Donaldson J. [1976] 1 W.L.R. 868; [1976] 3 All E.R. 437 reversed.

The following cases are referred to in the judgment: -

Alfred Dunhill of London Inc. v. Republic of Cuba, May 24, 1976, Supreme Court of the United States[425 U.S. 682].

Baccus S.R.L. v. Servicio Nacional Del Trigo [1957] 1 Q.B. 438; [1956] 3 W.L.R. 948; [1956] 3 All E.R. 715, C.A.

Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property[1954] A.C. 584; [1954] 2 W.L.R. 867; [1954] 1 All E.R. 969, H.L.(E.).

Barbuits' Case in Chancery (1737) Forr. Cas. temp. Talb. 281; *sub nom. Buvot v. Barbut* (1736) 3 Burr. 1481 and see 4 Burr. 2016.

Chung Chi Cheung v. The King [1939] A.C. 160; [1938] 4 All E.R. 786, P.C.

Claim Against the Empire of Iran Case (1963) 45 International Law Reports 57.

Compania Mercantil Argentina v. United States Shipping Board (1924) 131 L.T. 388, C.A.

Compania Naviera Vascongado v. S.S. Cristina (The Cristina) [1938] A.C. 485; [1938] 1 All E.R. 719, H.L.(E.).

Doe d. Lloyd v. Passingham (1827) 6 B. & C. 305.

Heathfield v. Chilton (1767) 4 Burr. 2016.

Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia [1955] A.C. 72; [1954] 3 W.L.R. 531; [1954] 3 All E.R. 236, P.C.

Kahan v. Pakistan Federation [1951] 2 K.B. 1003, C.A.

Krajina v. Tass Agency [1949] W.N. 309; [1949] 2 All E.R. 274, C.A.

Mackenzie-Kennedy v. Air Council [1927] 2 K.B. 517, CA.

Mellenger v. New Brunswick Development Corporation [1971] 1 W.L.R. 604; [1971] 2 All E.R. 593, C.A.

Metropolitan Meat Industry Board v. Sheedy [1927] A.C. 899, P.C.

Odessa, The [1915] P. 52.

Parlement Belge, The (1880) 5 P.D. 197, C.A.

Philippine Admiral, The [1976] 2 W.L.R. 214; [1976] 1 All E.R. 78, P.C.

Porto Alexandre, The [1920] P. 30, C.A.

Rahimtoola v. Nizam of Hyderabad [\[1958\] A.C. 379](#); [1957] 3 W.L.R. 884; [1957] 3 All E.R. 441, H.L.(E.).

Reg. v. Kent Justices, Ex parte Lye [\[1967\] 2 Q.B. 153](#); [1967] 2 W.L.R. 765; [1967] 1 All E.R. 560, D.C.

Reg. v. Keyn [\(1876\) L.R. 2 Ex.D. 63](#).

Reg. v. Secretary of State for the Home Department, Ex parte Thakrar [1974] Q.B. 684; [1974] 2 W.L.R. 593; [1974] 2 All E.R. 261, C.A.
Republic of Mexico v. Hoffman (1945) 324 U.S. 30.
Swiss Israel Trade Bank v. Government of Salta [1972] 1 Lloyd's Rep. 497.
Tamlin v. Hannaford [1950] 1 K.B. 18; [1949] 2 All E.R. 327, C.A.
Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies [1975] 1 W.L.R. 1485; [1975] 3 All E.R. 961, C.A.
Triquet v. Bath (1764) 3 Burr. 1478.
Ulen & Co. v. Bank Gospodarstwa Krajowego (1940) 24 N.Y.S. 2d. 201.
West Rand Central Gold Mining Co. Ltd. v. The King [1905] 2 K.B. 391.
Y.M.N. Establishment v. Central Bank of Nigeria. December 2, 1975, Provincial Court of Frankfurt, 8th Chamber for Commercial Matters; *sub nom. Youssef M. Nada Establishment v. Central Bank of Nigeria*, August 25, 1976, District Court of Frankfurt.

The following additional cases were cited in argument:

Blagojevic v. Bank of Japan, March 16, 1974, Cour D'Appel, Paris.
Bulmer (H. P.) Ltd. v. J. Bollinger S.A. [1974] Ch. 401; [1974] 3 W.L.R. 202; [1974] 2 All E.R. 1226, C.A.
Charkieh, The (1873) L.R. 4 A. & E. 59.
D. v. National Society for Prevention of Cruelty to Children [1976] 3 W.L.R. 124; [1976] 2 All E.R. 993, C.A., [1978] A.C. 171
De Wutz V. Hendricks (1824) 2 Bing. 314.
Dhellelmes et Masurel S.A. v. Banque Centrale de la Republique de Turquie (1963) 45 International Law Reports 85, Belgium Court of Appeal.
Dolder v. Lord Huntingfield (1805) 11 Ves.Jun. 283.
Grunfeld v. United States of America [1968] 3 N.S.W.R. 36.
Johore, Sultan of v. Abubakar Tunku Aris Bendahar [1952] A.C. 318; [1952] 1 All E.R. 1261, P.C.
Jonmenjoy Coondoo v. Watson (1884) 9 App.Cas. 561, P.C.
Krol v. Bank Indonesia (1958) 26 International Law Reports 180, Court of Appeal, Amsterdam.
Martin v. Bank of Spain (1952) 19 International Law Reports 202, Court de Cassation, France.
Minister of Supply v. British Thomson-Houston Co. Ltd. [1943] 1 K.B. 478; [1943] 1 All E.R. 615, C.A.
New York and Cuba Mail Steamship Co. v. Republic of Korea (1955) 132 F.Supp. 684.
Novello v. Toogood (1823) 1 B. & C. 554.
N.V. Cabolent v. National Iranian Oil Co., November 28, 1968, Court of Appeal, The Hague.
Parkin v. Government of the Republique Democratique du Congo [1971] 1 S.A.L.R. 259.
Republic of Congo v. Venne (1971) 22 D.L.R. (3d) 669.
Rich v. Naviera Vacuba, S.A. (1961) 197 F.Supp. 710.
Strousberg v. Republic of Costa Rica (1880) 44 L.T. 199, C.A.

Twycross v. Dreyfus (1877) [5 Ch.D. 605](#), C.A.
United States of America and Republic of France v. Dollfus Mieg et Cie, S.A. and Bank of England [[1952\] A.C. 582](#); [1952] 1 All E.R. 572, H.L.(E.).
United States of America v. Republic of China [1950] Q.L.R. 6.
Vavasour v. Krupp (1878) [9 Ch.D. 351](#), C.A.
Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes (1964) [336 F \(2d\) 354](#).
Viveash v. Becker (1814) 3 M. & S. 284.
Weilamann v. Chase Manhattan Bank (1959) [192 N.Y.S. 2d 469](#).

Zeevi (J.) and Sons Ltd. v. Grindlays Bank (Uganda) Ltd. (1975) [37 N.Y. 2d 220](#).

APPEAL from Donaldson J.

On November 4, 1975, the plaintiff, Trendtex Trading Corporation, issued a writ against the Central Bank of Nigeria, the defendant, in respect of payments due to the plaintiff from the bank under a letter of credit dated July 24, 1975, relating to a contract of the same date for the purchase of cement from the plaintiff by Pan-African Export and Import Co. Ltd. The plaintiff claimed that by reason of the defendant's breaches and repudiation of the letter of credit (which repudiation the plaintiff had accepted) the plaintiff had suffered loss and damage. On November 4, Mocatta J. ordered that the plaintiff should have leave to serve a concurrent writ of summons against the bank and to serve notice thereof on the bank at its registered office in Nigeria and he granted the plaintiff an injunction that the bank should retain \$13,968,190, or its equivalent in sterling, within the jurisdiction against the plaintiff's claim until the hearing of a summons returnable on November 11, 1975. On December 9, 1975, following an order on November 11, Mocatta J. ordered that the injunction be continued until the trial of the action or further order.

On March 26, 1976, on the bank's application by summons for the writ to be set aside on the ground that it was a department of the Federal Republic of Nigeria and was thereby immune from suit, Donaldson J. [\[1976\] 1 W.L.R. 868](#), 877, held that the bank was "an emanation, an arm, an alter ego and a department of the State of Nigeria" and ordered (p. 879) that "the injunctions be discharged, the proceedings set aside and all further proceedings . . . stayed."

The plaintiff appealed on the grounds that (1) the judge erred in fact or law in holding (a) that the bank was entitled to sovereign immunity; (b) that the bank was an emanation, an arm, an alter ego, and a department of the State of Nigeria; (c) that it was established or sufficiently established that all funds held or deposited in the United Kingdom in the name of the bank were funds held or deposited for and on behalf of the Nigerian state; (d) that the bank was not estopped from reliance upon a plea of sovereign immunity by the terms of its letter of April 28, 1975, to Credit Suisse of Lausanne; and (e) that the principles of sovereign immunity to be applied were not affected by community law. (2) The judge erred in fact or law in failing to hold (a) that the acts and functions of the bank which were relied on for the purposes of the plaintiff's claim in the proceedings should not be accorded sovereign immunity; (b) that the funds of the bank within the jurisdiction which were subject to the injunction were not funds lodged or available for the payment of its creditors; and (c) that the bank was not entitled to the benefit of sovereign immunity in the proceedings; and (3) that it would be contended that the plea of sovereign immunity by the bank should be rejected for the additional reasons: (i) that on the facts the bank waived any right to rely thereon; and (ii) the commercial nature of the transactions which were relied upon for the purposes of the plaintiff's claim in the proceedings.

The facts are stated in the judgment of Lord Denning M.R.

F. P. Neill, Q.C., M. A. Pickering and D. P. O'Connell (and Christopher French Q.C. and David Hunt on the delivery of judgments) for Trendtex.

T. H. Bingham Q.C. and *A. G. Guest* for the Central Bank.

Cur. adv. vult.

January 13, 1977. The following judgments were read.

LORD DENNING M.R. In July 1975 the port of Lagos/Apapa was congested with shipping. All the berths were occupied. There were 300 to 400 ships outside waiting. More ships were arriving daily. Most of them were carrying cement. All of those waiting were on demurrage. It was because the government departments had ordered far too much. No doubt Nigeria needed cement. It was a country which was developing fast. They were building houses, factories, barracks, and so forth. All of the work required cement. Previously the average rate of import through all ports had been two million tons of cement a year. Yet early in 1975 the government departments then in charge in Nigeria had ordered 10 times that quantity, 20 million tons, to be delivered over the next 12 months. The ports were utterly unable to cope with it. Even for all commodities together, the discharging capacity at Lagos/Apapa did not amount to two million tons a year. Yet here was 10 times that amount arriving - of cement alone - leaving nothing for other vital imports of food and materials. The crisis was one of the reasons for a change of government in Nigeria. On July 29, 1975, a new military administration took over the reins. One of its first tasks was to find out the root cause of the congestion. It found that the previous administration had made contracts for cement which were "unorthodox, imprudent or inequitable." Not only were the quantities far too large, but there were no proper safeguards in regard to payment of the price or demurrage. As a first step the new military administration issued a notice suspending the import of cement into Nigeria. It told suppliers not to load any more cement for the time being. It warned them that it would not pay demurrage unless it was certified as proper. In addition, the new administration launched a "crash programme" to increase the rate of discharge from the waiting vessels. It set up a committee to negotiate fresh terms with the suppliers. The object was to reduce the quantities on order and to spread the deliveries over a longer time. Most of the suppliers have appreciated the difficulties and fresh terms have been arranged. The steps thus taken have proved successful. The congestion of vessels has been cleared. But there is an aftermath. It is a large number of legal proceedings.

This case is one of them. It is a claim on a letter of credit issued by the Central Bank of Nigeria, the defendant. We are not concerned with the rights or wrongs of the claim: but only with a preliminary point. The Central Bank of Nigeria claim that they cannot be sued in this country on the letter of credit: because they are entitled to sovereign immunity. The plaintiff, Trendtex Trading Corporation, disputes this on the ground that this is an ordinary commercial transaction to which sovereign immunity does not apply. So I must describe the nature of the transaction.

The story starts with a contract which was made on April 25, 1975, before the crisis broke. The Ministry of Defence in Nigeria agreed to buy 240,000 tons of Portland cement from an English company, the Pan-African Export and Import Co. Ltd. The price was U.S. \$60.00 per ton c.i.f. Lagos/Apapa ports. Shipment at the rate of 20,000 tons a month, plus or minus 10 per cent., all to be delivered not later than August 15, 1976.

In pursuance of that contract the Ministry of Defence instructed the Central Bank of Nigeria to open a letter of credit in favour of Pan-African to the extent of U.S. \$14,400,000 to be valid for payment against shipping documents conformable to the contract of purchase.

The Central Bank of Nigeria duly issued a letter of credit in favour of Pan-African. It was numbered 83035. It was issued in London through their correspondent bank, the Midland Bank Ltd., 60, Gracechurch Street, London. It was transferable abroad once only and was subject to the uniform customs rules of the International Chamber of Commerce relating to documentary credits (1962 revision). It covered not only the price of \$14, 400,000, but also demurrage of \$4,100 a day.

It is important to notice that the Midland Bank Ltd. were only correspondents acting as agents for the Central Bank of Nigeria. The Midland Bank Ltd. did not confirm the credit so as to make themselves liable on it. They only advised the seller of its terms. On the credit itself, they said:

"We are requested to advise you of the terms of a credit which is irrevocable on the part of our principals but does not bear our confirmation."

The responsibility of the Central Bank of Nigeria

The point about confirmation had been expressly raised by suppliers: and the Central Bank of Nigeria had said that confirmation was unnecessary. They wrote an important letter on April 28, 1975, to the suppliers' bank in these words:

"I write to inform you that no confirmation is required for credits opened by us direct with our correspondent banks, of which the Midland Bank Ltd., London, is one. We are *irrevocably* committed to honour our engagements under this credit. Moreover, our correspondent, the Midland Bank Ltd., has our authority to pay the beneficiary the full value of this letter of credit through your bank on presentation of relevant shipping documents to them in London, provided the documents are in order. (See our letter of authority dated March 11, 1975, to our correspondent bank attached.) As a government bank and a prime bank, no supplier should have any cause to doubt our ability to pay our bills promptly. The question of our correspondents confirming our letters of credit should, therefore, not arise."

The transfer to Trendtex

In order to fulfil their contract to supply the cement, Pan-African entered into a contract with the Trendtex Trading Corporation of Zurich, Switzerland. The contract was dated July 24, 1975. By it Pan-African agreed to buy 240,000 tons of Portland cement from Trendtex. The price was U.S.\$59.50 per ton, c.i.f. Lagos/Apapa, thus showing a small profit of U.S.\$00.50 a ton to Pan-African. All other terms were to be as expressed in the Central Bank of Nigeria letter of credit (Midland Bank advice no. 83035) as transferred to the seller by the buyer.

On the same day, July 24, 1975, the credit was transferred to Trendtex. It was done by means of a new irrevocable letter of credit issued by the Central Bank of Nigeria through its correspondent the Midland Bank, London. It was numbered (83035A) and was for U.S.\$14,280,000, the price of the cement and again demurrage at U.S.\$4,100 a day.

In order to fulfil this contract to supply cement, Trendtex agreed to buy 240,000 tons of cement from Alsen-Breitenburg of Hamburg, and established a letter of credit issued by a Swiss bank for the price.

The shipments

During August and September 1975, Trendtex shipped four consignments of cement under their contract with Pan-African. In August they shipped 9,000 tons on *The Gempita* and 13,000 tons on *The Sugar Importer*. In September 10,600 tons on *The Newport* and 9,000 tons on *The Constantinos*. For those shipments Trendtex presented shipping documents to the Midland Bank Ltd., London, and were paid the price. In October 1975, Trendtex made two further shipments: 10,560 tons on *The Leodamas* and 10,900 on *The Dinos Methanitis*. They presented the shipping documents for these last two to the Midland Bank but were not paid the price. When each of those six vessels arrived off Lagos, the port was congested with hundreds of vessels loaded with cement, all waiting to discharge. Each waited its turn. *The Gempita* came on demurrage on September 5. *The Sugar Importer* on September 26. *The Newport* on October 25. *The Constantinos* on October 26. *The Leodamas* on October 31, and *The Dinos Methanitis* on November 20, 1971. Trendtex claimed payment of this demurrage under the letter of credit. They presented documents, all in order, to the Midland Bank, London, in support of their claim for demurrage. But the Midland Bank declined to pay. This was because of a telex message sent on September 24, from the Midland Bank to the bankers of Trendtex:

"Please inform Trendtex Trading Corporation Ltd., Zurich, beneficiaries of our account 83035A that we have received the following authenticated message from our principals, Central Bank of Nigeria, Lagos, reading as follows: 'Please stop demurrage payments against specified documents unless such documents have been certified for payment by the Central Bank of Nigeria.' Please request beneficiaries to be guided, accordingly."

Trendtex also wanted payment of the price for the October shipments but the bank refused to pay. This was because of a message on October 8, 1975, from the Central Bank of Nigeria to the Midland Bank and relayed to Trendtex:

"The Nigerian Federal Military Government has directed that in view of our port situation, shipping companies must give two months' notice to the Nigerian Ports Authority before sailing. In view of this, you are requested not to pay against documents presented in respect of letters of credit we have opened unless such documents are accompanied by certificates confirming that clearance has been obtained for the ships to sail to Nigeria. Thus, when documents are presented, no payment should be made until we confirm to you that the ship has obtained necessary clearance to sail to Nigeria."

On October 8, 1975, representatives of Trendtex went to Lagos and made representations to the Nigerian government. They were told that no payment whatever would be made on the last two vessels: and demurrage would only be paid on the first four vessels if certified by the Central Bank of Nigeria for payment.

The action

On November 4, 1975, Trendtex issued a writ in the High Court of Justice in London against the Central Bank of Nigeria. They claimed demurrage on all six vessels. They claimed the price of the cement shipped on the last two vessels. They claimed damages for

non-acceptance of the

balance of 175,340 tons still outstanding (out of the 240,000 tons ordered). They claimed damages on account of their obligations to their suppliers, Alsen-Breitenburg.

The Central Bank of Nigeria applied to set aside the writ on the ground that the Central Bank of Nigeria is a department of the Federal Republic of Nigeria and, therefore, immune from suit.

On March 26, 1976, Donaldson J. [\[1976\] 1 W.L.R. 868](#) set aside the writ. Trendtex appeal to this court. Trendtex also applied for an order that the bank do retain \$14 million in London to meet the claim. Mocatta J. made that order. It is effective because the bank have that sum to their credit with the Midland Bank. The money is being retained here pending the appeal.

One thing I would mention at the outset. There was a string of contracts for the purchase of cement - by the Ministry of Defence at Lagos from the Pan-African company in London - by the Pan-African company from Trendtex - and by Trendtex from Alsen-Breitenburg. Those contracts are altogether distinct from the contracts contained in the letter of credits. The contract sued upon in this action is the contract contained in the letter of credit issued by the Central Bank of Nigeria in favour of Pan-African and transferred to Trendtex. Trendtex can sue upon that contract as a distinct contract completely separate from the contract of sale. In the provisions of Uniform Customs issued by the International Chamber of Commerce it is said:

"Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts."

See *Gutteridge and Megrah, The Law of Bankers' Commercial Credits*, 5th ed. (1976), p. 205 (and p. 59).

Another point I would mention is that many people must have suspicions about the validity of the contracts made by the previous administration. There must have been some mismanagement somewhere to lead to this pile-up of vessels off Lagos. This may give rise in some of these claims to defences on the merits. But no considerations of that kind arise at this stage. The only question now is whether the action should be allowed to proceed at all. Is it to be stayed or struck out on the ground of sovereign immunity?

The case has been presented to us by both sides in a manner to which I would pay sincere tribute. The documents have been prepared admirably with all the relevant material and authorities collected, photographed and arranged for convenient study. The arguments have been put forward convincingly by two of the most able and persuasive advocates of the day. We cannot hope to do full justice to them, but we are much indebted to them.

The general picture

The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world. All nations agree upon it. So it is part of the law of nations.

To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it. That is what the Privy Council did in *The Philippine Admiral* [1976] 2 W.L.R. 214: see especially at pp. 232-233; and we may properly do the same.

The two schools of thought

A fundamental question arises for decision. What is the place of international law in our English law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops.

(i) *The doctrine of incorporation.* The doctrine of incorporation goes back to 1737 in *Buvot v. Barbut* (1736) 3 Burr. 1481; 4 Burr. 2016; sub nom. *Barbut's Case in Chancery* (1737) Forr. 280, in which Lord Talbot L.C. (who was highly esteemed) made a declaration which was taken down by young William Murray (who was of counsel in the case) and adopted by him in 1764 when he was Lord Mansfield C.J. in *Triquet v. Bath* (1764) 3 Burr. 1478:

"Lord Talbot declared a clear opinion - 'That the law of nations in its full extent was part of the law of England, . . . that the law of nations was to be collected from the practice of different nations and the authority of writers.' Accordingly, he argued and determined from such instances, and the authorities of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc., there being no English writer of eminence on the subject."

That doctrine was accepted, not only by Lord Mansfield himself, but also by Sir William Blackstone, and other great names, too numerous to mention. In 1853 Lord Lyndhurst in the House of Lords, with the concurrence of all his colleagues there, declared that . . . "the law of nations, according to the decision of our greatest judges, is part of the

law of England": see Sir George Cornwall Lewis's book, *Lewis on Foreign Jurisdiction* (1859), pp. 66-67.

(ii) *The doctrine of transformation.* The doctrine of transformation only goes back to 1876 in the judgment of Cockburn C.J. in *Reg. v. Keyn* (1876) [202-203](#):

"For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. . . . Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature."

To this I may add the saying of Lord Atkin in *Chung Chi Cheung v. The King* [\[1939\] A.C. 160](#), 167-168:

"So far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law."

And I myself accepted this without question in *Reg. v. Secretary of State for the Home Department, Ex parte Thakrar* [\[1974\] 1 Q.B. 684](#), 701.

(iii) *Which is correct?* As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: "But it does move." International law does change: and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law: see the "Statement of Opinion" by Sir R. Phillimore, Mr. M. Bernard and Sir H. S. Maine appended to the *Report of the Royal Commission on Fugitive Slaves* (1876), p. XXV, paras. 4 and 5. Again, the extent of territorial waters varies from time to time according to the rule of international law current at the time, and the courts will apply it accordingly: see *Reg. v. Kent Justices, Ex parte Lye* [\[1967\] 2 Q.B. 153, 173, 189](#). The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the courts - of our country and of theirs - have given effect to them, without any legislation for the purpose. Notably in the decision of the Privy Council in *The Philippine Admiral* [\[1976\] 2 W.L.R. 214](#).

(iv) *Conclusion on this point.* Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court - as to what was the ruling of international law 50 or 60 years ago - is not binding on this court today. International law knows no rule of stare decisis. If this court today is

satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it

can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it.

Has there been a change?

(i) *The doctrine of absolute immunity.* A century ago no sovereign state engaged in commercial activities. It kept to the traditional functions of a sovereign - to maintain law and order - to conduct foreign affairs - and to see to the defence of the country. It was in those days that England - with most other countries - adopted the rule of absolute immunity. It was adopted because it was considered to be the rule of international law at that time. In *The Parlement Belge* (1880) [5 P.D. 197](#), 205, Brett L.J. said:

"The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations . . . [so also] of some property . . . The universal agreement which has made these propositions part of the law of nations has been an implied agreement."

The rule was stated by Dicey in his work on Conflict of Laws, and repeated religiously by the judges thereafter. The classic restatement of it was made by Lord Atkin in *Compania Naviera Vascongado v. S.S. Cristina (The Cristina)* [\[1938\] A.C. 485](#), 490:

"The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."

That doctrine was repeated by Viscount Simonds in *Rahimtoola v. Nizam of Hyderabad* [\[1958\] A.C. 379](#), 394. He treated it as if it was a rule of English law, fixed and immutable, not to be departed from, even by the House of Lords itself.

(ii) *The doctrine of restrictive immunity.* In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state - or creates its own legal entities - which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as *jure imperii*, but no immunity to acts of a commercial nature, *jure gestionis*. In 1951 Sir Hersch Lauterpacht showed that, even at that date, many European countries had abandoned the doctrine of absolute immunity and adopted that of restrictive immunity - see his important article, "The Problem of Jurisdictional Immunities of Foreign States" in *The British Year Book of International Law*, 1951, vol. 28, pp. 220-272. Since that date there have been important conversions to the same view. Great impetus was given to it in 1952 in the famous "Tate letter" in the United States. Many countries have now adopted it. We have been given a valuable collection of recent decisions in which the courts of Belgium, Holland, the German

Federal Republic, the United States of America and others have abandoned absolute immunity and granted only restrictive immunity. Most authoritative of all is the opinion of the Supreme Court

of the United States in *Alfred Dunhill of London Inc. v. Republic of Cuba*. It was delivered on May 24, 1976, by White J. with the concurrence of the Chief Justice, Powell J. and Rehnquist J.:

"Although it had other views in years gone by, in 1952, as evidenced by . . . (the Tate letter) . . . the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our government since that time, as the attached letter of November 25, 1975, confirms . . . 'Such adjudications are consistent with international law on sovereign immunity'."

To this I would add the European Convention on State Immunity (Basle, 1972), article 4, paragraph 1, which has been signed by most of the European countries.

Are we to follow likewise?

Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, some one some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank. ". . . We must take the current when it serves, or lose our ventures.": *Julius Caesar*, Act IV, sc. III.

In one respect already the Privy Council have abandoned the absolute theory and accepted the restrictive theory. It is in respect of actions in rem: see *The Philippine Admiral* [1976] 2 W.L.R. 214, 232. But, unfortunately, the Privy Council seem to have thought that the absolute theory still applied to actions in personam. They said, at p. 233:

". . . it is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so."

That is a dismal forecast. It is out of line with the good sense shown in the rest of the judgment of the Privy Council. This is how they put it, at pp. 232-233:

". . . the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions . . . Their Lordships themselves think that it is wrong that it should be so applied . . . Thinking as they do that the restrictive theory is more consonant with justice they do not think that they should be deterred from applying it."

Such reasoning is of general application. It covers actions in personam. In those action, too, the restrictive theory is more consonant with justice. So it should be applied to them. It should not be retained as an indefensible anomaly.

I see no reason why we should wait for the House of Lords to make the change. After all,

we are not considering here the rules of English

law on which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong.

The modern rule

What then is the modern rule of international law? I tried to state it nearly 20 years ago in *Rahimtoola v. Nizam of Hyderabad* [\[1958\] A.C. 379](#), 422:

"If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but, if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."

I recently re-stated it in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies* [\[1975\] 1 W.L.R. 1485](#), 1491:

". . . a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market; or if it has a state department which charts ships on the Baltic Exchange: it thereby enters into the market places of the world: and international comity requires that it should abide by the rules of the market."

Since those cases, there have been two very recent cases on the subject: *The Philippine Admiral* [\[1976\] 2 W.L.R. 214](#) in November 1975, in the *Privy Council*; and *Alfred Dunhill of London Inc. v. Republic of Cuba* on May 24, 1976, in the Supreme Court of the United States. There is a Bill also before the House of Representatives of the United States reported on September 9, 1976 (now passed into law, Foreign Sovereign Immunities Act of 1976) which is very much on the lines I suggested. All this confirms me in the view which I have expressed.

The law of the European Community

Even if there were no settled rule of international law on the subject, there should at least be one settled rule for the nine countries of the European Economic Community. The Treaty of Rome is part of the law of England. One of the objectives contained in article 3 (*h*) [see Cmnd. 5179] is to ensure "the approximation of the laws of member states to the extent required for the proper functioning of the common market."

It is one of the functions of the Commission and the Council to issue directives to achieve this approximation: see articles 100, 101 and 102. I regard the word "approximation" in the treaty to mean "harmonisation."

In view of those provisions, it seems to me that it is the duty of each of the member states - and of the national courts in those states - to bring the law as to sovereign immunity into harmony throughout the community. The rules applied by each member state on the subject should be the same as the rules applied by the others. There is only one acceptable way of doing it. That is by adopting the doctrine of restrictive immunity on the lines I have suggested.

The application to this case

So I turn to see whether the transaction here was such as to attract sovereign immunity, or not. It was suggested that the original contracts for cement were made by the Ministry of Defence of Nigeria: and that the cement was for the building of barracks for the army. On this account it was said that the contracts of purchase were acts of a governmental nature, *jure imperii*, and not of a commercial nature, *jure gestionis*. They were like a contract of purchase of boots for the army. But I do not think this should affect the question of immunity. If a government department goes into the market places of the world and buys boots or cement - as a commercial transaction - that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.

There is another answer. Trendtex here are not suing on the contracts of purchase. They are claiming on the letter of credit which is an entirely separate contract. It was a straightforward commercial transaction. The letter of credit was issued in London through a London bank in the ordinary course of commercial dealings. It is completely within the territorial jurisdiction of our courts. I do not think it is open to the Government of Nigeria to claim sovereign immunity in respect of it.

The German decision

It is interesting to find that the German courts have had to deal with a precisely similar point. In February 1975, the Ministry of Defence in Nigeria agreed to purchase 240,000 tons of cement from a firm in Liechtenstein. The Central Bank of Nigeria issued letters of credit through its correspondent the Deutsche Bank in Frankfurt. The goods were shipped. The price paid. The vessel arrived at Lagos but, owing to the congestion, had to wait. The holders of the letters of credit claimed demurrage. They levied distress on the assets of the Central Bank of Nigeria then in Germany. The Central Bank claimed the release of these assets on the ground of sovereign immunity. On December 2, 1975, the Commercial Court of Frankfurt in *Y.M.N. Establishment v. Central Bank of Nigeria* rejected the plea. Their reasons were as follows:

"According to the decisions of the Federal Constitutional Court of 1962 and 1963 . . . a foreign state may be granted immunity from German jurisdiction only in respect of its sovereign activity (*acta jure imperii*) but not in respect of its non-sovereign activity (*acta jure gestionis*), because no general rule of public international law exists under which the domestic jurisdiction for actions against a foreign state in relation to its non-sovereign activity is precluded."

We are told that that decision is subject to appeal. So be it. But it affords strong support for

the view I have expressed, seeing that the German court decided in just the same way for just the same reasons.

Alter ego or organ of government

If we are still bound to apply the doctrine of absolute immunity, there is, even so, an important question arising upon it. The doctrine grants immunity to a foreign government or its department of state, or any body which can be regarded as an "alter ego or organ" of the government. But how are we to discover whether a body is an "alter ego or organ" of the government?

The cases on this subject are difficult to follow, even in this country: let alone those in other countries. And yet, we have to find what is the rule of international law for all of them. It is particularly difficult because different countries have different ways of arranging internal affairs. In some countries the government departments conduct all their business through their own offices - even ordinary commercial dealings - without setting up separate corporations or legal entities. In other countries they set up separate corporations or legal entities which are under the complete control of the department, but which enter into commercial transactions, buying and selling goods, owning and chartering ships, just like any ordinary trading concern. This difference in internal arrangements ought not to affect the availability of immunity in international law. A foreign department of state ought not to lose its immunity simply because it conducts some of its activities by means of a separate legal entity. It was so held by this court in *Baccus S.R.L. v. Servicio Nacional Del Trigo* [1957] 1 Q.B. 438.

Another problem arises because of the internal laws of many countries which grant immunities and privileges to its own organisations. Some organisations can sue, or be sued, in their courts. Others can not. In England we have had for centuries special immunities and privileges for "the Crown" - a phrase which has been held to cover many governmental departments and many emanations of government departments - but not nationalised commercial undertakings: see *Tamlin v. Hannaford* [1950] 1 K.B. 18. The phrase "the Crown" is so elastic that under the Crown Proceedings Act 1947 the Treasury have issued a list of government departments covered by the Act. It includes even the Forestry Commission. It cannot be right that international law should grant or refuse absolute immunity according to the immunities granted internally. I would put on one side, therefore, our cases about the privileges, prerogatives and exceptions of the "Crown."

It is often said that a certificate by the ambassador, saying whether or not an organisation is a department of state, is of much weight, though not decisive: see *Krajina v. Tass Agency* [1949] 2 All E.R. 274. But even this is not to my mind satisfactory. What is the test which the ambassador is to apply? In the absence of any test, an ambassador may apply the test of control, asking himself: is the organisation under the control of a minister of state? On such a test, he might certify any nationalised undertaking to be a department of state. He might certify that a press agency or an agricultural corporation (which carried out ordinary commercial dealings) was a department of state, simply because it was under the complete control of the government.

I confess that I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions. That is the way in which we

looked at it in *Mellenger v. New Brunswick Development Corporation* [\[1971\] 1 W.L.R. 604](#), when I said, at p. 609:

"The corporation . . . has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does."

With these considerations in mind, I turn to our problem.

Central Bank of Nigeria

At the hearing we were taken through the Act of 1958 under which the Central Bank of Nigeria was established, and of the amendments to it by later decrees. All the relevant provisions were closely examined: and we had the benefit of expert evidence on affidavit which was most helpful. The upshot of it all may be summarised as follows. (i) The Central Bank of Nigeria is a central bank modelled on the Bank of England. (ii) It has governmental functions in that it issues legal tender; it safeguards the international value of the currency; and it acts as banker and financial adviser to the government. (iii) Its affairs are under a great deal of government control in that the Federal Executive Council may overrule the board on monetary and banking policy and on internal administrative policy. (iv) It acts as banker for other banks in Nigeria and abroad, and maintains accounts with other banks. It acts as banker for the states within the federation: but has few, if any, private customers.

In these circumstances I have found it difficult to decide whether or no the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be.

This conclusion would be enough to decide the case, but I find it so difficult that I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department.

Waiver or estoppel

It was submitted that, by the letter of April 28, 1975, the Central Bank of Nigeria waived any claim to sovereign immunity or is estopped from claiming it. But the point was not pressed in this court because of previous decisions, such as *Kahan v. Pakistan Federation* [1951] 2 K.B. 1003. It was reserved for the House of Lords.

Injunction

It was said that the money standing to the credit in the books of the Midland Bank was money belonging to the Federation of Nigeria: and that it was not subject to seizure or to an injunction. This point seems to me to depend on precisely the same grounds as those considered earlier. If the Central Bank is entitled to immunity from being sued, so also can the funds be immune from being seized. Otherwise not.

Conclusion

In my opinion the plea of sovereign immunity, does not avail the Central Bank of Nigeria. I would allow the appeal, accordingly.