



Neutral Citation Number [2009] EWHC 2529 (Ch)

Case No: HC08C02783

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 October 2009

Before :

MR MICHAEL FURNESS QC
(Sitting as a Deputy Judge of the High Court)

Between :

POCKET KINGS LTD

Claimant

- and -

(1) SAFENAMES LTD
(2) COMMONWEALTH OF KENTUCKY

Defendants

Mr Romie Tager QC and Mr Jeremy Reed (instructed by Jeffrey Green Russell)
for the Claimant


Mr Christopher de Mauny (instructed by Franklins Solicitors LLP)
for the First Defendant

The Second Defendant did not appear

Hearing date : 30th July 2009

Approved Judgment

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

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Mr Michael Furness QC

Michael Furness QC:

1. This is an application by the Claimant, Pocket Kings Limited (“Pocket Kings”) for summary judgment in default of acknowledgment of service by the Second Defendant, the Commonwealth of Kentucky (“Kentucky”). The First Defendant, Safenames Limited (“Safenames”) is willing to submit to judgment on agreed terms provided that Pocket Kings obtains judgment in default against Kentucky.
2. The factual basis of Pocket Kings’ claim is succinctly pleaded in the Particulars of Claim the material parts of which I quote below.

- “1. Pocket Kings Limited (“*PKL*”) is engaged in the provision of online gaming services, and facilitates and licenses the use of the domain name *fulltiltpoker.com* (“*the Domain Name*”). Safenames Limited (“*Safenames*”), a company incorporated under the laws of England and Wales, provides PKL with various services pursuant to a Managed Services Agreement executed by Safenames on 26th May 2009 (“*the Agreement*”). The Agreement is governed by English Law. Clause 1.18.1 of Safenames’ General Terms Applicable to All Services provides that the Agreement is subject to the exclusive jurisdiction of the courts of England and Wales. Safenames is contractually responsible for pointing the Domain Name at the correct domain name servers to the order of PKL, and is the Registrar of the Domain Name.
2. By Second Amended Complaint filed on 18th September 2008 in Civil Action No. 08-C1-1409 in Division II of the Franklin Circuit Court in Kentucky (“*the Kentucky Proceedings*”), the Commonwealth of Kentucky brought a civil *in rem* forfeiture claim against 141 domain names, one of which was the Domain Name. In the Kentucky Proceedings the Commonwealth of Kentucky is acting in its sovereign capacity and pursuant to its public law powers to enforce that State’s criminal law and/or gaming regulatory legislation, and seeks the penal forfeiture of the Domain Name by the transfer thereof to the Commonwealth of Kentucky on the basis that: (1) the Domain Name has been used in the commission of multiple crimes and statutory violations within Kentucky, (2) unless forfeited in that way, the Domain Name will continue to be used in the commission of multiple crimes and statutory violations within Kentucky and (3) that the use of the Domain Name constitutes a public nuisance.

3. By Order dated 18th September 2008 made in the Kentucky Proceedings (“*the Seizure Order*”), Circuit Judge Thomas Wingate ordered *inter alia* that the 141 domain names, including the Domain Name, should immediately be transferred by their respective Registrars to an account of the Commonwealth of Kentucky. The Seizure Order provided that the said domain names were properly seized by the Commonwealth of Kentucky pursuant to Kentucky’s criminal and/or penal legislation (namely, KRS 528.100). The Seizure Order included directions for its service of upon the Registrars of the domain names in question: in particular, for the service of the Seizure Order on Safenames as the Registrar of the Domain Name.
4. The Seizure Order was made in proceedings which had not been served on the parties who would be affected thereby (including PKL and Safenames) who had no opportunity to defend the same.
5. By emailed letter dated 19th September 2008 from Hurt, Crosbie & May PLLC (the Commonwealth of Kentucky’s attorneys in the Kentucky Proceedings) to Safenames, which was received by Safenames in England, Safenames was purportedly served with a copy of the Seizure Order. The aforesaid letter asserted that Safenames was required by order of the Franklin Circuit Court to immediately transfer the Domain Name (and 4 other domain names) to the account of the Commonwealth of Kentucky.
6. Following a hearing on 26th September 2008 the Franklin Circuit Court directed the Commonwealth of Kentucky not to take any action relative to the operation or disposition of *inter alia* the Domain Name unless and until further ordered to do so by that court; however the court refused to stay the execution of the Seizure Order. By Order dated 16th October 2008 Circuit Judge Thomas Wingate reinstated the Seizure Order subject to various amendments, and ordered that a forfeiture hearing take place on 17th November 2008.
7. By letter dated 30th October 2008 PKL’s solicitors asked Safenames to give an undertaking that it would not transfer the Domain Name to the Commonwealth of Kentucky or to any official thereof or to any agent or other person nominated for that purpose by the Franklin Circuit Court of the Commonwealth of Kentucky or to any other person. The letter also sought an undertaking that Safenames would not do any act that interferes with or inhibits PKL’s use and enjoyment of the Domain Name. By the said letter PKL asserted and sought to enforce its contractual rights under the Agreement.
8. By letter dated 3rd November 2008 Safenames acknowledged that there was a conflict between the Seizure Order and its contractual duties owed to PKL, but Safenames refused to give the undertakings sought by PKL or any other comfort that the Domain Names would not be transferred.”

3. The Particulars of Claim go on to allege that Pocket Kings will suffer serious and irreparable harm if Safenames transfers the domain name to Kentucky or otherwise takes any other step that interferes with Pocket Kings' use and enjoyment of the domain name. It is then pleaded that the seizure order (whether in the original or amended form) should not be recognised or enforced by this Court on the basis that (a) the enforcement of the seizure order would amount to the exercise of the sovereign authority of Kentucky within this jurisdiction and would amount to the enforcement of the penal or public law of a foreign state, or (b) the enforcement of the seizure order within this jurisdiction would be contrary to public policy because the Kentucky proceedings breached all known principles of natural justice. It is also pleaded for the same reasons that this Court should not recognise or enforce any order for forfeiture of the domain names that is made in the Kentucky Proceedings.
4. The only relief claimed in the prayer for relief against Kentucky is a declaration that this Court will not recognise or enforce the orders currently made in the Kentucky proceedings or any subsequent order for the seizure or forfeiture of the domain name.
5. Since the commencement of these proceedings there has been a further significant development in the Kentucky proceedings, in that the Kentucky Court of Appeals, on the application of a number of domain name owners (but not Pocket Kings), has ruled that an internet domain name is not a gambling device, and therefore the Seizure Order was wrongly made. A further appeal by Kentucky to the Kentucky Supreme Court is still pending. As I understand the position Pocket Kings does not have the benefit of the Court of Appeals' ruling because it was not one of the appellants, so the Seizure Order against its domain name remains in force. Beyond serving the Seizure Order on the First Defendant, no attempt has been made to enforce that order to date.

6. These proceedings were issued on the 3rd October 2008. On 3rd December 2008 Warren J granted permission to serve the claim on Kentucky out of the jurisdiction in accordance with the requirements of the State Immunity Act 1978. Pursuant to that order the claim was served on Kentucky by means of service at the United States Department of State. The time for acknowledgement of service expired on 15th May 2009 and the application for judgment in default was issued on 9th June 2009. On 12th June 2009 directions were given by Floyd J for the service of the application for judgment in default on Kentucky. Service was effected in accordance with those directions on 24th June 2009.

The issues which arise

7. Although, as appears below, Kentucky are well aware of these proceedings and this application, they have chosen neither to appear nor to make any submissions in writing as to why a judgment should not be entered against them. There are, nonetheless, a number of issues on which I must satisfy myself before giving judgment against Kentucky. In considering these issues I am indebted to Mr Tager QC who has taken me through them carefully and indicated the possible lines of argument which Kentucky might have taken had it chosen to appear. It is, nonetheless, regrettable that this Court is obliged to give rulings on some important issues concerning state immunity without the benefit of adversarial argument. The issues which I need to consider are as follows.
- (a) Is Kentucky entitled to state immunity under the State Immunity Act 1978? If it is, then unless one of a number of exceptions in the Act apply to these proceedings, judgment may not be entered against it.
 - (b) If Kentucky is not a state within the meaning of the Act, has it been properly served both with the proceedings and with this application?

- (c) Do the facts of the case justify the granting of the declaratory relief which Pocket Kings claims against Kentucky?

Is Kentucky a state for the purposes of the State Immunity Act 1978?

8. Before considering this question I will set out the relevant provisions of the Act.

“1.- General immunity from jurisdiction.

(1) 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.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

12.- Service of process and judgments in default of appearance.

(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and Service shall be deemed to have been effected when the writ or document is received at the Ministry.

14.- States entitled to immunities and privileges.

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to –

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

but not to any entity (hereafter referred to as a “separate entity”) which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if –

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.

(6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.”

9. Section 1 of the Act imposes a duty upon the Court to satisfy itself as to whether state immunity is available to a defendant. In the case of Kentucky the first stage in that enquiry is to determine whether Kentucky is itself a state within the meaning of the Act. Section 14(1) provides that the immunities and privileges conferred by Part 1 of the Act apply to a state but not to any entity distinct from the executive organs of the government of the state and capable of suing or being sued (“a separate entity”). Section 14(5) draws a distinction between a constituent territory of a federal state and the state itself. Apart from section 12, the other provisions of Part 1 of the Act only apply to a constituent territory if an Order in Council so provides. No Order in Council has been made in respect of Kentucky. Section 14(6) provides that a constituent territory in respect of which no Order in Council has been made shall be treated for the purposes of sections 14(2) and (3) as if it were a separate entity.

10. Mr Tager submits that the United States of America is a sovereign state, that it is a federal state and that Kentucky is one of the constituent territories of that federal state. In case I should have any difficulty in taking judicial notice of these matters Pocket Kings has placed in evidence a report by an American lawyer Mr Jeff Ifrah dated 1st December 2008 which confirms these uncontroversial propositions. Mr Tager goes on to submit that it is clear from the structure of the Act that a constituent territory of a federal state cannot itself be a state for the purposes of the Act and he reinforces this submission by reference to section 12, which proceeds on the assumption that every state

will have a ministry of foreign affairs. Clearly that assumption would not be warranted if constituent territories of a federal state could also be states.

11. In making these submissions Mr Tager accepted that on this interpretation the Act proceeds on a different basis from the common law principles which it replaced. He referred me to the judgment of the Court of Appeal in *Mellenger v. New Brunswick Development Corporation* [1971] 1 WLR 604. In that case the Court of Appeal held, having regard to the constitution of Canada, that both the Dominion government and the several provincial governments which made up the Dominion were sovereign states. This decision is undoubtedly still good law in the context of the criminal law, to which Part 1 of the Act does not apply (see section 16(4)). In that context the *New Brunswick* case was considered and distinguished by the Divisional Court in *Alamiyeseigha v. The Crown Prosecution Service* [2005] EWHC 2704 (Admin). The Court were clearly attracted by submissions to the effect that a state for the purposes of sovereign immunity was an entity which was capable of conducting international relations. However, the Court concluded that it was bound by the *New Brunswick* case to conclude that it was not a necessary requirement for a claim to state immunity at common law that the entity did conduct international relations. The Court went on, however, to find that the entity in question (a constituent state of the Federal Republic of Nigeria) was not a state for state immunity purposes.
12. Whatever the position under common law, I agree with Mr Tager that the common law analysis adopted in the *New Brunswick* case is incompatible with the structure of the Act. Section 14 draws a clear distinction between “the State” and a constituent territory of a federal state. The drafting of section 14 does not make sense if it is possible for an entity to be both a constituent territory of a federal state and a state in its own right. In civil litigation, once the Court has identified a state, it is impossible for any constituent territory of that state also to qualify as a state. Instead it must be treated as a “separate

entity". Granted that Kentucky is, on any view, a constituent territory of a federal state it cannot itself be a state.

13. Having concluded that Kentucky is not a state I must now consider whether it is nonetheless entitled to state immunity by virtue of section 14(2), which is the section which confers a more limited species of immunity on separate entities. In order to attract immunity under section 14(2) it must be the case that Kentucky is, by virtue of bringing the Kentucky proceedings, doing something "in the exercise of sovereign authority". This raises the question whether a separate entity such as a constituent territory can have sovereign authority in its own right, or whether the sovereign authority which is referred to in section 14(2)(a) is the sovereign authority of the state itself. Mr Tager argues, both on principle and by reference to authority, that the sovereign authority there referred to is the sovereign authority of the state. As a matter of principle, he submits that it cannot have been intended that the authority of a separate entity should count as "sovereign authority" for the purpose of section 14(2), bearing in mind that a separate entity might be a body such as a Central Bank or a nationalised industry or some other governmental body distinct from the central organs of the state. By way of authority he relies on the case of *BCCI (Overseas) Ltd v. Price Waterhouse* [1997] 4 All ER 108. That case concerned a claim to immunity by the Ruler of Abu Dhabi. Abu Dhabi is a constituent state of the United Arab Emirates. After considering the terms of section 14 the Judge said this (at page 112f):

"It is now possible to consider the effect of these provisions on the position of a constituent state which is not the subject of [an Order in Council]. When such a state does something "in the exercise of sovereign authority", it is given the benefit of the same immunities as the state of which it forms a constituent part. It is not in dispute that the "sovereign authority" in section 14(2)(a) is a reference to the sovereign authority of the recognised state. In other words, when a constituent territory or other separate entity acts for and on behalf of the recognised State and effectively acts as if it was exercising the State's sovereign authority, it obtains the immunity that the State would have obtained had it acted on its own behalf.

Second, if it does not fall within the provisions of section 14(2)(a), the constituent territory or other separate entity has no immunity. It neither falls under section 14 nor does it obtain immunity under the Diplomatic Privileges Act 1964.”

14. This is certainly a statement of the position under the Act as Mr Tager would interpret it, but because the passage makes clear that the key proposition was not in dispute it cannot be part of the ratio of the decision.
15. Mr Tager also supports a passage from the leading textbook on the subject *The Law of State Immunity* (2nd edition) by Hazel Fox QC. At page 256 the following passage appears:

“Where no Order in Council has been enacted in respect of it, a constituent territory of a federal State is also to be treated as a separate entity, enjoying the same immunities when it acts in exercise of sovereign authority; the “sovereign authority” referred to in section 14(2)(a) is the sovereign authority of the recognised State.”

BCCI v. Price Waterhouse is cited as authority for that proposition.

16. Finally, Mr Tager relies on a passage from the speech of Lord Mustill in *Kuwait Airways Corporation v. Iraqi Airways* [1995] 1 WLR 1147 at 1172B which reads as follows:

“Assuming, therefore, that section 14(2)(a) is intended to create an additional requirement for immunity, one must ask again what is meant by the reference to things done by the entity in the exercise of a sovereign authority which the entity does not possess. The best I can do, to convey what I believe to be the flavour of section 14(2)(a), is to assert that the entity is immune only if in some sense the act, although not done by the sovereign, is a manifestation of the sovereign’s authority.”

17. Although the *Kuwait Airways* case contains extensive discussion of section 14 in the context of a separate entity, their Lordships’ speeches do not touch on the issue I now have to decide. In *Kuwait Airways* it was perfectly clear that the separate entity, Iraqi Airways, had acted on instructions from a recognised state. The authority by which it acted was therefore, clearly, that of the

recognised state. The issue was whether or not the character of the acts it was directed to perform were of a sovereign nature (*de iure imperii*) or of a non-sovereign character (*de iure gestionis*). On that question Lord Mustill dissented, but he does not appear to have differed from the majority in his interpretation of the Act, and the passage relied upon by Mr Tager is not contradicted by anything in any of the other speeches. The passage does not, of course, answer in terms the question which I am addressing, but Mr Tager submits that by his reference to “the sovereign” Lord Mustill is referring to the recognised state. As so interpreted the question, in the case of a separate entity such as a constituent territory, is whether the act in respect of which immunity might be claimed was in some sense a manifestation of the authority of the sovereign state.

18. The counter-argument to Mr Tager’s interpretation would appear to be that sovereign authority might lie outside both the recognised state and the separate entity and be shared between them (ie similar analysis to that adopted in the *Mellenger* case). On that basis, the separate entity might exercise a sovereign authority which was neither derived from, nor a manifestation of, the sovereign authority of the state.
19. The reason why this is an important issue is the constitutional position of Kentucky. According to the opinion of Mr Ifrah, the position is as follows:

“The US Federal Government’s powers over the 50 States are circumscribed by the US Constitution, as set forth in its Amendment X: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” US Const. Amend. X. The US Supreme Court has clarified that Amendment Ten reinforces that the States – and the people – are imbued generally with the powers not explicitly granted to the Federal Government. See e.g. *Fry v. US*, 421 US 542, 547n.7 (1975) (holding that the Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the State’s integrity or their ability to function effectively in a federal system).”

Mr Ihren goes on to say that among the powers reserved to state governments is the regulation of gambling.

20. It is clear that the Kentucky Proceedings have been brought under local Kentucky law by a Kentucky public official (the Secretary of the local Justice and Public Safety Cabinet) and not by any federal agency. It thus seems clear, certainly on the evidence before me, that the actions of Kentucky which might give rise to a claim to immunity in the present case are actions of the Commonwealth of Kentucky, and are not the exercise of or manifestation of any sovereign authority of the federal government of the United States. Thus if Mr Tager's construction is correct, immunity is not available to Kentucky, because the authority by which it regulates gambling within the Commonwealth is an exercise of its own sovereignty, and not the sovereignty of the federal government of the United States of America. On the other hand, had the United States constitution taken a form under which all sovereign power was vested in the federal government, but was then in part delegated to the constituent states, then on Mr Tager's construction state immunity would, in principle, be available, subject to Kentucky being able to satisfy the requirement in section 14(2)(b) that a state would have been immune in the same circumstances. It might be thought surprising that a different result should follow depending on the question whether the federal constitution operates on the basis of delegating sovereignty by the federal states to the federal government or on the basis of delegating sovereign authority from the central government to the federal states.
21. However, one has to remember that the evident purpose of the Act was primarily to confer immunity upon states. There is no independent immunity for separate entities or constituent territories; such immunity as they enjoy is parasitic on the immunity conferred on the state. The mere fact that the separate entity performs public functions is clearly not, of itself, sufficient to attract immunity.

22. Furthermore, as Mr Tager demonstrated in further written submissions made on this point (at my request) after the hearing was concluded, it has always been the case at common law that for the purpose of state immunity the weight of authority (apart from *Mellenger*) has been decisively in support of the proposition that sovereign authority means the authority of the nation state. Subordinate territories or government agencies do not themselves possess sovereign authority. In particular he referred me to observations of Lord Wilberforce in *I Congresso del Partido* [1983] 1 AC 244 at 262C:

The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of "par in parem" which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate.

23. Mr Tager also placed reliance on *R v Bow Street Stipendiary Magistrate ex p Pinochet (No 3)* [2000] 1 AC 147, in particular Lord Browne-Wilkinson at page 201G, and Lord Hutton at page 251G-H. He also referred to a passage in Lord Millet's speech at page 268:

"The doctrine of state immunity is the product of the classical theory of international law. This taught that states were the only actors on the international plane, the rights of individuals were not the subject of international law. States were sovereign and equal: it followed that one state could not be impleaded in the national courts of another; par in parem non habet imperium. States were obliged to abstain from interfering in the internal affairs of one another."

As Mr Tager points out, the Commonwealth of Kentucky is not an actor on the international plane, and is not a state sovereign and equal to other states. So in the classic theory of public international law it is not a state and it does not, when exercising its own authority, exercise the authority of a sovereign state. This is important because, as Lord Phillips observed (*ibid*) at page 279H, the Act should be interpreted, so far as possible, in a manner which accords with public international law.

24. For the reasons advanced by Mr Tager I have come to the conclusion that he is right in saying that “sovereign authority” in section 14(2) refers to the authority of the recognised state. It therefore follows that the Commonwealth of Kentucky is not entitled to immunity under the Act because it is not itself a sovereign state, and it is not exercising the sovereign authority of a sovereign state.

Has the Commonwealth of Kentucky been properly served?

25. The procedure for serving a foreign state is set out in section 12 of the Act, and that procedure is extended to service on constituent territories by section 14(5). There is in evidence a certificate signed by Martine Eadie, Pro Consul at the British Embassy in Washington DC certifying that copies of the claim were served upon the Department of State on the 23rd February 2009. It would therefore appear that the requirements of section 12(1) have been satisfied. However, by a letter from the US Department of State dated 19th June 2009 the US Department of State returned the documents served by the Pro Consul to the British Embassy. In that letter it is stated that service of proceedings on the Commonwealth of Kentucky must be undertaken in accordance with State’s own laws, regulations and procedures. It appears from a letter from the Foreign and Commonwealth Office to Pocket Kings’ Solicitors that the FCO have never before encountered a refusal by the State Department to accept service of proceedings on behalf of a state.
26. It does not seem to me that this unusual development affects the validity of the service effected on the State Department for the purposes of these proceedings. The correct method of service of proceedings before this Court must be determined by the law of England and Wales. As expressed in section 12(1) of the Act the requirements for service on Kentucky are stated in mandatory terms. It is clear that service in those terms and only in those terms

will suffice for the purposes of the Act. I therefore agree with Mr Tager that the rejection of service by the State Department in no way impugns the validity of the service of proceedings.

27. Service of the notice of this application was effected pursuant to the directions of Floyd J, who ordered that it should be served on Kentucky ex rel J. Michael Brown, Secretary Justice and Public Safety Cabinet, Office of the Secretary, 125 Home Street, Frankfort, KY 40601-2108, USA, pursuant to CPR 6.38(1). There is in evidence an affidavit from Mr Ian Ramsey an attorney licensed to practice in the Commonwealth of Kentucky who deposes to service in accordance with CPR 6.38(1), which also happens to satisfy the local requirements for service of proceedings in Kentucky.
28. I also note, although it does not form the basis of my decision on this point, that Kentucky are perfectly well aware of these proceedings through the informal service of the claim on Mr Brown (who received the claim form by fax and e-mail on 13th October 2008) and on a partner in the firm of Hurt Crosbie & May (who was personally served with the order of Warren J. on 12th December 2008). Hurt Crosbie & May represent the Kentucky in the Kentucky Proceedings. There has, indeed been an exchange of e-mails between Hurt Crosbie & May and Pocket Kings' Solicitors about a possible adjournment of this hearing. No adjournment was in fact requested by Kentucky. The only statement of the position of Kentucky in these proceedings is from Mr William Hurt of Hurt Crosbie & May who says, in an e-mail of 24th July 2009 "My client's position is that it is not a party to your action and not properly before the Court."

Is Pocket Kings entitled to the declaratory relief which it seeks?

29. I now turn to the substantive merits of Pocket King's claim, and ask whether or not the order of the Kentucky Court is an order which is, or is not,

enforceable in this jurisdiction. Mr Tager advances four alternative grounds for saying that it should not be enforced namely:

- (a) doing so would amount to the exercise of the sovereign authority of the Commonwealth of Kentucky in the English Courts;
- (b) doing so would amount to the enforcement of foreign penal law;
- (c) doing so would amount to the enforcement of the public law of a foreign state and
- (d) enforcement would be contrary to public policy because the Kentucky Proceedings constituted a breach of the rules of natural justice.

30. Mr Tager's starting point was Dicey & Morris, the Conflict of Laws, (14th Ed) at para 5R-019, where it is stated:

“English courts have no jurisdiction to entertain an action (1) for the enforcement either directly or indirectly of a penal, revenue or other public law of a foreign state or (2) founded upon an act of state.”

31. I accept this as an accurate statement of the law so far as it relates to penal laws, although the reference to “other public law” needs to be read in the light of recent Court of Appeal authority, which I discuss below. I consider first whether the Kentucky proceedings involved the enforcement of a penal law of Kentucky. The obvious places to look for information as to the nature of the Kentucky proceedings are the submissions to, and judgments of the Kentucky courts in those proceedings. The following passages seem to me to be relevant:

“1 This *in rem* forfeiture action is brought by the Commonwealth exercising its police powers and pursuant to KRS §528.100 and common law against the Domain Defendants to stop illegal internet gambling that is occurring in the Commonwealth in blatant disregard for and violation of Kentucky anti-gambling law and public nuisance law.”
(from the Kentucky's Second Amended Complaint)

“24 This Court has jurisdiction over this action because it is brought by the Commonwealth, in its Sovereign capacity and

pursuant to its police powers, alleging exclusively Kentucky statutory and common law claims.”

(Judgment of the Franklin Circuit Court dated 18th September 2008)

“36 Seizure of the Domain Defendants is necessary to adequately protect the Commonwealth’s legitimate governmental interests.”

(*ibid*)

“... seizure of the domain names serves a significant governmental purpose ...”

(Judgment of the Franklin Circuit Court dated 16th October 2008)

“Criminal forfeiture is part of a criminal sentence ... In contrast, a civil forfeiture is not punitive ... An *in rem* civil forfeiture is a remedial civil action, distinct from potentially punitive *in personam* civil claims such as fines. ... In the case of *Ursery* 518 US 267 at 284 the United States Supreme Court held that: ‘Civil forfeitures ... are designed to do more than simply compensate the Government. Forfeitures serve a variety of purposes, but are designed primarily to confiscate the property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.’”

(*ibid*)

“As possession of a gambling device may now constitute a crime under KRS 528.080, KRS 528.100 does not provide a civil *in rem* forfeiture proceeding, in my opinion. Indeed the plain language of the statute specifically states that for a gambling device to be forfeited, it must be “possessed or used in violation of this chapter”.

(Judge Taylor in the Kentucky Court of Appeals)

The last quotation indicates a difference of view between the first instance judge and one of the two majority judges in the Court of Appeals. The other majority judge did not express a view on this point.

32. There have been a number of decisions in recent years which have dealt with the question of the enforcement of foreign penal or public law. In *Government of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374 the Court of Appeal considered the approach to be taken to the question whether a foreign law was

penal in nature, and undertook a review of the earlier cases on foreign public law.

33. On the question whether a law was a penal law for this purposes the Court pointed out that this was to be decided by reference to the law of this jurisdiction – the categorisation of the provision in question in the law of the foreign state was not conclusive. In that case the Court decided the law in question was not penal, but that does not assist me in forming a view about the very different type of law which has been invoked in the Kentucky proceedings. So far as I am aware there is no authority on the question whether the forfeiture of assets used in the commission of a crime under local law is to be regarded as penal for the purpose of this rule. Regardless of the categorisation of this type of forfeiture as a civil remedy under US law (see the final two passages quoted in paragraph 31 above), it seems to me to be a provision distinctly penal in nature, requiring as it does the confiscation without compensation of an asset, on the ground that the owner, or at least the user of it, has been guilty of a criminal offence. The fact that the purpose of the forfeiture was ostensibly to protect the public rather than punish the wrongdoer does not seem to me alter the case.
34. That is not the end this point however, because the authorities (notably *Att-Gen of New Zealand v Ortiz* [1984] AC 1) say that what are not to be enforced are penal laws sought to be enforced by a sovereign state (see per Lord Denning MR at page 20). But I have held above that Kentucky is not a sovereign state, and is not exercising the authority of a sovereign state. This issue arises both in relation to Mr Tager's reliance on the penal nature of the Kentucky proceedings and in relation to his reliance on the public nature of those proceedings, to which I now turn.
35. Dicey defines the expression "other public law" to mean "all those rules (other than penal and revenue laws) which are enforced as an assertion of the

authority of central or local government.” (paragraph 5-032). If this is the correct test, the passages from the Kentucky Proceedings cited above (and other similar passages in the Kentucky judgments) demonstrate that this is fair description of nature of the Kentucky proceedings.

36. However in the *Barakat Galleries* case the Court of Appeal considered the correctness of the proposition in Dicey as regards “other public law”. The court reviewed a number of authorities on this topic, beginning with the observations of Lord Denning MR in *Att-Gen of New Zealand v Ortiz* [1984] AC 1. The question was considered by the High Court of Australia in *A-G (UK) v Heinemann Publishers Australia Pty Ltd (the Spycatcher case)* (1988) 165 CLR 30. The High Court concluded that the rule applied “to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government” and that the principle rendered unenforceable “actions to enforce the governmental interests of a foreign state”. According to the High Court the question was whether the “central interest” of the state in bringing the action was governmental in nature. The Court of Appeal then referred to the obiter views of the Privy Council in *President of the State of Equitorial Guinea v Royal Bank of Scotland*[2006] UKPC 7, where Lords Bingham and Hoffmann expressed tentative approval of the approach in *Spycatcher*.
37. Next in point of time was the decision of the Court of Appeal in *Mbasogo v Logo Ltd* [2007] QB 846, where it was held that the rule in Dicey accurately reflected the law. The Court, however, expressly refrained from saying whether the test in Dicey was the same as the test in *Spycatcher*. As the Court of Appeal in *Barakat Galleries* pointed out, the state’s claim in *Mbasogo* was a claim for losses suffered by virtue of an exercise of sovereign authority, and the ratio of the case was that exercise or assertion of a sovereign right is not justiciable. The Court of Appeal in *Barakat Galleries* said that that test was very similar to the test adopted in *Spycatcher* .

38. The Court of Appeal in *Barakat Galleries* concluded by saying (at paragraph 125)

“On the authorities as they now stand the only category outside penal and revenue statutes which is the subject of an actual decision is the exercise or assertion of a sovereign right. There is no decision which binds this court to find that there is a rule which prevents the enforcement of all foreign public laws. The test laid down by the High Court of Australia is not only consistent with the English authorities , including the *Equitoral Guinea* case in the Court of Appeal, but is a helpful and practical test.”

39. Finally, on this issue, I must refer to the Court of Appeal decision in *The United States Securities and Exchange Commission v Manterfield* [2009] EWCA Civ 27, in which it was held that the SEC could enforce a court order obtained in Massachusetts for the disgorgement by the defendant of the proceeds of fraud. The Court of Appeal did not consider that such a claim was penal in nature (because it was restitutionary), nor did it consider it to be unenforceable on the ground that it was a public law, because restitutionary claims on behalf of defrauded consumers were not the sort of governmental acts against which the rule against enforcing public laws of foreign states should be applied.

40. In conclusion on this issue, the position is that the authorities have in the case of both penal laws and public laws identified the basis of non-enforceability as being that one state does not recognise within its own jurisdiction the penal or public (in the sense of governmental) acts of another sovereign state. Does that mean, therefore, that my conclusion that in the regulation of gambling the Kentucky is exercising its own, non-sovereign authority, and not the authority of the sovereign federal state means that its penal and public laws can be enforced in this jurisdiction? In my view that cannot be right. The authorities were simply not addressing the situation before me, where the penal and public acts in question were undertaken by a government which was a

constituent part of a sovereign state, but which did not act by virtue of the authority of that state. If a sovereign states penal and public acts are not enforceable, the non-enforceability of the penal and public acts of the government of a constituent part of the sovereign state must be an *a fortiori* case.

41. I therefore conclude that the Kentucky proceedings are not enforceable in English law as being penal or governmental in nature. It is not therefore necessary for me to consider whether the Kentucky proceedings breached the principles of natural justice.

Should a declaration be granted

42. Finally, I consider whether I should exercise my discretion to make the declaration sought. The proceedings are essentially pre-emptive in nature – in theory the claimant might have waited to see if the Commonwealth of Kentucky would attempt enforcement proceedings and then defended them. But this seems to me to be a case where the pre-emptive approach was justified. The continued use of the domain name is clearly important to the claimant’s business and it is at present in state of uncertainty as to whether the Kentucky proceedings will be enforced. In the meantime it is concerned that the First Defendant may voluntarily comply with the Seizure Order. The First Defendant has agreed to submit to injunctive relief restraining it from complying with the Seizure Order (which it admits will be a breach of its contract with Pocket Kings) if Pocket Kings obtains a declaration as to the non-enforceability of the Kentucky Proceedings. In these circumstances it is appropriate to grant the declaration sought so far as it relates to the inability of Commonwealth of Kentucky to enforce the forfeiture order.
43. Pocket Kings also seek a declaration that the First Defendant will be in breach of contract if it complies with the order of the Kentucky court. As this is

admitted, and is not an issue which the court has determined, it does not seem to me to be appropriate to make a declaration in those terms. I have no objection to the admission being recited in the Order if the parties so wish. Granted the First Defendant's admissions Pocket Kings is entitled to the injunctive relief sought against the First Defendant, and I will make that part of the order as requested.