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FINDERS ARE NOT ALWAYS KEEPERS: SOVEREIGN IMMUNITY GRANTED TO THE REPUBLIC OF SOUTH AFRICA IN LANDMARK DECISION BY UK SUPREME COURT

Background

In a judgment handed down on 8 May 2024,[1] the UK Supreme Court (**UKSC**) has unanimously allowed the Government of the Republic of South Africa's (**Government**) appeal in respect of the salvage of 2,364 bars of silver (the **Silver**) from the "SS TILAWA" (the **Vessel**), thereby entitling it to immunity under s.10(4)(a) of the State Immunity Act 1978 (the **SIA**) and under Article 25 of the International Salvage Convention 1989 (the **Salvage Convention**) as incorporated into English law via the Merchant Shipping Act 1995 (the **MSA**).

The circumstances surrounding the salvage and how it came to England were described by Sir Nigel Teare, sitting as a judge of the High Court in the first instance judgment,[2] as *"... much like the board game Buccaneer ..."*. However, the UKSC's judgment serves as a warning that, unlike in the game of Buccaneer, finders are not always keepers.

On 20 November 1942, the Vessel set sail for Africa bound for Mombasa, Maputo and Durban. She departed from Ballard Pier, Mumbai with 222 crew members, 732 passengers, and 4 gunners. However, on 23 November 1942, the Vessel was torpedoed by a Japanese submarine whilst en route. At the time of the attack she was in the middle of the Indian Ocean, some 930 miles northeast of the Seychelles. "HMS BIRMINGHAM" and "SS CARTHAGE" rescued 678 survivors, but 280 passengers tragically lost their lives. The Vessel sank carrying, amongst other things, a cargo of silver which was owned by the Government, which had purchased it for the predominant purpose of being made into coin by the South African mint.

The Silver lay undisturbed for 75 years until the wreck was discovered by Argentum Exploration Limited (**Argentum**). Between 29 January and 23 June 2017, the Silver was recovered by Argentum from the wreck of the Vessel. It was then carried by sea and landed at Southampton, England on 2 October 2017 and subsequently declared to the Receiver of Wreck (the **ROW**) pursuant to s.236 of the MSA.

Argentum commenced an *in rem* claim for salvage against the Silver on 1 October 2019. The Government challenged the jurisdiction of the English court on the basis that it was entitled to immunity in accordance with s.1(1) of the SIA and/or Article 25 of the Salvage Convention (as given the force of law in the United Kingdom by s.224(1) of the MSA).

High Court / Court of Appeal

The question of whether the Government was entitled to rely on the SIA to establish state immunity turned on whether, for the purposes of s.10(4)(a) of the SIA, the Silver and the Vessel could be said to be *"in use, or intended for use for commercial purposes"* in 2017, that being the time when Argentum's cause of action (the claim for salvage) against the Government arose.

Sir Nigel Teare found that, predominantly, the intended use of the Silver was to mint coins, a state purpose. However, he held that both the Vessel and the Silver were in commercial use when the wreck was salved, since the Vessel was a commercial vessel and the Silver was being shipped as a commercial cargo. Nothing had changed between 1942 and 2017 to alter the status of either. As such, s.10(4)(a) of the SIA applied and the Government was not immune from proceedings *in rem* in respect of the Silver.

The Government appealed the decision and by a Court of Appeal majority decision, Popplewell and Andrews LJJ agreed with Sir Nigel Teare's judgment noting that the Government had chosen to have the Silver carried pursuant

[1] [2024] UKSC 14

[2] [2020] EWHC 2323 (Admlty)

to a commercial contract of carriage and was therefore exposed to salvage like any private owner of cargo. As the Silver was purchased under a FOB contract and shipped on a private vessel, it was *"in use… for commercial purposes"*. Laing LJ disagreed. In her dissenting judgment she said that the Silver was merely sitting in the hold of the Vessel and was not *"in use"* by the Government for any purpose, whether commercial or otherwise.

UK Supreme Court

In the UKSC hearing, the key issues were as follows:

1. Did the Court of Appeal err in interpreting the phrase *"at the time when the cause of action arose"* in s.10(4)(a) SIA solely by reference to the time when the maritime circumstances which made the Silver a recognised subject matter of salvage arose?

   Agreeing with the lower courts, the UKSC concluded that it is appropriate to have regard to the use and intended use of the Vessel and cargo at the time when the vessel was carrying the cargo, i.e. in 1942.

   Giving guidance for future cases, the UKSC held that "*In cases where the cause of action arises later in time, it is also appropriate to have regard to whether there has been any change in use or intended use in the intervening period. If, as in the present case, there has been no such change then it is the status of the vessel and cargo at the time of carriage which will be determinative*."

2. In holding that the Silver was in use for commercial purposes in 1942, did the majority in the Court of Appeal err in its interpretation and application of the phrase *"in use or intended for use for commercial purposes"* in s.10(4)(a)?

   The central issue between the parties on this appeal is whether the Silver was *"in use … for commercial purposes"* within s.10(4)(a) of the SIA when being carried on board the Vessel in 1942. If a party wishes to establish that a state is not immune from an *in rem* claim under s.10(4)(a) of the SIA, it will need to establish that both the ship and the cargo were in use or intended for use for commercial purposes.

   The Government submitted that the conclusion of the judge and majority of the Court of Appeal that the Silver was in use when it was being carried on board the Vessel was inconsistent with the natural meaning of the words *"in use"* and ignored the words *"intended for use"* in s.10(4)(a). It was further submitted that the first instance judge and the Court of Appeal removed the distinction drawn between 10(4)(a) for *in rem* claims, and 10(4)(b) for *in personam* claims against cargo.[3]

   The UKSC held that if the lower courts were right, then every state-owned cargo carried on a commercial vessel would be in use for commercial purposes and the test for s.10(4)(a) would be the same ass.10(4)(b). This is why the drafter of the legislation added a provision for the *"intended use"* of the cargo in respect of *in rem* claims, and the distinction between *in personam* and *in rem* claims in s.10(4)(a) gives effect to Article 3(3) of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 10 April 1926 (the **Brussels Convention**).

   Accordingly, the Government was declared immune as regards an action *in rem* in respect of the Silver carried on board the Vessel because the Silver was, at the time when the cause of action arose, intended for use for non-commercial purposes (i.e. sovereign purpose of minting coins).

3. Did the majority in the Court of Appeal err in holding that the intended use of the Silver in 1942 was not relevant to the application of s.10(4)(a) in the context of the cargo?

   The UKSC found the Court of Appeal to be erroneous in rejecting the Government's submission that the focus of the Court's inquiry should be on the Government's intended use for the Silver because the Silver was not in use at all when carried on board a ship.

   Firstly, for the reasons given in (2) above, it is not appropriate to allow the nature of the cause of action in salvage to influence the reading of the SIA in this way.

   Secondly, when the SIA came into force *"the limits of the restrictive theory of state immunity were uncertain"*. As far as Admiralty actions in rem are concerned, s.0(4) was not intended to give effect to customary international law but to enable the UK to ratify the Brussels Convention.

   Thirdly, the view expressed by the majority of the Court of Appeal as to the operation of sovereign/non-sovereign distinction in customary international law is an over-generalisation. In the case of immunity from adjudicative jurisdiction the focus is generally on the juridical nature of the activity and not for the purpose for which it is carried out. Immunity depends on the nature of the transaction not the purpose behind it. The claim brought by Argentum was not founded on any commercial activity or alleged breach of duty on the part of the Government, therefore it was necessary to have regard to the use and intended use of the Silver, which was consistent with the Brussels Convention.

[3] The Government had conceded at the Court of Appeal that it was not immune from an in personam claim against the Silver pursuant to s.10(4)(b) of the SIA. If a party wishes to establish that a state is not immune under s.10(4)(b) it will be enough to establish that the ship carrying the cargo was in use or intended for use for commercial purposes.

Fourthly, s.10(4)(a) of the SIA was unambiguous and required the use and intended use of the Silver to be taken into account when deciding whether there is entitlement to immunity. The Silver was not in use for commercial purposes when simply being carried as cargo. There was no dispute that the Silver was intended for the sovereign purpose of minting coins and s.10(4)(a) did not remove the general immunity conferred by s.1(1) of the SIA.

4. If applying the ordinary rules of construction to s.10(4)(a) the Government is entitled to immunity, then must s.10(4)(a) be read down under s.3 of the Human Rights Act 1998 because the Government's immunity would exceed that required by customary international law?

   Argentum submitted that if, on an application of the ordinary rules of construction to s.10(4)(a) of the SIA, the Government would be entitled to immunity then such immunity would exceed that required in customary international law and would constitute a disproportionate interference with the right of access to a court under Article 6 of the European Convention on Human Rights. It submitted that s.10(4)(a) must therefore be read down under s.3 of the Human Rights Act 1998 so as to deny immunity to the Government.

   The UKSC found that Argentum had two possible routes to pursue a claim for salvage: an action *in rem* or an action *in personam*. The immunity claimed by the Government under s.10(4)(a) applies only to proceedings *in rem* and it was common ground that it does not preclude proceedings *in personam*. Furthermore, it is relevant here that an action *in rem* of this sort is unusual and is not generally found outside common law jurisdictions.

   Additionally, the UKSC found that the grant of immunity from proceedings *in rem* on the basis of the intended use of the property for sovereign purposes conforms with and is required by general principles of international law. The UKSC held that the hybrid nature of proceedings *in rem* and the intrusion they would represent into a foreign state's rights over its property make it both appropriate and necessary that where the property is intended for use for sovereign purposes the state should be entitled to invoke immunity.

   Conclusively, s.10(4)(a) of the SIA gives effect to the restrictive theory of state immunity. It is a *lex specialis* required in order to prevent unjustifiable interference with a foreign state's public property. Accordingly, whether one considers that Article 6 of the ECHR is not engaged because immunity is required by international law or that compliance with international law is a justifiable interference with Article 6 rights, the answer is the same.

5. Is the Government entitled to immunity from this in *rem claim* under s.1 of the SIA and Article 25 of the Salvage Convention?

   For the reasons set out in issues (1)-(4), the UKSC held that the Government is entitled under s.1 of the SIA to immunity from the *in rem* claim against the Silver and that the exception to immunity under s.10(4)(a) does not apply because the Silver was not, at the time when the cause of action arose, in use or intended for use for commercial purposes.

   Furthermore, it was held that this result accords with Article 25 of the Salvage Convention: "*the Silver was a non-commercial cargo owned by a state and entitled, at the time of salvage operations, to sovereign immunity under generally recognised principles of international law*."

Conclusions

This was a landmark decision for a number of reasons:

Firstly, it is the first time that the courts have given careful consideration to, and cleared up any ambiguity, of the application of the SIA and Article 25 of the Salvage Convention, the restrictive theory of state immunity in public international law and claims to state immunity in the context of Admiralty proceedings *in rem*.

Secondly, as we learn more about the ocean seabed many more historic wrecks have and will become targeted by salvors for their potentially valuable cargo that they carry. Any salvor intending to bring valuable cargo to the UK and declaring it to the ROW under the MSA should take appropriate steps to identify the owner of any cargo and/or wreck and seek to agree a contract for the salvage before proceeding to recover any property. In addition to the other factual due diligence required, if a salvor disputes an ROW finding as to the owner of cargo and wants to establish an *in rem* claim, it will need to enquire whether the cargo being carried on board the vessel was *"in use or intended for use for a commercial purpose"*. If, as was the case with the Silver, the property was intended for use for a sovereign purpose, the salvor risks the *in rem* claim being set aside or struck out.

Thirdly, the decision affirms the position set out in Article 25 of the Internation Convention on Salvage 1989 (as incorporated into English law by the MSA) that:

> "*Unless the State owner consents, no provision of this Convention shall be used as a basis for the seizure, arrest or detention by any legal process of, nor for any proceedings in rem against, non-commercial cargoes owned by a State and entitled, at the time of the salvage operations, to sovereign immunity under generally recognized principles of international law*."

In other words, where a state can demonstrate that it is the owner of the salved property and, at the time the salvage operations were performed, it was not a commercial cargo, then the state is immune from an *in rem* cargo claim and entitled to the return of its property.

Fourthly, whilst not binding on other courts and jurisdictions, this decision might be persuasive in other common law jurisdictions when considering the status of state-owned cargo in salvage claims and the application of Article 25 of the Salvage Convention.

Fifthly, states and governments can be assured that the movement of goods around the world and the potential loss of sovereign immunity in the event that the ship and cargo are involved in an incident giving rise to a cause of action that is intended to be protected by the SIA will not be lost in circumstances where there has been a commercial contract entered into for the carriage and movement of the goods.

Finally, whilst not specifically dealt with in the UKSC judgment, the Court of Appeal judgment also provided important clarification on the powers of the ROW to determine the amount of a salvage award under the MSA. The Court of Appeal held unanimously that the MSA does not confer any power on the ROW to decide whether salvage is due or the amount of salvage due, and that there was no requirement for the ROW to continue to detain a wreck if a state successfully invokes state immunity in response to a claim for salvage.

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