



Press Summary

8 May 2024

Argentum Exploration Ltd (Respondent) v Republic of South Africa (Appellant)

[2024] UKSC 16

On appeal from [2022] EWCA Civ 1318

Justices: Lord Lloyd-Jones, Lord Briggs, Lord Hamblen, Lord Leggatt, Lord Richards

Background to the Appeal

On 23 November 1942, SS TILAWA (“the Vessel”) was sunk in the Indian Ocean by enemy action. On board was a cargo of 2,364 bars of silver being carried from Bombay to Durban (“the Silver”). The Silver belonged to the Union of South Africa, now the Republic of South Africa. It had been purchased for the predominant purpose of being made into coin by the South African mint. As of 2020, the Silver had an estimated value of approximately US\$ 43 million.

In 2017, the Silver was recovered from the seabed at a depth of some 2½ kilometres by a specialist salvage vessel. It was carried to the United Kingdom and declared to the Receiver of Wreck.

Argentum claims to be the salvor (rescuer) of the Silver and argues it is entitled to a claim for salvage – ie payment for recovering the Silver from the seabed. Under maritime law, it is possible to make a claim for voluntary salvage, which means a salvor can make a claim regardless of whether the owner of the property requested or consented to the salvage operation. In this case, Argentum had retrieved the Silver without any prior agreement with South Africa, so its claim was for voluntary salvage.

A salvage claim can be made in personam (against a specific person: in this case, South Africa as the owner of the Silver) or in rem (against the thing itself: in this case, the Silver). In rem claims provide certain procedural advantages. For example, the claim can be served by fixing a claim form to the property itself, rather than serving the claim form on the property’s owner. In rem proceedings also generally provide a right to arrest the property in question which can act as security for the claim. In these proceedings, Argentum brought its claim for salvage in rem against the Silver, rather than in personam against South Africa.

South Africa argued that the High Court had no power to hear Argentum's claim because of the principle of state immunity, meaning that it could not be sued because of its sovereign status as a foreign state. Argentum argued that South Africa did not have immunity, because the exception to immunity under section 10(4)(a) of the State Immunity Act 1978 applied.

Based on the wording of that exception, the argument between the parties primarily turned on whether the Silver was "in use or intended for use for commercial purposes" when it was being carried at sea in November 1942. The High Court found in favour of Argentum, holding that the Silver was in use for commercial purposes, as did a majority in the Court of Appeal. South Africa now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows South Africa's appeal. It holds that the Silver was not in use nor intended for use for commercial purposes at the time when the cause of action arose. Therefore, South Africa is entitled to immunity from Argentum's in rem claim against the Silver. Lord Lloyd-Jones and Lord Hamblen give a joint judgment with which the other members of the Court agree.

Reasons for the Judgment

Section 10(4)(a) of the State Immunity Act 1978 provides that a state is not immune as respects an action in rem against a cargo belonging to that state if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes. This is a higher threshold than for an action in personam which may be brought if the ship's use was for commercial purposes (section 10(4)(b)).

It is common ground between the parties that the Vessel was in use for commercial purposes when it was carrying the Silver. It is also now common ground between the parties that the Silver on board was not intended for use for commercial purposes: its predominant intended use was the sovereign purpose of minting currency. As a result, the central issue between the parties on this appeal is whether the Silver was "in use... for commercial purposes" within section 10(4)(a) when it was being carried on board the Vessel in 1942 [66].

Argentum argues that the Silver was in use for commercial purposes because of the commercial arrangements under which it was being shipped to South Africa. The Court rejects this submission.

At the outset, to say that the Silver was "in use" while it was being carried on board the Vessel does not accord with the ordinary and natural meaning of those words. Cargo sitting in the hold of a ship is not being used for any purpose, commercial or otherwise [69].

If Argentum's interpretation were correct, it would defeat Parliament's intention to make separate provision for state immunity from actions in rem against state-owned cargoes as compared with actions in personam for enforcing a claim in connection with such a cargo. To bring an action in rem against a state-owned cargo, Parliament has imposed additional threshold criteria that the cargo in question must also be in use or intended for use for commercial purposes. If it were right to say that when a cargo is carried on a commercial vessel it is in use for commercial purposes, the additional threshold criteria for actions in rem would be made redundant [78].

Proceedings in rem are far more intrusive into the rights of a state over its property than proceedings in personam. In particular, the mere issue of a claim in rem gives the claimant the status of a secured creditor and encumbers the property with that claim; the property is the subject matter of the claim and, in relation to claims for salvage of cargo, there is a maritime lien over the cargo; jurisdiction is established merely by the presence of the property within

the jurisdiction; the establishment of jurisdiction puts the property owner in the difficult position of facing a choice between appearing and defending the claim or staying away and losing its property, and issuing the claim gives rise to a right to arrest the property. There are therefore compelling reasons why more stringent criteria should be satisfied before a state is denied immunity [79]-[87].

Section 10 of the State Immunity Act 1978 was enacted to enable the United Kingdom to ratify the Brussels Convention of 1926. The provisions of that Convention further support South Africa's interpretation of section 10(4)(a) and the conclusion that Parliament intended a distinct approach for immunity from in rem proceedings [90]-[97].

The majority of the Court of Appeal rejected South Africa's submission that, because the Silver was not in use at all when carried on board a ship, the focus of the Court's inquiry should be on the Government's intended use for the Silver. The majority's approach to the relevance of the intended use of the cargo in the application of section 10(4)(a) is erroneous [99]-[110].

It is not necessary to read down section 10(4)(a) under section 3 of the Human Rights Act 1998 to be compatible with the right of access to a court under article 6 of the European Convention on Human Rights. In enacting section 10(4)(a), the United Kingdom Parliament had the legitimate aim of giving effect to the restrictive theory of immunity in international law so as to enable it to become a party to the Brussels Convention. The measure is also proportionate. The immunity claimed by South Africa applies only to proceedings in rem and it is common ground that it does not preclude proceedings in personam [114]. More generally, in the circumstances of the case, 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 [115].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)