

HIGH COURT JUDGMENTS ON FREEZING ORDERS AND IMMUNITY FROM THE ENGLISH JURISDICTION

Assuranceforeningen Gard Gjensidig v The International Oil Pollution Compensation Fund

[2014] EWHC 1394 (Comm) (07 May 2014)

[2014] EWHC 3369 (Comm) (17 October 2014)

Introduction

The High Court of Justice of England & Wales (Mr Justice Hamblen) has, in May and October 2014, given two judgments in the case of *Assuranceforeningen Gard Gjensidig v The International Oil Pollution Compensation Fund*. The judgments relate to:

- (1) the granting of a freezing order against the Defendant ([2014] EWHC 1394 (Comm)) (“the Freezing Order Decision”); and
- (2) the Defendant’s application challenging the jurisdiction of the courts of England & Wales pursuant to CPR Part 11 ([2014] EWHC 3369 (Comm)) (“the Immunity Decision”).

Background

The International Oil Pollution Compensation Fund (“the Fund”) is an international organisation set up (and incorporated into English law by the International Oil Pollution Compensation Fund (Immunities and Privilege) Order 1979 (“the 1979 Order”) made under the International Organisations Act 1968) for the purpose of compensating the victims of oil pollution disasters. The terms of the compensation regime are to be found in the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (“the Convention”). Under these terms, the shipowners responsible for the oil spills (or their insurers) are responsible for the grant of payments in respect of claims arising from the spills up to a limitation of liability. The Fund is then responsible for compensating victims who have not been fully compensated by the payments of the shipowner or insurer.

The 1979 Order provided at Article 6:

(1) Within the scope of its official activities the Fund shall have immunity from suit and legal process except:

...

(b) in respect of actions brought against the Fund in accordance with the provisions of the Convention;

*(c) in respect of any contract for the supply of goods or services, and **any loan or other***

transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation

In 1997, a large spillage of crude oil occurred when a ship known as the *Nissos Amorgos* ran aground in the Maracaibo Channel in Venezuela.

Assuranceforeningen Gard Gjensidig (“the Claimant”) was the insurer of the *Nissos Amorgos*. In 2010, the Claimant was held liable by the courts of Venezuela to pay US\$60m to the Republic of Venezuela in compensation. This figure went beyond the limitation of liability imposed on the Claimant under the compensation regime.

The Claimant brought proceedings against the Fund for recovery of this money, contending that the Claimant and the Fund were parties to a funding agreement (“the Agreement”). Under the terms of the Agreement, the Claimant agreed to pay compensation up to the limitation of liability and the Fund agreed to take responsibility for paying compensation over and above the limitation of liability.

The Freezing Order Decision

In October 2013, the Administrative Council of the Fund decided:

- (a) that no reimbursements should be made to the Claimant;
- (b) that the Fund should be wound up; and
- (c) that any remaining money be redistributed amongst contributors.

As a result of this decision, the Claimant feared dissipation and applied to the English courts for a freezing order against the Fund.

In relation to the freezing order, Hamblen J considered five issues:

- (1) whether the Fund was immune from the grant of a freezing order;
- (2) whether there was a good arguable case that there was an established practice amounting to a loan or other transaction that would bring the claim within the exception from immunity;
- (3) whether the Fund was immune from the Venezuela proceedings;
- (4) whether the Claimant had a good arguable case in respect of the English proceedings;
- (5) whether there was a real risk of dissipation.

Hamblen J heard arguments on the potential risks of dissipation of assets and the proper construction of the 1979 Order, and analysed the authorities on the relevant principles of interpretation where a statute or statutory instrument is enacted to give effect to the UK’s obligations under a treaty.

Hamblen J held:

- (1) that the grant of immunity was inseparable from the established exceptions, which clearly covered “legal process” (which included the granting of freezing orders);
- (2) whilst there was no formal loan arrangement, there was a good arguable case on present evidence that the arrangements between the Claimant and the Fund was for the purpose of “funding” interim payments;
- (3) the Claimant did not have a good arguable case that the claim in Venezuela was brought

in accordance with the provisions of the Convention;

(4) there was a good arguable case that the Agreement existed, however real issues were likely to arise relating not only to its existence but also to which claims it would cover;

(5) the decision of the Administrative Council of the Fund demonstrated that there was a real risk of dissipation of assets through the winding up resolution.

Accordingly, Hamblen J granted the freezing order in respect of the English proceedings but not in respect of the Venezuelan proceedings.

The Immunity Decision

Hamblen J considered two issues:

(1) did the Agreement exist?

(2) if the Agreement did exist, did it fall within an exception to immunity from jurisdiction?

1) Existence of the Agreement

Having set out the uncontroversial principles of contract formation, Hamblen J considered the Fund's arguments relating to the distinction between a promise and a statement of policy (with respect to the extent to which each can create a binding contract), and on intention to create legal relations. The Claimant stressed the importance of the fact that a transaction had been performed as evidence for the existence of a contract.

Hamblen J considered where, as in the instant case, the alleged Agreement was one created through a hybrid of express agreement and implied conduct, the burden (as is generally the case) was on the Claimant to prove the contract. On the facts, the Claimant's reliance on its conduct was equally consistent as giving rise to a non-contractual expectation rather than a binding contract.

On the facts, the Agreement did not exist.

2) Exception to Immunity from Jurisdiction

Hamblen J heard arguments relating to the Fund's attempt to draw an analogy between the immunity in question in the present case and the presumption of immunity in Section 1 of the State Immunity Act 1978, and analysed the judgment of Lord Justice Bingham (as he then was) in *Standard Chartered Bank v ITC* [1987] 1 WLR 641.

Hamblen J held that, if the alleged Agreement had existed, then it would fall within the Fund's "official activities". As such, the Fund had made out a prima facie case of immunity. Since the Claimant had failed to prove the existence of the Agreement, the Fund naturally could rely on such immunity from jurisdiction.

Hamblen J also considered the authorities relating to a "loan" or "other transaction for the provision of finance", including *Potts' Executors v IRC* [1951] AC 443, *Gadhok v Shamji* [2003] EWHC 931 (Ch), and Dickinson et al, *State Immunity: Selected Commentary and Materials* (2004).

On the facts, Hamblen J considered that the alleged Agreement (if it existed) would not have satisfied the description of either a “loan” or “other transaction for the provision of finance”.

Concluding Remarks

Hamblen J (having found against the Claimant) nevertheless sympathised with its position, given that the judgment would have the effect of causing the Claimant to lose not only the money that it had already paid up to the limitation of liability but also now a substantial sum over and above that limitation of liability.

The judgment is likely to have ramifications for the broader perceptions of the Fund, as well as on applications for immunity from jurisdiction in England & Wales.

(The Claimant was represented in the Freezing Order Decision by Professor Khawar Qureshi QC, Head of McNair Chambers (with Christopher Hancock QC and Malcolm Jarvis)).

28 October 2014