THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

24 July 2020

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LTD v THE KINGDOM OF SPAIN and THE FRENCH STATE, THE M/T "PRESTIGE"

[2020] EWHC 1920 (Comm)

BEFORE: MR JUSTICE BUTCHER

CASE SUMMARY

Background

In 2002, the MT "Prestige" ("**the Vessel**") sank off the coast of Northern Spain causing a large oil spill and consequent significant damage to the coastline of Spain and France. The incident led to the institution of criminal proceedings in Spain and civil claims were subsequently brought within these. The Claimant ("**the Club**") was sued as liability insurers of the owners of the Vessel. The Club commenced arbitrations against Spain and France but Spain and France did not participate. The arbitrator issued an award which included a number of declarations. These included declarations that Spain and France were bound by an arbitration clause in the insurance contract between the owners of the Vessel and the Club.

The Club sought to enforce those awards as judgments pursuant to s. 66 Arbitration Act 1996 (the "**AA**"). Spain and France defended that claim and issued their own proceedings under ss. 67 and 72 of the AA for a declaration that the arbitrator had had no jurisdiction to render the awards. These applications were the subject of proceedings before Hamblen J in *The "Prestige" (No. 2)* [2013] EWHC 3188 (Comm). The applications were rejected, the awards were entered as judgments and orders were made in their terms. Hamblen J further held that Spain and France were not entitled to invoke state immunity in respect of the Club's claims. The decision of Hamblen J was upheld on appeal by the Court of Appeal ([2015] EWCA Civ 333).

Proceedings came before the Spanish Supreme Court which held that the Club was directly liable to the Spanish claimants, including Spain and France. Questions of quantum were remitted to a Provincial Court and the Club participated in those proceedings. The Provincial Court rendered a judgment on quantum and issued an execution order. Spain brought proceedings in this jurisdiction to enforce the execution order. The Club served on the States a number of notices of arbitration purporting to commence, fresh arbitration proceedings against them, seeking declarations that the States were in breach of their obligations not to pursue the direct civil claims other than by arbitration in London, as well as injunctive relief.

The Club sought declaratory relief that Spain and France were in breach of their obligations to honour the arbitral awards (the "**Award Claims**"). The Club also sought an order that Spain and France would pay to the Club such sums as the Club might be ordered to pay where the judgments are recognised or enforced. Further declaratory relief was sought in relation to the

judgments and orders of Hamblen J and of the Court of Appeal (the "**Judgment Claims**"). The Club sought a declaration that Spain and France were in breach of their obligations to abide by the judgments and pursue their claims in London arbitration.

ISSUE 1: Service on France

The issue was whether service of proceedings on a Member State of the EU such as France can be effected by the methods prescribed in Regulation (EU) No. 1393/2007 ("**the Service Regulation**"), or can only be effected in accordance with the regime set out in s. 12 of the State Immunity Act 1978 (the "**SIA**"). France contended that the Service Regulation had no application to service on it or other EU Member States and that service via the Foreign and Commonwealth Office pursuant to s. 12 of the SIA was of mandatory and exclusive application, so that the Club had not validly served proceedings on France.

Butcher J held (at [45]) that the Service Regulation applied since: (a) the Service Regulation was applicable to actions against Member States, save where they concern matters which manifestly concern *acta iure imperii*; (b) where the Service Regulation applies, it establishes a mandatory regime for service and does not permit derogations for other means of service in national law; (c) Article 12 of the Service Regulation is not intended to and does not provide for Member States to establish a method of service on Member States which is different from and excludes the other methods set out in the Service Regulation; (d) the Service Regulation does not permit national rules restricting service on a Member State to service under Article 12 (in any event, s.12 of the SIA would not be such a rule, because it does not expressly seek to restrict service to Art. 12 of the Service Regulation); (e) it would be incompatible with the Service Regulation for a national law, such as the SIA, to restrict service to a particular method and it would undermine the objective and scheme of the Service Regulation; (f) the commentary from the organs of the EU supports this view, (g) S. 12 of the SIA is and remains mandatory, save where it is inconsistent with EU legislation which has primacy; (h) the fact that the effect of the Service Regulation is not reflected in textbooks or in the CPR Rules does not affect its proper construction or effect; and (i) these conclusions do not undermine respectful dealing between EU Member States bound by a regime which prioritises, *inter alia*, national rules on service and the development of a common European area of civil justice. Accordingly, France had been validly served with the Judgment Claim.

ISSUE 2: State Immunity

Spain and France contended that they were immune from the jurisdiction of the Court and placed reliance on s. 1 of the SIA. The Club contended that the States were not immune, because one or more of the exceptions provided for by ss. 2, 3(1)(a), 3(1)(b) and 9 of the SIA was or were applicable. Butcher J held (at [52] –[59]) that the Award Claims could be said to '*relate to*' an arbitration for the purposes of s. 9(1), but that the Judgment Claims could not. The key difference was the interposition of the English court proceedings.

Butcher J held (at [60]) that there may be an overlap of exceptions to immunity and that this was no reason for giving s.3 a narrow construction. He went on to hold (at [62]) that the continued pursuit of the civil claims by Spain and France constituted a "*commercial transaction*" for the purposes of s.3, so that the proceedings before the Court (both the Award Claims and Judgment Claims) related to that commercial transaction. The Court (at [63]) distinguished *Svenska Petroleum Exploration v Government of the Republic of Lithuania* [2007] 1 Lloyd's rep 193, and *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 since

the proceedings in question related directly to the underlying commercial transaction (continued pursuit of the civil claims). Thus, the Court held (at [65]) that neither France nor Spain were immune from suit.

ISSUE 3: Jurisdiction over the Award Claims

France and Spain challenged the jurisdiction of the Court. In relation to the Award Claims, it was common ground that the applicable rules were common law rules since these claims fell within the arbitration exception to Regulation (EU) No. 1215/2012 ("**the Recast Regulation**"). The parties disagreed as to whether the Judgment Claims fell within the scope of the Recast Regulation.

Butcher J held, in relation to the Award Claims (at [77] – [92]) that at common law, the Court had jurisdiction over the Defendants if there had been valid service out of the jurisdiction. In order for the service to have been valid, three requirements had to be satisfied (at [72]): (a) the claims must fall within a statutory gateway in CPR PD 6B, para. 3(1); (b) there must be a serious issue of fact or law that should be tried; and (c) England must be clearly or distinctly the most appropriate forum. The parties concentrated their submissions on the second requirement, (b).

Butcher J held that the Award Claims raised serious issues to be tried. There was no authority to the effect that there could be no claim for damages for failing to give effect to declaratory awards and there was, at least, a serious argument that as a matter of principle and policy compensation ought to be available as a remedy for such a failure. The quasi-contractual situation with which the case was concerned where States were not original parties to the insurance contract was one that threw up complexities of analysis. Whether or not causes of action arising from the obligations to honour the awards had merged with the s.66 judgments was a serious issue to be tried. Whether or not the Club could be said to have submitted to the jurisdiction of the Spanish Courts would need to be the subject of evidence and could not be determined at the hearing. The Court dismissed arguments that these proceedings constituted an abuse of process by the Club. The Court declined to resolve any serious issue on any point of law, holding that the issues required further factual evidence, were complex and required detailed consideration and the Court was therefore called upon to exercise judicial restraint.

ISSUE 4: Jurisdiction over the Judgment Claims

Butcher J held (at [104]-[108]) that the Judgment Claims did not fall within the arbitration exception contained in Article 1(2)(d) of the Recast Regulation. The Court held that these claims were too far removed from the arbitrations to fall within the exception. They depended on the separate causes of action arising as a result of the States' not giving effect to the judgments which were distinct from those arising as a result of the States' failure to honour the awards. The obligations were said to have arisen in the course of and as an aspect of judicial proceedings and not in the course of the arbitral reference or as an aspect of it. There was nothing intrinsically connected with arbitration in the nature of the action. Consideration of the origin and purpose of the arbitration exception (and of the New York Convention) did not suggest that it should apply.

The Court considered whether the Judgment Claims fell within section 3 of Chapter II of the Recast Regulation ("*matters relating to insurance*"). Upon reviewing the authorities, Butcher J held (at [122]) that: (a) section 3 is not to be restrictively construed; (b) "*matters relating to*

insurance" are not confined to "*matters relating to insurance contracts*"; (c) "*matters relating to insurance*" can extend to determinations of rights of persons who were not parties to an insurance contract, including beneficiaries and, in the context of liability insurance, injured parties; (d) the question of whether particular proceedings are or involve a "*matter relating to insurance*" calls for an evaluative judgment. It will not generally be enough that insurance forms part of the history or "*pathology*" of a claim for it to be a "*matter relating to insurance*". On the other hand, a claim is not prevented from being a "*matter relating to insurance*" by the intervention of some other legal connection between the parties; and (e) in making the evaluation, the Court is concerned to see whether, as a matter of "*substance and reality*", and applying common sense, the proceedings can be said "*fairly and sensibly*" to be matters relating to insurance.

The Court held (at [123]) that the Judgment Claims were "*matters relating to insurance*". The essential purpose of the Judgment Claims was to seek to ensure compliance with, or redress for non-compliance with obligations which derived from an insurance policy. The Court held (at [130]) that the States, insofar as they fell within any of the categories in Articles 11 and 13, fell within the category of "*injured parties*". The States were "*injured parties*" for the purposes of section 3 of Chapter II of the Recast Regulation. Butcher J held (at [138]) that if a party has suffered its own losses, such that it counts as an "*injured party*" in its own right, then it must be regarded as an "*injured party*" for the purposes of section 3 of Chapter II the Recast Regulation, notwithstanding that it may also have subrogated claims. Further, even if that is not right as a general rule, it should at least apply when the relevant party's subrogated claims form a minority of its claims.

CONCLUSION

The Court therefore held (at [144]) that:

(1) Neither France nor Spain were immune from any of the actions;
(2) The Court had jurisdiction in respect of the Award Claims;
(3) The Court did not have jurisdiction or should decline jurisdiction in relation to the Judgment Claims.
