SALVAGE OF SUNKEN TREASURE AND THE LAW OF STATE IMMUNITY

Admiralty jurisdiction and practice incorporates many sui generis concepts that do not readily yield common law analogues. One such feature of Admiralty is the law of salvage, recognised in the laws of seafaring nations since antiquity. Salvage permits persons who render assistance to a vessel or her cargo in danger at sea to claim a reward for their efforts. Another is the law of wreck, which applies where a vessel is abandoned with no hope or intention of recovery: see e.g., *The Lusitania* [1986] Q.B. 384 at 389; [1986] 1 All E.R. 1011 at 1015. With developments in technology, the ability to salve cargoes from shipwrecks has been enhanced. Questions arise as to how the rules of salvage apply to such cargoes and, where a vessel or cargo is property of a state, how the law of State immunity interacts with such principles.

It is with these issues that the Court of Appeal (Popplewell L.J., Andrews L.J. and Elisabeth Laing L.J.) was concerned in its recent judgment in *Argentum Exploration Ltd v The Silver* [2022] EWCA Civ 1318 (*Argentum*), an unusual case arising from the sinking of the *SS Tilawa* by a Japanese torpedo in World War II, and the salvage by a treasure hunter of 2,364 bars of silver belonging to the Republic of South Africa (RSA) from the shipwreck decades later in 2017.

Argentum is significant as the first appellate consideration of s.10(4)(a) of the State Immunity Act 1978 (SIA). Section 10(4)(a) provides:

> "(4) A State is not immune as respects—
>
> (a) 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".

By s.17, "commercial purposes" means "purposes of such transactions or activities as are mentioned in [s.3(3)]". Section 3(3) relevantly defines "commercial transaction" to include "any contract for the supply of goods or services".

The determinative issue at first instance and on appeal was whether "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" (see at [19]). On appeal, a new issue arose concerning the Receiver of Wreck's powers under the Merchant Shipping Act 1995. This was addressed by the court (primarily at [162]–[207])

■ Clinical negligence; Delegation; Dental services; Dentists; Doctors; Duty of care; Self-employed workers; Vicarious liability

but, given the majority's conclusion as to s.10(4)(a), it did not affect the appeal's outcome.

At first instance, Sir Nigel Teare (sitting as a judge of the High Court) held that s.10(4)(a) of the SIA applied, and RSA was not immune from *Argentum*'s claim for salvage. Essentially, Sir Nigel held that the time for assessing whether the vessel and cargo were in use for commercial purposes was when the vessel was carrying the cargo in 1942, rather than in 2017 (*Argentum Exploration Ltd v The Silver* [2020] EWHC 3434 (Admlty); [2021] Q.B. 585 at [121]–[123]). While the cargo was not literally being used during the voyage, for the purposes of s.10(4)(a), it was sufficient that it was in use for the purposes of the contract of a sale and the contract of carriage (see at [125] and [164]). Nothing had subsequently been done by RSA to change the status of the cargo since 1942 (see at [167]–[168]).

We have previously analysed Sir Nigel's decision (see (2021) 137 L.Q.R. 385). We observed that, whilst the judge clearly reached "the correct result", his interpretation fit "somewhat awkwardly with the ordinary and natural meaning of the terms of s.10(4)(a)" (at 385). There was "a degree of awkwardness in describing cargo being carried on a ship pursuant to a contract of carriage as 'in use'", and also a difficulty in focusing upon use in 1942 where s.10(4)(a) focused on "the time when the cause of action arose" (see at 388).

Upon RSA's appeal against Sir Nigel's decision, these interpretive difficulties were of central importance. Unsurprisingly, given the question's novelty and the issues with the drafting of s.10(4)(a), the Court of Appeal produced three separate judgments. By majority (Elisabeth Laing L.J. dissenting), it held that Sir Nigel was correct to conclude that RSA was not covered by sovereign immunity on the basis of s.10(4)(a) SIA.

RSA's submissions on appeal largely restated its arguments at first instance, namely that the status of the vessel, and the silver, was to be assessed in 2017, which is when it said the cause of action in salvage arose (*Argentum* [2022] EWCA Civ 1318 at [25]). In the alternative, RSA argued that, even if assessing "use" in 1942, Sir Nigel was wrong to treat the contract of carriage and cargo as "in use for commercial purposes". Instead, the contracts were for the purpose of putting the silver on board and having it carried. Indeed, the intended use of the silver in 1942 was a non-commercial use, being predominantly for the production of South African coinage. As a further alternative, RSA argued that, even if the silver was in use for commercial purposes in 1942, the weight to be attached to this use in 1942 should be minimal compared to the weight to be attached to its intended use; and both the use and intended use came to an end when the vessel became a wreck.

Argentum submitted that the SIA should be construed in accordance with the customary international law of sovereign immunity and the terms of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships done at Brussels on 10 April 1926 (Brussels Convention) (at [29]). Argentum contended that, as a matter of customary international law, the existence of a "maritime adventure" is the foundation for any claim for salvage—that is, transport by a ship at sea or in tidal waters. Since RSA could not establish the existence of a maritime adventure, there was therefore no immunity. Similarly, Argentum argued that, under art.3.3 of the Brussels Convention, State immunity from all claims to salvage had been removed in respect

of cargo on merchant ships, even where the carriage was for non-commercial purposes. Consequently, Argentum argued that Sir Nigel was correct in concluding that the vessel and the silver were in commercial use in 1942, and that mere inactivity (rather than a decision) by RSA in relation to the silver could not amount to a change in use.

In giving the leading judgment, Popplewell L.J. dealt first with the context in which s.10(4)(a) was to be construed. In addition to consideration of the Brussels Convention, a central integer of his Lordship's contextual reasoning was an analysis of the nature and elements of a claim for salvage under maritime law. Critically, he observed that property is not a recognised subject of salvage in maritime law unless it is or has been *cargo* carried on board a ship at sea or in tidal waters and concerned in a "maritime adventure" (see at [57]). Additionally, given that most of the successful claims for salvage have involved salvage of a wreck (see at [65]), and s.10(4) is expressly concerned with salvage, he concluded (at [68]) that the drafter of s.10(4)(a) must have intended the section to apply to ships and cargoes which had become wreck, and the terms "use" and "intended use" in relation to both ship and cargo must be construed in this context.

Relatedly, Popplewell L.J. held (at [70], Andrews L.J. and Elisabeth Laing L.J. concurring on this point) that the time at which the use or intended use of the ship and cargo is to be assessed is the point at which *the relevant aspect* of the cause of action for salvage in maritime law arises, and not when the cause of action is complete with the occurrence of the last ingredient. This conclusion accorded with the relevant inquiry in salvage being as to whether the status of the goods is "cargo", as temporally the property must be or have been cargo before it comes into danger; i.e. the enquiry is necessarily backwards-looking. Here, the question was when the silver became cargo concerned in a maritime adventure.

His Lordship also considered that this conclusion accorded with art.3.3 of the Brussels Convention, pursuant to which the relevant time is before the salvage services are rendered (see at [80]). Thus, he agreed with Sir Nigel that the consequences of RSA's submission (that the relevant time to assess the cause of action was in 2017) were inconsistent with customary international law and the restrictive theory of State immunity (see at [81]).

Notably on this point, in her Ladyship's separate reasons, Andrews L.J. considered that the use of the word "arose" rather than "accrue" in s.10(4)(a) was significant—dictionary definitions of "arose" include "originate" and "begin to exist"—from this perspective, "a claim for salvage originates from, or begins with, maritime circumstances". The use of the word "arose" indicated that the focus was on the point in time at which the relevant goods became cargo carried onboard a ship and involved in a maritime adventure, which was when a cause of action in salvage "arose" for the purposes of s.10(4)(a) (all at [120]).

Applying this construction to the facts (at [90]), Popplewell L.J. agreed with Sir Nigel that the silver was "in use" by RSA for commercial purposes when it was on board the vessel. This use "consisted of RSA making arrangements for the Silver to be put on board the Vessel and carried to South Africa by sea" and essentially involved two activities:

> "(i) entering into a contract of purchase on fob terms for the Silver to be delivered on board the Vessel; and (ii) entering into the contract of

> carriage with the owners of the Vessel for it to be carried by sea to South Africa".

Both of these aspects constituted an "activity for commercial purposes" within s.10(4)(a). The essential point was stated by Andrews L.J. in her Ladyship's concurring reasons (at [117]):

> "the silver was on board the vessel for the purpose of being transported from India to South Africa pursuant to two inter-related commercial contracts, a contract of sale and a contract of carriage. It was there to serve the purposes of those commercial contracts … Nothing that the RSA did in respect of this cargo was any different from the actions of a private owner involved in similar commercial arrangements".

Popplewell L.J. then went on to reject RSA's arguments concerning the "use" of the goods. First, as to RSA's argument that the contracts were for the purpose of putting the silver on board and having it carried, he held that the silver only became cargo because of the identified activity by RSA in entering into the contracts. The relevance of the contracts is not merely that the delivery on board and transportation of the silver would fulfil them. These contracts were also the means by which RSA caused the silver to become cargo (see at [91]).

Secondly, his Lordship held (at [93]) that RSA's argument that the silver was not in use for any purpose at all when on board the vessel would deprive the word "use" of any substantial content in s.10(4)(a) in relation to cargoes.

Thirdly, as to RSA's argument that the word "use" in s.10(4)(a) was directed solely to use of the ship and the phrase "intended use" directed solely at the cargo, his Lordship concluded (at [94] and [95]) that this did not reflect the natural meaning of the statutory language; was not in accordance with customary international law, which focuses on the nature of the activity undertaken rather than its purpose; and, was inconsistent with the salvage context with which s.10(4)(a) was concerned. In salvage claims, the intended use of the cargo on completion of the voyage is irrelevant. Instead the focus is on the property being cargo when on board the vessel (see at [97]). On this final point, Andrews L.J. considered that the phrase "intended for use" is apt to cover the scenario wherein a casualty occurs when the ship has not yet embarked upon her intended voyage (see at [124]).

While Elisabeth Laing L.J. agreed with Popplewell L.J. and Andrews L.J. on the "temporal focus" of the inquiry (at [129]), her Ladyship dissented in relation to whether it could be said, for the purposes of s.10(4)(a), that, when the ship sank, the cargo was "in use" by RSA for commercial purposes. First, her Ladyship did not consider that matters relating to the cause of action in salvage could be used to construe the term "cargo" in s.10(4)(a) (see at [138]) because s.10(4)(a) is not expressed to apply solely to salvage claims (although it would be rare for it to apply outside of this context). By contrast, Popplewell L.J. considered that s.10(4)(a) was "essentially concerned with salvage claims", and so was to be interpreted having regard to the principles of the law of salvage (see at [32]–[35]). Secondly, Elisabeth Laing L.J. considered that, as a matter of ordinary language, a cargo will rarely be "in use" while it is being carried. Therefore, the relevant question was whether or not, *when the casualty occurred*, the cargo was *intended*

for use for commercial purposes (see at [141]). Applying this approach, her Ladyship disagreed with Popplewell L.J.'s and Andrews L.J.'s conclusion that the cargo was "in use" while being carried onboard the vessel. Rather, the cargo was cargo because it was being carried on the ship, and the nature of that arrangement said nothing about the use or intended use of the cargo (see at [142]). Elisabeth Laing L.J. considered that the legislative background of s.10(4)(a) and the Brussels Convention supported her construction. She concluded (at [157]) that the silver was being "carried" for an intended use that was substantially a governmental and non-commercial purpose.

There are two main differences in approach between that of the majority in the Court of Appeal and Sir Nigel Teare at first instance. First, as noted above, the majority emphasised the elements of a claim for salvage in resolving the question of when the relevant cause of action "arose" for the purposes of s.10(4)(a)—focusing upon the question of when the silver became cargo that was concerned in a maritime adventure, such that it could be capable of salvage. Secondly, as adverted to above, the Brussels Convention assumed greater prominence on appeal (for both the majority and minority) in resolving the interpretive difficulties presented by the terms of s.10(4)(a).

It was "common ground between the parties that [s.10 of the SIA] was intended to give effect" to the Brussels Convention (see at [38]). For the majority, the fact that s.10(4)(a) was intended to give effect to the Brussels Convention provided a foundation for their preferred interpretation of that provision. Indeed, Andrews L.J. considered that the difficulties in interpreting it were likely to stem from the fact that the legislative drafter had paraphrased art.3.3 of the Brussels Convention, rather than transposed it (see at [110]). Having regard to the terms of art.3.3, Popplewell L.J. held that the intention behind s.10(4)(a) was to preserve State immunity where the use or intended use of cargo was non-commercial (see at [43]). Conversely, s.10(4)(b) was intended to remove immunity for all in personam claims contemplated by s.10(4)(b) (see at [44]). On the other hand, Elisabeth Laing L.J. considered that the terms of art.3.3 supported her dissenting view, on the basis that the silver was being carried for a non-commercial purpose—i.e. for minting into coinage (see at [157]).

In commenting upon Sir Nigel Teare's decision at first instance, we concluded that his Lordship had clearly reached the correct result, but that the interpretive difficulties arising in the case revealed issues with the drafting of s.10(4)(a) (see (2021) 137 L.Q.R. 385 at 385). In particular, the "temporal focus" of the inquiry mandated by the words of s.10(4)(a) (that is, when the cause of action in salvage "arose") posed a particular difficulty both at first instance and on appeal. However, the majority in the Court of Appeal neatly resolved this interpretive difficulty in a way that overcomes the issues with the drafting. Both majority judges provided a contextual grounding for their interpretation by relying on the law of salvage in order to ascertain the proper time for undertaking the mandated inquiry. Andrews L.J. (at [120]) also gave a firm textual basis for the majority's preferred interpretation by drawing a distinction between a cause of action arising, rather than accruing.

The other key interpretive difficulty for both Sir Nigel and the Court of Appeal concerned the description of cargo being carried onboard a ship as "in use". In our

view, with respect to this issue, the majority's approach is less satisfactory. Even if one has recourse to the terms of the Brussels Convention, there is an air of unreality to describing cargo passively on board a vessel as "in use" in any meaningful sense. Despite this, the alternative construction—that the cargo was not in use during the voyage—is even less compelling. The alternative view would, as Popplewell L.J. identified, denude the word "use" in s.10(4)(a) of any useful meaning (see at [93]–[96]). Ultimately, we consider that this is an issue of drafting that cannot entirely be overcome, even after the detailed interpretive exercise undertaken by the majority. As such, there is still much to be said, in our view, for adopting the more realistic concept of a "commercial cargo", as is the case in the Australian Foreign State Immunities Act 1985 (Cth). The concept of a "commercial cargo" also embraces, with more realistic language, what Andrews L.J. held (at [117]) to be the essential point, as we set out above—namely that the cargo was being transported pursuant to commercial contracts of carriage.■

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