Neutral Citation Number: [2022] EWCA Civ 1318

Case No: CA-2021-000517

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ADMIRALTY COURT (KBD)
SIR NIGEL TEARE (sitting as a Judge of the High Court)
[2020] EWHC 3434 (Admlty)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 11/10/2022

Before :

LORD JUSTICE POPPLEWELL
LADY JUSTICE ANDREWS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

ARGENTUM EXPLORATION LIMITED

Claimant/Respondent

- and -

THE SILVER AND ALL PERSONS CLAIMING TO BE INTERESTED IN AND/OR TO HAVE RIGHTS IN RESPECT OF, THE SILVER

Defendant/Appellant

- and -

(1) SECRETARY OF STATE FOR TRANSPORT

(2) THE RECEIVER OF THE WRECK

Interveners

- -
- -

Stephen Hofmeyr KC, Liisa Lahti and Cameron Miles (instructed by **Tatham & Co**) for the **Claimant/Respondent**
Christopher Smith KC and Jessica Wells and Naomi Hart (instructed by **HFW LLP**) for the **Defendant/Appellant**
Christopher Staker (instructed by the **Treasury Solicitor**) for the **Interveners**

Hearing dates : 15, 16 March, 5, 6, 7 July 2022

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Approved Judgment

This judgment was handed down remotely at 10 am on Tuesday, 11 October 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

Lord Justice Popplewell

Introduction

1. The depth from which sunken treasure can be recovered has greatly increased with the technological advances of recent times. The so called *Rhodian Law,* or *Nautical Law of the Rhodians*, was published by Loewencklau in 1596, reflecting, in part, text which survives from earlier mediaeval manuscripts. It purported to record various articles as having been the maritime law of Rhodes as adopted by Roman law, although there is academic opinion that it is spurious (see e.g. Robert Benedict The Historical Position of the Rhodian Law 1909 Yale Law Journal Vol XVIII No 4 p223). Article 47 provides:

> XLVII. If gold or silver or any other thing be drawn up from a depth of eight cubits [about 12 feet], he that conserves it shall have one third, and if 15 cubits [about 23 feet], he shall have one half because of the danger of the depth. For recovery of goods thrown from the sea onto land or submersed in one cubit of water he shall have one tenth.

2. This case concerns a cargo of 2,364 bars of silver ("the Silver") which sank to the seabed of the Indian Ocean at a depth of some 2½ kilometres in 1942. It was then regarded as unsalvageable, but some 75 years later it was recovered, giving rise on this appeal to important issues of law in relation to state immunity from Admiralty proceedings for salvage, and claims for salvage of wreck more generally.

3. The appellant is the Republic of South Africa ("RSA"). It is the owner of the Silver, which was being carried by the SS TILAWA ("the Vessel") from Bombay to Durban during the Second World War for minting into coinage by the Government of the Union of South Africa, RSA's predecessor in title (for convenience I shall refer to both as RSA since nothing turns on the distinction). On 23 November 1942 the Vessel was hit twice by Japanese torpedoes and sank with her cargo. In 2017 the Silver was salvaged and brought to Southampton where it was delivered to the Receiver of Wreck, to whose order it is held, pursuant to s. 236 of the Merchant Shipping Act 1995 (the "MSA"). The respondent ("Argentum") claims to have been the salvor, and asserted a claim for salvage by bringing proceedings in rem against the Silver in the Admiralty Court. RSA entered an acknowledgment of service, and applied to strike out or set aside the claim, or have it permanently stayed, on the grounds that the proceedings attracted state immunity.

4. Sir Nigel Teare ("the Judge") dismissed the application, holding that the proceedings fell within the exception to immunity in s. 10(4)(a) of the State Immunity Act 1978 ("the 1978 Act"). RSA appeals from the Judge's decision.

The events of 1942

5. The Silver was one of a number of consignments sold by the Government of India to RSA on fob terms. Although sold on fob terms, it was the Government of India as

seller who arranged the contract of carriage with the owners of the Vessel. It is common ground, however, that it did so on behalf of RSA as purchaser and that RSA was a party to such contract of carriage, although no documentary evidence of it survives.

6. The Vessel was a privately owned passenger/cargo liner built in 1924. On the voyage she was carrying 6,472 tons of cargo, including cotton, and 732 passengers. She was manned by a crew of 222. When she was torpedoed, the Silver was secured in her bullion room, and sank with the Vessel to the bed of the Indian Ocean. Some 280 lives were lost, with the survivors being taken back to Bombay. Under wartime insurance arrangements, the Vessel was insured by the UK Government, which paid the claim brought by the owners of the Vessel. At all times thereafter the Vessel, lying on the seabed, has been the property of the UK Government. The Silver, on the other hand, was uninsured. It was and remains owned by RSA.

7. The Silver had been purchased by RSA in order for it to be made into coin by the South African Mint, a body which had recently been established by the South African Mint Act 1941 to replace the Pretoria branch of the London Royal Mint. There was a dispute between the parties over the intended use of the Silver by the Mint. Argentum claimed that it was required to produce Egyptian coinage, which was a profitable activity for the Mint. RSA contended that it was required to produce South African coinage. The Judge considered in detail the relevant evidence and concluded that "[i]t is probable that the cargo on board the SS TILAWA was destined both for Union silver coinage and for Egyptian coinage. In circumstances where 80% of silver was used for Union coinage and 20% for Egyptian silver coinage it is likely that the greater part of the cargo was destined for Union coinage and the lesser part for Egyptian coinage". The Judge's finding has not been challenged on appeal. The cargo was therefore intended in 1942 for a predominantly sovereign use.

The salvage

8. After an 18-month search the Vessel was located and identified by Advanced Maritime Services ("AMS") in 2014. By a contract dated 12 December 2014 Argentum engaged AMS to recover the Silver. AMS engaged a specialist salvage vessel, the SEABED WORKER. Recovery operations commenced in January 2017 and were carried out until the last of the Silver was recovered on 23 June 2017, with interruptions for the vessel to visit Salalah, Oman, for crew changes and other necessary provisioning of supplies and spares. The Silver was transhipped from the SEABED WORKER onto the PACIFIC ASKARI in the contiguous zone off the coast of South Africa on 3 September 2017, by which it was then carried to the UK, arriving in Southampton on 2 October 2017. At that time Argentum mistakenly believed that the Silver belonged to the UK Government.

9. RSA had first become aware of the possibility of recovering the Silver not from Argentum, but from other salvors, Odyssey, who had approached the then Deputy President of RSA in September 2016 with a view to securing a salvage contract. The Judge considered the subsequent exchanges between RSA and Odyssey, with whom a contract was eventually signed on 14 February 2018. The Judge found that RSA had not formed any intention to contract for the salvage of the Silver until after consideration of a letter dated 13 October 2017, which was after Argentum's cause of

action had arisen (on the latest of the dates contended for by either party in this action). At the date of the accrual of the cause of action in salvage, therefore, RSA had no intention as to the use of the Silver if and when salved.

The course of the proceedings

10. The Silver was placed in secure custody following its arrival in Southampton on 2 October 2017. On 26 October 2017 it was declared to the Receiver of Wreck ("the Receiver") and has since that time been held to the Receiver's order. On 14 September 2018 RSA claimed ownership of the Silver. Argentum was made aware that a claim to ownership had been made but was initially unaware of who had made it. On 23 October 2018 the Receiver made a decision that RSA was the owner of the Silver. There was some argument about whether that decision should stand, but eventually Argentum agreed that it was correct. On 12 November 2018 Argentum advised the Receiver that it was entitled to the Silver as "unclaimed wreck", but that if a claim to ownership were proven, it sought a salvage award. If an award could not be agreed with the owner, Argentum advised that that would likely entail an application to the Admiralty Court. Thereafter Argentum was advised by the Receiver on 31 January 2019 that it was RSA which claimed ownership of the Silver and correspondence ensued between Argentum, RSA and the Receiver.

11. On 1 October 2019 Argentum commenced the action in rem, seeking a declaration that it was the owner of the Silver or, in the alternative, a salvage award. The claim form did not specify whether the claim for salvage was made under the maritime law of salvage or under the International Maritime Organization International Convention on Salvage 1989 ("the Salvage Convention"). The salvage claim was said to be without prejudice to Argentum's primary case that the Receiver was the appropriate person to determine its claim for salvage, and that it was entitled to payment of such salvage due before release of the Silver to its owners under s. 239 of the MSA.

12. On 3 March 2020 RSA entered an acknowledgment of service for the purpose of asserting its interest in the Silver and claiming immunity pursuant to the 1978 Act and article 25 of the Salvage Convention. On 25 March 2020 RSA issued an application notice seeking an order that the action be struck out or stayed on the grounds that it was entitled to immunity from the claim.

13. On 17 April 2020 the Receiver advised Argentum and RSA that she had no legal power to decide the amount of salvage; and that if not agreed, the salvage would need to be determined by a court. The Receiver considered that the appropriate way for Argentum and RSA to progress the matter was through the proceedings then pending before the Admiralty Court. On 29 September 2020 the claim in rem was served on the Silver.

14. In addition to claiming immunity, RSA disputes liability to Argentum for salvage for a number of reasons. In particular it denies that it was Argentum which salved the Silver. It also maintains that any salvage claim is time-barred as having been commenced more than two years after the salvage services had been terminated. Article 2 of the Salvage Convention provides that a claim for salvage under the Convention becomes time-barred two years after the day on which the salvage operations are terminated. RSA contends that the salvage operations were terminated

when the Silver was successfully raised from the Vessel to the SEABED WORKER, which was completed on 23 June 2017, more than two years before the current action was commenced on 1 October 2019. Argentum contends that the salvage operations were terminated on 2 October 2017 when the cargo was landed at Southampton, and so just under two years before the Claim Form was issued.

The State Immunity Act 1978 and customary international law

15. Section 1 of the 1978 Act provides that a state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of Part I of the Act. The 1978 Act deals with the jurisdiction of the court (1) to adjudicate upon claims against foreign states (the "adjudicative jurisdiction") and (2) to enforce against foreign states by legal process judgments pronounced and orders made in the exercise of the adjudicative jurisdiction (the "enforcement jurisdiction"). Sections 2 to 11 deal with adjudicative jurisdiction and sections 12 to 14 deal with enforcement jurisdiction. The adjudicative and enforcement jurisdictions reflect the two forms of state immunity recognised by the common law before the passing of the 1978 Act; see *Benkharbouche v Embassy of The Republic of Sudan* [2017] UKSC 62, [2019] AC 777 at [8] per Lord Sumption.

16. Section 10 is entitled “Ships used for commercial purposes”. By subsection (1) it applies to Admiralty proceedings, and proceedings on any claim which could be made the subject of Admiralty proceedings. Subsections (2) and (3) address immunity for claims against, or in connection with, state-owned ships and sister ships. Subsection (4) addresses immunity for claims against or in connection with state-owned cargo. It provides:

> “(4) A State is not immune as respect—
>
> > (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, or
> >
> > (b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.”

17. Section 17 defines commercial purposes as meaning “purposes of such transactions or activities as are mentioned in section 3(3) above”. Section 3(3) defines “commercial transaction” as meaning:

> “(a) any contract for the supply or goods or services;
>
> …
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.”

18. Argentum relies on s. 10(4)(a) alone because the current proceedings are an action in rem. Section 10(4)(b) is not directly in issue, but its application to the facts of this

case and other possible cases of salvage informs the debate as to the proper approach to the application of s. 10(4)(a). Moreover s. 10(4)(b) is potentially of direct relevance to the parties, because Argentum also commenced a claim for salvage against RSA in a separate action in personam, for which it was granted permission to serve out of the jurisdiction on a without notice application. The validity of the claim form in that action has been extended without it yet having been served or expired.

19. The issue on this appeal is, therefore, whether the Silver and the Vessel fall within the words "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."

20. In *The London Steam-ship Owners Mutual Insurance Association Ltd v Spain and France (The Prestige Nos 3 & 4)* [2021] EWCA Civ 1589, [2022] 1 WLR 3434, this Court summarised the relationship between the 1978 Act and customary international law at [39]-[40]:

> 39. "…The provisions of the Act fall to be construed against the background of the principles of customary international law, which at the time it was enacted, as now, drew a distinction between claims arising out of those activities which a state undertakes *jure imperii*, i.e. in the exercise of sovereign authority, and those arising out of activities which it undertakes *jure gestionis*, i.e. transactions of a kind which might appropriately be undertaken by private individuals instead of sovereign states, in particular what is done in the course of commercial or trading activities. The former enjoyed immunity; the latter did not. This came to be known as the restrictive theory of immunity, which had by then been adopted by the common law in this country. See *Alcom Ltd. v Republic of Colombia* [1984] AC 580 at pp. 597-599, *Playa Larga and Marble Island (Owners of Cargo Lately Laden on Board) v I Congreso del Partido* [1983] 1 AC 244 at pp. 261-262, and *Benkharbouche* at [8]. The Act did not, however, merely seek to frame immunity in terms of this binary distinction, choosing instead to formulate the exceptions to immunity in a series of detailed sections, such that the existence of immunity under public international law is not conclusive as to whether immunity has been removed by the 1978 Act. As Lord Diplock observed in *Alcom* at p. 600, the fact that the bank account of the Colombian diplomatic mission which the respondents in that case sought to make the subject of garnishee proceedings would have been entitled to immunity from attachment under public international law, at the date of the passing of the 1978 Act, was not sufficient to establish that it enjoyed immunity under the Act; it made it highly unlikely that Parliament intended to require United Kingdom courts to act contrary to international law unless the clear language of the statute compelled such a conclusion; but it did not do more than this.
>
> 40. In the converse situation, however, in which there would be no immunity under customary international law, there is a more direct correlation between immunity under customary international law and the 1978 Act as a result of the enactment of sections 3 and 4 of the Human Rights Act 1998 and the application of article 6 ECHR, together with Article 47 of the Charter of

> Fundamental Rights of the European Union. As explained in *Benkharbouche*, any immunity granted to a State is necessarily incompatible with Article 6 as disproportionate if and to the extent that it grants to a state an immunity which would not be afforded in accordance with customary international law. Section 3 of the Human Rights Act requires that so far as it is possible to do so, legislation must be given effect in a way which is compatible with the Convention rights. This is an interpretative obligation of strong and far reaching effect which may require the court to depart from the legislative intention of Parliament, in accordance with the principles articulated in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 and *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264. The alternative remedy of a declaration of incompatibility under section 4 is a remedy of last resort (*Ghaidan* at [46], *Sheldrake* at [28]).”

The Judgment

21. The Judge noted that it was RSA’s case that if it is immune from the jurisdiction of the Admiralty Court in these proceedings, the Receiver will be obliged to deliver up the Silver to it without payment of salvage. The Judge observed that that was a stance which surprised him and would perhaps have surprised Sir Robert Phillimore who said in *The Constitution* [1879] 4 P. 39 at p. 46 that “it would be improper to suppose that any foreign government would not remunerate the services of salvors, taking proper means to establish what those services were.” The Judge noted that the resolution of that dispute, which turned on s. 239 MSA, was for another occasion. Before us, RSA made clear that its position was not that it had been entitled to the Silver without ever having to pay any salvage, but rather that the Silver should have been landed and declared in South Africa through whose waters it passed, and the rights to salvage adjudicated upon there, where no question of state immunity could have arisen; but that any claim to salvage there would now be time-barred.

22. The Judge’s reasoning in concluding that at the time the cause of action for salvage arose both the Vessel and the Silver were in use for commercial purposes can be summarised as follows.

    (1) It was common ground that s. 10 of the 1978 Act was passed to enable the UK to ratify the 1926 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels (“the Brussels Convention”). Article 3 of the Brussels Convention retained immunity for state-owned or operated ships only when “employed exclusively at the time when the cause of action arises on Government and non-commercial service”. This, the Judge held, was what was described in the more general language of the 1978 Act by the phrase “in use or intended for use for commercial purposes.” However, the whole of article 3 was difficult to interpret, and had been agreed at a time when the restrictive theory of state immunity in customary international law was in its infancy, such that the focus had to be on the language of s. 10, not the Convention.

(2) "In use or intended foruse" for commercial purposes must be given its ordinary and natural meaning having regard to its context: *SerVaas Inc v Rafidain Bank* [2012] UKSC 40, [2013] 1 AC 595 per Lord Clarke at [16].

(3) Vessels when at sea are in use for the purpose for which they are built, and in the case of cargo vessels, that includes the carrying of cargo. The task of applying the phrase "in use" to cargoes is not so easy because they are only put to the purpose for which they are grown or manufactured after the conclusion of the contract of carriage and when they are no longer on board.

(4) The surprising consequences of RSA's position were that ship and cargo would be immune from a claim in rem for salvage when they sank, notwithstanding that both vessel and cargo had been in use for commercial purposes immediately prior to sinking. The same would be true of a vessel which had become wreck by stranding, and its cargo which was salvageable. It was difficult to see why the fact that a vessel becomes a wreck should determine whether a state is immune from an action in rem for salvage in respect of its cargo. This cannot have been intended by Parliament when enacting the 1978 Act in order to give effect to the restrictive theory of state immunity. This suggested that Parliament did not intend to ignore the status of the vessel and cargo at the time when the vessel was carrying the cargo. On the contrary, if both the vessel and the cargo were in commercial use when carrying the cargo, that would usually identify the status of the vessel and cargo when the cause of action for salvage arose. It was therefore appropriate in this case to examine the status of the Vessel and Silver in 1942 in order to determine their status in 2017.

(5) It was common ground that the Vessel was in commercial use before she sank in 1942. The Silver was also then in commercial use because the use to which it was being put was being carried on a merchant ship, being carried pursuant to a contract of sale with the Government of India and a contract of carriage with the shipowner. If "in use" were to be understood in the sense contended for by RSA, very few, if any, cargoes would be in use during a voyage. If a state contracts for its goods to be carried by sea, a classic example of a commercial contract, there is no reason, pursuant to the restrictive theory of state immunity, why it should not be exposed to the same liability in salvage as a private owner of goods. Such a conclusion was supported by what Gross J said at [82] in *Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd (The Altair)* [2008] EWHC 612 (Comm), [2018] 2 All ER (Comm) 805, [2008] 2 Lloyd's Rep 90.

(6) There was no reason to conclude that the status of the cargo had changed between 1942 and 2017. In order for it to change there would have to have been some decision by RSA to change it, and there was none on the facts of this case. The Silver had in all probability been forgotten about by RSA, which did not actively consider what to do with it until after 13 October 2017 which was after the last date on which the cause of action in salvage is said to have arisen. The fact that the contract of carriage had come to an end was not a circumstance which of itself could effect a change to the status of the cargo.

It had only come to an end as a result of the sinking of the vessel and cargo to what was then an unsalvageable depth, which has nothing to do with the circumstances in which states are entitled to claim immunity pursuant to the restrictive theory.

(7) It was unnecessary to decide whether in 1942 the Silver was intended for use for commercial purposes. Use for Egyptian coinage was a commercial purpose and use for South African coinage was a sovereign purpose. Had he had to decide the matter, the Judge would have held that it was intended to be used substantially for the sovereign government purpose of South African coinage and accordingly was not intended for use for commercial purposes, by analogy with the position in *The Parlement Belge* (1880) 5 PD 197, as explained by Lord Cross in *The Philippine Admiral* [1977] AC 373 at pp. 391-392.

The parties' submissions

23. This appeal was listed for a two-day hearing. On the morning of the second day of the hearing, the Court raised the questions whether section 10(4) of the 1978 Act, on its true construction, applies at all to wreck, a legal term of art; and the related question whether, under the MSA, the Receiver has the power to determine salvage, and an obligation only to release property against a payment of salvage (or the provision of security), even if the owner can invoke state immunity in court proceedings. The hearing was adjourned to enable (i) the Receiver to intervene and (ii) the parties to apply to amend their appeal notices if they wished to address these questions. The Receiver and Secretary of State for Transport have intervened, RSA has amended its Notice of Appeal, Argentum has amended its Respondent's Notice and each of RSA, Argentum and the Interveners filed further skeleton arguments and addressed these additional issues at the resumed hearing of the appeal.

24. The arguments on each side ranged widely and to some extent changed during the course of submissions. I give a high-level summary by reference to the final positions taken at the adjourned appeal hearing.

RSA's submissions

25. In its original application, RSA's case was that neither the Vessel nor the Silver was in use or intended for use for commercial purposes at the time when the alleged cause of action arose in 2017. In its Appellant's Notice and original appeal skeleton argument, and at the initial appeal hearing, RSA accepted that the Vessel was in use for commercial purposes at that time. In its amended Notice of Appeal and at the resumed appeal hearing, RSA reverted to its position before the Judge, that the Vessel was not in use for commercial purposes in 2017. Its ultimate position on immunity was that:

(1) Argentum's cause of action (if any) arose in 2017 and it was irrelevant to consider the status of the Vessel or Silver in 1942;

(2) when Argentum's cause of action (if any) arose in 2017, the Vessel was not in use or intended to be used at all;

(3) at that time, 2017, the Silver was not in use or intended for use at all;

(4) moreover at that time the Silver was wreck not "cargo" and the Vessel was wreck not a "ship";

(5) it would be consistent with (and certainly not contrary to) the restrictive theory of state immunity for the RSA to be immune from the jurisdiction under section 1 of the 1978 Act and for that immunity not to be removed by section 10(4)(a): the only relevant activity in which RSA was involved for the purposes of the salvage claim was ownership of an asset that had lain on the seabed since 1942, which is an act of an entirely sovereign nature;

(6) the Silver was not in any event in use for commercial purposes in 1942 when on board the Vessel because (i) it was not in use at all and/or (ii) the Judge was wrong to treat putting the Silver on board the Vessel and having it carried to South Africa as being for the purposes of the contract of purchase or contract of carriage; the position was the reverse: the contracts were for the purpose of putting the Silver on board and having it carried;

(7) the intended use for the Silver in 1942 was a non-commercial use, being predominantly for the production of South African coinage;

(8) alternatively if (as the Judge found) (i) it is relevant to look at the status of the Silver in 1942; and (ii) the Silver was in use for commercial purposes in 1942:

(a) the weight to be attached to its actual use in 1942 should be minimal compared with the weight to be attached to its intended use; and

(b) the use (and intended use) of the Silver came to an end when it became wreck.

26. RSA also relied on article 25 of the Salvage Convention as providing immunity. However, when pressed in argument, Mr Smith KC accepted that if immunity was lost under s. 10(4) he could not succeed under article 25 as an alternative.

27. As to the powers and duty of the Receiver under the MSA, RSA argued that:

(1) the Receiver has no power to determine the amount of salvage due;

(2) the Receiver's obligation to require payment of salvage as a condition of release in s. 239 MSA arises only where it has been held to be due in court (if not agreed); if the salvor is unable to establish its claim to salvage in a court of competent jurisdiction, as Argentum is unable to do in this case by reason of RSA's state immunity, the Receiver is obliged to release the cargo to the owner without payment of salvage.

28. This was also the position of the Interveners on the MSA, who developed the points by subjecting the statutory provisions to a detailed analysis.

Argentum's submissions

29. Argentum's submissions as to immunity under the 1978 Act were, in summary, as follows:

(1) the 1978 Act must be construed in accordance with customary international law and the Brussels Convention;

(2) there is no immunity under customary international law: the existence of a maritime adventure is an essential foundation for a liability to pay salvage, and that maritime adventure is the relevant activity for which the state must establish immunity;

(3) the Brussels Convention removes immunity for all claims to salvage in respect of cargo carried on merchant ships, even where carried for non-commercial purposes;

(4) against this background the Judge was right in his conclusions on the application of s. 10(4):

(a) the Vessel and Silver were in commercial use in 1942; and

(b) mere inactivity by RSA in relation to the Silver could not amount to a change of that use by 2017 when the cause of action arose; what would be required would be a decision to change the use, and mere inactivity cannot have that effect.

30. As to the MSA:

(1) the Receiver has power to determine whether salvage is due and if so the amount; such power is implicit in ss. 239 and 248; the 1978 Act has no application to such determination because s. 1(1) confers immunity from the jurisdiction of "courts", an expression defined at s. 22(1) so as not to include the Receiver;

(2) in any event the Receiver has no power to release the salved wreck to the owner under s. 239 without paying salvage "due"; whether salvage is "due" is a matter of the substantive rights and obligations of the salvor and owner and is not affected by the procedural inability to enforce such rights in a suit against a state: state immunity bars the remedy, not the right;

(3) Argentum's ability to recover salvage is not determined either by whether RSA has state immunity from suit by Argentum, or by whether the Receiver has power to determine the amount of salvage; assuming both issues are resolved in favour of RSA, the Receiver still has an obligation to retain the Silver under ss. 226 and 239, and the dispute as to whether RSA is entitled to release can be determined in suit brought by RSA against the Receiver claiming possession, in which Argentum could pursue its claim for salvage with no question of state immunity arising because RSA would have submitted to the jurisdiction by commencing proceedings; if RSA chooses not to bring such a claim for release of the Silver there will come a time when it is to be treated as having abandoned its claim to ownership.

Discussion

The scope of s. 10(4)

31. Section 10(4) is concerned with claims in respect of state-owned cargo. Section 10(4)(a) is concerned with admiralty actions in rem against the cargo. Section 10(4)(b) is concerned with admiralty actions in personam for enforcing a claim in connection with cargo. Three aspects may be noted.

32. First, section 10(4)(a) is essentially concerned with salvage claims. The jurisdiction of the Admiralty Court is defined at s. 20 of the Senior Courts Act 1981, and in all such cases is exercisable in actions in personam (s. 21(1)). However an action in rem may only be brought in a more limited range of admiralty claims, which are defined in subsections 21(2) to (4). The only categories of claim falling within those subsections which are capable of supporting an action in rem against cargo are:

    (1) those identified in subsection (1)(s) which include claims for forfeiture of goods, restoration of goods after seizure and droits of admiralty; and

    (2) where there is a maritime lien or other charge on a cargo (subsection (3)). The common position taken by the parties before us was that a claim for salvage is the only category of claim giving rise to a maritime lien on cargo.

33. The parties agreed that category (1) cases will rarely arise. Section 10(4)(a) must therefore be approached on the basis that it is essentially addressed to immunity from in rem claims for salvage.

34. By contrast, s. 10(4)(b) is concerned with a very much broader range of claims, being all those within the in personam admiralty jurisdiction conferred by s. 20 of the Senior Courts Act. In personam claims against a state in connection with its cargo would include, for example, a shipowner's claim for damages for shipping an injurious or dangerous cargo; or for damage caused to a vessel by negligent stowage performed by the state's servants or agents. They also include an in personam claim for salvage (s. 20(2)(j)), which exists alongside the right in rem. The development of the maritime law cause of action in salvage was exclusive to the High Court of Admiralty which, unlike the common law courts, had power to give effect to the maritime lien by detention of the property. Nevertheless, it recognised a right in personam, which lies against the owner or anyone else with an interest in the salved property who benefits from the salvage: *The Two Friends* (1799) 1 C. Rob. 271, 277 per Sir William Scott; *Five Steel Barges* (1890) 15 PD 142, 146 per Sir James Hannan P; *The Port Victor* [1901] P 243, 255-256, per Lord Alverstone CJ; *Admiralty Commissioners v Owners of MV Josefina Thorden and her Cargo (The Josefina Thorden*) [1945] 1 All ER 344, 347 per Atkinson J; *Duncan v Dundee, Perth and London Shipping Co* (1878) 5 R 742 (Court of Session).

35. Since s. 10(4)(b) also applies to (in personam) claims for salvage, it follows that (a) and (b) must be interpreted consistently in relation to the existence or otherwise of immunity for salvage claims in respect of state-owned cargoes.

36. Secondly, with one important exception, s. 10(4) is concerned with voluntary, rather than contractual, salvage services. All salvage contracts will come within the wide definition of commercial transactions in s. 3(3)(a), and immunity will be removed by s. 3(1). The exception arises out of s. 10(6) which disapplies s. 3 to ships and cargoes owned by states who are parties to the Brussels Convention. In relation to such states, immunity is removed only, if at all, by s. 10 for contractual salvage services, as well as voluntary salvage.

37. Thirdly, it is to be noted that a different and narrower test is applied in s.10(4)(a) to loss of immunity for in rem (salvage) claims against state-owned cargo from that applied to in personam (salvage and other) claims in connection with such cargo in s. 10(4)(b). In the latter, the use or intended use of the cargo by its state owner is irrelevant to immunity; all turns on the use and intended use of the ship. Even in cases of sovereign use or intended use of the cargo, the state loses its immunity if the ship is in commercial use or intended for commercial use. Whereas for in rem proceedings, the state retains immunity if the cargo is in, and intended for, sovereign use, irrespective of the use or intended use of the ship.

The Brussels Convention

38. It was common ground between the parties that section 10 was intended to give effect to the Brussels Convention, and thereby enable the United Kingdom to ratify it, as Lord Sumption recognised in *Benkharbouche* at [10]. The UK ratified it on 3 July 1979. The Brussels Convention does not, however, itself establish customary international law, in 1926 or 1978, not having been ratified by more than a small proportion of the world's states engaged in international trade by sea.

39. The relevant provisions are as follows:

> "*Article 1*
>
> Sea-going vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.
>
> *Article 2*
>
> For the enforcement of such liabilities and obligations, there shall be the same rules concerning the jurisdiction of tribunals, the same legal action, and the same procedure as in the case of privately owned merchant vessels and cargoes and of their owners.
>
> *Article 3*
>
> §1. The provisions of the two preceding Articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a State, and used at the time a cause of action arises on Government and non-commercial service, and such vessels ships shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings in rem.

> Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity:
>
> 1. In case of actions in respect of collision or other accidents of navigation;
>
> 2. In case of actions in respect of assistance, salvage and general average;
>
> 3. In case of actions in respect of repairs, supplies or other contracts relating to the vessel.
>
> §2 The same rules shall apply to State-owned cargoes carried on board the vessels hereinabove mentioned.
>
> §3 State-owned cargoes carried on board merchant vessels for Governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to any judicial proceedings in rem.
>
> Nevertheless, actions in respect of collision and accidents of navigation, assistance and salvage, and general average, and actions on a contract relating to such cargo may be brought before the tribunal having jurisdiction under Article 2."

40. Articles 1 and 2 remove immunity for all state-owned/operated vessels and state-owned cargoes. Article 3 provides for exceptions to that lack of immunity, in effect containing the provisions which confer/preserve immunity. Article 3.1 applies to state-owned/operated ships. Article 3.2 applies the same principles to state-owned cargoes on state-owned ships. They provide for immunity but only from (1) seizure, attachment or detention by any legal process or proceedings in rem and (2) where the ship is used at the time the cause of action arises exclusively on Governmental and non-commercial service. There is a carve out (i.e. removal of immunity) for certain types of proceedings namely collision, accidents of navigation, assistance, salvage, general average and contracts relating the vessel including for repairs and supplies, but these are only carved out for claims brought in the state shipowner's own courts, and are not therefore the proper subject matter of state immunity in international law, which is concerned to prevent a state being subjected to the jurisdiction of the courts of other states.

41. Article 3.3 governs "State-owned cargoes carried on board merchant vessels". Its first paragraph confers immunity but only (1) in respect of seizure, attachment or detention by legal process or proceedings in rem and (2) where the cargo is carried for Governmental and non-commercial purposes. Unlike article 3.1 it does not use the language of "use" of the vessel, nor does it refer to the use for non-Governmental and commercial purposes being assessed at the time the cause of action arises. Its second paragraph carves out from immunity the enumerated classes of actions which are equivalent to those carved out in 3.1, but in this instance the immunity is removed for such actions "brought before the Court which has jurisdiction under Article 2", that is to say actions which could be brought in courts which would have jurisdiction if they were privately owned cargoes, which extends to courts other than those of the state owning the cargo.

42. There was a dispute as to the nature of the carve-out in Article 3.3 for the specified types of claims. Argentum argued that it was a complete withdrawal of immunity in respect of claims of this kind. RSA contended that it left in place the immunity from in rem proceedings conferred by the first paragraph of the article, but provided for a loss of immunity for in personam claims.

43. The structure of s. 10(4) indicates that the latter is how the drafter interpreted the Convention if, as is to be presumed, they were intending s. 10 to give effect to the Convention. Section 10(4)(a) does not remove immunity altogether in respect of salvage, one of the enumerated types of claim; on the contrary section 10(4) draws a distinction between in rem and in personam proceedings, and for in rem salvage proceedings, which are the subject matter of s. 10(4)(a), it provides that immunity may be preserved by reference to non-commercial use/ intended use of the cargo.

44. The drafter has also implemented the intention in the second paragraph of article 3.3 to exclude altogether immunity from in personam claims for the specified categories of claim, but has done so by using different language. The words in section 10(4)(b) "if…the ship carrying [the state-owned cargo] was…in use or intended for use [for commercial purposes]" were intended to reflect the words in article 3.3 "State-owned cargoes carried on board merchant vessels for Governmental and non-commercial purposes". This suggests that in s. 10(4)(b) the expression "use" of the "ship" "for commercial purposes" is intended to convey the concept of a merchant ship. That must also be its sense in s. 10(4)(a).

The nature and ingredients of a claim for salvage

45. Since 1995 a salvage claim arises in English law pursuant to the Salvage Convention, which is given the force of law by s. 224(1) of the MSA. However the Convention right is not exhaustive, as is apparent from s. 20(2)(j) of the Senior Courts Act 1981. There remains the cause of action for salvage under maritime law which had existed for many centuries prior to 1995. When the 1978 Act was enacted, salvage could only be claimed under maritime law. Section 10(4) must therefore be interpreted on the basis that it was addressed to the maritime law of salvage.

46. There are two aspects of the cause of action for salvage in maritime law which are of importance in interpreting s. 10(4). The first is the place of "cargo" within such cause of action. The second is the right to salvage of wreck.

Cargo

47. The cause of action for salvage in maritime law is an ancient one and peculiar to it. Before the coming into force of the Supreme Court of Judicature Act 1873, jurisdiction over claims for salvage under maritime law was exercised by the High Court of Admiralty. The Judges of that court developed the law upon "equitable principles and according to the rules of natural justice" (per Lord Stowell in *The Juliana* (1822) 2 Dods. 504, 521).

48. In *The Goring* [1988] 1 AC 831 at p. 845F-G Lord Brandon adopted the summary of the four classic ingredients of the cause of action articulated by Mr Antony Clarke QC in argument (p.833H) as being that (i) the services have been rendered as a volunteer;

(ii) the property which has been salved is a recognised subject of salvage; (iii) the property which has been salved was in danger at the time when the services were performed; and (iv) the services have resulted in the preservation of property of value. The decision in that case confirmed that the right to salvage was territorially restricted to salvageable property when at sea and in tidal waters below the high water mark.

49. The important ingredient for present purposes is (ii), namely that the property must be recognised as a proper subject of salvage. Articles 1(a) and (c) of the Salvage Convention allow a claim for salvage of any property not permanently or intentionally attached to the shoreline which is in danger in navigable waters. By contrast, the type of property recognised by maritime law as a proper subject matter of salvage was more narrowly confined, as explained by the Court of Appeal and House of Lords in the leading case of *Wells v The Owners of the Gas Float Whitton (No 2)* [1896] P 42, [1897] AC 337.

50. In that case a claim for salvage was made for rescuing a light buoy moored in the River Humber to warn vessels of a shoal, in the form of a 50 ft long hull mounting a gas-fed beacon, which had come adrift from its mooring. It was held that it was not a ship or vessel, and accordingly could not be a proper subject of salvage. The Court of Appeal and the House of Lords unanimously rejected the argument that the recognised subjects of salvage are not confined to ships and cargoes but extend to any property in peril which is committed to sea (see p. 339). In the House of Lords, speeches were given by Lords Herschell, Watson and MacNaghten, with all of whom Lord Morris agreed.

51. At p. 343, Lord Herschell said:

> "That a ship or vessel, with her apparel and cargo, and flotsam, jetsam and lagan, which have formed part of one or other of these, are subjects of salvage is clear law".

52. Flotsam jetsam and lagan, which Blackstone's Commentaries characterise as "uncouth appellations", were explained in *Sir Henry Constable's case* (1601) 5 Co Rep 106:

> "Flotsam, is when a ship is sunk or otherwise perished, and the goods float on the sea. Jetsam, is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish. Lagan (vel potius ligan) is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again."

53. Lord Herschell went on to reject, as did all the members of the Judicial Committee, the wider proposition being advanced that the Admiralty Court had jurisdiction to award salvage in respect of every object which has been saved from peril at sea. At pp. 345-6, in the conclusion to his speech, he confirmed that the Admiralty jurisdiction was confined to ship and cargo, or that which has formed one of them, and should not be extended. In relation to cargo he had also said at pp. 344-5

> "Some of the cases relied on related to the rescue of things which, having been in tow of vessels, had broken loose and were in peril. Where goods are being towed from place to place, although they are not, strictly speaking, cargo, they yet partake of its character and are closely analogous to it. They are being transported from place to place by a vessel. Their transport is a maritime adventure of precisely the same nature as the carriage of goods in the body of a ship. All the grounds of expediency in which the law of salvage is said to have had its origin would seem to apply to the one case as much as to the other. It may be, then, that in salvage law a broad and liberal construction should be extended to the word "cargo," so as to embrace goods in course of being transported by a vessel though not inside it. I desire to reserve my opinion on the point, in case it should hereafter be necessary to decide it. In the present case it is quite unnecessary."

54. Lord Watson said at p. 348 that the subjects of maritime salvage had been correctly identified in the clear and exhaustive judgment delivered by Lord Esher MR on behalf of the Court of Appeal. Lord Watson's own summary of that judgment at p. 347 was:

> "Shortly stated, the judgment of Lord Esher M.R. is to the effect that there are no proper subjects of a maritime claim for salvage other than vessels or ships used for the purpose of being navigated, and goods which at one time formed the cargoes of such vessels, whether found on board, or drifting on the ocean, or cast ashore."

55. Although that is an accurate and pithy summary, it is worth quoting Lord Esher's judgment more extensively, because it is of importance to the conclusions which I have reached. At pp. 49-53 he said:

> "The second point, therefore, is, what is the jurisdiction of the High Court of Admiralty as to salvage, ascertained from its practice and judgments and from statutes? As to its practice and judgments, irrespective of statutes, it seems to be one uniform continuous statement by judges and writers of authority that the jurisdiction as to salvage is exercised in respect of a ship, her apparel, and her cargo; of freight in danger, and saved by reason of the saving of the ship or cargo; and of flotsam, jetsam, or lagan, being each of them part of the cargo of a ship. Lord Tenterden (Abbotts Treatise on Merchant Ships and Seamen 5th ed. 397) thus expresses it: It is "the compensation that is to be made to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of salvage." In Park on Insurance, chap, viii., on Salvage (8th ed. vol. i. p. 300), "Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies." In Kent's Commentaries (12th ed. vol. iii. p. 245), "Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict or recapture. . . . The equitable doctrine of salvage came from the Roman law, and it was adopted by the Admiralty jurisdictions in the different countries of Europe." In Parsons' Law of Shipping, chap, viii., of Salvage (vol. ii. p. 260), "In Admiralty, and generally in the law merchant, it means the compensation which is earned by persons who

voluntarily assist in saving a ship or her cargo from peril." In Williams and Brace's Admiralty, 2nd ed. p. 114, chap, vi., on Salvage, "Salvage is the reward payable for services rendered in saving property lost at sea, or in saving any wreck, or in rescuing a ship or boat, or her cargo, or apparel, or the lives of the persons belonging to her, from loss or danger." In Mr. Carver's book (The Carriage of Goods by Sea 2nd ed. P. 327) (which will be the Abbott on Shipping of the future), chap, xi., on Salvage and Wreck, s. 322, "By the common law, one who saves, or helps in saving, a vessel to which he is a stranger from danger at sea, is entitled to a reward for his services. . . . So, also, with regard to cargo or other property belonging to a vessel at sea which is rescued from danger, whether while in the vessel or after having been thrown or washed out of her; those who rescue such property are entitled to reward, and to a lien upon the property for that reward. The reward thus payable to these salvors is called salvage." There is no word used by any of these writers which mentions any subject or object as the subject or object of salvage under the common law jurisdiction as to salvage of the High Court of Admiralty, other than the ship, her apparel, or cargo, or the wreck of them. If in Williams and Bruce more is meant by the phrase " property lost at sea," the statement is, in the notes, made to depend on the authority of American cases, which will be discussed hereafter. In the last treatise on the subject of salvage—Kennedy on Salvage—the case is thus stated (p. 2) :"A salvage service, in the view of the Court of Admiralty, may be described, sufficiently for practical purposes, as a service which saves or helps to save maritime property—a vessel, its apparel, cargo, or wreck—or the lives of persons belonging to any vessel, when in danger," &c. The learned author then quotes the American cases as to rafts of timber, but observes: "There does not appear, however, to be any reported case in which the English Admiralty Court has awarded salvage for the preservation of any but such maritime property as is included in the suggested description." So far, therefore, as the text-writers are to be considered, if the extended meaning of the subject-matter of salvage in the High Court of Admiralty in its original or common law jurisdiction is that which is asserted on behalf of the plaintiffs in this case, all the text-writers but two have overlooked it, and of the two one founds it solely on the American cases, and the other cites those cases but questions them. If we go further, and examine the sources of the English law, as, for instance, the laws of Oleron, Wisbuy, and others, every article in them treats of ships and what concerns them, and of nothing else. For example, art. 43 of the Laws of Oleron, "In all other things found by the sea-side which have formerly been in the possession of some or other, as wines, oil, and other merchandise, although they have been cast overboard, and left by the merchants," &c. So in the most valuable and remarkable code known as the Ordinance of Louis XIV., of August, 1681, the whole of more than 100 sections deals with ships and the affairs of ships only, and with the wreck of ships or effects, called shipwrecked effects. 1 See s. xlv., headed "Wrecks and Ships Run Aground." (See A treatise of the Dominion of the Sea and a compleat body of the Sea Laws, 3rd ed. Pp. 349 to 356). In the Black Book of the Admiralty there is no passage to indicate anything but ships and the conduct of them. In the Wisby No. 2. Town-law on Shipping, ch. xiii., headed "Of things found on LOKI Esher M.R. the sea," runs thus: "Should a man find goods driving on the sea, where he can see no land, should he bring these things to land, he shall have half for his labour; if he could see the land he shall have a third part.

Sect. 1: Should a man find goods on the ground where he has to use oars and hooks, he shall have the third part. Sect. 2 : Should a man find a ship driving on the sea and no people are in it, and he brings it to land, of that which results from it, whether from the ship or from the goods, he shall have half, and it shall remain outside the City's bounds. Sect. 3: Should a man find goods driving to land to which he can wade, he shall have of them the eighth penny; so likewise should a man find goods driven on to the shore he shall have the eighth penny therefrom. If any one denies that he has found such goods, and is afterwards convicted of it, that is theft." Reading the word "goods" here subject to the context of all the other clauses, it must, I think, mean goods which have been on a ship. The truth is that no merchant or legislator ever imagined goods at sea which had got there without having been in a ship. Then, turning to what is, after all, the chief source from which the jurisdiction of the Admiralty Court is to be ascertained, namely, the decisions of the English Courts, we begin with *Sir Henry Constable's Case*, which defines what is "wreck of the sea," …… In *Hartfort v. Jones* (1 Ld Raym 393) Holt C.J. held in favour of a lien as against an action of trover, the lien being claimed for salvage services; that is, being an Admiralty lien. But those services were alleged to be for saving the goods from a ship which took fire, and that they hazarded their lives to save them. In *Nicholson v. Chapman* (2 H. Bl. 254) an action of trover was brought in respect of a quantity of timber placed in a dock on the banks of the Thames, but, the ropes accidentally getting loose, it floated, and was carried by the tide. It was saved, and the defendants refused to deliver it until salvage was paid. Eyre C.J. and the Court held that the saving of it was not such salvage as the law recognises, i.e., in the Admiralty or the Common Law Courts. "The question" is, said the Lord Chief Justice, "whether this transaction could be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river ... may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving; and that our law has also provided that this recompense should be a lien upon the goods which have been saved." He then goes on to say that goods carried by sea are exposed to danger, &c, and that the recompense is dictated by principles of public policy recognised in civilised and commercial countries. He then continues: "Such are the grounds upon which salvage stands; they are recognised by Lord Chief Justice Holt in *Hartfort v. Jones*. But see how very unlike this salvage, (i.e., in *Hartfort v. Jones*) is to the case now under consideration." The difference thus alluded to evidently is that in the earlier case the goods were saved from a ship on the sea; in the later case the goods were never on the sea at all. In the case of a *Raft of Timber* (2 Wm. Rob. 251) Dr. Lushington refused to issue a monition, i.e., a summons, calling upon the owner of the raft to shew cause why salvage should not be awarded. It is said that the question was only as to the locality in which Lord Esher M.R. the services were rendered. But Dr. Lushington also relied upon the nature of the object. "This," he said, "is neither a ship or sea-going vessel; it is simply a raft of timber." There is no case in any English Court in which the question of salvage reward has ever been entertained unless the subject of the salvage service was a ship, her apparel, or cargo, or freight, which is peculiar to ships, or wreck of a ship or her cargo, or, by statute, the life of a person in danger, because the person has been on board ship. It follows that no jurisdiction of the Admiralty in England can be carried, by

> reason of the practice or judgments of the Admiralty or any other Court, beyond a claim for salvage in respect of the subjects and objects above named."

56. In the House of Lords, Lord MacNaghten did "not think it possible usefully to add anything to the very able and exhaustive judgment of the Master of the Rolls"; and said that Lord Esher's judgment satisfactorily disposed of the "suggestion that salvage extends to all goods found in peril at sea however they may have got there."

57. It is, therefore, clear that, leaving aside ships and their apparel and freight, 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 what Lord Herschell described as a maritime adventure (in the context of it extending to towed cargoes).

58. In Kennedy & Rose *Law of Salvage* 10th edn., the law is stated to require "maritime circumstances" as a separate ingredient of the cause of action: paragraph 1-001; and that this requires a maritime adventure (paragraphs 3-022, 3-023). If by this is meant that for property to qualify (other than the ship or ship's apparel or freight), it must be, or have been, cargo on a ship in maritime circumstances, it is fully supported by *The Gas Float Whitton (No 2)*.

59. This ingredient is also implicit in the statements of policy which are said to justify the maritime claim for salvage, which has no counterpart in the law of restitution. For example, in *Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch. D. 234, Bowen LJ said at pp. 248-9:

> "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.
>
> There is an exception to this proposition in the maritime law. I mention it because the word "salvage" has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

60. The references to "the advantage of trade" and "mercantile enterprises" capture the concept of the maritime circumstances which are an element of the cause of action in salvage.

Wreck

61. Wreck is used in everyday language to refer to debilitated vehicles. In maritime law it is a more narrowly defined term of art, which applies to cargoes as well as vessels.

62. Wreck is defined in s. 255 of the MSA as including "jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water."

63. "Derelict" is a term of art applying to a vessel if it has been abandoned with no hope or intention of recovering it: *Cossman v West* (1887) 13 AC 160 (PC), 180, 181; *Bradley v Newsom* [1919] AC 16, 24-25; *Court Line v The King* (1945) 78 Lloyd's Rep 390, 396 Col 2; *Pierce v Bemis (the Lusitania)* [1986] 1 QB 384, 388D.

64. A cargo also becomes "derelict" and therefore wreck by the same criteria, that is to say if it is abandoned with no intention or hope of recovering it: *The King v Property Derelict* (1825) 1 Hagg. 383; *HMS Thetis* (1835) 3 Hagg 228, 235, 166 ER 390, 393; *The Lusitania* at p. 389D-E; *R (Knight) v Secretary of State for Transport* [2017] EWHC 1722 (Admin).

65. Many of the successful claims for salvage over the centuries have involved salvage of wreck. An example in relation to a cargo of gold coin is *HMS Thetis* (sup.). Indeed one of the reasons why there is so much case law on the question of "derelict" is that more liberal remuneration was usually given if the vessel was a derelict: *Bradley v Newsom* per Lord Finlay LC at p. 26.

66. If the drafter of the 1978 Act had thought that salvage for wreck was covered by a comprehensive regime under the Receiver's powers (then under the Merchant Shipping Act 1894), with immunity also catered for under that regime, it would be permissible to approach the construction of s. 10 on the basis that it was not intended to apply to wreck. It was for that reason that we asked to be addressed on the Receiver's powers and the MSA regime. Having heard argument, I am satisfied that the Receiver does not have power to determine the amount of salvage, for the reasons explained by Elisabeth Laing LJ. Moreover, the argument that the Receiver has such powers was not that they were expressly conferred by statute, but merely that they were implicit in other provisions. I do not, therefore, think that the drafter of section 10(4) can have intended to exclude from its scope salvage of wreck, which forms a substantial part of the maritime law of salvage.

67. In this connection Mr Smith drew attention to the distinction which is drawn in s. 226(1)(a) and (b) of the MSA between cargo and wreck, and the fact that the Receiver is given different powers in relation to cargo and wreck, including in particular powers under s. 233 for the purposes of preservation of cargo, which it is said are aimed at preventing cargo becoming wreck. I am not persuaded that "cargo" is used in these provisions to exclude wreck. But even if it were, the distinction would make sense in the context of provisions containing powers to preserve cargo. The distinction cannot be translated to s. 10(4) of the 1978 Act which is concerned with salvage, which applies equally to cargo before and after it becomes derelict.

68. It follows that the drafter of s. 10(4)(a), which applies in essence to salvage claims, must have intended it to apply to ships and cargoes which had become wreck. The "use" and "intended use" of both ship and cargo must be construed in that context.

69. For this reason I reject Mr Smith's submission that the subsection does not apply on the grounds that the Silver was wreck not cargo, and the Vessel was wreck not a ship. Derelict ships and cargoes have historically been a major subject of maritime claims for salvage , and were not intended by the drafter of s. 10(4) to be excluded from the scope of the subsection. Derelict ships and derelict cargoes remain ships and cargoes for the purposes of the subsection.

The correct construction of s. 10(4)(a)

70. Against this background, it is necessary to identify the point of time at which the use or intended use of vessel and cargo is to be assessed, which turns on the correct interpretation of the governing phrase "at the time when the cause of action arose". In my view it must be referring to the point of time at which *the relevant aspect* of the cause of action for salvage in maritime law arises, not when the cause of action is complete with the occurrence of the last ingredient. The ingredient of the maritime law cause of action in salvage to which use of ship or cargo is relevant comprises the maritime circumstances which make the property a recognised subject matter of salvage. This is necessarily directed to the circumstances before the salvage services were required and rendered. In the case of salvage of goods, the relevant ingredient is that the goods involved should have had the status of "cargo", which depends upon use of a vessel, and of goods connected to it, prior to the commencement of salvage services. Accordingly the inquiry as to use for the purposes of s. 10(4) focusses on the point of time when the goods have their status as "cargo", before salvage takes place, so as to make them a recognised subject matter of salvage at the later point of time when the salvage services are rendered.

71. This enables the expression "in use or intended for use for commercial purposes" to be given its ordinary and natural meaning having regard to its context, as Lord Clarke stated was the correct approach to the equivalent phrase in s. 13(4) of the 1978 Act in *SerVaas* at [16]. By contrast, RSA's argument does not seek to put any sensible meaning on the words "in use or intended for use", applied to either ship or cargo, in respect of salvage of wreck. It simply asserts that wrecked ship or cargo is not in use.

72. As I go on to explain, this interpretation is supported by the word "cargo"; the word "carrying"; the word "use" applied to both vessel and cargo; the Brussels Convention; customary international law; and the operation of s. 10(6); all in the context of the subsection applying to salvage of wreck.

"cargo"

73. The first question which must be asked for the purposes of the application of s. 10(4) is whether the action in rem is against a "cargo"; if not the section has no application. Section 10(4)(a) does not refer to actions in rem against property, but to actions in rem against cargo. This is because the maritime cause of action does not arise in relation to property generally; in order to be the proper subject matter of a maritime law claim for salvage, the property must be or have been cargo before it comes into danger. This inquiry, therefore, is necessarily addressed to the point of time before the commencement of the salvage services.

74. This is also the reason why I cannot accept Mr Smith's argument that the only activity relevant to Argentum's claim for salvage against RSA is the latter's status as owner of the Silver. It is not ownership of property generally which founds the maritime cause of action, but ownership of cargo, which is then salved. That is why by its terms s. 10(4) is only concerned with cargo, not other property. What renders RSA liable to salvage (if it is liable) is not merely its ownership of the Silver, but also the Silver being properly characterised as its "cargo", which itself requires an inquiry which looks back to the point before salvage occurred.

"carrying"

75. The word "carrying" in the phrase "both the cargo and the ship carrying it" is used to identify the ship whose use or intended use is to be examined for immunity purposes. It is not an additional criterion for the application of the subsection. In many cases of salvage the "carrying" will have been terminated or interrupted by the casualty which made the salvage services necessary. That will almost always be the case for wreck. In cases of derelict, in which the vessel and cargo have been abandoned, the vessel will no longer be carrying the cargo anywhere by the time the salvage services commence. So too cases of flotsam, jetsam and lagan or indeed any cargo which has become detached from the vessel and is lying on the seabed. It cannot sensibly make a difference to the application of s. 10(4) whether the salved cargo remained within the ship or had fallen on the seabed beside it. The function of the word "carrying" is simply to identify the ship whose use or intended use is to be examined. This identifying function means that the inquiry must necessarily be directed at a point of time when the cargo was a cargo being carried. It is only by looking at the carrying of cargo at that point of time that the relevant vessel can be identified. Again, therefore, the inquiry is addressed to the point of time before the cause of action in salvage is completed by the rendering of the salvage services.

"*Use of the cargo*"

76. Just as the word cargo dictates a backward-looking inquiry into what makes the property something which can properly be described as cargo, so too the "use" of the cargo must look to the same point of time, that is to say its use prior to the commencement of salvage services. Since section 10(4)(a) is primarily concerned with salvage, and salvage must include salvage of wreck which involves an abandonment of any hope of recovering the cargo, it makes no sense to inquire into the use that the cargo owner may be making of the cargo at the time the salvage services are rendered or completed. At that time the cargo has ex hypothesi been abandoned if it is derelict, and so will not be in use at all by the cargo owner. "Use" must refer to a time when the cargo was in use prior to it becoming wreck, which is necessarily before the completion of the cause of action for salvage of wreck.

"*Use of the ship*"

77. It was common ground between the parties by the conclusion of the hearing that "use" and "intended use" of the vessel referred to use of the vessel by the cargo owner, not by the vessel owner or operator (although the latter had been Mr Smith's contention until a volte face in his oral reply submissions). I agree. Section 10(4) is concerned with the immunity of a state cargo owner, and it must be the activity of that state

cargo owner, not a third party, which determines the existence or otherwise of immunity. This is reinforced by section 10(4)(b), in which for actions in personam, including in personam actions for salvage, use or intended use of the cargo is irrelevant and the sole determinative factor is use of the vessel.

78. For similar reasons, use of the vessel cannot be a reference to use by the salvor. Moreover the equiparation by the drafter of s. 10(4) of the vessel being "in use for commercial purposes" with the concept of a merchant vessel in the Brussels Convention, rules out interpreting it as use by a salvor, because use by a salvor of a wreck in the course of salvage services would not affect the question whether the vessel was "a merchant vessel". A salvor would be using a wrecked vessel for the commercial purposes of salvage even if she were not a merchant ship but a state-owned ship in use for sovereign, non-commercial purposes.

79. In cases of wreck, it is meaningless to inquire for what purpose the cargo owner is using the vessel at the time the salvage services are rendered; if the vessel is wreck, it has been abandoned without any hope of recovery. Again the inquiry into use or intended use of the vessel must be addressed to a point of time before the cause of action is complete, before salvage services are rendered.

The Brussels Convention

80. Article 3.3 of the Brussels Convention does not contain any temporal phrase equivalent to "when the cause of action arises". It simply addresses the subjection to seizure, attachment, detention or judicial proceedings of "cargoes carried on board merchant vessels for Governmental and non-commercial purposes". However the equiparation of the vessel being "in use for commercial purposes" in s. 10(4)(a) and (b) with the concept of a merchant vessel in article 3.3 of the Brussels Convention, points to the relevant time being before the salvage services are rendered. Vessels will usually have acquired their status as merchant ships by reference to the use being made of the vessel before they are in danger and can benefit from salvage services.

Customary international law

81. I agree with the Judge that the consequences of RSA's arguments are surprising, in that ship and cargo would be immune from a claim in rem for salvage when they sank, notwithstanding that both vessel and cargo had been in use for commercial purposes immediately prior to sinking; and that the same would be true of a vessel which had become wreck by stranding, and its cargo which was salvageable. They are surprising consequences because they would afford immunity where none would exist under the restrictive theory in customary international law. For the purposes of the latter it is necessary to identify the act or activity upon which the claim is founded, which is what must then be assessed as being sovereign or commercial; and it is the nature of the act not its purpose which falls to be assessed: *I Congreso* per Lord Wilberforce at pp. 263C, 263G and 267B-C. What exposes a state cargo owner to salvage in such cases as the Judge referred to is the commercial use of a vessel to carry the cargo, which exposes it to the risk of having to pay salvage if it is saved from danger to the cargo owner's advantage. That is the activity of the cargo owner upon which the salvage claim is based, not, as I have explained, mere ownership at

the time the salvage services are rendered. That activity is non-sovereign and does not attract immunity under customary international law.

82. It was no doubt in order to avoid these unpalatable consequences that at the initial hearing on the appeal, Mr Smith conceded that the vessel was in use for commercial purposes in 2017; but he was unable to give any cogent explanation as to how that was so if, as he submitted, the question arose at the time of completion of the salvage services. If the relevant use of the vessel was by the shipowner, as he was then contending, it is difficult to see how the owners of the Vessel, having been paid out on their insurance, and abandoned the Vessel at the bottom of the sea in 1942 could be said to be using it for any purpose long after the contract of carriage had been frustrated; still less so the UK Government who became the owners by paying the insurance; and if, as Mr Smith subsequently adopted for the first time in his reply speech, the relevant use of the vessel is by RSA, it is equally difficult to see how RSA was doing anything with the Vessel during or at completion of the salvage operations. By this time Mr Smith had abandoned his earlier position on use of the ship and was contending, consistently, that the Vessel was not in use in 2017 during salvage or at its completion. However this left RSA with the surprising and unpalatable consequences of its argument, to which the Judge referred.

Section 10(6)

83. A similar point arises from the operation of s. 10(6) of the 1978 Act. The effect of s. 10(6) is that where cargo is owned by a state which is a party to the Brussels Convention, and the state enters into a contract for salvage services, immunity is only lost, if at all, under s. 10(4); section 3, which in other cases removes immunity for contractual salvage, is disapplied. If RSA's argument were correct, s. 10 does not remove immunity from such a contractual salvage claim where the cargo is being carried for a commercial purpose on a merchant vessel pursuant to a commercial contract of carriage, because the Convention state cargo owner is not using the vessel or cargo when the salvage services are completed. This would be a most surprising result, and again inconsistent with customary international law. If, however, s. 10(4)(a) is to be interpreted as I have suggested, it would remove immunity in such a case in just the same way as it does for voluntary salvage for non-Convention state-owned cargoes.

Article 25 of the Salvage Convention

84. The Salvage Convention was not concluded until 1989 and not given effect in domestic law until 1995; it cannot therefore inform the proper interpretation of the 1978 Act. Nevertheless I do not read Article 25 as applying a different temporal point to the inquiry. It provides:

> "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 recognised principles of international law."

85. The customary international law principles are to be applied to "non-commercial cargoes" which necessarily focuses on their status as "cargoes" before they became wreck; and the question is whether the state is entitled to immunity under customary international law "at the time of the salvage operations" which must focus on the status of the cargo as a non-commercial cargo when the salvage operations commence, not when the cause of action is complete by the completion of the salvage services. Its status as a non-commercial cargo (or otherwise) will be determined by reference to the circumstances in which it came to be a cargo.

Section 3 Human Rights Act

86. I have reached this conclusion as to the proper interpretation of s. 10(4)(a) without the need to resort to s. 3 of the Human Rights Act. I would, however, have been prepared to read down s. 10(4) to give it this effect in accordance with section 3, had it been necessary, in order to avoid the subsection conferring immunity where none would be afforded under customary international law.

Section 10(4)(a) applied to the facts of the case

87. The focus, then, is on the ingredient of Argentum's salvage claim which is concerned with whether the Silver was a recognised subject of salvage. The maritime circumstances which comprise that ingredient were no different when the salvage commenced in 2017 from those which existed at the moment in 1942 when the Vessel and Silver went to the seabed. No distinction is to be made between the moment when the Vessel suffered the casualty and the moment when the Silver became derelict by abandonment of hope of recovery by RSA, which it is to be inferred took place shortly after the sinking in 1942: wreck as a recognised subject matter of a claim for salvage depends upon the maritime circumstances which preceded it becoming derelict. Moreover the mere passage of time between cargo becoming derelict and the commencement of salvage services does not affect whether it is a recognised subject of salvage. It makes no difference whether it was salved within hours of becoming wreck or after 75 years.

88. Accordingly the use and intended use of the Vessel and Silver which it is necessary to examine are those at the time the Vessel sank in 1942, when the Silver was a cargo. The Silver was a cargo in maritime circumstances then because it was being carried on the Vessel. That is what makes the Silver a recognised subject of salvage for the purposes of the maritime law claim.

Use of the Vessel

89. As to the use of the Vessel in 1942, it was common ground that it was for commercial purposes. That had been conceded by RSA on the basis that the relevant use was by the shipowner. Now that it is recognised that the relevant use must be RSA's use of the Vessel, not that of the shipowner, the conclusion remains the same: RSA entered into the contract of carriage, and contracting with a merchant ship for carriage of goods by sea is "for commercial purposes" within the meaning of s. 10(4), because the contract of carriage is a transaction falling within s. 3(3)(a).

Use of the Silver

90. As to the use of the cargo by RSA in 1942, I agree with the Judge that the Silver was in use by RSA for commercial purposes when it was on board the Vessel. The use consisted of RSA making arrangements for the Silver to be put on board the Vessel and carried to South Africa by sea. That was the use which gave it its status as "cargo" for the purposes of a maritime law claim in salvage. The activity involved in making these arrangements was (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 aspects were non-sovereign activity under customary international law, and both were activity for commercial purposes within s. 3(3)(a) of the 1978 Act, and consequently within s. 10(4)(a). Such arrangements would normally include, additionally, communications with sellers and shipowners in relation to performance of the contracts. For example, fob buyers would normally have to nominate the vessel to the sellers and its loading date/range. This would be commercial activity under s. 3(3)(c). It is not clear whether that also occurred in this case where the contract of carriage with the shipowners was arranged by the sellers themselves, on behalf of RSA.

91. It is no answer to say, as RSA argued, that the transportation was not for the purposes of the contracts, but rather the reverse, i.e. that the contracts were for the purposes of the transportation, and the transportation was pursuant to the contracts, not for the purposes of them. 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. They were also the means by which RSA caused the Silver to become cargo.

92. I would not accept RSA's argument that this is to give the expression "in use for commercial purposes" a meaning other than its "ordinary and natural meaning having regard to its context" in the words of Lord Clarke in *SerVaas*. Context is everything, and here the context is property which is to be transported in a ship in order to qualify as "cargo"; and for the purposes of an inquiry into whether the circumstances which render it "cargo" constitute commercial purposes, as defined in the 1978 Act. A property owner can readily be described, in normal language, as using his goods in getting them from A to B. Use cannot in this context be confined to physical handling. The Silver in this case was in motion over the sea when the Vessel sank. RSA, as cargo owner, created those circumstances for its cargo. To say that a cargo owner creating those circumstances for its cargo is using its cargo is, to my mind, a perfectly natural use of language. Conversely, if one were to put the antithetical question, "is cargo on board a ship property of which the cargo owner is making no use?" the natural response would be in the negative.

93. RSA's argument that the Silver was not in use at all, for any purpose, by RSA when on board the Vessel would deprive the word "use" of any substantial content in s. 10(4)(a) in relation to cargoes. Mr Smith gave only one example of when a cargo owner, on his case, might be using a cargo whilst being carried on board a ship, namely an LNG cargo whose vapours were used by the shipowner (presumably at the behest of, or at least with the consent of, the cargo owner since it is use by the cargo owner not the shipowner which is relevant). One might imagine other possible situations, such as the use of a cargo of sand to put out a fire, or the transfer of a

liquid cargo between tanks for the purposes of trim. But it is unrealistic to think that the word "use" was aimed at such remote possibilities.

94. Mr Smith argued that even if "use" did not have any substantial content in relation to cargoes when on board a ship, the subsection nevertheless admitted of a coherent construction: the words "in use or intended for use" apply to both cargo and the ship carrying it. Use could be addressed solely to the use of the ship and intended use addressed to the cargo. Whilst this is a possible linguistic construction, it is not the natural reading of the language used.

95. There are, moreover, further difficulties, which in my view make this interpretation untenable. Under customary international law, to which s. 10(4) is intended to give effect, the sovereign/commercial test applies to the nature of the activity being undertaken, not its purpose, as the citations from the speech of Lord Wilberforce in *I Congresso* to which I have referred earlier make clear. This is mirrored in the language of the 1978 Act which identifies what is sovereign and what commercial in section 3 by reference to "transactions" and "activities". Use of cargo, rather than its intended use, must therefore be the essential focus of the provision for state-owned cargoes, because it addresses the nature of the activity, not its purpose. To give the word "use" no substantial content is to depart from customary international law by giving no weight to the nature of the activity in question. The argument that the effective operative words for the cargo are intended use, not use, is to give a meaning to the section which is contrary to customary international law.

96. It is true that the subsection applies the concept of intended use to the cargo, as well as use. It removes immunity, even in the case of sovereign use, if the intended use is commercial. In doing so it goes beyond customary international law in its narrowing of the scope of state immunity, as any state is free to do by its domestic legislature. But the converse is not the case in this country, by reason of the Human Rights Act. Section 3 of that Act requires the subsection to be read as giving substantial content to the word use because otherwise immunity would be granted to prevent access to our courts for an in rem claim where there would be no immunity under customary international law.

97. Moreover, the specific context of subsection 10(4)(a) is salvage, including salvage of wreck. The intended use of the cargo on completion of the voyage is legally and logically irrelevant to such a claim, which arises before completion of the voyage. The maritime cause of action in salvage depends upon the property being cargo when on board the vessel, which demands an inquiry as to use at that time, not intended use thereafter. If the subsection were only essentially concerned with the intended use of the cargo following discharge at destination, immunity would depend upon something entirely irrelevant to the cause of action with which the subsection is essentially concerned.

98. Unlike Elisabeth Laing LJ, I do not find this construction counterintuitive. A state which contracts to buy and transport in a merchant ship any form of military equipment or necessaries, whether they be boots, armaments or rations, is engaged in activity which is not sovereign but commercial, irrespective of the ultimate purpose of that activity. That is so under customary international law: what such a state is doing in engaging in the activity of having the goods transported under a commercial

contract of carriage is of a character which any private individual might undertake. That is also the case under domestic law by reason of s. 3 of the 1978 Act. Where a state uses its own warship to carry military equipment or armaments, or requisitions a ship to do so, the activity is sovereign; but even in such cases, s. 10(4)(a) removes the immunity if the intended purpose is non-sovereign, as it would be, for example, if the state were intending to sell on the cargo at a profit, or where a cargo of grain for commercial sale were carried on a state owned vessel.

99. I do not find any support for a contrary view in article 3.3 of the Brussels Convention. The words "for Governmental and non-commercial *purposes*" in the Brussels Convention do not mandate an inquiry only as to intended use rather than use. I agree with Elisabeth Laing LJ that to ask whether a cargo is being carried on a ship "for commercial purposes" is an inquiry as to why it is there. But to ask "why is it being carried" does not distinguish between use and intended use. The question may admit of two answers, one being how it came to be there and the other being what was intended to be done with it thereafter. The former is the relevant question because the context is salvage and what makes property cargo; against that background, the answer to why the Silver was on the Vessel as a cargo is not that it was intended for coinage but that it was put on board for carriage to South Africa under commercial contracts of purchase and carriage. That is what meant it was being carried for commercial purposes. I would regard that as an interpretation which is consistent, at its lowest, with the use of the word "purposes" in the Brussels Convention.

100. I am also unable to agree with Elisabeth Laing LJ's view that the existence of an in personam claim for salvage, for which immunity is removed by s. 10(4)(b), renders a construction of s. 10(4)(a) which retains immunity from in rem claims for salvage of cargoes on merchant ships a permissible one. Two considerations arise. First, what distinguishes the action in personam from the action in rem is that in the latter (i) jurisdiction is established by the presence of the res within the jurisdiction, upon which the claim form can be served; and (ii) the res may be detained and sold so as to provide security for the claim and effective enforcement of a judgment. Section 10(4)(a) is concerned solely with the first of these, the establishment of jurisdiction, which is the adjudicative aspect of an action in rem; detention and sale are subject to the enforcement rules on immunity contained in section 13. It is therefore no answer to a construction of s. 10(4)(a) which maintains immunity for an action in rem to say that s. 10(4)(b) permits an action in personam, because it does not do so by providing for the adjudicative jurisdiction to be established by service on the res. It curtails the adjudicative jurisdiction notwithstanding the potential availability of an action in personam. Secondly, the ability to pursue an in personam claim depends upon the exercise of a discretion as to whether to permit service out of the jurisdiction on the foreign state, having regard to traditional forum conveniens factors. Whether they would be fulfilled in this case has not yet been investigated or established in an inter partes hearing. It is not obvious that the mere presence of the Silver in the UK, to which Argentum brought it, would make England the forum conveniens; and in any event, whatever the position on the facts of this case, it could not be said that recourse to the court could be had by an in personam claim in all cases where an in rem remedy was available.

101. In *The Altair* Gross J expressed the view that cargo was in use for commercial purposes in analogous circumstances to the present case. That case concerned a challenge on state immunity grounds to an award of salvage pursuant to a contract on the terms of Lloyd's Standard Form of Salvage Agreement, commonly known as Lloyd's Open Form or LOF, pursuant to which a vessel laden with wheat had been refloated. The Grain Board of Iraq (the GBI) had bought the cargo of wheat on fob terms from Turkish sellers, Eksim. The cargo was intended for public distribution in Iraq as part of the Public Distribution System (PDS). Gross J held, as the arbitrator under the LOF had done, that the GBI was party to the LOF; was a separate entity from the state of Iraq; and had not entered into the LOF in the exercise of sovereign authority; and so was not entitled to immunity pursuant to section 14 of the SIA. The alternative argument, that immunity was lost under s. 10(4)(b), did not therefore have to be decided. Gross J addressed it briefly at [82]:

> 82…. (i) As I understood Mr Hoyle's submissions, he, very properly, did not dispute that the vessel was in use for commercial purposes. Furthermore and equally properly, he disclaimed any suggestion that the cargo was an aid cargo; there was simply no evidence to such effect. As it seems to me, it follows that at the time of the salvage, the cargo was in use for commercial purposes; it was at that time a commercial cargo. It had been bought from Eksim (and, for that matter, shipped) commercially; it seems hopeless to me to contend otherwise. State immunity accordingly does not apply. (ii) As to Mr Hoyle's submission that the cargo was intended for use as part of the PDS, even if well-founded, that cannot affect the cargo's status as a commercial cargo at the time of the salvage."

102. Gross J was there using "commercial cargo" as a shorthand for cargo which was in use for commercial purposes within the meaning of s. 10(4).

103. RSA argued that the Judge's conclusion that the Silver was in commercial use in 1942 was inconsistent with what Lord Diplock had said in *Alcom v Republic of Columbia* [1984] 1 AC 580 at p. 602 (to which Gross J in *The Altair* does not appear to have been referred). That case concerned whether s. 13(4) of the 1978 Act applied to debts representing the balance standing to the credit of a diplomatic mission in a current bank account used to meet the day-to-day expenses of running the mission. The decision was that these were clearly not commercial purposes. At p. 602G, Lord Diplock said;

> "To speak of a debt as "being used or intended for use" for any purposes by the creditor to whom the debt is owed involves employing English words in what is not their natural sense…; though it might be permissible to apply the phrase intelligibly to the credit balance in a bank account that was earmarked by the state for exclusive use for transactions into which it entered jure gestionis."

104. These obiter remarks are not of any relevance to the conclusions I have expressed. They were made in relation to bank accounts, not cargo, and for the purposes of s. 13(4), which is concerned with use of property "for the time being", not in the different context of s. 10(4)(a) concerned essentially with salvage claims and with the part "use" plays in the cause of action. Lord Diplock did not even go so far as to suggest that a bank account could not be "in use" for the purposes of s. 13(4).

105. In support of its argument that the Silver was not in use in 2017, RSA sought to draw an analogy with the treatment of bank accounts by Stanley Burnton J in *AIC v Federal Government of Nigeria* [2003] EWHC 1357 (QB) at [56]-[58], where he held that the use of bank accounts may change over time; that if an account has been dormant for at least 18 months, it cannot be said to be used for any relevant purpose; and that the previous use of such an account is weak evidence of its current use. The analogy is not apt because the inquiry for the purposes of s. 10(4)(a), in the context of a claim under maritime law for salvage, focusses on the point of time when the goods acquired their status as cargo.

106. Mr Smith also submitted that the Judge's conclusion was contrary to the approach stated by Lord Clarke in *SerVaas* at [16] that "Parliament did not intend a retrospective analysis of all the circumstances which gave rise to the property, but an assessment of the use to which the state has chosen to put the property." I see no conflict. That case was concerned simply with use of property for the purposes of the enforcement immunity in s. 13 of the 1978 Act; by contrast, in the current case, the Court is concerned not with property simpliciter but with "cargo" and its status as such. The inquiry is therefore necessarily about the circumstances which make it cargo. As Mr Smith observed, many state-owned assets are acquired by way of commercial contract. Where enforcement immunity is in issue, it is usually irrelevant how the state acquired the property. In this case, however, the fob purchase contract is relevant to the inquiry in s. 10(4), addressed to salvage, because it is an essential element in the Silver being "cargo"; entering into the fob purchase contract was what RSA did by way of arranging for the Silver to be put on the Vessel.

Disposal

107. For these reasons I would dismiss the appeal.

The powers and duties of the Receiver under the MSA

108. It is not necessary for the outcome of the appeal to express conclusions on the detailed points argued in relation to the Receiver's powers and duties under the MSA. However we were asked to do so in order to provide future guidance, and having heard full argument, we think it right to take the opportunity to do so. On those issues I agree with Elisabeth Laing LJ for the reasons she gives.

Lady Justice Andrews:

109. I have had the advantage of reading in draft the judgment of Popplewell LJ. Like him, and for essentially the same reasons, I would dismiss this appeal. I add a few observations of my own in deference to the detailed legal arguments that we considered, and because the issues of statutory construction were far from straightforward.

110. The problems appear to me to stem from the fact that instead of transposing the language of Article 3(3) of the Brussels Convention directly into the 1978 Act, the drafter has chosen to paraphrase it. If one considers the relevant Articles of the Brussels Convention which concern adjudicative immunity (set out in para [39] above) the starting point under Article 1 is that a sovereign state is <u>not</u> immune from

the type of claims to which a private person would be exposed in respect of the operation of ships or the carriage of cargoes on ships (including a claim for salvage). It cannot claim immunity from suit in a foreign court merely by reason of its status as owner of the ship or cargo in question. The exceptions to that position set out in Article 3 depend not only on the ownership of the ship or cargo, but on whether the ship is being used *exclusively* on Governmental and non-commercial service at the time when the cause of action arises, or, in the case of a state-owned cargo carried on board a merchant ship, whether the cargo is carried on board that ship for Governmental and non-commercial purposes.

111. As the proviso to Article 3(3) makes clear, even in a situation in which the exception applies for state-owned cargoes carried on merchant ships for Governmental and non-commercial purposes, a tribunal having jurisdiction under Article 2 would still have jurisdiction over an in personam claim against the state for salvage of such a cargo. Therefore the exception under Article 3(3) is a restricted one, which does not prevent the courts of an otherwise competent jurisdiction from determining the liability of the state to pay salvage in such a case. It merely protects the state-owned property from being arrested in order to found jurisdiction over the claim. However, an action in rem has many advantages, and where the limitation period is relatively short, and it may take time (and even legal proceedings) to ascertain the identity of the owner of the salvaged cargo, the salvor is likely to wish to avail himself of the option of commencing proceedings in rem if he can. The fact that the salvor might have the alternative of pursuing a claim in personam against the state is not a good reason to interpret the Brussels Convention (or the 1978 Act) in a way that artificially constrains the circumstances in which actions in rem can be brought for salvage of state-owned cargoes on board merchant ships.

112. Although an action in rem for salvage involves the assertion of a maritime lien (a form of charge by way of security) over the property of the state, the claim is not a claim to property. I respectfully disagree with Elisabeth Laing LJ's characterisation of the claim as one which concerns property and not a transaction or an activity. It is a claim for services rendered (which necessarily involves activity) in respect of cargo which was placed in peril by reason of being carried on a seagoing vessel. Without the activity of saving the cargo from danger there would be no claim. If those services were rendered pursuant to a contract for salvage, the claim would concern a transaction as well.

113. As Lord Sumption JSC explained in *Benkharbouche* at [8]-[10] the Brussels Convention was concerned mainly with acts of a kind which would generally not attract immunity under the restrictive doctrine of state immunity at common law. Its provisions are consistent with that doctrine (although by the time the 1978 Act was enacted, they had been largely superseded by developments in the common law). The key principle of international law which governs issues of sovereign immunity is the distinction between claims arising out of acts undertaken in the exercise of sovereign authority, and claims arising out of transactions which might appropriately be undertaken by private individuals. That distinction depends on the nature or character of the act rather than the state's motive or purpose in engaging in that act, though the latter may assist in determining the former.

114. Viewed through that lens, as the Judge observed at [161] of the judgment below, there appears to be no principled reason why a state owner of cargo which has been salvaged after a marine casualty to a merchant ship on which it was carried on a commercial voyage should be treated any differently from a private owner of such cargo, nor why the cargo itself should be immune from an action in rem brought in the jurisdiction in which it is located. The claim for salvage arises from the fact that the cargo was exposed to the perils of the seas through a maritime adventure, and in such a case, the maritime adventure will have been of a commercial nature because the vessel was a merchant vessel. The state has chosen to have its cargo carried by sea pursuant to a contract of carriage just like any private owner of cargo, and has therefore exposed itself to claims for salvage like any private owner. The actions which gave rise to the liability are entirely of a commercial character.

115. In the present case the vessel was undoubtedly a merchant vessel. Under the Brussels Convention, the relevant inquiry, in the case of the cargo, is why was it being carried on this vessel? Was it there for a Governmental and non-commercial purpose? The inquiry *must* relate to the time when the cargo is being carried on the ship and not some later time. That much seems obvious from the phrase "carried on board merchant vessels for Governmental and non-commercial purposes" in Article 3(3), but is put beyond doubt by the point made by Popplewell LJ that, once it is off the ship, the property in question ceases to be "cargo". Thus any use to which that property is to be put after it reaches its destination is irrelevant to the inquiry.

116. If the cargo had been one of armaments, the ship had been requisitioned (though remaining in private ownership), and the destination had been a war zone (or the nearest safe port to that war zone) a court might have little difficulty in concluding that the cargo was being carried for a Governmental and non-commercial purpose and that the act of causing it to be carried on the vessel constituted a sovereign act. However, if the ship was not requisitioned but her owner was paid for transporting the cargo the position is less clear-cut. In this example, the purpose of putting the armaments on the vessel could be said to be to supply the state's military personnel, and thus a sovereign purpose, given the destination of the voyage. Yet the nature of the property will not suffice, without more, to make the act of shipping it a sovereign act. A court faced with that scenario could well adopt Popplewell LJ's approach, and decide that the state had engaged in purely commercial activity by making the necessary arrangements for a cargo of armaments to be transported on a merchant ship or by buying that cargo on fob or cif terms. Whilst I can see the force of that analysis, it is unnecessary for the purposes of this appeal for me to express a final view on it. I would prefer to reserve the position until it directly arises for determination.

117. In the present case, 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. The RSA was a party to the former and the latter was arranged by the seller for its benefit. The silver became cargo and was at the risk of the RSA after it crossed the ship's rail. 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.

118. That leads me to the conclusion that if the question we had to determine were governed by the Brussels Convention, the RSA could not have relied on Article 3(3) to contest the jurisdiction of this court to determine the action in rem. Nor could it have done so had the question been governed solely by the principles of customary international law. The 1978 Act was intended to give effect to restrictive theory of sovereign immunity as well as to implement the provisions of the Brussels Convention into domestic law. That means that an interpretation of s.10(4) of the 1978 Act which leads to a different result from the one which would have been reached at common law or under the Brussels Convention cannot have been what Parliament intended. Of course, as Elisabeth Laing LJ has pointed out, the language of the 1978 Act prevails in the case of conflict between the ordinary meaning of the language and customary international law, but if it is possible to interpret them consistently without artifice, as I believe it is, that problem does not arise.

119. The difficulties in this case arise from two phrases in section 10(4)(a), namely, "at the time when the cause of action arose" and "in use or intended for use." If the question is posed "when did the cause of action arise?" the instinctive answer is "when the last necessary ingredient of the cause of action occurred", because without all the ingredients there is no complete cause of action. The salvors would have no claim against anyone for salvage before they performed the salvage services. However, on closer examination it becomes apparent that the instinctive response cannot be the correct one. It gives rise to the startling consequence that a state would have blanket immunity from claims for salvage (including in personam claims under section 10(4)(b)) in all cases of wreck, even if the state-owned cargo was a commercial cargo shipped on a merchant vessel. Yet, as I have said, the proviso to Article 3(3) of the Brussels Convention expressly envisages an in personam claim for salvage being available against a state even if the cargo was shipped on a merchant vessel for Governmental and non-commercial purposes. Instead of reflecting the terms of the Brussels Convention, or the restrictive doctrine of state immunity, as Parliament intended, this interpretation would drive a coach and horses through it, and lead to state immunity being conferred in circumstances in which it would neither have arisen at common law nor under that Convention.

120. In my judgment the solution lies in the fact that the drafter did not use the word "accrued", but instead used the word "arose", mirroring the language of Article 3(1) of the Brussels Convention (albeit that that paragraph relates only to the ship). "Arise" and "accrue" are not (or not necessarily) synonyms. The various dictionary definitions of the verb "arise" include: "originate", "begin to exist" and "begin to occur". It seems to me that this is the sense in which the verb was being used by the drafter in the context of section 10. Considered from that perspective, a claim for salvage originates from, or begins with, maritime circumstances. If a burglar ran from a house to the seashore and threw a diamond necklace into the sea and someone voluntarily dived in and retrieved it, no claim for salvage would lie against the owner of the necklace. Leaving aside the peculiar circumstances of towed items, the property which is salvaged must have been carried on a vessel and placed in danger in consequence of some event occurring whilst the vessel was engaged in a maritime adventure on the sea or in tidal waters.

121. For all the reasons which Popplewell LJ has given, the inquiry as to the use of the vessel and cargo must be a backwards-looking one, directed at a time when the cargo could properly be described as "cargo" (and thus qualify as the subject of a claim for salvage) which it cannot do unless there are "maritime circumstances". In this case the cause of action originated at the latest when the ship suffered a casualty whilst at sea in the course of her commercial voyage, placing both the vessel and her cargo in peril. Therefore the relevant inquiry must be directed to the position at the time of the casualty in 1942 which is when the cause of action arose in the sense of "originated" or "began".

122. In my view this interpretation of "when the cause of action arose", which focuses upon the time of the voyage or the marine casualty, also sheds light on the meaning of "intended for use" in this specific context. As Popplewell LJ has pointed out, Article 3 of the Brussels Convention refers to the purpose for which a ship is "used" at the time when the cause of action arose, but makes no reference to the use of the cargo at all. Instead Article 3(3) focuses on the purposes for which the cargo is on the ship. There is nothing said in Article 3 about the *intended* use of either ship or cargo, which begs the question of why the drafter included references to "intended use" in section 10 (though the expression also appears in section 13, which relates to all types of state-owned property and not just cargo). As regards both the use of the ship and the use of the cargo, I agree with the proposition (which, by the end of the oral argument, had become common ground between the claimants and the RSA) that this refers to the use or intended use by the state at the relevant time.

123. For reasons already given, the intended use of the cargo by the state after the voyage is complete is an irrelevant consideration, even if that intention was formed before the cargo was loaded. Moreover, the only intended use the state would have for a merchant ship must relate to the voyage. As Popplewell LJ has pointed out, an in rem claim for salvage depends on the salvaged property qualifying as "cargo", a status which it acquires from the moment it is loaded on the vessel to the time when it is taken off the vessel or otherwise parts company with it physically in consequence of a casualty. That status does not change during that period; yet the owner's intention as to the future use of property is capable of being changed whilst it is in transit. If the focus of the inquiry in most cases of state-owned cargo laden on merchant ships were on the state's "intended use" for the cargo after it reached its destination, the question whether the state was immune from an action in rem could depend on a change of intention prior to the casualty. On that interpretation, if the RSA intended to sell the silver when it put it on board but then changed its mind and decided just before the casualty that it was going to use it to mint Union coinage, the RSA would be immune from proceedings in rem notwithstanding that the status of the silver as "cargo" remained constant and it was put on board for a wholly commercial purpose. I can see no principled justification for the question of immunity turning on the state's intentions, in this way, rather than on its actions.

124. There is, however, another way in which the intended use of the ship or cargo would be directly relevant, and which to my mind makes more sense. A claim for salvage may arise if the casualty occurs when the ship has not yet embarked upon her intended voyage. The phrase "intended for use" is apt to cover that scenario, in which there is arguably no actual use being made of the ship or cargo for the purposes of the

relevant commercial transaction(s) as yet. It avoids any unnecessary argument about whether the ship or cargo is being used for the purposes of the contract of carriage at that time. Where there is actual use, it is likely to be the same as the intended use and therefore the focus should be on the actual use.

125. The drafter has used "in use or intended for use" to cover both the cargo and the ship carrying it. They have not referred to the intended use of the cargo and the actual or intended use of the vessel. That means that the actual "use of the cargo" must be considered, and it must be given some meaning. I am not persuaded by the argument that once it is laden on board a vessel, a cargo is just being carried from A to B, and is not put to any use at all, save in those rare circumstances exemplified by Popplewell LJ in paragraph [93]. That would rob the phrase "in use" of any sensible meaning so far as cargo is concerned. I respectfully concur in the view expressed by Gross J in response to a similar argument in the *Altair* at [82]. One cannot perform a contract for carriage of goods by sea without a cargo being laden on board the vessel in question and transported on that vessel. Given that this is so, it makes no sense to me to say that the vessel transporting the cargo is being used by the cargo owner for commercial purposes, but the cargo is not.

126. The question whether the cargo was "in use for commercial purposes" at the relevant time can be paraphrased by substituting the definition of "commercial purposes" in section 17 of the 1978 Act: "was the cargo in use for the purposes of any transaction or activity mentioned in section 3(3)?" The answer is plainly yes, because when it was placed on board the vessel, and at all material times thereafter, the cargo was being used to fulfil or perform obligations under transactions engaged in by the RSA otherwise than in the exercise of sovereign authority. It was put on board the vessel for carriage to South Africa pursuant to commercial contracts of sale and carriage. The seller's obligations to deliver the cargo to the RSA were fulfilled by putting the goods on board. Moreover, the seller made arrangements on behalf of the RSA for the goods to be transported by sea to South Africa; once title passed under the contract of sale, the shipowners owed duties to the RSA in respect of the carriage of the goods to their destination and their delivery up at the end of the voyage. The salvage proceedings "relate to" commercial transactions in the sense in which that phrase is used in section 3(1)(a) of the 1978 Act because the silver became "cargo" through the performance of the contract of carriage by sea and the contract of sale. For all those reasons, I agree with the Judge and with Popplewell LJ that cargo sold under an fob contract and shipped on board pursuant to a contract of carriage contained in or evidenced by a bill of lading is "in use for commercial purposes". That is enough to dispose of this appeal.

127. As to the question whether the Receiver has an implied statutory power to decide whether salvage is "due" in the present case, I have concluded that she does not. That does not mean that she would have been obliged to release the silver if we had allowed the appeal. Even if the RSA had been entitled to claim immunity in respect of the English court's adjudicative jurisdiction over a claim in rem, the Receiver would be obliged to detain the silver as long as there remained a realistic possibility that that salvage would be agreed (or awarded by an arbitrator) or that a court of competent jurisdiction would decide that it is due. That court could be the English court (in a claim in personam, if jurisdiction is established) or possibly a court in South Africa,

which both parties accept has always been a court of competent jurisdiction. These matters have been addressed in detail by Elisabeth Laing LJ in her judgment, and I respectfully agree with her analysis of the relevant provisions of the Merchant Shipping Acts.

Lady Justice Elisabeth Laing :

Introduction

128. My judgment is in two parts. In the first section, I explain why I am unable to agree with Popplewell LJ and Andrews LJ about the interpretation of section 10(4)(a) of the 1978 Act. In the second section I consider the statutory scheme governing the powers of the Receiver of Wreck ('the Receiver'). This was not an issue in the first instance hearing, but it was the subject of detailed submissions in this Court, and all the parties agreed that it would be useful for this Court to give some guidance on it.

The interpretation of section 10(4)(a)

129. I agree with Popplewell LJ's reasons for holding that the temporal focus of the inquiry under section 10(4)(a) is the time when the maritime circumstances giving rise to the claim for salvage arose. I do not agree, however, with his conclusion that, when the ship sank, the cargo, that is, the Silver, was 'in use' by RSA for commercial purposes. On the contrary, it was not in use for any purpose and it was intended for use for a non-commercial purpose. I will explain briefly why.

The statutory context

130. Section 1 of the 1978 Act enacts a general rule about immunity, which is subject to the exceptions described in the other provisions of the 1978 Act.

Transactions

131. Section 3 creates an exception for commercial transactions entered into by a State and for obligations which fall to be performed wholly or partly in the United Kingdom. Section 3(3) defines a 'commercial transaction' as '(a) any contract for the supply of goods or services; (b) 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; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority'. Section 17 defines 'commercial purposes' as 'purposes of such transactions or activities as are mentioned in section 3(3) above'.

Property

132. Section 6 is headed 'Ownership, possession or use of property'. It creates a number of limited exceptions for proceedings relating to immovable property in the United Kingdom and to other property interests. Section 6(4)(b) concerns indirect claims against property which is (a) in the possession or control of a State or (b) in which it claims an interest. Immunity is preserved as respects (a) if the State would have been

immune against a direct claim, and as respects (b) if the claim is not admitted or supported by prima facie evidence.

133. Section 13 is headed 'Other procedural privileges'. It protects States from a variety of forms of legal process. Section 13(2)(b), however, provides that 'the property of a State shall not be subject to any process…in an action in rem, for its arrest, detention, or sale'. Section 13(2)(b) does not 'prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only' in the two cases listed in section 13(4)(a) and 13(4)(b) (section 13(4)). By section 14(4), 'Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes'.

Power to amend the 1978 Act

134. Section 15(1) confers a power on the Sovereign to amend the 1978 Act by Order in Council, for two express purposes only.

> 'If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State—
>
> (a) exceed those accorded by the law of that State in relation to the United Kingdom; or
>
> (b) are less than those required by any treaty, convention or other international agreement to which that State and the United Kingdom are parties,
>
> Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.'

Statutory context: summary

135. There are therefore six significant features of the legislative context.

(i) The 1978 Act provides for a broad immunity subject to express exceptions.

(ii) It draws a broad distinction between claims concerning transactions and claims concerning property. Section 6(4) maintains a broad procedural immunity concerning indirect claims made against property owned by a State. The claim in this case concerns property, and not a transaction, or an activity.

(iii) The effect of section 13 is that, in a case which falls outside section 10, there is an absolute bar on proceedings in rem against property owned by a State, unless that property is 'for

the time being in use or intended for use for commercial purposes'.

(iv) Property owned by a State bank or central monetary authority is deemed not be in use or intended for use for commercial purposes.

(v) Section 15(1) supports the view, based on the legislative history, and which I explain below, that one of Parliament's purposes in enacting the 1978 Act was to comply with such relevant international treaties as the United Kingdom might ratify. Section 15(1) does not refer to any mismatch between the provisions of the 1978 Act and customary international law, or permit the correction of any such discrepancy.

(vi) Section 3(3)(a), (b) and (c) are not directly relevant in this case. Read with section 17, section 3(3) nevertheless explains what is meant by the phrase 'for commercial purposes' in section 10(4)(a). There is (in summary) a two-stage inquiry. First, there must be a transaction or activity of the kind identified in section 3(3). Second, the matter at issue must be 'for the purposes of such transactions or activities as are mentioned in section 3(3)'.

The meaning of section 10(4)(a)

136. Section 10 is headed 'Ships used for commercial purposes'. It applies to Admiralty proceedings and to proceedings on any claim which could be made the subject of Admiralty proceedings (section 10(1)). By section 10(2)(a), a State is not immune as respects an action in rem against a ship belonging to that State, or an action in personam for enforcing a claim against that ship, if 'at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes'. Section 10(3) enacts a rule about sister ships; in short, both must be in use or intended for use for commercial purposes for immunity to be lost. Section 10(4)(a) removes immunity 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'. Section 10(4)(b) removes immunity as respects a claim in personam for 'enforcing a claim in connection with a cargo if the ship carrying it was then in use or intended for use as aforesaid'. Thus the loss immunity against claims in personam depends only on the use or intended use of the ship; the use or intended use of the cargo is irrelevant.

137. Two aspects of section 10(4)(a), in particular, are controversial.

138. The first is what 'cargo' means. I am not persuaded that considerations relating to the cause of action in salvage can be relevant to construction of the word 'cargo'. Section 10(4)(a) is not expressed to apply, and does not only apply, to salvage claims, as the parties agreed (see paragraphs 32 and 33 of Popplewell LJ's judgment). The fact that it applies only to 'rare' cases other than salvage claims is neither here nor there. A cargo is a cargo purely and simply because it is being carried on a ship. A cargo owned by a State is a thing. It is a subset of the property owned by a State. Whether something is

a cargo is primarily a factual, not a legal question (see further, paragraph 142, below). A thing is a cargo if it is being carried on a ship.

139. The second is how the phrase 'in use or intended for use for commercial purposes' (as that phrase is defined) is to be understood. The drafting of section 10(4)(a) is condensed. There are five initial points.

(i) As a matter of ordinary language, the phrase 'in use or intended for use' could apply both to the ship and to the cargo, and require a court to consider the use, and the intended use, both of the ship, and of the cargo.

(ii) A possible effect of that condensed drafting, nevertheless, is that the phrase 'in use' has a meaning in section 10(4)(a), even if only refers to the use of the ship.

(iii) In any event, there may be cases, as Mr Smith's argument and Popplewell LJ's judgment show (see paragraph 93) in which a cargo could be said, on RSA's construction of the phrase 'in use', to be 'in use' when being carried. Another possible example, which would still have been relevant when the 1978 Act came into force, would be a coal-fired merchant ship carrying coal destined for the use of the navy, if the state cargo owner had made a contract by which it agreed to the use of part of the cargo to power the ship. If the language of section 10(4)(a) requires 'in use' to apply to cargoes, the existence of such cases shows that RSA's construction does not deprive 'in use' of any meaning as respects cargoes, even if the cases in which a cargo could be said to be in use while being carried are rare.

(iv) If it is supposed that section 10(4)(a) mandates an inquiry into the use and intended use both of the ship and of the cargo, it does not dictate the answer to that inquiry on the facts of a particular case. It follows that the court considering the application of section 10(4)(a) is not required to conclude that a cargo must have an actual use or an intended use. It is simply required to ask, and to answer, those questions in that sequence.

(v) The phrase 'intended for use' is a signal by the draftsman that the focus of this part of the inquiry is the use which is intended for the cargo when it reaches its destination. Whether a cargo has an intended use is a question of fact, to be answered on any evidence which shows what use was intended for the cargo by the State. It is to be answered by reference to the evidence about that intended use at the time when the casualty occurred. This phrase is the clearest possible signal by the draftsman that the inquiry concerns the future use of the cargo. If, contrary to my clear view about the correct construction of article 3 of the Brussels Convention (see paragraphs 156-157, below), there is

> any conflict on this point between article 3 and section 10(4)(a), the language of section 10(4)(a) obviously prevails.

140. It might be argued that if 'in use' must have a more than exceptional content as respects cargoes, it ought to follow that the phrase 'intended for use' must also have a more than exceptional content as respects cargoes. Whether or not that argument is right, a sixth point is that the approach of the Judge, of Popplewell LJ and of Andrews LJ means that section 10(4)(a) could never apply to a state-owned cargo carried on a commercial or merchant vessel, because such a cargo will always be carried pursuant to commercial arrangements of the kind which they describe in their judgments, and will therefore never have immunity. That is a counter-intuitive result for state-owned cargoes such as armaments.

141. I consider that, as a matter of ordinary language, a cargo (and this is so whether or not it is owned by a state) will rarely be 'in use' for any purpose of its owner, commercial or otherwise, while it is being carried. The answer to the first question posed by section 10(4)(a), therefore, in most cases, will be, and in this case is, that the cargo was not in use while it was being carried. The result is that the key question will be, and in this case is, whether or not, when the casualty occurred, the state-owned cargo was intended for use by the State for commercial purposes (as defined), or not. I agree that when it sank, the ship was in use for commercial purposes (it does not matter, for this short judgment, whether that use was by the ship owner or by RSA).

142. I have carefully considered the Judge's reasons, and those of Popplewell LJ and of Andrews LJ, for holding that the cargo was 'in use' for commercial purposes when the SS TILAWA was sunk. With the greatest respect to their considerable commercial expertise, those reasons are, to my mind, unpersuasive. I do not agree that, as a matter of ordinary language, a cargo of silver which was sitting in the hold of the ship was being used by RSA for any purpose, commercial or otherwise. It was being carried, and that is all. It was the subject of commercial arrangements for its carriage, but that is not the relevant inquiry. If it is assumed that the earlier events in this case had taken place after the 1978 Act came into force, RSA would not have been immune, by virtue of section 3(3)(a), if it had failed to pay the sums due under the contract of carriage, because that was a straightforward contract for services. The existence of that contract, and the liabilities it created, shed no light, however, on the question posed by section 10(4)(a) read with section 3(3), which is a different question. That question concerns the use or intended use by RSA of the cargo, and not the nature of the arrangements by which the cargo arrived in, and was carried in, the ship's hold. The cargo was cargo because it was being carried on a ship. It was 'cargo' for that reason, and not because of the legal arrangements which led to that carriage.

The legislative background

143. That approach to the construction of section 10(4)(a) is supported by the legislative background, as I will now explain.

144. On 16 May 1972 the member states of the Council of Europe signed the European Convention on State Immunity ('the Basle Convention'). Article 30 provides:

> 'The present Convention shall not apply to proceedings in respect of claims relating to the operation of seagoing vessels owned or operated by a Contracting State or to the carriage of cargoes and of passengers by such vessels or to the carriage of cargoes owned by a Contracting State and carried on board merchant vessels'.

This means that the Basle Convention does not affect the field in which the Brussels Convention operates. If that is not already clear from article 30, it is from paragraph 115 of the Explanatory Report to the Basle Convention. Thus, despite its antiquity, the States which ratified the Basle Convention did not consider that new, or more up-to-date rules than the rules in the Brussels Convention were necessary (in its narrow field).

145. The 1978 Act received Royal Assent on 20 July 1978. It came into force on 22 November 1978. Its long title was

> 'An Act to make new provision with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes'.

146. The United Kingdom ratified the Basle Convention on 3 July 1979. It came into force on 4 October 1979. On 3 July 1979, the United Kingdom also ratified the Brussels Convention, which, in its original form, had, by then, had been in force for over 50 years.

147. As Lord Sumption observed in paragraph 10 of *Benkharbouche*, 'One purpose of the State Immunity Act 1978 was to give effect to the Brussels and Basle Conventions, and thereby enable the United Kingdom to ratify them'. Further, the decision in *Benkharbouche* shows that if there is a conflict between the ordinary meaning of the language of the 1978 Act and customary international law, the language of the 1978 Act prevails, as one might expect (unless retained EU law now dictates otherwise, and it does it not). Moreover, if there is, to any relevant extent, a conflict between customary international law and the Brussels Convention, the latter, and not the former, is, in the light of the legislative history, the proper aid to the interpretation of section 10(4)(a). As an aside, I was not persuaded that we were shown, in any of the relevant materials, that there is a near universal State practice, out of a sense of legal obligation, of not according immunity to property belonging to a State, including cargoes.

148. Against that background, section 10(4)(a) should be construed, so far as possible, so as to be consistent with article 3.3 of the Brussels Convention.

The Brussels Convention

149. The structure of the Brussels Convention, and the structure of article 3 are important. Article 1 is a general rule that ships owned or operated by States, cargoes owned by them, the passengers carried on them, and the States concerned, are subject to the same rules and liabilities which apply to private vessels and cargoes. Article 2 further provides that the enforcement of those liabilities and obligations will be subject to the jurisdictional and procedural rules as affect privately owned merchant vessels, cargoes, and their owners.

150. Article 3 then creates three exceptions to the general rules created by articles 1 and 2.

151. First (and in short), articles 1 and 2 do not apply to ships etc 'owned or operated by a State' and which are 'used at the time the cause of action arises exclusively on Governmental and non-commercial service'. Such vessels are immune from 'seizure, attachment or detention by any legal process' and from 'judicial proceedings in rem' (article 3.1). That rule, in turn, is subject to a proviso, which permits a claimant to take proceedings in the competent tribunals of the State owning or operating the vessel, in the three cases described in the proviso to article 3.1. The second such case refers to 'actions in respect of…salvage'.

152. Second, 'the same rules' are to apply to 'state-owned cargoes carried on board the vessels described in article 3.1 (article 3.2).

153. Third, 'State-owned cargoes carried on board merchant vessels for Governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to judicial proceedings in rem' (article 3.3). That third exception is also subject to a proviso, which permits certain actions, including for salvage, to be brought before the tribunal which has jurisdiction under article 2 (ibid).

154. It is clear from the language of article 3.1 and article 3.3 that a ship which is 'operated by' a State (for example, a ship which has been requisitioned by a State) is treated in the same way as if it were owned by the State, and is in a different category, for the purposes of article 3, from a 'merchant ship'. Merchant ships are dealt with in article 3.3 alone.

155. Article 3.3 does not refer to the use, or to the intended use, either of the ship, or of the state-owned cargo. It provides, simply, that 'State-owned cargoes carried on board merchant vessels for Governmental and non-commercial purposes shall not be subject to seizure, attachment or detention by any legal process or to any judicial proceedings in rem'. There is no requirement that the purposes be exclusively non-commercial and governmental (compare the requirement in article 3.1 about the purposes for which a ship is in use). Unlike the inquiry required by section 10(4)(a), the inquiry does not depend on the identification of a commercial purpose, but rather, on the identification of a Governmental and non-commercial purpose. At the risk of pleonasm, the criterion for the immunity is, self-evidently, a purposive criterion. It refers to the purposes of the State. It does not refer to, and does not depend on, the 'use' of the cargo (contrast article 3.1, which does refer to the use of a ship). Article 3.2 and 3.3 simply refer to state-owned cargoes 'carried on board' vessels. Article 5, which refers to 'the Governmental and non-commercial character' of the cargo further supports that approach.

156. The inquiry required by article 3.3 is why the cargo was being carried. It was being carried for Governmental and non-commercial purposes. I do not understand the argument to the contrary. It appears to rest on considerations which I have already discussed above, and which I have rejected. If the commercial arrangements which lead to the carriage of a State-owned cargo on a merchant vessel inevitably mean that the cargo is not carried for Governmental and non-commercial purposes, the bar on in rem proceedings in article 3.3 is wholly redundant. If, contrary to my clear view, there is any ambiguity in section 10(4)(a), there is none in article 3.3, which, as I have already said, is the proper aid to the construction of section 10(4)(a), rather than customary international law. The language of section 10(4)(a) is different, but the result is the same. The cargo was not 'in use' while it was being carried, but it was intended for use for a non-commercial purpose.

157. I consider that the Silver was being 'carried' for the relevant purposes under article 3.3, as it was being carried to South Africa in order to be minted into coinage, and substantially for a Governmental and non-commercial purpose, as the Judge found. The Judge also answered the question posed by section 10(4)(a) by holding that the Silver was not intended for use for commercial purposes. It follows that, pursuant to section 10(4)(a), the Silver is immune as respects an action in rem.

Does this interpretation have unjust consequences?

158. I do not consider that this is a surprising, or, indeed, an unjust outcome. The focus of section 10(4)(b) is the use or intended use of the ship, not of the cargo. It therefore permits an in personam claim in the United Kingdom to enforce a claim against a state-owned cargo carried on a merchant ship, regardless of the use or intended use of that cargo. Argentum could therefore have issued in personam proceedings in the United Kingdom against RSA within the limitation period. That course is also permitted by article 3.3, which refers to the tribunal having jurisdiction under article 2 (not to the tribunal having jurisdiction under article 3). We were also told in the hearing (for what it is worth) that Argentum could have issued in personam proceedings in South Africa within the relevant limitation period.

159. The availability of a remedy in personam in the United Kingdom is a powerful further reason for not giving section 10(4)(a) a strained meaning. The availability of that remedy, even if it is less valuable or convenient to Argentum than a remedy in rem, also means that if section 10(4)(a) has the meaning which I consider that it does, that provision does not impair the very essence of the right of access to a court. An argument based on any suggested incompatibility between section 10(4)(a) and article 6 of the European Convention on Human Rights (see paragraphs 13-19 of *Benkharbouche*) could not, therefore, succeed in this case.

160. This is a question which will arise in every case to which section 10(4)(a) applies. Its answer cannot depend on any particular procedural difficulties which Argentum might have encountered, whether because it issued proceedings either after, or close to the end of, the limitation period, and so might not have time to serve the proceedings in South Africa; or otherwise.

Conclusion on section 10(4)(a)

161. As a matter of ordinary English, the Silver was not in use by its State owner when it was being carried on board the SS TILAWA. It was intended for use for a non-commercial purpose, as the Judge found. Section 10(4)(a) is a bar to proceedings in rem against the Silver. Section 10(4)(b) nevertheless permits an action in personam against RSA.

The powers of the Receiver of Wreck

162. It is not possible to construe the relevant provisions of the MSA without understanding of the statutory context and the legislative history.

The statutory context: the Merchant Shipping Act 1995

163. The MSA is comprehensive. It deals with many topics, such as the registration of British ships, masters and seamen, safety, shipping vessels and passenger vessels. As originally enacted, it had 13 Parts. Part 9A, entitled 'Wreck Removal Convention' and Schedule 11ZA ('Wrecks Convention') were added by the Wreck Removal Convention Act 2011. As its long title shows, the MSA is a consolidation Act. It consolidates, in part, provisions of the Merchant Shipping Act 1894 ('the 1894 Act'). It also enacts new law. Two principles apply to its interpretation, therefore. First, there is a presumption that, to the extent that it consolidates the old law, it is not intended to change the law. Further, unless there is an ambiguity or difficulty in its interpretation, it should not be interpreted by reference to the legislation which it repealed (*Inland Revenue Commissioners v Joiner* [1975] 1 WLR 1701 per Lord Diplock at 1711).

Section 224 and the Salvage Convention

164. Section 224(1) incorporates the Salvage Convention into the law of the United Kingdom by providing that its provisions, as set out in Part I of Schedule 11 to the MSA, are to have the force of law. The provisions of Part II of Schedule 11 are to have effect in connection with the Salvage Convention, and section 224(1) has effect subject to Part II of Schedule 11 (section 224(2)). Paragraph 6 of Part II provides that references in the Salvage Convention to judicial proceedings are, in England and Wales, to proceedings in the High Court or the county court, and any reference to the tribunal having jurisdiction, in so far as it refers to judicial proceedings, is to be construed accordingly.

165. Article 1 of the Salvage Convention defines 'salvage operation' as meaning 'any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever'. The Salvage Convention applies 'whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party' (article 2). The Salvage Convention does not apply to 'warships or other non-commercial vessels owned or operated by a State and entitled, at the time of the salvage operations, to sovereign immunity under generally recognised principles of international law unless that State decides otherwise' (article 4.1). Article 12.1 provides that 'Salvage operations which have led to a useful result give right to a reward'. Article 13 is headed 'Criteria for fixing the reward'. The general rule is that the reward should be fixed with a view to encouraging salvage operations, and having regard to ten listed factors, which are not listed in the order of

their importance. They include the value of the salved vessel and other property, and various factors such as the extent to which salvage operations have been successful, and the skill and effort expended by the salvor.

166. The Salvage Convention does not affect the salvor's maritime lien (article 20.1) although he may not enforce it if satisfactory security has been provided (article 20.2). Article 21 deals with the provision of security. Article 22 is headed 'Interim payment'. 'The tribunal having jurisdiction over the claim of the salvor may, by interim decision, order that the salvor shall be paid on account such amount as seems fair and just, and on such terms, including terms as to security where appropriate, as may be fair and just according to the circumstances of the case'. Article 23 provides for limitation. Any action relating to payment under the Salvage Convention 'shall be time-barred if judicial or arbitral proceedings shall not have been instituted within a period of two years' of the day on which the salvage operations ended.

167. Article 25 is headed 'State-owned cargoes'. Unless the State owner consents, no provision of the Salvage Convention may be used 'as the 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 recognised principles of international law'.

168. Nothing in section 224(1) or (2) of the MSA is to affect any rights or liabilities arising out of any salvage operations started or other acts done before 1 January 1995 (section 224(4)).

Other provisions of Part IX of the MSA

169. Part IX of the MSA is headed 'Salvage and Wreck'. Chapter 1 (sections 224-230) is headed 'Salvage', and Chapter II (sections 231-247), 'Wreck'. Chapter III makes supplemental provision. 'Wreck' is defined in section 255(1) as including 'jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water'. 'Salvage' is also defined in section 255(1). It includes 'subject to the Salvage Convention, all expenses properly incurred by the salvor in the performance of the salvage services'.

170. Section 248 of the MSA is headed 'Functions of the Secretary of State as to wreck'. Section 248(1) gives the Secretary of State 'the general superintendence throughout the United Kingdom of all matters relating to wreck'. Section 248(2) gives the Secretary of State power, with the consent of the Treasury, to appoint one or more people to be 'receiver of wreck for the purposes of this Part'. The Receiver is to discharge such functions as are assigned to him by the Secretary of State. The corresponding provision in the 1894 Act was section 566. Under section 566, the Board of Trade, rather than the Secretary of State, had the general superintendence of all matters relating to wreck, and power, with the consent of the Treasury, to appoint the Receiver, 'to perform the duties of receiver under this Part of this Act'.

171. Section 249 makes provision for the fees and expenses of the Receiver. The Receiver is to be paid the expenses properly incurred by him, and such fees as are prescribed in regulations by the Secretary of State. The Receiver has, among others, the same rights

and remedies in respect of those fees and expenses as a salvor has, 'in respect of salvage due to him' (section 249(3)). If there is a dispute about the amount, it is to be determined by the Secretary of State, whose decision is to be final (section 249(4)). The Secretary of State's decision is also final in relation to any question about their respective powers which arises between a harbour authority or conservancy authority and a general lighthouse authority (section 254(1) and (2)).

172. The Receiver has power, on the application of either party, to appoint a valuer 'to value the property' if 'any dispute as to salvage arises' (section 225(1)). The Receiver must give copies of the valuation to both the parties. If the specified formalities have been observed, a copy of the valuation is admissible 'in any subsequent proceedings' (section 225(2)). The person who applies for the valuation must pay such fee for it as the Secretary of State may direct.

173. Section 226 is headed 'Detention of property liable for salvage by receiver'. This provision was the subject of some debate in oral submissions, so I set it out in full.

> '(1)Where salvage is due to any person under this Chapter, the receiver shall—
>
> (a) if the salvage is due in respect of services rendered —
>
> (i) in assisting a vessel, or
>
> (ii)in saving life from a vessel, or
>
> (iii)in saving the cargo and equipment of a vessel,
>
> detain the vessel and cargo or equipment; and
>
> (b) if the salvage is due in respect of the saving of any wreck, and the wreck is not sold as unclaimed under this Chapter, detain the wreck.
>
> (2)Subject to subsection (3) below the receiver shall detain the vessel and the cargo and equipment, or the wreck, as the case may be, until payment is made for salvage, or process is issued for the arrest or detention of the property by the court.
>
> (3)The receiver may release any property detained under subsection (2) above if security is given—
>
> (a)to his satisfaction, or
>
> (b)where—
>
> (i) the claim for salvage exceeds £5,000, and
>
> (ii)any question is raised as to the sufficiency of the security,

to the satisfaction of the court.

(4)Any security given for salvage under this section to an amount exceeding £5,000 may be enforced by the court in the same manner as if bail had been given in that court.

(5)In this section "the court" means the High Court…'

174. So, where 'salvage is due to any person under this Chapter' the Receiver must, if 'the salvage is due in respect of' the services which are listed in section 226(1)(a), detain 'the vessel and cargo or equipment', and, if 'the salvage is due' in respect of the saving of any wreck (and the wreck has not been sold as unclaimed under Chapter I), detain the wreck (section 226(1)). When the Receiver has detained anything pursuant to section 226(1), he must continue to do so 'until payment is made for the salvage, or process issued for the arrest or detention of the property by the court' (section 226(2)). The Receiver may nevertheless release any property detained under section 226(1) if security is given to his satisfaction, or where the claim for salvage exceeds £5000, or any question is raised as to the sufficiency of the security, to the satisfaction of the court (section 226(3)). 'The court' is defined in section 226(5) as 'the High Court'.

175. If the Receiver is detaining property under section 226(2), and the 'persons liable to pay the salvage' in respect of any property which the Receiver is detaining know that it is being detained, section 227(1) (read with section 227(4)) permits the Receiver to sell that property in the cases described in section 227(2)(a)-(c). Those are where:

(a) the amount is not disputed, and 'payment of the amount due is not made within twenty days after the amount is due';

(b) the amount is disputed, but no appeal lies from the first court to which the dispute is referred, and payment is not made within 20 days after the decision of the first court; and

(c) the amount is disputed and an appeal lies from the decision of the first court to some other court, and within 20 days of the decision of the first court neither payment of the sum due is made nor proceedings are commenced for an appeal.

After the payment of the expenses of the sale, the Receiver must apply the proceeds of the sale to pay the expenses, fees and salvage, and any excess must be paid to the owners of the property or any other person entitled to it (section 227(4)).

176. Where the aggregate amount of 'salvage payable' in respect of certain salvage services has been 'finally determined', and does not exceed £5000, but there is a dispute about how it is to apportioned among several claimants, 'the person liable to pay the amount' may ask the Receiver for permission to pay the amount to the Receiver (section 228(1)). The Receiver may, but is not obliged to, receive the amount, and if he does, must give a certificate to the person who is liable to pay the amount (section 228(2)). Such a certificate is 'full discharge and indemnity to the person by whom it was paid' and to his property, 'against the claims of all persons in

respect of the services mentioned in the certificate' (section 228(3)). Section 228(4) and (5) provide:

> '(4)The receiver shall with all convenient speed distribute any amount received by him under this section among the persons entitled to it, on such evidence, and in such shares and proportions, as he thinks fit.
>
> (5)Any decision by [the Receiver] under subsection (4) above shall be made on the basis of the criteria contained in article 13 of the Salvage Convention.'

The Receiver may retain 'any money which appears to him to be payable to any person who is absent' (section 228(6)). By section 228(7), 'A distribution made by [the Receiver] under this section shall be final and conclusive as against all persons claiming to be entitled to any part of the amount distributed'.

177. Section 229(1) gives 'the court' (the definition in section 229(4) is the same as the definition in section 226(5)) power, in specified circumstances, when the amount of 'salvage payable has been finally determined', to make an apportionment 'among the persons entitled to it in such manner as it thinks just'. Any such decision must be made on the basis of the criteria in article 13 of the Salvage Convention (section 229(2)).

178. Sections 231-235 are headed 'Vessels in distress'. Section 232 imposes duties on the Receiver in the case of vessels in distress, and section 233 confers powers on the Receiver in the case of such vessels.

179. Sections 236-240 are headed 'Dealing with wreck'. Section 236(1) imposes, among other things, a duty on any person who finds or takes possession of any wreck outside United Kingdom waters and brings it into those waters, and does not own it, to give notice to the Receiver and, as directed by the Receiver, either hold it to the Receiver's order, or deliver it to the Receiver. Any failure to comply with section 236(1) is a criminal offence. The offence is punishable on summary conviction with a fine, and, if the person is not the owner of the wreck, he forfeits any claim to salvage and is liable to pay twice the value of the wreck, to the owner, if the owner claims it, or if it is not claimed, to the person entitled to the wreck (section 236(2)).

180. If the Receiver takes possession of any wreck, he must, within 48 hours, make a descriptive record of the wreck, and, if 'in his opinion' the value of the wreck exceeds £5000, he must also transmit a similar description to Lloyd's of London (section 238(1)). Section 239 is headed 'Claims of owners to wreck'. Any owner of any wreck in the possession of the Receiver who establishes his claim to the wreck 'to the satisfaction of the Receiver' within one year of the time when it comes into the Receiver's possession shall, 'on paying the salvage fees and expenses due' be entitled to have the wreck delivered or the proceeds of sale paid to him (section 239(1)).

181. Section 240 gives the Receiver power to sell wreck in four different circumstances, if 'in his opinion' various criteria are met. Where the Receiver sells wreck in the circumstances described in section 240(1A) he may make an advance payment to the

salvors 'of such amount as he thinks fit and subject to such conditions as he thinks fit on account of any salvage that may become payable to them in accordance with section 243(5).'

182. Sections 241-244 are headed 'Unclaimed Wreck'. Section 242(1) requires a person who is 'entitled' to unclaimed wreck to give the Receiver a statement giving particulars of his entitlement, and an address to which any notices may be sent. Where such a statement is supplied and 'the entitlement is proved to the satisfaction of the [Receiver]', he must, on taking possession of the wreck, send a description of the wreck to the owner at that address (section 242(2)).

183. Section 243 is headed 'Disposal of unclaimed wreck'. It applies when the Receiver has wreck found in United Kingdom waters in his possession if 'no owner establishes a claim to it' within one year of its coming into his possession (section 243(1)). If a person has, nevertheless, 'proved to the satisfaction of the Receiver' that he is entitled to unclaimed wreck found in the place where the wreck was found, the Receiver must deliver the wreck to that person 'on payment of all expenses, costs, fees and salvage due in respect of it' (section 243(2)). If the wreck is not claimed by anyone pursuant to section 242, the Receiver must sell the wreck and pay the proceeds as 'directed' by section 243(6), after making the deductions required by section 243(4) and 'paying to the salvors the amount of salvage' to be determined in accordance with section 243(5) (section 243(3)). The amount of salvage to be paid to the salvors by the Receiver 'shall be such amount as the Secretary of State directs generally or in a particular case' (section 243(5)). Section 244 is headed 'Effect of delivery of wreck etc under this Part'. Delivery of wreck or payment of the proceeds of sale of wreck by the Receiver 'under this Chapter' discharges the Receiver from all liability in respect of the delivery or payment (section 244(1)). Nevertheless, such delivery 'shall not prejudice or affect any question which may be raised by third parties 'concerning the right or title to the wreck or concerning the title to the soil of the place at which the wreck was found' (section 244(2)).

184. Sections 245 and 246 create the offences of taking wreck to a foreign port and interfering with a wrecked vessel or with wreck. The former offence is punishable with a maximum sentence of five years' imprisonment and the latter with a fine.

185. Section 247 gives the Receiver powers to apply to a justice of the peace for a search warrant if he suspects that someone is hiding or has any wreck, or that any wreck is being improperly dealt with, in order to enter any house or other place, or any vessel and to search for, seize and detain any wreck found there.

186. Finally, section 268 gives the Secretary of State power to cause a formal investigation into any accident to be carried out by wreck commissioners. Any such investigation must be carried out in accordance with rules made under section 270(1) (section 268(2)). Section 269(1) gives the Secretary of State power to order a re-hearing, and section 297(4) gives some persons affected a right of appeal to the High Court. Section 297(1) gives the Lord Chancellor power to appoint wreck commissioners. It is clear from section 297 as a whole that wreck commissioners hold a judicial office. There were equivalent provisions in Part VI of the 1894 Act.

The legislative history: the Merchant Shipping Act 1894

187. I have already referred in passing to some provisions of the 1894 Act. A detailed survey of the 1894 Act is not necessary, but I will describe the general structure of Part IX the 1894 Act. I will then summarise two of its general features, which, together, may (but only if they are ambiguous) throw some light on the meaning of the relevant provisions of the MSA.

188. Part IX is headed 'Wreck and Salvage'. It contains 61 provisions. The first group of provisions in Part IX is headed 'Vessels in distress' (sections 510-517). Section 510(1) defines the expression 'wreck' in the same terms as section 255(1) of the MSA. There are 14 further groups of provisions. Two ('Marine Store Dealers' and 'Marking of Anchors') have no counterparts in the MSA. In contrast with the MSA, the provisions about wreck in the 1894 Act (sections 518-537) precede the provisions about salvage (sections 544-565).

189. The first such general feature is illustrated by a table which the parties helpfully agreed. That table, which I have not checked in detail, suggests that more than a dozen provisions of both Acts are identical, and, further, that other provisions of the 1894 Act have similar corresponding provisions in the MSA, but with some differences, material or otherwise. For example, on examination, sections 555 and 556 of the 1894 Act and sections 228 and 229 of the MSA, respectively, are very similar, but not identical, mainly because the monetary limits are different and because the MSA provisions incorporate the criteria in article 13 of the Salvage Convention. Section 240 of the MSA, which corresponds to section 522 of the 1894 Act, was amended after the MSA came into force. According to the parties, sections 479, 518, 519, 520, 521, 523, 524, 527, 551, 552, 553, and 566 of the 1894 Act are identical to sections 270, 236, 237, 238, 239, 241, 242, 244, 225, 226, 227, and 248 of the MSA, respectively. Significantly for current purposes, sections 225-229 and 248 have identical or almost identical predecessors in the 1894 Act.

190. The second such feature is that there is no equivalent in the MSA of sections 547-9 and 565 of the 1894 Act. Sections 547-556 of the 1894 Act are headed 'Procedure in Salvage'. The sidenote to section 547 is 'Determination of salvage disputes'. Section 547(1) provided that all such disputes 'shall, if not settled by agreement, arbitration or otherwise, be determined summarily in manner provided by this Act, in the following cases…'. Three cases are then described (where the parties agreed, and when the value of the property, or the amount claimed, did not exceed stated limits). Section 547(2) provided that, 'Subject as aforesaid', disputes about salvage were to be 'determined' by the High Court in England. If the claimant did not recover more than the limit for summary claims, he was not entitled to recover any costs, unless the court certified that the case was fit to be tried otherwise than summarily. In short, where a dispute was to be determined summarily, it was to be referred to and determined by a county court having Admiralty jurisdiction by virtue of the County Courts (Admiralty Jurisdiction) Act 1868 (section 547(4)). Section 548 made further provision about the summary procedure and section 549 provided for appeals in summary cases. Section 565 provided compendiously that, subject to the provisions of the 1894 Act, the High Court should have jurisdiction 'to decide upon all claims whatsoever relating to salvage…'

191. There was some debate in argument about what 'or otherwise' in section 547(1) of the 1894 Act might mean. Mr Smith suggested that it might be a reference to the jurisdiction in salvage disputes of Commissioners appointed by the Lord Warden of the Cinque Ports ('the Commissioners') (see section 1 of the Cinque Ports Act 1821). I note two things. First, section 571 of the 1894 Act provides 'Nothing in this Part of this Act shall prejudice or affect any jurisdiction or powers of the Lord Warden or any officers of the Cinque ports or of any court of those ports or of any court having concurrent jurisdiction within the boundaries of these ports, and disputes as to salvage arising within those boundaries shall be determined in the manner in which they have been hitherto determined'. Second, section 571 of the 1894 Act was repealed by paragraph 1 of Schedule 12 to the MSA, with effect from 1 January 1996. I consider that the most likely explanation for the use of the phrase 'or otherwise' in section 547(1) is that it refers to the jurisdiction of the Commissioners, which was expressly preserved by section 571, a provision which has now been repealed.

192. The absence of provisions in the MSA which correspond to sections 547-549 and 565 of the 1894 Act is readily explained. The MSA did not repeal sections 547-548. Section 547 was repealed in relation to England and Wales by Schedule 5 to the County Courts Amendment Act 1934, in so far as it related to the summary determination of disputes about salvage, and by section 226 of and Schedule 6 to the Supreme Court of Judicature (Consolidation) Act 1925, in so far as it related to the High Court of England and Wales. Section 548 was also repealed by the County Courts Amendment Act 1934. For completeness, provisions equivalent to sections 547-548 and 565 of the 1894 Act still exist. They are, as respects the High Court, in section 20(1)(a), (2)(j)(i) and (7)(b) of the Senior Courts Act 1981. The admiralty jurisdiction of the High Court includes any claim under the Salvage Convention. When the MSA came into force, the county court had a significant general admiralty jurisdiction, conferred by section 27 of the County Courts Act 1984. Section 27 has now been almost entirely repealed, and any jurisdiction the county court has in admiralty cases must now derive from its general jurisdiction, conferred by section 15, to decide contract and tort claims (subject to financial limits). Section 30 suggests that the county court can still make decisions in admiralty matters which concern claims about collisions, subject to the restrictions in section 30.

Discussion

193. The starting point is the language of the disputed provisions, in its ordinary and natural meaning, read in the statutory context. That context requires that principle to modified in two ways. First, the Receiver's powers can be exercised in a wide variety of circumstances. In some circumstances, he must act very quickly. The provisions must, therefore, not be read in an over-literal way, but in a way which enables them to work in practice. Second, the issue of state immunity, which only arises in a minority of cases, cannot drive the interpretation of the MSA, which must be interpreted sensibly and consistently in the majority of cases in which there are no issues of state immunity. As Dr Staker pointed out, cases in which the limitation period has expired raise analogous points. The disputes in this case about whether and if so to what extent the Receiver has power to make binding decisions about the rights of the parties in a dispute about salvage must also be considered against three wider points.

194. First, my survey of the relevant provisions shows that the MSA re-enacts provisions about the Receiver's powers, either in words which are identical, or nearly identical, to the words of the corresponding provisions in the 1894 Act. I consider that there is no material which would displace the presumption that Parliament did not intend to change the scope of those powers from their scope under the 1894 Act. In particular, it seems to me that sections 547 and 548 of the 1894 Act recognised that most if not all disputes about any entitlement to salvage and its amount would be decided in the courts (in the absence of agreement or arbitration). There are no provisions in the MSA which correspond to sections 547 and 548. That does not show, however, that Parliament, by enacting the MSA, intended to change the law about the nature or scope of the Receiver's powers (see paragraph 192, above).

195. Second, section 224(1) and paragraph 6 of Part II of Schedule 11 read with article 2 of the Salvage Convention suggest that Parliament intended disputes relating to matters which are dealt with in the Salvage Convention to be decided in courts (as defined in paragraph 6). This would ensure that the Salvage Convention, including article 25 (see paragraph 167, above), which section 224(1) incorporates into the law of the United Kingdom, would be applied whenever such disputes were decided. This approach is reinforced by the definition of 'salvage' in section 255(1) (see paragraph 169, above). In that context, it is highly unlikely that Parliament could also have intended that the Receiver, who is clearly not a court for the purposes of article 2 or of paragraph 6, should also have some parallel powers to decide disputes about salvage, to the exercise of which the Salvage Convention would or might not apply. I say 'might not' because even if the Receiver is not a court, it could be argued that, as the Salvage Convention is part of the law of the United Kingdom, he should in any event apply it when making a decision. It follows that if there is any ambiguity in the relevant provisions of the MSA, I should lean against an interpretation which would or might produce such a counter-intuitive result.

196. Third, another relevant principle of construction is that if Parliament has conferred detailed express powers on identified decision-makers, that is inconsistent with an intention to confer implied powers on unidentified decision-makers (in Latin, 'Expressio unius exclusio alterius'). My survey shows that there are several provisions of the MSA which evince a clear, express, intention to confer on a named decision-maker, that is, on the Secretary of State, or on the Receiver, as the case may be, a power to make decisions which affect or may affect the parties' rights. They include, as respects the Secretary of State, sections 243(5), 254(1), 254(2), and 294(4), and, as respects the Receiver, sections 226(3), 228(4), 228(5), 228(7), 238(1), 239(1), section 240 passim, and sections 240(1A), 242(2), and 243(2). In each example, the process of decision-making is also specified; for example, the Receiver must be satisfied that x is the case, or x must be 'proved to his satisfaction', in others, x must be the case 'in his opinion', or x must 'appear' to be the case. In some cases, he must do 'as he thinks fit', and in others, the materials he must take into account are specified (see section 228(4) and (5)), or he must be satisfied 'on such evidence…as he thinks fit'. These express provisions, and their variety, point strongly against an interpretation of sections 226 and 239 which would, by some process of implication, enable the Receiver, when he is not identified in those provisions as a decision-maker, to make other decisions which affect the parties' rights, in accordance with criteria which are not specified.

197. Against that background, I must consider what section 226 and section 239(1) mean. Argentum's 'primary submission' (additional skeleton argument, paragraph 15) is that section 226 requires the Receiver to detain any material until the salvage has been paid and that the effect of section 239(1) is that RSA is only entitled to have the Silver delivered to it if it pays the salvage, fees and expenses due. Argentum also argues that the Receiver does have jurisdiction to decide whether salvage is due, and, if so, its amount, but that that contention is not essential to its case. Despite the distinction which Argentum draws between its primary and secondary submissions, they are linked, and I will therefore consider them together.

198. In reaching my conclusions, I have not taken into account the Interveners' submissions about resources. The budget which the Secretary of State is prepared to make available to the Receiver to enable him to carry out his functions is irrelevant to this issue of construction. Nor have I taken into account their argument that the Receiver is an official who does not have the legal expertise to decide disputes about salvage. The Secretary of State has power to appoint more than one Receiver if that is necessary. I have also disregarded Argentum's arguments that Parliament cannot have intended it to be without a remedy. That may, or may not, be the outcome of the proper construction of the statutory provisions, but it cannot by itself be a reason for construing them in a particular way (see paragraph 193, above).

199. The focus of the argument was sections 226 and 239. I will consider them in turn.

200. There are two main issues about the meaning of section 226. The first issue is whether section 226 gives the Receiver a power to decide whether or not salvage is due. It is suggested that the word 'due' in section 226(1), 226(1)(a) and 226(1)(b) must mean that the Receiver has power to decide whether salvage is legally due, because he would not otherwise know whether or not to detain the relevant items, and she has to make any decision to detain quickly. It might then follow that (leaving aside the possibility that the parties might have agreed that salvage is due), 'due' cannot mean that a court (or arbitrator) has decided that salvage is due, because of the inevitable delay which such proceedings will entail.

201. Argentum accepts that such a power of decision in the Receiver is no more than 'implicit' in section 239 and implicit in, or consistent with, the provisions of Chapter II of Part IX. Argentum relies on section 248(1), the form on which a salvor makes a claim for salvage (form MSF 6200), and on the fact that it is 'odd' to give the Receiver power to decide ownership but not salvage. It is clear from paragraph 21 of Argentum's additional skeleton argument that the purpose of this argument (if correct) is that it would enable Argentum to circumvent the relevant provisions of the 1978 Act. Argentum argues that section 22 of the 1978 Act means that its provisions do not apply to decisions by the Receiver, and that article 25 of the Salvage Convention is not engaged, because, by article 2, the Salvage Convention only applies to decisions in judicial or arbitral proceedings, and paragraph 6 of Part II of Schedule 11 makes clear that decisions by the Receiver are not 'judicial proceedings'.

202. That is an ingenious argument, but I cannot accept it, against the background of the three general points which I have just made in paragraphs 194-196, above. I consider that in section 226, 'due' must mean 'is or may be due'. It does not mean 'is decided by the Receiver to be due'. This interpretation enables the Receiver to act quickly, and

is consistent with those three general points. It is also consistent with section 227, which in my judgment expressly provides that the parties' agreement about salvage or a decision by the courts is the foundation of liability to pay salvage. The hierarchy in section 227 does not sit happily with the contention that the Receiver, as well as the court, has a power to decide whether salvage is due (and, if so, in what amount).

203. The second issue raised by section 226 is whether section 226(3) requires the Receiver to detain any property until any salvage which is 'due' has been paid. Argentum argues that, even if state immunity operates to exclude a remedy in respect of its claim to salvage, it does not extinguish its entitlement to salvage. Salvage is 'due' to it: see *Benkarbouche*, paragraphs 18-19, per Lord Sumption. The Receiver is therefore obliged to detain the cargo until salvage has been paid. Such an interpretation of section 226(3) would put pressure on the relevant State to issue proceedings for delivery up and (arguably at least) to submit to the jurisdiction and waive its immunity. The Receiver submits that he cannot be required to detain the material for ever, if there is no realistic possibility that a court will require the owner to pay salvage, whether that is because the court has decided that a remedy is barred by state immunity, or because no claim for salvage has been made within the applicable limitation period. I accept that submission, which gives practical effect to section 226(3) in its overall context. I consider that if a court has, for whatever reason, decided that a claim to salvage is barred, the Receiver must release the wreck. First, it is unlikely, if state immunity had been successfully invoked, that any court in which it was invoked would have decided what salvage was 'due'. More importantly, such an interpretation would undermine the 1978 Act, and the Salvage Convention. It is, for that reason, an implausible interpretation. It is true that salvage might still theoretically be 'due' in such a case, just as it would be theoretically due in a case in which the limitation period had expired; but Parliament cannot plausibly have intended that the Receiver should continue to detain wreck in such circumstances. Thus, 'due' must mean, either, that the parties have agreed that salvage is due (and that includes by arbitration), or that a court has decided that there is an enforceable claim to it.

204. I now consider section 239. Section 239(1) raises an issue which is similar to the issue I have just considered (as does section 243(2), which also uses the word 'due'). The first point to note about section 239(1) is that it expressly gives the Receiver power to make a specific decision (about whether the owner has established a claim to the wreck), and provides for the threshold that must be met: the claim must be established 'to the satisfaction of the Receiver'. By contrast, it does not expressly give the Receiver power to decide whether salvage is due, or what salvage is due, and it does not refer to any relevant threshold. That contrast is, in itself, significant. I further consider that for the reasons I have given in the previous paragraph, the Receiver is right to submit that this provision does not mean that the Receiver may only release wreck to a State, which has successfully invoked state immunity, if that State nevertheless pays the salvage which is 'due'. Parliament cannot plausibly have intended that the Receiver should continue to detain wreck in such circumstances.

205. I acknowledge that there is an apparent anomaly in what seems to me to be the correct interpretation of these provisions. In order to make the provisions work in practice, it is necessary to conclude that the word 'due' has two different meanings in these

provisions. In section 226(1), it means 'is or may be due'. That meaning is required because otherwise the Receiver's power of interim detention, which must be exercised quickly, and usually before any determination of the parties' rights, would be useless. In section 227, and in other related provisions, and in sections 226(3) and 239(1), 'due' means 'agreed to be due' or 'decided by a court to be due'. It does not, in any relevant provision (including in sections 226(3) and 239(1)) mean 'theoretically due even though a court has held that the claim is not enforceable'. Those two provisions are concerned with the enforcement of the putative salvor's security before that security is lost by the release of the wreck to its owner. They must therefore refer to salvage which is agreed, or has been decided by a court, to be due. This means that the Receiver may detain the wreck as long as there is a realistic possibility that salvage will be agreed or that a court of competent jurisdiction may decide that it is due. Once that is no longer so, she must release the wreck or its proceeds to the owner.

206. Finally, I am not impressed with Argentum's other arguments about implication. Nothing can be deduced from section 248(1) of the MSA. This power is a power of general superintendence, and it is conferred on the Secretary of State. Section 248(1) tells us nothing about the powers of the Receiver. It could not be exercised in a way which is inconsistent with the express provisions of the MSA, and it is hard to see how a power of 'general superintendence' could enable the Secretary of State to confer any relevant power on the Receiver. In any event, there is no suggestion that it has been exercised in any way which is relevant to the issues in this appeal. In the context of the express statutory provisions to which I have referred, Form MSF 6200 is not even a straw in the wind. Finally, the question is not whether it is 'odd' for Parliament to have given the Receiver one power, but not another. The question, rather, is what powers Parliament has given the Receiver.

Conclusion on the Receiver's powers

207. For those reasons, I have reached four conclusions.

(a) The relevant provisions of the MSA are not ambiguous.

(b) In their statutory context, they do not confer, by implication, any power on the Receiver to decide whether salvage is due, or how much salvage is due.

(c) Sections 226, 243(2) and 239 do not require the Receiver to continue to detain a wreck if a State successfully invokes state immunity in response to a claim for salvage.

(d) It follows that the State is not obliged to issue proceedings for the delivery up of the wreck, and by doing so, arguably at least, to waive state immunity.

If the provisions were ambiguous, the legislative history would support my interpretation.