Neutral Citation Number: [2020] EWHC 3434 (Admlty)

Case No: AD-2019-000148

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Admiralty action in rem against
2391 bars of silver ("the Silver") formerly laden on board the SS TILAWA (sunk 1942)

Date: 16/12/2020

Before :

SIR NIGEL TEARE
sitting as a Judge of the High Court

- -

Between :

ARGENTUM EXPLORATION LIMITED	**Claimant**
- and -	
THE SILVER AND ALL PERSONS CLAIMING TO BE INTERESTED IN AND /OR TO HAVE RIGHTS IN RESPECT OF, THE SILVER	**Defendant**

- -
- -

Stephen Hofmeyr QC, Liisa Lahti and Cameron Miles (instructed by **Tatham & Co**) for the **Claimant**
Christopher Smith QC and Jessica Wells (instructed by **HFW LLP**) for the **Defendant**

Hearing dates: 26, 27 and 30 November 2020

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Approved Judgment

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed 16 December 2020 at 10:00 am

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Sir Nigel Teare :

Introduction

1. This case, like the board game Buccaneer, concerns 2364 bars of silver. The Claimant is a UK company formed in 2012 for the purpose of locating and salving valuable shipwrecks lying at depths which up until then had precluded salvage. It claims to have salved the silver bars from the wreck of the SS TILAWA which was sunk in the Indian Ocean on about 23 November 1942 by two Japanese torpedoes. There were many passengers and crew on board, 281 of whom lost their lives. The current value of the silver bars is said to be some US$ 43 million.

2. The alleged salvage was carried out in 2017 and the silver bars were taken to Southampton on 2 October 2017 where they were declared to the Receiver of Wreck. They are now held to the order of the Receiver of Wreck pursuant to section 236 of the Merchant Shipping Act 1995. Subsequently, on 14 September 2018, the Government of the Republic of South Africa ("the RSA") claimed to be the owner of the silver bars. The Claimant was made aware that a claim to ownership had been made but was unaware of who had made the claim. On 12 November 2018 the Claimant, by its solicitors, advised the Receiver of Wreck that it was entitled to the silver as "unclaimed wreck" but that if a claim to ownership were proven the Claimant sought a salvage award. If an award could not be agreed with the owner the Claimant advised that that "would likely entail an application to the Admiralty Court to fix an award". Thereafter the Claimant was advised on 31 January 2019 that it was the RSA which claimed ownership of the silver and correspondence ensued between the Claimant, the RSA and the Receiver of Wreck.

3. On 1 October 2019 the Claimant commenced this action in rem, seeking a declaration that it was the owner of the silver bars or, in the alternative, salvage. On 3 March 2020 the RSA entered an acknowledgment of service for the purpose of asserting its interest in the 2364 bars of silver and for claiming immunity pursuant to the State Immunity Act 1978 and Article 25 of the Salvage Convention. On 25 March 2020 the RSA issued an application notice seeking an order that the action be struck out or stayed on the grounds that the RSA was entitled to immunity from it.

4. On 17 April 2020 the Receiver of Wreck advised the Claimant and the RSA that she had no legal power to decide the amount of salvage and if not agreed the salvage "would need to be determined by a court". The Receiver of Wreck considered that the appropriate way for the Claimant and the RSA to progress the matter was "through the proceedings now pending before the Admiralty Court".

5. I was told that on 29 September 2020 the claim in rem was served on the silver bars.

6. In the event that the RSA is not entitled to immunity it appears that the RSA also resists paying salvage to the Claimant upon the grounds that, although it accepts that the silver bars were salved, it denies that it was the Claimant who salved them. It also maintains that any claim for salvage is time barred, the claim having been issued (it is said) more than two years after the date on which the salvage services were terminated.

7. The Claimant now accepts that the RSA (or its predecessor, the Government of the Union of South Africa) is and was at all material times the owner of the bars of silver. What remains is the Claimant's claim for a salvage reward in respect of its (alleged) salvage services. This hearing is to determine the validity or otherwise of the RSA's claim to immunity from the jurisdiction of this court.

8. If the court determines that the RSA is entitled to immunity the Claimant will nevertheless contend that salvage is due and that the Receiver of Wreck cannot release the silver to the RSA save on payment of the salvage due pursuant to section 239 of the Merchant Shipping Act 1995. Section 239 appears to be the modern enactment of the old procedure whereby derelicts became droits of admiralty if not claimed with a year but if claimed within that year were restored to their owner upon payment of salvage; see HMS Thetis (1835) 166 ER 390, 3 Hagg 228 per Sir John Nicholl at p.393 in the ER and p.235 in Hagg (an early example of a vessel which sank off Brazil with treasure on board, which treasure was recovered and brought to England where it was restored to its owner subject to the payment of salvage).

9. The RSA maintains that if it is immune from the jurisdiction of this court the Receiver of Wreck will be obliged to deliver the silver to the RSA without any salvage being paid. That is a stance which surprised me and perhaps would have surprised Sir Robert Phillimore who said in the *Constitution* [1879] 4 P. 39 at p.46. (a case of conventional salvage, rather than the recovery of treasure, where state immunity was relied upon) that "it would be improper to suppose that any foreign government would not remunerate the services of salvors, taking proper means to ascertain what these services were."

10. The resolution of that dispute concerning section 239, if it arises, is for another occasion.

11. On this application the RSA has sought an order that the Claimant's action in rem be struck out, set aside or stayed on the grounds that the RSA is immune from the jurisdiction of this court.

12. The application engages two conflicting interests, the interest of the Claimant in access to justice and the interest of the RSA in being immune from the jurisdiction of this court. Those two interests are to be balanced by application of the State Immunity Act 1978.

13. Section 1 of the State Immunity Act 1978 ("the SIA") provides that "a State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act." .

14. Section 10 of the SIA provides as follows:

(1) This section applies to—

(a) Admiralty proceedings; and

(b) proceedings on any claim which could be made the subject of Admiralty proceedings.

…………….

(4) A State is not immune as respects—

(a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; 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.

15. "Commercial purposes" are defined by section 17 as meaning "purposes of such transactions or activities as are mentioned in section 3(3) above."

16. Section 3(3) of the SIA states as follows:

"In this section "commercial transaction" means –

(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.

17. The claim before this court was commenced as an action in rem against a quantity of silver bars which were once part of the cargo on board the SS TILAWA. Following an acknowledgment of service an action in rem continues as an action in personam also; see *The Stolt Kestrel* [2015] EWCA Civ 1035 at paragraphs 62-70 per Tomlinson LJ. However, in the present case service was acknowledged by the RSA for the purpose of establishing that the RSA was immune from the jurisdiction of this court. It may not therefore be appropriate to talk of this action also proceeding in personam against the RSA. Counsel for the RSA relied upon section 10(4)(a) as the relevant sub-section and counsel for the Claimant did not suggest that section 10(4)(b) was the relevant section. I shall therefore concentrate on section 10(4)(a).

18. Thus the question is whether the bars of silver and the vessel carrying them were, at the time the cause of action arose, in use or intended for use for commercial purposes.

19. The RSA's case is that at the time the cause of action for salvage arose (in 2017) neither the SS TILAWA nor the silver bars were in use or intended for use for any purpose. Both had been at the bottom of the Indian Ocean for over 70 years and were not being used by anyone, let alone the RSA. The Claimant is therefore, according to the RSA, unable to establish that the SS TILAWA and the silver bars were in use or intended for use for commercial purposes. It must follow, it is said, that the Claimant cannot establish an exception to the immunity conferred by section 1 of the SIA.

20. The Claimant's case is that at the time the cause of action for salvage arose (in 2017) both the SS TILAWA and the silver bars retained the status they had in 1942. The SS TILAWA was in 1942 a vessel in use for commercial purposes and the silver bars were in 1942 a cargo in use for the purposes of a commercial contract for the carriage of goods. That status was retained notwithstanding that the vessel and cargo had lain at the bottom of the Indian Ocean for over 70 years.

21. The RSA maintains that the position in 1942 is irrelevant. But if it is relevant the RSA submits that after the vessel set sail from India the silver bars were not in use by the Government of the Union of South Africa but were intended for use by the Government of the Union of South Africa for the production of Union coinage, which was not a commercial purpose but a governmental or sovereign purpose. Accordingly, the RSA is still entitled to immunity.

22. The Claimant said in response that the production of coin was a commercial activity, particularly if the silver bars were required for the production of Egyptian coin.

23. The Claimant had an alternative case based upon what was said to be the RSA's intention in 2017, namely, to have the silver bars sold, with RSA retaining a share of the proceeds of sale. That, said the Claimant, was a commercial purpose. The RSA denied that it had any such intention at the time the cause of action arose in 2017. But if it did, that was a governmental or sovereign purpose because its share of the proceeds would be used for governmental or sovereign purposes.

24. That brief summary of the case explains why it will be necessary to examine the factual position both in 1942 and in 2017. The opposing cases have also necessitated a study not only of the SIA but also of customary international law, in particular the restrictive theory of sovereign immunity as it was applied in England before the introduction of the SIA.

<u>The facts</u>

25. It is first necessary to set out the facts which have given rise to this dispute. I shall summarise (i) the circumstances in which the Government of the Union of South Africa became the owner of the silver bars and the use which was to be made of them in South Africa; (ii) the voyage on which the SS TILAWA was engaged when she was sunk by Japanese torpedoes, (iii) the salvage services (in outline only) and (iv) the RSA's knowledge of the silver and its dealing with Odyssey, another company interested in salving the silver.

<u>The silver bars</u>

26. There is documentary evidence (found in the archives of the India Office and of the Dominions Office held at Kew and in the British Library) that in 1942 the Government of India sold silver to the Government of the Union of South Africa on fob terms. It appears that there were four such sales. This case concerns the fourth sale which was agreed in early November 1942. The silver was to be shipped in two consignments. The first consignment of 2391 silver bars was shipped on board the SS TILAWA on or about 17 November 1942. Payment was demanded on 19 November 1942 and was received on 2 December 1942. Between those two dates SS TILAWA

had been sunk by enemy action. There is no dispute that the Government of the Union of South Africa was the owner of the silver when the vessel sank.

27. There is no documentary evidence of the contract of carriage. In an fob contract the buyer will usually arrange the contract of carriage. However, it does not appear that the Government of the Union of South Africa did so with regard to the silver. With regard to the first sale of silver in 1942 the Government of the Union of South Africa, by letter dated 10 February 1942, requested the Government of India to arrange the shipment. The Government of the Union of South Africa further requested that the bills of lading be consigned to the Stores Superintendent, South Africa Railways and Harbours, Durban. One negotiable copy of the bill of lading was to be sent to the Stores Superintendent with the remaining copies posted to the Deputy Master of the Royal Mint in Pretoria. No marine or war risk insurance was required. The Government of the Union of South Africa was to pay the cost of the goods plus the freight. It is more likely than not that the same arrangements were requested with regard to the shipment in November 1942 with which this case is concerned. Thus it would appear that the Government of the Union of South Africa, although it did not arrange the contract of carriage contained in or evidenced by the bill of lading, was party to it. Counsel for the RSA accepted that that was the probability.

28. It is common ground that the silver bars were sold for use by the South African Mint. The Mint had been founded by the Mint Act of 1941. (Prior to 1941 there was a mint in Pretoria in South Africa which was a branch of the Royal Mint in London.) The Mint was a not a separate legal person but was an integral part of the Department of Finance of the Government of the Union of South Africa under the executive authority of the Minister of Finance. The Mint had no right to contract or acquire or own property in its own name. The Mint Act provided for the Mint to produce coinage for use within the Union of South Africa or within other states. The Act contemplated that such activities would generate profit and made provision as to where such profit should be paid. If coinage for use in South Africa were produced the profit was to be shared between the Coinage Fund and the Consolidated Revenue Fund. The latter was a fund established by the Union of South Africa Act 1909 which contained all revenue collected in the Union (save for that from railways, ports and harbours). The former was a fund established by the Financial Adjustments Act 1930 which was used to fund the recoinage of worn coins and any losses arising from the coining of Union coinage. If coinage for use in other states were produced the profit could go to the other state (at the discretion of the Minister of Finance) or, in the absence of a direction to that effect, to the Coinage Fund.

29. The factual case of the Claimant is that the silver bars were required by the Mint to produce Egyptian coinage. That was not accepted by the RSA. It is also the Claimant's case that the production of Egyptian coinage was profitable. That was at one stage not accepted by the RSA but at the hearing the profitable nature of the production of Egyptian coinage was not disputed (though its significance was).

30. The court's finding as to whether the silver bars were intended to be used by the Mint for the production of Egyptian coin depends upon the inferences to be drawn from the contemporaneous documents.

31. The annual report for the year 1942 from the Director of the Mint to the Minister of Finance (a Mr. Hofmeyr) stated that the year had been the most active and onerous in the Mint's history. During 1942 the production of silver and bronze coin had reached a record figure. In addition to increased demand for Union coinage there had been orders for non-Union coinage from East Africa, Egypt, French Equatorial Africa and Mauritius. Egypt required silver coinage. The Mint also had an ammunition department which, unsurprisingly, was particularly busy in 1942. The report also indicated that the Mint dealt with gold, meeting the demands of the dental profession and producing badges and medals. The latter were not only for the Union but for other states also. Thus badges were produced for the Belgian Congo Forces, Loraine Crosses were produced for the Free French Authorities in Central Africa and badges were produced for the Ethiopian Police. The Mint also had demands closer to home; the production of a handsome sports trophy for the Mint Recreation Club.

32. It appears that in late January 1942 the East African Currency Board enquired whether the South African Mint could produce bronze coinage. Indian mints were unable to assist ("owing to large orders from Empire Governments and increased domestic demands") and the Board was reluctant to place an order with the UK ("in view of long and hazardous journey to East Africa").

33. By April 1942 the Mint had also received "an urgent" order for 10 million silver Egyptian silver piastre coins. The Union authorities proposed to defer the production of Union coinage to enable the Mint to produce the Egyptian coinage in June and July 1942, provided certain conditions could be fulfilled. The Union authorities were content for the question of priority between the Egyptian and East African orders to be agreed between London and Cairo. On 2 May 1942 the Union authorities were still waiting for an "early decision as regards priority between East African and Egyptian orders". They received that decision on 8 May 1942; the Egyptian order was to have priority.

34. It appears that the Union authorities required "extra forgings" both for the East African and Egyptian orders, which forgings were to be supplied by the East African Currency Board (though Egypt would be charged for its share). On 4 June 1942 the Union authorities wanted to know whether their requirements for forgings and dies, which were required for both Egyptian and East African coinages, would be satisfied. The East African Currency Board reported on 19 June 1942 that the first part of the order for forgings had been shipped and that the balance would be forwarded as soon as manufacture was complete. This matter was of such importance that it engaged the attention of Mr. Eden, the Foreign Secretary. On 25 June he confirmed that the forgings for both the Egyptian and East African coins had been ordered by the East African Currency Board.

35. It therefore does not appear that the Egyptian coinage was produced in June and July 1942.

36. The submission made orally on behalf of the RSA was that the Egyptian coinage was produced by August or September 1942. There is no express evidence to that effect.

37. In September 1942 the Mint placed an order for the supply of silver from India. Delivery in South Africa was requested in 5 shipments between October 1942 and

February 1943. By a letter dated 6 October 1942 the order was increased but 3 shipments were requested, to arrive in October, November and December 1942. It was stated that the supply was of special urgency and was required "from a point of policy to avoid embarrassment to the Union Government arising from present shortage of coin for the Union and also in Egypt". The words "and also in Egypt" suggest that the Egyptian coin had not been produced by this time.

38. Prior to 4 November 1942 India offered to supply the requested silver fob Bombay at a particular price but otherwise on the same terms as applied to earlier sales of silver. On 4 November 1942 that offer was accepted. It was said that some or all of the silver could be supplied "in the form of fine bars". Shortly thereafter, on or about 13 November 1942, the High Commission of the Union of South Africa in Trafalgar Square was informed by the Mint Master in Bombay there were only two vessels available, one sailing shortly and the other in about a month's time. Two-thirds of the requested silver would be placed on the first vessel.

39. In the event 2391 bars were "despatched" on 17 November 1942. The Agreed Chronology states that on 17 November 1942 the silver was despatched from the Bombay Mint and shipped on board the SS TILAWA.

40. After the vessel and cargo were lost as a result of enemy action the Director of the Mint reported on 14 December 1942 to the Secretary for Finance that replacement of the bullion was required "for Union Coinage". That suggests that the Egyptian coinage had been produced from other silver.

41. On 30 December 1942 the second consignment equivalent to one third of the order was shipped. The replacement silver was sent in two shipments on 6 February 1943 and 12 March 1943.

42. It is accepted by the Claimant that the Egyptian coinage was in fact produced in 1942. That is evidenced by the Report of the Director of the Mint for 1942 which records that in 1942 10 million Egyptian silver piastres were produced. The submission made on behalf of the Claimant was that the silver bars shipped on board SS TILAWA were intended to be used for the production of Egyptian coin. By inference the Claimant's case must be that when that cargo was lost the Egyptian coin must have been produced in what remained of 1942 from other silver bought by the Mint. In that regard there was evidence in a letter dated 13 May 1943 from the Mint that silver was also obtained from the Rand Refinery in 1942. The letter further stated that of the bullion received in 1942 approximately 80% had been used for Union coinage and approximately 20% for Egyptian coinage.

43. It seems to me improbable that the Egyptian coin was produced by September 1943. That suggestion sits unhappily with the letter dated 6 October 1942 to which I have referred above. It also seems to me improbable that all of the silver shipped on board the SS TILAWA was destined to be made into Egyptian coin. The report for 1942 referred to increased demand for both Union coinage and non-Union coinage. Consistently with that increased demand, a letter dated 30 August 1943 from the High Commission referred to a statement from the Mint that the order for 10 million pieces had to be carried out "at a time when extremely great pressure for coinage was being experienced in many directions". There is no clear evidence earmarking the shipment

on board the SS TILAWA for Egyptian coin. It 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.

44. My finding is therefore that on the balance of probabilities the 2391 bars of silver which were loaded on board the SS TILAWA were destined to be used for the production of both Union and Egyptian coin and that it was likely that the greater part of the shipment would be used for Union coin.

45. It appears from a report produced in 1948, when the Mint was anxious to attract orders from other states for coinage (to provide work and employment for the Mint at a time when the local demand for coinage was low), that the Mint had made a profit on two orders for Egyptian coinage during the war, one in 1942 and the other in 1944/45. I therefore find that the Egyptian order in 1942 was a profitable activity for the Mint. I did not understand that to be challenged.

The voyage

46. The SS TILAWA was a merchant ship (a passenger/cargo liner) owned by the British India Steam Navigation Company, having been built on the Tyne in 1924. She was 125 metres in length and 16.5 metres in beam. Her gross tonnage was 10,006 and she was powered by a 4 cylinder quadruple expansion engine with a single shaft and screw. Her maximum speed was 12 knots. She was manned by a crew of 222.

47. The voyage on which she was engaged was from Bombay to Durban. She was carrying 6472 tons of cargo (which included cotton) and 732 passengers. She carried four gunners for protection.

48. Research of Admiralty War Diaries and situation reports has enabled the following to be stated. Early in the morning of 23 November 1942 when the vessel was making good 12 knots under bright moonlight northwest of the Maldive Islands she was torpedoed by the Japanese submarine I-29. She did not immediately sink but settled by the bow. The passengers took to the lifeboats. Between 40 and 90 minutes later a second torpedo struck her on her port side and she slipped under the waves. The first radio officer had been able to transmit an SOS message before he lost his life as a result of the second torpedo attack. HMS Birmingham which was deployed for commerce raider interception responded. A swordfish plane from HMS Birmingham spotted the survivors and directed HMS Birmingham to them. A total of 673 survivors were brought back to Bombay on 27 November 1942.

49. The wreck and the silver bars lay on the bed of the Indian Ocean from 1942.

50. I was told that it is accepted that the wreck of the vessel is owned by the UK Government as a result of wartime insurance arrangements put in place by the UK Government. The same did not apply to the silver bars because they were not insured.

The salvage of the silver bars

51. The case of the Claimant is that it engaged Advanced Maritime Services ("AMS") to find the wreck in July 2012. After an 18 month search the wreck was located and identified in December 2014. By a contract dated 12 December 2014 the Claimant engaged AMS to recover the silver bars. AMS engaged the salvage vessel SEABED WORKER, a specialised vessel designed for deep sea recovery operations. Planning took place in 2015 and 2016. The recovery operations were commenced in January 2017. Crew changes took place in Salalah, Oman, every 28 days. The recovery operations were completed in June 2017. Whenever the vessel entered Salalah any bars of silver which had been recovered were wet stored in international waters near Salalah, that is, they were locked in a basket and placed on the seabed before the vessel entered territorial waters and recovered when the vessel proceeded back to the wreck site.

52. SEABED WORKER was then engaged in other recovery operations between 23 June and 2 August 2017 (and called at Salalah for a crew change on 13 July, the silver being placed in wet storage in international waters).

53. There is evidence that the Claimant and AMS believed that the owner of the silver bars was the UK Government. (The Information Memorandum provided by the Claimant to potential investors in 2012 stated that the cargo was insured by "the British Government" and that the owner of the cargo was "HM Government". As is now accepted that was incorrect. It is, however, common ground that the UK Government was the owner of the wreck of the SS TILAWA.) Arrangements were made to take the silver bars to the UK via the Cape of Good Hope (so that the silver would not enter Egyptian territorial waters by proceeding through the Suez Canal). SEABED WORKER proceeded towards the Cape of Good Hope via the Seychelles where she called on 10 August 2017 for a crew change. Again, the silver was placed in wet storage in international waters whilst the vessel went into port. The bars of silver were transferred to the M/V PACIFIC ASKARI in the South African contiguous zone off the coast of South Africa on 3 September 2017 and carried to the UK, arriving at Southampton on 2 October 2017.

54. The silver was placed in a bonded warehouse and on 26 October 2017 was declared to the Receiver of Wreck. It was stated that it was believed that the silver belonged to HM Government and salvage was claimed.

RSA's knowledge of the silver and its dealings with Odyssey

55. The documents which have been disclosed by the RSA and the witness statements served on behalf of the RSA show that the RSA first became aware of the possibility of recovering the cargo in September 2016 when Dr. Patricia Makhesha, acting on behalf of a company called Odyssey, approached the then Deputy President of the RSA, Mr. Cyril Ramaphosa, and HH Ambassador Rapulane Sydney Molekane. A proposed draft contract was provided by Odyssey. It was entitled "No Cure No Pay Contract for Salvage of Cargo" and concerned the silver bars which had been on board the BEATRIX, which appears to have been a pseudonym for the SS TILAWA. The Annex to the draft contract stated that the cargo was believed to be the property of the RSA. It noted, correctly, that 2391 bars had been shipped from the Mint at Bombay to the Union of South Africa which had paid the Indian Government in full

in spite of the loss. The draft contract proposed that Odyssey would recover the cargo and pay the RSA 10% of the net salved value of the cargo.

56. There is no evidence that any negotiations then took place. I was told that the RSA's emails had been searched and nothing found.

57. On 25 March 2017 Mr. Wayne Morris, on behalf of Odyssey, contacted the Minister of Environmental Affairs, the late Dr. Bomo Edith Molewa, by email and provided a further copy of the draft contract. There is no evidence of any discussions between the Minister and Mr. Morris. Counsel for the Claimant submitted that it is likely that there were such discussions. It is possible that there were. I do not think I can say more than that.

58. On 25 June 2017 the Minister contacted Ms. Sandea de Wet, Chief State Law Adviser, Department for International Relations and Cooperation, who contacted Mr. Scholtz, a State Law Adviser (International Law) Department for International Relations and Cooperation, and asked to speak to him. If there were any discussions between the two advisers they are not recorded in any email. Mr. Scholtz does not refer to any in his witness statements. It is probable that there was some discussion between the two advisers. However, it does not appear that any written report was made to the Minister.

59. It appears that there was then some further contact between the Minister and Mr. Morris of Odyssey because the Minister came into possession of a further version of the draft contract which contained some small amendments to the first draft.

60. The Minister forwarded that further draft to Ms. De Wet on 22 July 2017. Her email began as follows:

> "My apologies for responding so belatedly. It has been a hectic period towards and post Policy Conference."

61. That suggests that Ms. De Wet had had some communication with the Minister before. But it cannot have been by email because none has been disclosed by the RSA.

62. The Minister continued as follows:

> "Kindly receive herewith two documents, one of which is a "contract proposal". I hope this will assist in the further analysis so that we can feed back to the proponent."

63. The reference to "further analysis" is consistent with there having been some initial analysis by either Ms.de Wet or the Minister or both. But again, that can only have been verbal because the RSA has not disclosed any email recording an analysis.

64. The second document which the Minister passed on was a report on "The Beatrix Shipwreck Project". That can only have come from Mr. Morris of Odyssey. (The report is the product of much detailed research, not only of the archives of the India Office and Dominions Office but also of Admiralty War Diaries and situation reports.)

65. The Minister concluded her email in these terms:

> "Please feel free to make contact with Mr. Wayne Morris who will respond to any further question we may have. I am aware that they are fairly concerned that there are other people who are attempting to get this treasure of ours before we do, hence they are in a bit of a hurry, subject to all matter being cleared. Once matters are clearer, we will need to bring Treasury Minister and DIRCO Minister on board.
>
> Kindly note that they would want to involve as few top people in government as possible, for very obvious reasons."

66. The reference to "any further question" suggests that some initial questions had already been asked. It is possible that they resulted in the report on the project being provided. The reference to Odyssey's concerns and their wish to involve as few top people as possible suggests that that there had been discussions between the Minister and Odyssey when such concerns were expressed.

67. The terms of the email also show that no other ministers had yet been consulted. That would only happen at a later stage when matters were "clearer".

68. On 24 July Ms. de Wet emailed Mr. Scholtz as follows:

> "Can we now look again if we can get a little wiser please ? Please have a look then we chat. Seems to me there is urgency to the case here."

69. This suggests that the two advisers had discussed the matter earlier and were now to discuss the draft contract again. In his witness statement Mr. Scholtz has stated that he had been informed by Ms. de Wet and believes that she was not involved in any discussions, correspondence or negotiations with Odyssey at this time. He has further stated that so far as he has been able to ascertain the small amendments to the draft contract had been made unilaterally by Odyssey. No emails have been disclosed suggesting any such discussions between Ms. de Wet and Odyssey. Whether there were any emails on the Minister's personal or private email account is not known. Given the contents of the Minister's email of 22 July it is more likely than not there were some discussions between the Minister and Odyssey either by email or in person or both.

70. As envisaged by the Minister, contact was established by the Office of the Chief State Law Adviser. On 31 July 2017 Mr. Scholtz emailed Mr. Morris. He asked if there was any agreement in place relating to BEATRIX with the UK government or with the successor in title of the shipowner. He also asked for any information that may "clarify how the South African government would have jurisdiction over the wreck of the BEATRIX."

71. It appears that Mr. Morris did not respond to this request. But on 6 September 2017 he asked Ms. de Wet to contact him. Ms. de Wet asked Mr. Scholtz to contact Mr. Morris. He sought to do so by telephone and on 11 September 2017 by email referred to the questions he had earlier asked and asked for "feedback". On 12 September 2017 Mr. Scholtz spoke with Mr. Morris by telephone. Mr. Scholtz reported to Ms. de Wet that Mr. Morris "had not yet bothered to read the email" but that Mr. Morris was

not aware of any distinction between ownership of the cargo and jurisdiction over the wreck. Ms. de Wet replied asking "who is this man who is so ignorant! Is he a treasure hunter/opportunist or a bona fide operation ? What is his background ?" Mr. Scholtz said that it seemed to him that Mr. Morris was an intermediary and that "the real salvagers are Odyssey" who appeared to be "reasonably bona fide" being listed on the US stock exchange. Ms. de Wet asked Mr. Scholtz whether they (Odyssey) "know about the guy" (Mr. Morris.) Mr. Scholtz replied that the Minister was in contact with Mr. Morris and referred to the two documents which Mr. Morris had given the Minister. He asked whether he should try to talk to Odyssey. Ms. de Wet replied that he should, adding "I smell a rat here".

72. On 26 September 2017 Ms. De Wet asked Mr. Schultz if any progress had been made. Mr. Schultz replied that he had not made any progress. On the same day he emailed Mr. Morris asking for answers to his questions and whether his organisation acted as agent for Odyssey. Mr. Morris telephoned to say that he was awaiting feedback from Odyssey. As to his links with Odyssey Mr. Scholtz regarded him as "a bit evasive" but he said that he "previously worked for Odyssey" and that he acted as their agent.

73. On 27 September 2017 Mr. Morris replied by email. He said he had received a response from Odyssey who indicated that the RSA had a claim as owner of the cargo and that the concerns raised "have never been an issue in the numerous salvages they have been involved in."

74. On 11 October 2017 Mr. Scholtz received a belated response to his emails to the Odyssey web site. Mr. Gregg Stemm, the Chairman of Odyssey emailed saying that he was the person to deal with and was happy to talk by telephone.

75. On 12 October 2017 Mr. Scholtz replied to Mr. Stemm by email. He said he had been concerned to confirm whether Mr. Morris acted as the agent of Odyssey. He also explained that whilst South Africa had a claim to ownership of the cargo of silver it had no jurisdiction over the wreck of the vessel. He suggested that since the UK had flagship jurisdiction there should be some form of agreement involving the UK, South Africa and the salvors.

76. On 13 October 2017 Mr. Stemm replied. He confirmed that Mr. Morris was their agent and explained that in other cases the cargo salvage arrangements were separate from the ship. He assumed that the RSA had seen the draft agreement and pointed out that Odyssey would take liability "for any legal actions undertaken." He said that it was possible that "some pirates" may already have attempted to recover the silver and that time was of the essence because of recent activity in the area of the shipwreck.

77. It is apparent that legal advice was then given to the Minister. On 27 November 2017 Mr. Scholtz informed Mr. Morris that the Minister may contact him.

78. In the event contact was made in January 2018 and negotiations over the proposed contract took place. A contract was agreed on 14 February 2018. The RSA was to receive 15% of the proceeds of sale of the silver. The contract contemplated that the silver might be recovered by someone else and appeared to provide that the RSA's 15% would apply to "any other recovery activity undertaken by a Third Party".

79. The submission made on behalf of the Claimant was that when the interest of the RSA in the silver was first stirred in 2016 the RSA "looked to have it salved commercially, and to sell the silver commercially at a vast profit." It was submitted that by 23 June 2017 or 2 October 2017 (the earliest and latest dates contended for the accrual of the cause of action in salvage) the RSA evinced an intention to continue to use the silver for commercial purposes. This is denied by the RSA. Its case is that negotiations did not in fact commence until January 2018 and that it was only then that the suggested intention was evinced.

80. The RSA was aware of the silver and its apparent ownership of the silver when the draft salvage contract was first presented in 2016 and again in March 2017. There is no evidence that either the Deputy President or the Ambassador responded to the draft contract in 2016. There is also no evidence that the Minister responded to the draft contract in 2017 before she passed on the draft to the RSA's Legal Advisers on 25 June 2017. I accept that it is more likely than not, having regard to the terms of the Minister's email dated 22 July 2017, that there was contact between the Minister and Mr. Morris at some stage before 22 July 2017. However, it is likely that this contact concerned requests by the Minister for more information, which was provided by Mr. Morris in the form of the most informative report. The Claimant does not accept the evidence of Mr. Scholtz that the minor amendments to the draft contract provided at this time were made unilaterally by Odyssey. However, there is no reason not to accept his evidence. The first draft identified three questions as to the draft (addressed to "Patricia"). Their content suggests that a draft based on English law had been used and that it was thought that the draft should be amended to refer to South African law. This was done in the amended draft. So the need for the amendments appears to have been spotted by Odyssey. The amendments could therefore have been made unilaterally. If the RSA had been involved in these amendments one would expect Mr. Scholtz or Ms. de Wet to have been involved and there is no email suggesting that they were. The questions asked by Mr. Scholtz on 31 July 2017 suggests that the RSA had not reached the position of deciding whether to enter into negotiations or not. The telephone discussion between Mr. Scholtz and Mr. Morris on 12 September 2017 do not suggest that negotiations were already underway. The RSA's questions were only answered clearly by Mr. Stemm on 13 October 2017. Thereafter, it would appear that legal advice was given to the RSA and eventually in January 2018 negotiations commenced.

81. The most than can be said is that by 2 October 2017, the date upon which the Claimant says that the cause of action in salvage accrued, the RSA was aware of the silver, that there were salvors or treasure hunters interested in recovering it and that if it were recovered the RSA might benefit financially through receiving a modest share of the proceeds. I am unable to accept that from the time when the RSA was first informed of the silver in 2016 the RSA "looked to have it salved commercially, and to sell the silver commercially at a vast profit." If anything their cautious response suggested some scepticism. I am also unable to accept the submission that by 23 June 2017 or 2 October 2017 the RSA "evinced an intention to continue to use the silver for commercial purposes." Again the most than can be said is that if the silver were salved the RSA was aware that it might benefit. It was not until Mr. Stemm's response of 13 October 2017 and after considering that response with its legal advisers that the RSA formed the intention of entering into a contract with Odyssey pursuant to which the silver would be salved and then sold to the benefit of the RSA.

State Immunity

82. Since the English law of sovereign immunity is to be found in the SIA it is necessary to apply the provisions of that Act.

83. Section 10(4)(a) provides as follows:

> "(4) A State is not immune as respects—
>
> > (a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes;"

84. Thus the essential question is whether the cargo of silver bars and the SS TILAWA were, when the cause of action for salvage arose, "in use or intended for use for commercial purposes".

85. Although it was common ground between counsel that this was the essential question counsel sought to apply section 10(4)(a) in very different ways, each seeking support from the authorities and from customary international law. Before discussing their respective arguments it is necessary to make some preliminary observations about customary international law, the SIA and, in particular, its application to admiralty actions in rem.

86. It was common ground that customary international law supports the restrictive theory of state immunity. "Properly speaking [State immunity] comprised two immunities whose boundaries were not necessarily the same: an immunity from the adjudicative jurisdiction of the courts of the forum, and a distinct immunity from process against its property in the forum state…The restrictive doctrine recognised state immunity only in respect of acts done by the state in the exercise of sovereign authority (jure imperii), as opposed to acts of a private law nature (jure gestionis)"; see *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777 at paragraphs 8 per Lord Sumption.

87. It is also common ground that the SIA was passed in order to give effect to the restrictive theory of sovereign immunity and that the SIA falls to be construed against the background of that theory; see *Alcom Ltd. v Republic of Colombia* [1984] 1 580 at p.597 G-H per Lord Diplock.

Application of the restrictive theory of sovereign immunity to actions in rem against ships

88. The *Philippine Admiral* [1976] 1 Lloyd's Reports 234 was decided in the Privy Council shortly before the SIA was enacted. In that case the restrictive theory of sovereign immunity was preferred and applied to actions in rem against a ship owned by a foreign state and which was arrested. The manner in which that theory was applied to such actions was developed in the *1 Congreso del Partido* [1983] AC 244.

89. In the *Philippine Admiral* there were three actions in rem issued in Hong Kong against the *Philippine Admiral* for goods supplied and damages for breach of a charterparty. The party liable for such claims was a company which was in possession of the vessel pursuant to a contract with the Republic of the Philippines. Ownership

remained with the Republic. The vessel was arrested and ordered to be sold. The Republic applied for all proceedings to be set aside on the grounds of sovereign immunity. At first instance the court set aside the proceedings, applying the absolute theory of sovereign immunity pursuant to which the fact that the vessel was used for ordinary commercial purposes did not preclude the operation of the doctrine. The court followed the decision of the Court of Appeal in the *Porto Alexandre* [1920] P.30. The decision at first instance was reversed on appeal, the court of appeal holding that the decision in the *Porto Alexandre* could be distinguished. The Privy Council held that the restrictive theory of sovereign immunity was more consonant with justice and decided not to follow the *Porto Alexandre*. The Privy Council then had to consider whether the *Philippine Admiral* could properly be regarded as a mere trading vessel or was a ship *publicus usibus destinata* (destined for public use) which involved considering the past history of the vessel since she became the property of the Republic and the use to which she was likely to be put by the Republic in the future; see p.248 per Lord Cross. The Privy Council held that the vessel was a trading vessel. She had been used for commercial purposes for many years and there was no reason to suppose that that was to change. Accordingly the appeal was dismissed and the claim to immunity failed; see p.249.

90. The application of the restrictive theory of sovereign immunity as it applied to actions in rem against ships owned by a foreign state was taken a step further in *1 Congreso del Partido* [1977] 1 Lloyd's Reports 536 by Robert Goff J. sitting in the Admiralty Court. In that case an action in rem was issued against *1 Congreso del Partido*, which was said to be a sister ship of the two vessels in connection with which the claims in that action arose, the *Playa Larga* and the *Marble Islands*. *1 Congreso del Partido* was arrested in Sunderland. At first instance the Republic of Cuba sought to have the actions set aside on the grounds of sovereign immunity. It was said that *1 Congreso del Partido* was destined for uses regarded by the Cuban Government as public but that even if she was to be regarded as an ordinary trading vessel the Republic was still entitled to immunity on the authority of the *Porto Alexandre*.; see pp.544-545. After judgment had been reserved by Robert Goff J., the advice of the Privy Council in the *Philippine Admiral* was delivered. Further argument was necessary. At the renewed hearing the Republic of Cuba conceded that *1 Congreso del Partido* was an ordinary trading vessel and did not seek to support the decision in the *Porto Alexandre*. However, the claim to immunity was maintained on the grounds that the English court would not implead a foreign sovereign where the claim on which the arrest was based arose from an exercise of sovereign or public or governmental power; see pp.546 and 551. That submission was upheld and it was held on the facts that the diversion of the two cargoes on *Playa Larga* and *Marble Islands* was an act of foreign policy in respect of which immunity may be invoked; see p.555. That decision was affirmed by the Court of Appeal. However Lord Denning and Waller LJ were in disagreement and so the matter proceeded to the House of Lords; see [1983] AC 244. The House of Lords held, in the case of the *Playa Larga* unanimously and in the case of the *Marble Islands* by a majority, that the claims were based on private commercial acts. The claim to immunity therefore failed.

91. Thus, before the introduction of the SIA it was necessary in the case of an action in rem where the ship had been arrested to examine not only the character of the vessel against which the action in rem had been brought but also the character of the acts which gave rise to the claims.

The application of the SIA to actions in rem against ships

92. Following the introduction of the SIA that dual approach has been replaced by section 10 of the SIA. In the case of actions in rem against a ship the question is whether at the time the cause of action arose the ship was "in use or intended for use for commercial purposes"; see section 10(2). In the case of a sister ship arrest the question is whether both the ship which is arrested and the ship in connection with which the claim arose were "in use of intended for use for commercial purposes"; see section 10(3).

93. There is no dispute that section 10 of the SIA 1978 was passed in order to enable the UK to ratify the Brussels Convention for the unification of certain rules concerning the immunity of state-owned ships which had been agreed in 1926 by the UK but not ratified. Article 1 of the Brussels Convention provided that sea-going ships owned or operated by States shall be subject as regards claims in respect of the operation of such ships to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships. But Article 3 provided that Article 1 shall not apply to "ships of war, State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service."

94. It seems clear that the phrase "in use or intended for use for commercial purposes" in SIA 1978 was intended to describe in more general language the distinction drawn in articles 1 and 3 between those state-owned ships which were entitled to state immunity and those which were not. The phrase also echoes the distinction drawn by the Privy Council in the *Philippine Admiral* between trading vessels and ships destined for public use. The phrase is, I think, readily applied to vessels. Vessels when at sea are used for the purposes for which they have been built. All that is necessary is to decide whether that use is for commercial purposes.

The application of the SIA to actions in rem against state-owned cargoes

95. Prior to the coming in to force of the SIA there was, it appears, no case which considered the circumstances in which a foreign state was entitled to claim immunity, pursuant to the restrictive theory of sovereign immunity, from an action in rem against cargo owned by the foreign state. This is not surprising since there was very little time between the decision in the *Philippine Admiral* and the coming into force of the SIA.

96. Section 10(4)(a) of the SIA provides that there is no immunity in respect of such actions where, at the time the cause of action arose, both the cargo and the ship carrying it were "in use or intended for use for commercial purposes". Again, that phrase is readily applicable to ships which are used for the purposes for which they have been built, namely, carrying cargo. One only needs to examine whether the purposes are commercial. When applying the same phrase to cargoes, the task is not perhaps as easy. For cargoes, typically, are not put to the use for which they were grown or manufactured during carriage. They are only put to the use for which they have been grown or manufactured after the carriage has been completed and they are no longer on board the ship. It may be necessary to bear this difference in mind when applying section 10(4)(a) to state owned cargoes.

The scheme of the SIA and admiralty actions in rem

97. In *Alcom v Republic of Colombia* [1984] 1 AC 580 Lord Diplock observed at p.600 C that the SIA dealt with the jurisdiction of the court (1) to adjudicate upon claims against foreign states (the "adjudicative jurisdiction") and (2) to enforce by legal process (the "enforcement jurisdiction") judgments pronounced and orders made in the exercise of the adjudicative jurisdiction. Sections 2-11 dealt with adjudicative jurisdiction and sections 12-14 dealt with enforcement jurisdiction. The adjudicative and enforcement jurisdictions reflected the two forms of state immunity recognised by the common law before the passing of the SIA; see *Benkharbouche* at paragraph 8 per Lord Sumption

98. A typical example of the adjudicative jurisdiction is where a person seeks to sue a state upon a contractual obligation A typical example of the enforcement jurisdiction is where a judgment is sought to be enforced against the property of a state.

99. Admiralty actions in rem do not fall easily into this classification. In an action in rem against a ship a claimant will seek an adjudication of its claim but may also obtain an order for the arrest and later sale of the ship in order to enforce the judgment. Thus it was that in *Alcom* Lord Diplock observed that admiralty jurisdiction in rem may be regarded as hybrid; see p.600 G.

100. In this case the court is concerned with an action in rem against the cargo of silver bars which, it is common ground, is and was owned by the RSA or its predecessor. Such actions are expressly dealt with by section 10(4)(a) of the SIA. The SIA provides that a state is not immune as respects an action in rem against a cargo belonging to that state if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes.

101. However, section 13(2)(b) and (4) also deal with the arrest, detention or sale of property in an action in rem, a further illustration of the hybrid nature of an action in rem. The court may issue any process in respect of the property of a state where the property is for the time being in use or intended for use for commercial purposes. Thus what excludes immunity is the same concept in both the adjudicative jurisdiction and the enforcement jurisdiction namely, proof that the vessel and cargo, or the property, are "in use or intended for use for commercial purposes." However, although the test is the same the context in which it is applied is different. In the one case it is applied in the context of the adjudicative jurisdiction. In the other it is applied in the context of the enforcement jurisdiction. Also, in the case of the adjudicative jurisdiction the test must be satisfied at the time when the cause of action arose whilst in the case of the enforcement jurisdiction the test must be satisfied "for the time being", that is, at the time when the process is issued, which will be sometime after the cause of action has arisen.

The meaning of "in use or intended for use for commercial purposes"

102. The meaning of this phrase has been considered by the Supreme Court in the case of section 13. In *SerVaas Inc v Rafidain Bank* [2012] 3 WLR 545 Lord Clarke stated at paragraph 16 that "the expression "in use for commercial purposes" should be given its ordinary and natural meaning having regard to its context…Parliament did not intend a retrospective analysis of all circumstances which gave rise to property, but an

assessment of the use to which the state had chosen to put the property." In paragraph 17 Lord Clarke said that what must be established is that property is "currently" in use or intended for use "for a commercial transaction." Whilst the use of the word "currently" reflects the phrase "for the time being" in section 13 the same approach must be appropriate in the context of section 10 save that the relevant time is the date when the cause of action arose and save that section 10 concerns the adjudicative jurisdiction, not the enforcement jurisdiction.

103. In the present case there has been no arrest of the cargo and so it is section 10 which applies, not section 13. Section 13 will only come into play if and when it is necessary to arrest the cargo.

104. As made clear by Lord Clarke what must be established is that the silver bars, at the time the cause of action arose in 2017, were in use or intended for use for commercial purposes.

105. If it were sought to arrest the cargo the same question would arise but it would have to be answered as at the time an attempt were made to arrest the cargo.

The competing submissions

106. The RSA's submission has the attraction of simplicity. It is said that when the cause of action in salvage arose in 2017 neither the SS TILAWA nor the silver bars were in use or intended for use by the RSA. If the cause of action arose on 23 June 2017 when the retrieval operation was complete the silver bars were on board the SEABED WORKER. If the cause of action arose on 2 October 2017 when they arrived in the UK the silver bars were in Southampton.

107. On those dates the RSA was aware of the silver. It knew that one or more salvors were interested in salving it and that if that happened the RSA might benefit. Odyssey had offered 10% of the proceeds of sale. But the RSA had not determined what to do with the silver. By 23 June 2017 the RSA does not appear to have taken any steps with regard to the silver. Similarly, the RSA does not appear to have taken any steps with regard to the silver by 2 October 2017. It was only when the RSA received Mr. Stemm's response dated 13 October 2017 to the RSA's important questions, and they had been considered, that the RSA began to form an intention to enter into a contract pursuant to which the silver would be salved and sold. Since that intention was formed after the cause of action arose it is not relevant to the present dispute.

108. Thus it is the case of the RSA that when the Claimant's cause of action for salvage arose, at the latest on 2 October 2017, neither the silver nor the SS TILAWA were in use or intended for use by the RSA. It is on that basis that the RSA claims that it is immune from the Claimant's action in rem against the silver.

109. The Claimant's submission is a little more complicated. It involved looking at the position in 1942 to establish the status of the ship and cargo and then applying that status to 2017 when the cause of action in salvage arose.

110. Section 17 defines commercial purposes as being the "purposes of such transactions or activities as are mentioned in section 3(3) above."

111. The transactions mentioned in section 3(3) of the Act include "any contract for the supply of goods or services".

112. This definition of commercial purposes was described by Lord Diplock in *Alcom v Republic of Colombia*]1984] 1 AC 580 at p.603 B as an "extended meaning which takes one back to the comprehensive definition of "commercial transaction" in section 3(3)". Lord Diplock (with whom the other members of the House of Lords agreed) then made the following observation:

> "Paragraph (a) of this tripartite definition refers to *any* contract for the supply of goods or services, without making any exception for contracts in either of these two classes that are entered into for the purposes of enabling a foreign state to do things in the exercise of its sovereign authority either in the United Kingdom or elsewhere."

113. The Government of the Union of South Africa purchased the silver bars pursuant to an fob contract of sale. It was as a result of that fob sale that the silver bars were on board the SS TILAWA. The silver bars were being carried on board the SS TILAWA from India to South Africa pursuant to a contract of carriage. Thus when the vessel was sunk, taking the silver bars to the bottom of the Indian Ocean, the silver bars were the subject both of a contract for the supply of goods and of a contract for the supply of services.

114. It was therefore submitted on behalf of the Claimant that in 1942 the cargo of silver bars was in use for the purposes of a contract for the supply of goods and for the purposes of a contract for the supply of services. Pursuant to the definition of commercial purposes in the SIA those were commercial purposes.

115. There was no dispute that in 1942 the SS TILAWA was in use for commercial services.

116. It was further submitted that the status of the vessel and cargo in 1942 remained the status of the vessel and cargo in 2017. The fact that the wreck of the vessel and the cargo had lain on the bottom of the Indian Ocean for over 70 years did not lead to a change in their status.

117. For these reasons the Claimant submitted that the RSA was not entitled to immunity. The action in rem was against the cargo of a state in circumstances where both the cargo and the ship carrying it were, at the time when the cause of action arose, in use for commercial purposes

Discussion

118. The submission made on behalf of the RSA has the merit that it focuses upon an assessment of the use to which the RSA put the silvers bars in 2017 when the cause of action in salvage arose. In saying that the RSA did not put the silver bars to any use in 2017 the RSA is using the words of section 10(4) in what can be said to be, depending upon the context, their ordinary and natural meaning. Thus the submission is consistent with the approach of Lord Clarke in *SerVaas*.

119. The submission made on behalf of the Claimant has the merit that it seeks faithfully to apply the extended statutory definition of commercial purposes in the SIA. In saying that the silver bars were "in use" for the purposes of the fob contract of sale or for the purposes of the contract of carriage the Claimant is, however, using the words of section 10(4)(a) in a sense which is perhaps less ordinary and natural than the sense in which they are used by the RSA in its submission.

120. Further, even if, giving the language of section 10(4)(a) an ordinary and natural meaning in its context, one can say that the cargo was being used for the purposes of the contract of sale and contract of carriage in 1942, can it be said that that was the position in 2017? For both contracts had come to an end, over 70 years earlier, a point stressed by counsel for the RSA.

121. In considering these competing arguments it is helpful to consider the consequences of the RSA's argument. That argument invites the court to conclude that the SS TILAWA, although in use for commercial purposes in 1942, was no longer in such use in 2017. If that is the correct approach it would follow that in a case where both ship and cargo were in use for commercial purposes immediately prior to sinking they would cease to be so once they had been sunk with the result that if the cargo were later salved the RSA would be immune from a claim in rem for salvage and indeed from a claim in personam for salvage, for at the time the cause of action in salvage arose the ship would not be in use for commercial purposes (see section 10(4)(b) which deals with in personam actions against a state-owned cargo). Other examples may be postulated which do not involve an historic wreck. A ship may run aground and as a result of structural failure caused by hogging stress be unsalveable and in need of a wreck removal contract on commercial terms. Salvors are able however to salve her cargo. If the cargo is owned by a state and is in use or intended for use for commercial purposes the state would be immune from both an action in rem and an action in personam because, at the time when the cause of action for salvage arose, the vessel was no longer in use or intended for use for commercial purposes but was merely a wreck.

122. These are surprising consequences. It is difficult to see why the fact that the vessel becomes a wreck should determine whether a state is immune from an action in rem for salvage in respect of its cargo. They suggest that Parliament cannot have intended that, in applying section 10 of the SIA, the court was to ignore the status of vessel and cargo when the vessel was carrying the cargo. It is of course clear that Parliament required the assessment of the question of use for commercial purposes to be made at the time when the cause of action arose but in doing so the above examples suggest that one must have regard to the use of the vessel and cargo when the vessel was carrying the cargo. If both were in use for commercial purposes when the vessel was carrying the cargo then that will usually identify the status of the vessel and cargo when the cause of action for salvage arose. Otherwise, in the examples suggested, a state would have immunity from salvage, both in rem and in personam. That cannot have been intended by Parliament when enacting the SIA in order to give effect to the restrictive theory of sovereign immunity. The RSA's argument seeks, I suggest, to apply section 10(4)(a) mechanically, rather than intelligently having regard to its consequences and the restrictive theory of sovereign immunity.

123. I therefore consider that it is appropriate to have regard to the status of the vessel and cargo in 1942 when deciding whether the vessel and cargo were, at the time the cause of action for salvage arose in 2017, in use or intended for use for commercial purposes. The status of the vessel and cargo in 1942 may not determine the status of the vessel and cargo in 2017 but it must be a relevant consideration.

The position in 1942

124. There is no dispute that the SS TILAWA was in use for commercial purposes in 1942.

125. The submission made on behalf of the Claimant was that the silver was in use for commercial purposes after it left India because it was in use for the purposes of the contract of a sale and the contract of carriage. Those are commercial purposes pursuant to the extended definition of commercial purposes in the SIA.

126. The Claimant's case on this point was put by counsel in this way:

> "At the time of sinking the silver was being shipped pursuant to a commercial contract of carriage. It was therefore at the time in use for commercial purposes…The use to which the silver was put was to be carried from Bombay to Durban on board a merchant ship. It was being put to this use so that it could be further used in the Union where it was required. …And the use to which it was being put was undoubtedly for commercial purposes. This was the status of the cargo."

127. The submission made on behalf of the RSA was that the silver was not "in use" at any time since it left India because cargo on board a vessel is not in any use and was not "intended for use for commercial purposes" because the silver was to be used by the Government of the Union of South Africa to produce coins, a governmental or sovereign purpose. Counsel for the RSA accepted that the contract of carriage was a commercial contract and that, pursuant to section 3(1) of the SIA, the RSA would have no immunity as respects proceedings relating to that commercial contract. The same applied to proceedings relating to the contract of sale. But where an action in rem was brought against a cargo belonging to a state the state had immunity unless the cargo and the ship carrying it were when the cause of action arose in use or intended for use for commercial purposes. Counsel said:

> "An asset on board a ship is not in use"

128. Before reaching a conclusion as to which of these competing submissions is correct it is necessary to refer to two matters, first, the Brussels Convention of 1926 and, second, the decision of Gross J. in the *Altair* [2008] 2 Lloyd's Reports 90.

129. It is common ground that section 10 of the SIA was enacted in order to enable the United Kingdom to ratify the Brussels Convention of 1926 for the unification of certain rules concerning the immunity of state-owned ships. However, it also related to state-owned cargoes. The relevant provisions provided as follows:

> "Article 1

Sea-going ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships, as well as the States which own or operate such ships and own such cargoes shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment.

Article 2

As regards such liabilities and obligations, the rules relating to the jurisdiction of the Courts, rights of actions and procedure shall be the same as for merchant ships belonging to private owners and for private cargoes and their owners.

Article 3

1. The provisions of the two preceding Articles shall not apply to ships of war, State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service, and such ships shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem.

Nevertheless, claimants shall have the right to proceed before the appropriate Courts of the State which owns or operates the ship in the following cases:

1. Claims in respect of collision or other accidents of navigation;

2. Claims in respect of salvage and in the nature of salvage and in respect of general average;

3. Claims in respect of repairs , supplies or other contracts relating to the ship; and the State shall not be entitled to rely upon any immunity as a defence.

+2 The same rules shall apply to State-owned cargoes carried on board any of the abovementioned ships.

+3 State-owned cargoes carried on board merchant ships for Government and non-commercial purposes shall not be subject to seizure , arrest or detention by any legal process nor any proceedings in rem.

Nevertheless, claims in respect of collisions and nautical accidents, claims in respect of salvage or in the nature of salvage and in the respect of general average, as well as claims in respect of contracts relating to such cargoes, may be brought before the Court which has jurisdiction in virtue of Article 2."

130. Counsel for the Claimant submitted that section 10 of the SIA should be interpreted consistently with the Brussels Convention insofar as possible to do so. This approach is consistent with the approach adopted by Brandon J. when interpreting the admiralty jurisdiction provisions of the Administration of Justice Act 1956 which were said to

give effect to the provisions of the Arrest Convention of 1952. In the *Andrea Ursula* [1973] QB 265 at 270H–271B, Brandon J stated:

> "Recent decisions of the Court of Appeal show that, where the meaning of an English statute intended to give effect to an international convention to which the U.K. is a signatory is not clear, the court can and should look at the terms of the convention to assist it in construing the statute; and further that, having done so, the court should so construe the statute as to give effect, so far as possible, to the presumption that Parliament intended to fulfil, rather than to break, its international obligations. *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740. See also *The Annie Hay* [1968] P 341, in which this court applied those decisions. I turn, accordingly, to consider the relevant provisions of the International Convention relating to the Arrest of Sea-going Vessels, and the provisions of the Act of 1956 intended, or apparently intended, to give effect to them."

131. In *1 Congreso del Partido* Lord Wilberforce did not regard the provisions of the SIA 1978, which only came into force after the events in issue, as evidence of what the limits to the restrictive theory of state immunity were in international law; see p.260 B-E. Lord Wilberforce also did not accept that the Brussels Convention was a statement of generally accepted international law. It was "a limited agreement between a limited number of states"; see p.260 E-H. However, the SIA applies to the facts of the present case and in circumstances where section 10 apparently enabled the UK to ratify the Brussels Convention, it seems appropriate, applying the principle referred to by Brandon J., to have regard to it.

132. Counsel for the Claimant submitted that the Brussels Convention did not provide for immunity from the English court's adjudicative jurisdiction in rem, even where the state-owned cargo was "carried on board for Government and non-commercial purposes". He relied upon the final paragraph of Article 3 which provided: "Nevertheless, ……claims in respect of salvage ……may be brought before the Court which has jurisdiction in virtue of Article 2." Article 2 provided that "the rules relating to the jurisdiction of the Courts, rights of action and procedure shall be the same as for merchant ships belonging to private owners and for private cargoes and their owners". Counsel had in mind, I think, that one such rule relating to jurisdiction is that the Admiralty court may have jurisdiction in rem by the issue and service of an in rem claim against state-owned cargoes.

133. Counsel for the RSA submitted that Article +3 of the Convention was concerned with in personam claims.

134. The difficulty with the Claimant's submission is that the article 3.1 expressly states that state-owned cargoes shall not be subject to "any proceedings in rem". The difficulty with the RSA's submission is that the final paragraph could have referred to in personam proceedings expressly but did not do so. (It may however be noted that in the *Philippine Admiral* Lord Cross said that article 1 of the Brussels Convention covered not only actions in rem but also actions in personam; see p.243.)

135. It is possible that the distinction drawn in article +3 and the final paragraph is between the enforcement jurisdiction (by way of seizure, arrest or detention) and the adjudicative jurisdiction (determining whether a cause of action is established) which would include both a claim in rem where there was service but no arrest and a claim in personam.

136. I have found it very difficult to interpret article +3 and the final paragraph in the context of articles 1-3 as a whole. Counsel for the RSA also described the Brussels Convention as "difficult to interpret" and counsel for the Claimant did not address the interpretation of articles 1-3 and articles +2 and +3 in detail.

137. The Brussels Convention was agreed at a time when the restrictive theory of international law was in its infancy and international law has developed since then. Moreover, the language and structure of section 10 of the SIA is different from the Convention. It may also be noted that whilst customary international law provides for the restrictive theory of sovereign immunity and so for the distinction between vessels used for commercial purposes and vessels used for governmental purposes I was told by counsel for the RSA (and not, I think, resisted by counsel for the Claimant) that customary international law does not identify precisely where the line is to be drawn. This is consistent with Lord Wilberforce's observation in *I Congreso del Partido* at p.260 D that the limits of the doctrine were still in the course of development and in many respects uncertain. Thus it must be for national legislatures and courts to decide where the line is to be drawn. England has sought to do so in section 10 of the SIA. For these reasons the court should, I think, concentrate on interpreting the words of section 10 in their context rather than seek to interpret the different and difficult language of the 1926 Convention.

138. Counsel for the Claimant also sought support from the only decision on the SIA in the context of a claim for salvage against cargo interests, the *Altair* [2008] 2 Lloyd's Reports 90. That case concerned an award of salvage pursuant to a contract on the terms of Lloyd's Standard Form of Salvage Agreement ("LOF"). The award was challenged pursuant to section 67 of the Arbitration Act 1996. A vessel, laden with wheat, had grounded on 28 August 2006. An LOF dated 1 September 2006 was agreed and on 7 September 2008 the casualty was refloated, before being redelivered on 9 September 2006. The Grain Board of Iraq ("the GBI") had bought the cargo of wheat from Eksim. The cargo was intended for "public distribution" in Iraq as part of the Public Distribution System ("PBS"). Gross J held, as the arbitrator under the LOF had done, that the GBI was party to the LOF and so had agreed to arbitration pursuant to the LOF; see paragraphs 42 and 59. The GBI was a separate entity from the State of Iraq and the entry into the LOF was not done in the exercise of sovereign authority and so GBI was not entitled to immunity pursuant to section 14 of the SIA; see paragraph 80. The challenge to the award of salvage on the grounds of state immunity failed for those reasons. No question therefore arose for decision as to section 10 and the judge dealt with this issue briefly. At paragraph 82 Gross J. said, in the context of section 10(4)(b) of the State Immunity Act:

> (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.

139. What was said by Gross J. in paragraph 82 was obiter. However, it is significant that he considered that the cargo was "in use" for commercial purposes because it was what he described as a "commercial cargo". That appears to have been judicial shorthand for the test set out in section 10(4)(a); see paragraph 84(iii) where Gross J. said:

> "Whereas a state enjoys immunity from an action in rem unless the cargo is a "commercial cargo" (section 10(4)(a)),……………."

140. Gross J.'s reasons for saying that the cargo was a commercial cargo were that "it had been bought from Eksim (and for that matter shipped) commercially." Gross J. further said that if the cargo was intended for use as part of the PDS, "that cannot affect the cargo's "status" as a commercial cargo at the time of the salvage".

141. Counsel for the RSA suggested, by reference to paragraph 20 of the judgment, that the arbitrator had had in mind that the cargo was going to be sold at subsidised prices and was therefore "commercial". This may or may not have been the view of the arbitrator but paragraph 82 makes it clear that the judge had in mind that the cargo was "commercial" because it had been bought and was shipped commercially.

142. Gross J. did not analyse the matter by reference to the extended definition of commercial purposes in the SIA but his conclusion was, it seems, to me consistent with the submission made in the present case on behalf of the Claimant. It was for this reason that counsel for the RSA had to submit that the judge's conclusion, if based on the contract of sale and contract of carriage, was wrong. I consider that Gross J.'s approach supports the Claimant's submission that the silver was in use for commercial purposes because it had been bought from the Bombay Mint and shipped commercially. The fact that the silver may have been intended for use as part of the governmental or sovereign activity of producing Union coinage could not affect the "status" of the cargo as a commercial cargo. Section 3(3)(a) of the SIA which identifies a commercial transaction as any contract for the supply of goods or services is not subject to the words "otherwise than in the exercise of sovereign authority" which only apply to section 3(3)(c), as explained by Lord Diplock in *Alcom*.

143. However, Gross J. did not have the benefit of the guidance given by two later cases to which I must have regard.

144. The two later cases concerned section 13 of the SIA and were relied upon by counsel for the RSA. However, it is necessary to begin with *Alcom* which was decided before the *Altair*.

145. *Alcom Ltd. v the Republic of Colombia*]1984] 1 AC 580 concerned a garnishee order which attached debts owed by a bank to a state. The question was whether the state was entitled to immunity. The House of Lords held that it was. Lord Diplock said that to speak of a debt as "being used or intended for us for commercial purposes" involved employing ordinary English words in what is not their natural sense; see p. 602 G. He concluded that unless it could be shown that the bank account was earmarked by the foreign state solely for being drawn upon to settle liabilities incurred in commercial transactions the debt could not be regarded as in use for commercial purposes; see p.604 D.

146. The first of the two later cases relied upon was *SerVaas Inc. v Rafidain Bank* [2012] 3 WLR 545. This was another case involving a third party debt order in relation to the debt payable by a bank to a state by way of a dividend under a scheme of arrangement. Lord Clarke stated that the phrase "in use for commercial purposes" should be given its ordinary natural meaning having regard to its context; see paragraphs 16 and 17. Lord Clarke emphasised that it was not sufficient that the property in question related to or was connected with a commercial transaction. It had to be currently in use or intended for use for a commercial transaction; see paragraph 21. Lord Clarke further stated that it was not relevant that monies in a bank account may have originated from commercial transactions; see paragraph 19. "The focus is throughout on actual use"; see paragraph 21.

147. The second of the two later cases relied upon was *LR Avionics Technologies Ltd. v Federal Republic of Nigeria* [2016] 4 WLR 120. That case concerned a charging order on premises in London owned by a state but leased to a company for the purpose of providing Nigerian visa and passport services. Males J. held that the premises were not in use for commercial purposes. Following the approach of Lord Clarke "the primary consideration must be the nature or character of the relevant activity, what is being done with (or in this case on) the property in question"; see paragraphs 38. Males J. concluded that the purpose for which the property was being used was not merely to earn rent under a lease but to provide consular services; see paragraph 39. Again, following the approach of Lord Clarke it was not sufficient that the property may be connected with a commercial transaction, namely, the contract for the supply of consular services. The purpose for which it was in use was the provision of consular services. The fact those services were being provided by an agent was incidental; see paragraph 40.

148. The statements of principle in both *Alcom* and *SerVaas* must be followed, as they were in *LR Avionics*. But the present case involves a ship and cargo rather than debts owed to a bank or a building. It also involves the adjudicative jurisdiction rather than the enforcement jurisdiction. In determining whether property is in use for commercial purposes regard must always be had to the context, as Lord Clarke stated.

149. I must now return to the competing submissions in this case.

150. As a matter of the ordinary use of language a cargo on board a ship is typically not spoken of as being in use. Rather, it is spoken of as being carried from one port to another pursuant to a contract of carriage. It will of course be used by the receiver but that is only after it has been discharged from the vessel at the port of discharge.

151. The conclusion invited by counsel for the RSA that cargo is not in use during the voyage does not determine the question of state immunity because it remains to consider whether the cargo is intended for use for commercial purposes. Counsel pointed out that the commentary of the International Law Commission in 2004 on article 16 of the UN Convention on Jurisdictional Immunities of States and their Property understood the phrase "used or intended for use" in this way; see paragraph 15 of the commentary. (The UN Convention – which has been described by Aikens J. as a most important guide to on the state of international opinion, see *AIG v Republic of Kazakhstan* [2006] 1 WLR 1420 at paragraph 80 - deals with ships owned or operated by a state in article 16, and sub-paragraph 4 thereof refers to state-owned cargo. The structure of the article has some similarities with the scheme of the SIA but deliberately makes no reference to actions in rem and in personam and describes as "manifold" the difficulties inherent in the formulation of rules for the exception from the principle of non-immunity; see paragraph 3 of the commentary. It was not suggested that I should interpret the language of the SIA by reference to the much later 2004 UN Convention. I have therefore not attempted to consider how article 16 would apply to the present case.)

152. Counsel for the Claimant submitted that a cargo is in use for the purposes of the contract of carriage. "It's entirely normal for a cargo to be considered as in use within the natural sense of those words…when it is on board a ship and being carried to its destination". Whilst this may be a possible use of the phrase "in use" when applied to a cargo, it is perhaps not the typical way in which the phrase is used. The carrier would not say that he is using the cargo for the purposes of the contract of carriage. He would say that he was carrying the cargo. The owner of the cargo would not say that he was using the cargo. He would say that his cargo was being carried. Of course, the cargo is closely connected with the contract of carriage, indeed it is subject to it, but that is not what section 10(4)(a) requires.

153. There is therefore, I think, a cogent argument that, giving the words of section 10(4)(a) their ordinary and natural meaning, the cargo of silver bars was not in use when being carried from Bombay to South Africa.

154. The Claimant's argument can however be supported. As I have stated earlier in this judgment there is little difficulty in applying the phrase "in use or intended for use for commercial purposes" to ships. Ships are typically used for the purposes for which they were built whilst carrying cargo. But cargoes are not typically used for the purposes for which they were grown or manufactured whilst being carried. That difference is part of the context in which the phrase "in use or intended to be used for commercial purposes" is to be applied to cargo. If the phrase "in use" were to be understood in the sense suggested by the RSA very few if any cargoes would be in use. The only one suggested in argument was the use of vapours from an LPG cargo for fuel. That suggests that the phrase "in use" when applied to cargo is intended to be applied in a different sense from that in which it is used when applied to ships.

155. The silver was bought and shipped on board a merchant ship pursuant to an fob contract of sale and a contract of carriage contained in or evidenced by a bill of lading, two ordinary commercial contracts. Those who enter such contracts can find themselves subject to liabilities in salvage which are ordinary commercial liabilities. It would be surprising if a state which, like any private entity, enters into such

contracts, were immune from actions in rem against its cargo in respect of salvage. It would be difficult to reconcile such a conclusion with the restrictive theory of state immunity against the background of which the SIA is to be interpreted.

156. Counsel for the Claimant submitted that there is no "principled reason" why the RSA should be immune from an obligation to pay salvage for the recovery of the silver or from proceedings in rem seeking payment of that salvage. It was said that requiring the RSA to answer the claim for salvage is clearly "neither a threat to the dignity of that state, nor any interference with its sovereign functions" (Lord Wilberforce's words in the *I Congreso del Partido* [1983] 1 AC 244 at p.262E).

157. In the present case the claim which the Claimant wishes to make in rem against the silver bars is a claim in salvage. It is a claim based upon the fact that a successful salvage service by the Claimant conferred a benefit upon the RSA as owner of the salved property. A liability to pay salvage is an incident of maritime law, now enshrined in the Salvage Convention as part of English law, which can affect all those who contract for their goods to be carried by sea. When a state contracts for its goods to be carried by sea, a classic example of a commercial contract, there is no reason why, pursuant to the restrictive theory of sovereign immunity, it should not be exposed to the same liability in salvage as a private owner of cargo. To adopt the phrase used by Lord Cross in the *Philippine Admiral* to justify his preference for the restrictive theory of sovereign immunity it is "more consonant with justice" that the state should in such circumstances be exposed to the same liability in salvage as a private owner of cargo. As Gross J. observed in the *Altair* at paragraph 57 "there is no unfairness in a state, having enjoyed the benefit of salvage services, becoming bound to pay for them (subject to any particular questions as to enforcement)".

158. Counsel for the RSA accepted the RSA was liable to pay salvage (assuming there was a good claim and that jurisdiction could be established) but he said that the RSA was immune from an action in rem in England claiming such salvage. Counsel said that an admiralty action in rem obliges the RSA to come before the court because if it does not do so its property would be arrested and sold to discharge the liability to pay salvage. The RSA ought not, it is said, to be placed in that position. There is therefore a principled reason for the RSA's claim to immunity.

159. However, the court is at present concerned with the adjudicative aspect of an action in rem. There has been no arrest and there is no application for a warrant of arrest. If there were no acknowledgement of service by the RSA the Claimant would still be required to prove its claim if it sought judgment; see CPR 61.9(3)(a)(iii). The enforcement aspect of an action in rem would only come into play if and when the Claimant sought to arrest and then sell the cargo. That has not happened and may never happen. The silver is held to the order of the Receiver of Wreck pursuant to section 236 of the Merchant Shipping Act 1995. If and when it did happen section 13 would have to be considered and applied as at the time when the Claimant sought the issue of an arrest warrant, not at the earlier date when the cause of action in salvage arose. At present all that is sought is that the court exercises its adjudicative jurisdiction to determine the amount of salvage that is due.

160. In *I Congreso del Partido* the vessel was not only subject to an action in rem but was arrested. The state in that case therefore had even more reason to come before the

court. Yet those circumstances did not cause the restrictive theory of sovereign immunity to be brought into play in circumstances where the vessel was used for commercial purposes and where the actions which gave rise to liability were commercial in character.

161. I therefore have difficulty in accepting that there is a principled reason for state immunity from the court's adjudicative jurisdiction in an action in rem claiming salvage where 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 of cargo.

162. I think that these matters should be borne in mind when applying the phrase "in use or intended for use for commercial purposes" in the context of the court's adjudicative jurisdiction since the SIA was intended to give effect to the restrictive theory of sovereign immunity.

163. When those two matters are borne in mind, first, the circumstance that cargoes are typically not used during the voyage for the purposes for which they have been grown or manufactured, and, second, the lack of a principled reason for the application of the restrictive doctrine of state immunity in the context of the court's adjudicative jurisdiction, I am persuaded that it is right to conclude, notwithstanding the cogency of the argument to the contrary, that when a cargo is sold under an fob contract and shipped on board pursuant to a contract of carriage contained in or evidenced by a bill of lading it is used for commercial purposes. That is the ordinary and natural meaning of the phrase "in use or intended for use for commercial purposes" when regard is had to the context of cargoes on board a ship and also to the restrictive theory of state immunity which is the background against which the SIA is to be interpreted. The fact that the Government of the Union of South Africa intended to use the greater part of the silver to produce Union coinage in South Africa after the silver had been discharged from the vessel does not detract from that conclusion.

164. I have said that the argument of the RSA is cogent. That is because there is a sense in which it can be said that the cargo was not "in use" at all during the voyage. But there is also a weakness in that argument, as I have endeavoured to explain. It leads to the conclusion that the RSA is immune from the adjudicative jurisdiction of the court where it has exposed itself to a liability in salvage by reason of having chosen, as any private citizen does, to have its property carried by sea. Those are not the circumstances in which the state would expect to be immune from the adjudicative jurisdiction of the court pursuant to the restrictive theory of sovereign immunity. Since the SIA is to be interpreted against the background of the restrictive theory of state immunity that is a powerful reason for interpreting "in use" when applied to cargo in the manner submitted by counsel for the Claimant.

165. The conclusion I have reached is consistent with the approach of Gross J., albeit obiter, in the *Altair*. I accept that Gross J. did not have the benefit of the later case of *SerVaas* in the Supreme Court which emphasised that the "focus is on actual use" or of the later case of *LR Avionics* which described the critical issue as the "use to which the property in question is put". Those cases, however, concerned the enforcement jurisdiction and did not involve cargo on board a ship. Gross J.'s conclusion that the cargo in that case was a commercial cargo (in use for commercial purposes) because it

had been bought and shipped commercially, notwithstanding that it was to be used as part of the Public Distribution System, reflects the conclusion which I have reached. Counsel for the RSA submitted that Gross J.'s approach was wrong. I however agree with Gross J's approach.

The status of the cargo when the cause of action arose in 2017

166. For the reasons I have given earlier the character or status of the cargo in 1942 is relevant to the character or status of the cargo in 2017. In the present case there is no reason to conclude that the character or status of the cargo in 1942 as a cargo used for the commercial purposes of a contract of carriage had changed by 2 October 2017, the latest date on which it could be said that the cause of action in salvage had accrued.

167. Counsel suggested that the contract of carriage had come to an end and therefore the status of the cargo in 1942 no longer applied. But the contract of carriage came to an end because the vessel and cargo had sunk to a depth at which salvage was not practicable at the time. Such events have nothing to do with the circumstances in which foreign states are entitled to claim immunity pursuant to the restrictive theory of sovereign immunity and so I do not consider that this circumstance can affect the status of the cargo for the purposes of section 10 which must be construed against the background of the restrictive theory of sovereign immunity.

168. In order for the character or status of the cargo in 1942 to have changed by 2017 there must have been some decision by the state to change it. There was none on the facts of this case. The silver had, in all probability, been forgotten about until 2016 when the RSA was informed of its existence by Odyssey. But the RSA did not actively consider what to do with the cargo until sometime after 13 October 2017, that is, after the last date on which the cause of action in salvage is said to have arisen.

169. For these reasons I have concluded that, applying section 10(4)(a) of the SIA in its context, that of a cargo being carried by sea, it was in use for commercial purposes, namely, the purposes of the contract of carriage. It follows that the RSA is not immune in respect of the claim in rem against the silver bars.

170. The conclusion I have reached is "consonant with justice" because it enables the Claimant to have access to justice whilst ensuring that the RSA's immunity from the adjudicative jurisdiction of the court in an action in rem against the cargo for salvage is consistent with the restrictive theory of sovereign immunity to which the SIA gives effect.

Two further aspects of the restrictive theory

171. Before leaving this part of the case I should mention two further arguments advanced by counsel for the Claimant derived from the restrictive doctrine of sovereign immunity as it was applied in England prior to the SIA 1978.

172. First, counsel submitted that when determining whether an act is *jure imperii* (a sovereign or public act) or *jure gestionis* (a private act) it is the nature or character of the act which is important, not its motive or purpose. There is considerable authority for this proposition which is derived from *I Congreso del Partido*. I shall not set out it. It is sufficient to refer to Lord Sumption's statement of principle in

Benkkharbouche v The Embassy of the Republic of Sudan [2019] AC 777 when describing the restrictive theory at paragraph 8, said:

> "Moreover, and most importantly, the classification of the relevant act was taken to depend upon its juridical character and not on the state's purpose in doing it save in cases where that purpose threw light on its judicial character: *Playa Larga (Owners of Cargo lately laden on board) v I Congreso del Partido* [1983] 1 AC 244."

173. Counsel for the RSA accepted the correctness of the submission made by counsel for the Claimant. But he submitted that it did not apply where there was no transaction or activity of the state relied upon, save the ownership of property. In such a case the test was whether the property was in use or intended for use for commercial purposes as stated in section 10(4)(a) of the SIA.

174. I am not sure that in this context no activity is relied upon and that all that is involved is the ownership of the cargo. The Government of the Union of South Africa chose to subject its cargo to a contract of carriage. I have not however relied upon this principle when applying section 10(4) of the SIA. In that context the court is concerned with identifying whether the cargo was in use for commercial purposes.

175. Second, counsel submitted that there was both in customary international law and in the SIA a "comprehensive dichotomy" between sovereign acts and private acts with no scope for an intermediate category. The phrase is taken from *The Law of State Immunity by Fox and Webb* 3rd.ed. p.197 in the course of a discussion as to section 3 of the SIA.

176. Counsel for the RSA accepted this submission but he said that it was of no relevance to section 10(4)(a). Counsel for the RSA referred to *AIC v The Federal Government of Nigeria* [2003] EWHC 1357 (QB), another case concerning section 13. Stanley Burnton J. recognised at paragraph 58 that if a bank account had lain dormant "it cannot be said to be presently used for any relevant purpose". That is, it would appear, a recognition that if an asset is not used for any purpose then an exception to the State's immunity cannot be established. It is an illustration of the third category. This approach was referred to by Lord Clarke in *SerVaas* with apparent approval; see paragraph 21.

177. I therefore accept that in the context of section 13 there may be a third category of property which is not in use for any purpose. Whether there is scope for that third category in the context of section 10 which deals with the adjudicative jurisdiction is not clear. But in applying section 10(4)(a) and reaching the conclusion I have I have not found it necessary to rely upon the suggested dichotomy.

<u>Other matters</u>

178. In the light of my conclusion it is unnecessary to consider whether, if, contrary to my conclusion, the cargo was not in use for commercial purposes it was intended to be used for commercial purposes. On my findings of fact the silver was intended to be used in the production of coin, with the greater part likely to be used for the production of Union coin and the lesser part likely to be used for the production of Egyptian coin. Had the silver been designated to be used exclusively for Union

coinage I would have regarded that as a sovereign or governmental activity. Had the silver been designated to be used exclusively for Egyptian coinage I would have regarded that as a commercial activity. But it was not designated to be used exclusively for either purpose. In those circumstances I would have been inclined to say that it was intended to be used substantially for the government or sovereign purpose of producing Union coinage; cf the approach of the Court of Appeal in the *Parlement Belge* (1880) 5 PD 197 as explained by Lord Cross in the *Philippine Admiral* at pp.240-241. On that basis it was not intended to be used for commercial purposes. The same conclusion could be reached by applying the approach suggested by Lord Diplock in *Alcom* at p.604 D with regard to section 13. Where property of a state has not been "earmarked" for commercial activity it cannot be said to have been intended for commercial purposes. However, it is unnecessary to decide this matter and I do not do so.

179. Reliance was also placed by the RSA on article 25 of Salvage Convention of which is part of English law pursuant to section 244 of the Merchant Shipping Act 1995. Article 25 of the Salvage Convention provides as follows:

> "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 recognized principles of international law."

180. I do not consider that this article adds to the debate. For the reasons I have given the cargo of silver bars was not a non-commercial cargo and the RSA is not entitled to sovereign immunity under generally recognised principles of international law or in the form in which they have been enacted by the SIA.

Conclusion

181. For the reasons I have endeavoured to express I have concluded that the RSA is not entitled to immunity.

182. The Claimant requires the court to exercise its adjudicative jurisdiction in rem by assessing the amount of salvage that is due so that, pursuant to section 239 of the Merchant Shipping Act 1995, the silver can be delivered to the RSA, "on paying the salvage due". Since the Receiver of Wreck has stated that the Receiver cannot assess the salvage due and that the court must determine the salvage that is due there is obvious good sense in the court exercising its adjudicative jurisdiction to do so. The RSA is not immune from the adjudicative jurisdiction of the court in this action in rem because, for the reasons I have given, the ship and cargo were, at the time the cause of action in salvage arose, in use for commercial purposes. The Claimant does not require the court to exercise its enforcement jurisdiction by arresting the cargo and selling it because there is no need to do so.

183. I am grateful to counsel for their most skilful and interesting submissions and to those instructing them for preparing the evidence and for doing all that was necessary to enable the hearing of this application to take place remotely because of the Covid pandemic.