17 August 2012

PRESS SUMMARY

SerVaas Incorporated (Appellants) *v* Rafidain Bank and others (Respondents) [2012] UKSC 40
On appeal from: [2011] EWCA Civ 1256

JUSTICES: Lord Phillips (President), Lady Hale, Lord Clarke, Lord Sumption and Lord Reed.

BACKGROUND TO THE APPEALS

On 9 September 1988, the Appellant ("SerVaas") entered into an agreement with the Iraqi Ministry of Industry for the supply of equipment, machinery and related services required for the commissioning of a state owned copper and brass processing factory in Iraq. On 2 August 1990 Iraq invaded Kuwait and on 4 August 1990, the assets of Rafidain Bank ("Rafidain") in the UK were frozen in accordance with a United Nations sanctions regime. On 13 August 1990 SerVaas terminated the agreement and subsequently commenced proceedings in the Paris Commercial Court against the Ministry to recover money due under the agreement. It gave judgment in favour of SerVaas for US$14,152,800 ("the Judgment"). The Judgment was recognised in the Netherlands and SerVaas recovered US$966,515 by partial enforcement there against Iraq's assets. In July 2002, SerVaas received US$6,736,285 from the UN Claims Commission by way of compensation for losses caused by Iraq as a result of the invasion of Kuwait.

In May 2003, the regime of Saddam Hussein in Iraq fell. On 22 May 2003 the UN Security Council passed Resolution 1483 establishing the Development Fund for Iraq ("DFI"). On 21 November 2004, Iraq made a debt cancellation agreement with government creditors comprising the Paris Club. In December 2004, Iraq began a process of debt restructuring with its commercial creditors and the creditors of other specified Iraqi entities, including Rafidain under the auspices of the Iraq Debt Reconciliation Office ("the IDRO Scheme"). Rafidain, in the meantime, had had a winding up petition presented in respect of it by the Bank of England, in relation to which Provisional Liquidators had been appointed in respect of its UK assets, but which petition had been adjourned generally. On 26 July 2005, Iraq announced an offer to repurchase claims for the commercial creditors of specified Iraqi debtors, including Rafidain, where claims arose before 6 August 1990. In May 2006, Iraq issued an invitation to tender claims for cash purchase and for exchange. Thereafter Iraq took assignments of certain debts owed to Rafidain's creditors by Rafidain in accordance with the IDRO Scheme.

On 3 April 2008, a scheme of arrangement for the distribution of assets held by the Provisional Liquidators to Rafidain's creditors was sanctioned ("the Scheme"). By 19 August 2009, Iraq had submitted claims in the Scheme which were admitted in the sum of US$253.8 million ("the Admitted Claims"). The original commercial debts constituting the Admitted Claims were acquired by Iraq by way of assignment from existing creditors of Rafidain. On 4 November 2009, SerVaas obtained an order registering the Judgment in England and Wales against the Ministry under the Civil Jurisdiction and Judgments Act 1982 ("the Registration Order"). It was served on Iraq on 2 May 2010 and became enforceable against the Ministry and Iraq in England and Wales on 2 September 2010. On 11 October 2010 Iraq's US lawyers responded to a request from the Scheme Administrators by stating that the dividend payment on the Admitted Claims should be paid to the account in the name of the DFI with the Federal Reserve Bank in New York. As at November 2010, the debt due in respect of the Judgment is said to have amounted to US$34,481,200.49.

In the meantime on 7 October 2010 Mann J granted an application by SerVaas lifting the stay on proceedings against Rafidain and made an order preventing Rafidain, the Provisional Liquidators and the Scheme Administrators from making any payment to Iraq under the Scheme in respect of the Admitted Claims or recognising or giving effect to any assignment or transfer of the Admitted Claimant to a third party which would have the effect of reducing the amount payable to Iraq to an amount less than the Judgment debt.

On 13 October 2010 SerVaas issued an application for a Third Party Debt Order, that is, an order that the debts payable to Iraq by Rafidain by way of dividend under the Scheme be instead paid to SerVaas insofar as necessary to satisfy the Judgment. On 30 November 2010, the Chargé d'Affaires and Head of Mission of the Embassy of Iraq in London signed a certificate ("the Certificate") that the Admitted Scheme Claims have never been used, are not in use and are not intended to be for use for any commercial purpose. Iraq applied to discharge the injunction on the ground that monies due to Iraq by Rafidain were immune from execution by virtue of section 13(2)(b) of the State Immunity Act 1978. In the High Court, Arnold J held that the Admitted Claims were immune from execution by reason of s.13(2)(b) and (4) because they were not property which was for the time being in use or intended for use for commercial purposes. By a majority, the Court of Appeal dismissed SerVaas' appeal. SerVaas appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Whether property is "for the time being in use or intended for use for commercial purposes" within the meaning of s.13(4) of the State Immunity Act 1978 does not depend on whether that property has in the past been used for commercial purposes.

Lord Clarke gives the leading judgment with which Lord Phillips, Lady Hale, Lord Sumption and Lord Reed agree.

REASONS FOR THE JUDGMENT

It was common ground that (a) the monies payable under the Scheme are a debt and a chose in action and as such are "property" within the meaning of s.13(2)(b); (b) that Iraq's state intention is to transfer the proceeds of the Admitted Claims to the DFI; (c) that, the Certificate creates a rebuttable presumption that the Admitted Claims are not in use or intended for use for commercial purposes; (d) that the onus lies on SerVaas to show a real prospect that it can rebut that presumption; and (e) that the debts were intended for use for sovereign and not commercial purposes. As these are summary proceedings, the issue is whether there is any real prospect of SerVaas rebutting the presumption.

The central question in this appeal is therefore whether the nature of the origin of the debts is relevant to the question whether the property in question was in use for commercial purposes. It is not. This conclusion is based on the language of s.13(4) and on previously decided domestic and comparative authority. As to language, s.13(4) should be given its ordinal and natural meaning having regard to its context and it would not be an ordinary use of language to say that a debt arising from a transaction is "in use" for that transaction. Parliament did not intend a retrospective analysis of all the circumstances which gave rise to property but an assessment of the use to which the state had chosen to put the property. The language of s.13(4) can also be contrasted with other sections of the Act. As to authority, Lord Diplock in *Alstom v Republic of Columbia* [1984] AC 580 distinguished between the origin of the funds on the one hand and the use of them on the other. Various decisions of the American Federal courts of appeals and of the Court of Appeal in Hong Kong also support this distinction.

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
www.supremecourt.gov.uk/decided-cases/index.html