Case No: 2014-318

Neutral Citation Number: [2014] EWHC 1394 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 07/05/2014

Before:

MR JUSTICE HAMBLEN

- -

Between:

Assuranceforeningen Gard Gjensidig	**Claimant**
- and -	
The International Oil Pollution Compensation Fund 1971	**Defendant**

- -
- -

Christopher Hancock QC
Khawar Qureshi QC and Malcolm Jarvis (instructed by **Ince & Co LLP**) for the **Claimant**
Jonathan Hirst QC and Professor Dan Sarooshi (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing dates: 1 May 2014

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Judgment

Mr Justice Hamblen:

Introduction

1. The Claimant ("Gard") is a P & I club, a member of the International Group of P & I clubs, and the insurer of the owners ("Owners") of the vessel "NISSOS AMORGOS" ("the vessel").

2. The Defendant ("the Fund") is an international legal organisation, created pursuant to the Convention on the Establishment of an International Fund for Compensation for Oil Pollution of 1971 (the "Fund Convention"), and given the status of a corporation under English law by virtue of the provisions of the International Organisations Act 1968 and a statutory instrument made pursuant to the provisions of that Act, namely the International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979 (the "Order").

3. Gard has brought claims in this country and in Venezuela against the Fund seeking declarations that the Fund is liable to indemnify it in respect of its liability to the Bolivarian Republic of Venezuela ("the Republic") under a judgment of the Criminal Court of First Instance in Maracaibo, Venezuela, dated 26 February 2010 ("the Maracaibo judgment"). The judgment held that the Owners and Gard were liable to the Republic in the sum of US$60,250,396 plus indexation and costs in respect of the Republic's claims for pollution damage arising out of the grounding in 1997 of the vessel in the Maracaibo Channel, Venezuela, as the result of which approximately 3,600 mt of crude oil escaped from the vessel.

4. Gard's present application is for a freezing injunction in support of its claims. The application is resisted by the Fund, primarily on the grounds that the court has no jurisdiction to make the order sought.

5. The application is supported by a witness statement from Ms Clare Kempkens of Gard's solicitors, Ince & Co. LLP, together with various exhibits and a further witness statement from Gard's Venezuelan lawyer, Mr Wagner Ulloa. The Fund relies on a witness statement from Mr Charles Brown of its solicitors, Reed Smith LLP, together with various exhibits.

The Conventions

The CLC

6. The Convention on Civil Liability for Oil Pollution Damage of 1969 (the "CLC") provides for compensation for parties who suffer loss as a result of marine oil pollution incidents. The general scheme of the CLC Convention is as follows:

    (1) Shipowners are made strictly liable in respect of oil pollution damage, with very limited exceptions (Art III).

    (2) The amount of that liability is however limited to an amount calculated by reference to the tonnage of the vessel (Art V (1)).

(3) Shipowners may lose the right to rely on the limit of liability if the incident was due to their actual fault or privity (Art V (2)).

(4) Shipowners may avail themselves of the benefit of limitation by establishing a fund with the competent court for the limitation amount, and this may be constituted by means of a bank guarantee if acceptable to the court (Art V(3)).

(5) If they have established a fund, and are entitled to limit liability, the court shall order the release of any ship or other property of the owner which has been arrested (Art VI (1)).

(6) The courts with exclusive jurisdiction in relation to Convention claims are the courts for the place in which the damage occurred (Art IX (1)).

(7) Shipowners are required to have insurance in respect of this liability (Art VII).

(8) Claimants have a right of direct action against the insurer (here Gard) (Art VII (8)).

(9) However, the insurer is entitled to rely on the limit of liability even where there is actual fault or privity on the part of the shipowner (Art VII (8)).

(10) Where the amount of the limit of liability is insufficient to meet all claims, then each claimant is only entitled to recover its prorated share of its claim (Art V (4)).

The Fund Convention

7. The Fund Convention provides a second tier of compensation for parties who suffered loss by reason of oil pollution incidents, over and above the layer of compensation provided by the CLC. Its general scheme is as follows:

(1) The Fund is to provide compensation in respect of amounts which are irrecoverable under CLC either because shipowners are not liable under CLC, or because the amounts in question cannot be recovered from shipowners, or because the limit under CLC is too little to provide adequate compensation (Art 4(1)).

(2) The Fund's liability is limited to an amount of SDR 60 million (Art 4(4) (a)).

(3) In addition to the compensation payable to third parties, the Fund Convention provides for the payment to Shipowners of the top slice of the CLC liability (Art 5(1)).

(4) The Courts with exclusive jurisdiction in relation to Convention claims are the courts for the place in which the damage occurred (Art 7).

(5) Where claims are made against the shipowner or its guarantor, then either party to the relevant proceedings may notify the Fund of those proceedings and if the Fund has had the opportunity to intervene, the Fund is bound by the facts and findings in that judgment even if the Fund has not in fact intervened (Art 7(5) and (6)).

(6) Where the amount of the limit of liability is insufficient to meet all claims, then each claimant is only entitled to recover its prorated share of its claim (Art 4(5)).

8. There is a time bar for the bringing of an action against the Fund of "six years from the date of the incident which caused the damage", after the expiry of which any rights to compensation for persons or indemnification for the shipowner "shall be extinguished" (Art 6(1)). There is a limited exception for claims for a "top slice" indemnity under Art 5(1) – in no case is such a claim to be extinguished "before the expiry of a period of six months as from the date on which the owner or his guarantor acquired knowledge of the bringing of an action against him under the Liability Convention". Art 5(1) is the only right of indemnity against the Fund conferred under the Fund Convention.

The incident and the resulting claims

9. The grounding incident occurred in 1997 and resulted in numerous claims being made.

10. The Owners and Gard established a limitation fund of Bs 3,473,462.78 (equivalent to about US$7.2 million) through Banco Venezolano de Credito S.A.C.A. This was approved by Judge Colmenares on 27 June 1997, and the vessel was released on 21 July 1997.

11. The Club and the Fund opened a joint claims agency and through the agency the Club (between June 1997 and December 2000) paid approximately US$6.5 million in respect of the claims made. Thereafter, the claims were paid by the Fund (to a total amount of approximately US$18.5 million).

12. The proceedings brought in Venezuela included criminal proceedings against the Master for the offence of pollution by leak or discharge. After a finding of guilt the file was then referred to the Criminal Circuit of Zulia State, Maracaibo, to hear the civil action arising from the criminal offence. That resulted in a judgment in favour of the Republic against the Owners and Gard in an amount equivalent to US$60.25 million (plus indexation and costs). The Fund was a third party intervener in the proceedings and was required to be notified of the judgment, but it was not a defendant and there is no judgment against it. However, the court considered and rejected the Fund's argument that the claim against it was time barred, holding that the Fund was notified within time and that this was sufficient. It also stated that the Fund was liable under Articles 2 and 4 of the Fund Convention. It stated as follows:

> "As regards the International Compensation fund for Oil Pollution Damage, in light of the accident which occurred, the said fund is liable to make payment, in accordance with the provisions contained in Articles 2 and 4 of the International

Agreement for the Constitution of an International Compensation Fund for Oil Pollution Damage.

The said liability incumbent on the International Fund arises in cases where the protection laid down in the International Convention on Civil Liability for Oil Pollution Damage is insufficient."

13. The judgment against the Owners and Gard would appear to be in disregard of the provisions of the CLC and in particular Owners' right to limit liability and the barring effect of the constitution of a limitation fund. The contention that the Owners were entitled to limit liability was dismissed on the grounds that the attempt to limit was based on the earlier decision by the Cabimas Court which was taken at a time before liability was established at all. However:-

(1) There is no finding of actual fault or privity on the part of the Owners (nor was this even alleged).

(2) There is in fact no consideration of whether Owners are entitled to limit liability under the terms of CLC.

(3) There is no consideration of why insurers should not be entitled to limit liability, irrespective of fault or privity and indeed no finding that they cannot.

14. In the light of the judgment Gard has brought proceedings in Venezuela and in this country against the Fund. The claim in Venezuela seeks a declaration that the judgment means that the Fund is liable to the Republic for its claim and reimbursement of any payment made by Gard. The claim in this country contends that pursuant to the arrangements made between Gard and the Fund it has a right of indemnity from the Fund in respect of any liability that it has to the Republic in excess of the CLC limit. This is disputed by the Fund. Its consistent position has been that the Republic's claims are inadmissible and time barred. This is to be contrasted with the claims made by other claimants which were dealt with and paid pursuant to the agency set up with Gard (up to a total of approximately US$25 million).

The winding up of the Fund

15. The perceived need to seek freezing order relief arises out of the fact of the imminent winding up of the Fund.

16. Following the entry-into-force in 1996 of the modified version of the compensation regime contained in the 1992 Civil Liability and Fund Conventions, the number of State parties to the Fund Convention reduced progressively to the extent that the Fund Convention ceased to be in force on 24 May 2002. However, Article 44 of the Fund Convention provides:

"1. If this Convention ceases to be in force, the Fund shall nevertheless

(a) meet its obligations in respect of any incident occurring before the Convention ceased to be in force;

(b) be entitled to exercise its rights to contributions to the extent that these contributions are necessary to meet the obligations under sub-paragraph (a), including expenses for the administration of the Fund necessary for this purpose.

2. The Assembly shall take all appropriate measures to complete the winding up of the Fund, including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the Fund.

3. For the purposes of this Article the Fund shall remain a legal person."

17. At its session in October 2012 the Fund's Administrative Council decided to set up a consultation group to examine and to make recommendations to facilitate the process of winding the Fund up. At its April 2013 session the Administrative Council instructed the Fund's Director to try to resolve as many of the outstanding issues as possible and to put forward proposals for the winding up of the Fund for consideration at its October 2013 session. Following meetings between representatives of the Club and the Fund on 20 June, 29 August and 10 September 2013, the Administrative Council decided, at its October 2013 session (at §§3.3.19, 8.3.30 and 8.3.50):

> "... that the 1971 Fund should not reimburse the Club of any payment made as a consequence of the Supreme Court judgment (Criminal Section) in respect of the claim by the [Republic]" [i.e. the Supreme Court's judgment upholding the Maracaibo judgment];
>
> "... that the 1971 Fund should be wound up as soon as possible" and
>
> "... to instruct the Director to study the legal and procedural issues relating to the winding up of the 1971 Fund further in consultation with the Legal Affairs and External Relations Division of IMO."

18. At a meeting of representatives from Gard, the International Group and the Fund on 18 March 2014, the Fund's Director advised of his intention to make a recommendation to the Fund's next meeting, to be held on 6 – 9 May 2014, *inter alia* that the money left in the Fund should be returned to contributors.

19. On 22 April 2014, the Fund's Secretariat published a note for consideration by the Fund at its meeting on 6 – 9 May 2014 seeking the Fund's approval of a Resolution permitting the Fund to "reimburse" monies held in its Major Claims Funds and its General Fund to contributors and a further Resolution (to be adopted at the Fund's next meeting in October 2014) dissolving the Fund's legal personality with effect from 31 December 2014.

20. The evidence is that the Fund currently holds monies totalling approximately £4.6 million. It is the proposed return of these monies which has prompted the present application.

21. On 19 March 2014 the Claim Form and Particulars of Claim were issued and served on the Fund. The present application was issued and served on 21 March 2014. The Fund acknowledged service indicating its intention to dispute the Court's jurisdiction on 1 April 2014. The Fund's application to dispute the court's jurisdiction was issued on 28 April 2014.

The Issues

22. The principal issues which arise are:

Immunity

(1) Whether the Fund has immunity from the grant of freezing order relief.

(2) Whether the Fund has immunity from the claim made (i) in this country and (ii) in Venezuela.

Freezing Order relief

(1) Whether Gard has a good arguable case in respect of its claim (i) in this country and (ii) in Venezuela.

(2) Whether there is a real risk of dissipation.

Immunity

(1) Whether the Fund has immunity from the grant of freezing order relief

23. It is common ground that this is an issue which has to be decided since it goes to the court's jurisdiction to grant freezing order relief.

24. The Fund enjoys privileges and immunities within the UK pursuant to the Headquarters ("HQ") Agreement and the Order.

25. Article 5 of the HQ Agreement entitled "Immunity" provides as follows:

> "Within the scope of its official activities, the Fund shall have immunity from jurisdiction and execution except:
>
> (a) to the extent that the Fund waives such immunity from jurisdiction or immunity from execution in a particular case;
>
> (b) in respect of actions brought against the Fund in accordance with the provisions of the Convention [the 1971 Fund Convention];
>
> (c) in respect of any contract for the supply of goods or services, and 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;

(d) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Fund or in respect of a motor traffic offence involving such a vehicle;
(e) in respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;
(f) in the event of the attachment, pursuant to the final order of a court of law, of the salaries, wages or other emoluments owed by the Fund to a staff member of the Fund;
(g) in respect of the enforcement of an arbitration award made under Article 23 of this Agreement; and
(h) in respect of a counter-claim directly connected with proceedings initiated by the Fund.

(2) The Fund's property and assets wherever situated shall be immune from any form of administrative or provisional judicial constraint, such as requisition, confiscation, expropriation or attachment, except insofar as may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to, or operated on behalf of, the Fund."

26. These privileges and immunities of the 1971 Fund in Article 5 of the HQ Agreement are replicated in a similar fashion by s. 6 of the Order which provides as follows:

"(1) Within the scope of its official activities the Fund shall have immunity from suit and legal process except:

(a) to the extent that it shall have waived such immunity in a particular case;
(b) in respect of actions brought against the Fund in accordance with the provisions of the Convention;
(c) in respect of any contract for the supply of goods or services, and 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;
(d) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Fund or in respect of a motor traffic offence involving such a vehicle;
(e) in respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;
(f) in the event of the attachment or, in Scotland, arrestment, pursuant to the order of a court of law, of the salaries, wages or other emoluments owed by the Fund to a staff member;
(g) in respect of the enforcement of an arbitration award made under Article 23 of the Agreement; and
(h) in respect of a counter-claim directly connected with proceedings initiated by the Fund.

(2) Paragraph 1 of this Article shall not prevent the taking of such measures as may be permitted by law in relation to the property and assets of the Fund in so far as they may be temporarily necessary in connection with the prevention

> and investigation of accidents involving motor vehicles belonging to, or operated on behalf of, the Fund."

27. It is to be noted that the main differences are the reference in s.6 (1) of the Order to "suit and legal process" (as opposed to "jurisdiction and execution" in Article 5(1)) and the different terms in which s.6 (2) and Article 5(2) are expressed.

28. The purpose of the HQ Agreement is stated in its preamble as being "to define the status, privileges and immunities of the Fund and persons connected with it".

29. The purpose of the Order is described in the Explanatory Note to it which states as follows:

> "These privileges and immunities are conferred in accordance with an Agreement which has been negotiated between the Government of the United Kingdom and the International Oil Pollution Compensation Fund [the HQ Agreement]".

30. The Fund submits that this makes it clear that the Order was enacted specifically to implement the HQ Agreement. This is further supported by a letter dated 25 April 2014 that was provided by the Foreign & Commonwealth Office ("FCO") in response to a request for clarification by the Fund in the form of a letter dated 20 March 2014. This provides:

> "I confirm that the United Kingdom is bound by the terms of the Headquarters Agreement of 27 July 1979 to afford to the 1971 International Oil Pollution Compensation Fund the privileges and immunities set out in the Agreement. The International Oil Pollution Compensation Fund (Privileges and Immunities) Order 1979 (SI 1979/912) was made to give effect to the Agreement. The language of the Order reflects the terms of the International Organisations Act 1968, which contains the relevant enabling power. Accordingly I confirm that the obligations of the United Kingdom under the Headquarters Agreement, including in particular Article 5 thereof, are given full effect in the Order."

31. Gard does not dispute that the Order was enacted to implement the HQ Agreement, but points out that that does not mean that it has done so. Its case is that the only immunity from freezing order relief conferred under the Order is where the action falls outside the exceptions listed in s.6 (1) and where such action is not otherwise necessary in relation to the prevention and investigation of accidents involving Fund motor vehicles under s.6 (2). The Fund's case is that it is unclear whether this is so and that where there is an ambiguity regard should be had to the HQ Agreement which confers under Article 5(2) a wide immunity from "provisional judicial constraint", including freezing orders. Gard submits that it is not appropriate to have regard to the HQ Agreement since there is no ambiguity, and that in any event the immunity conferred by Article 5(2) does not extend to freezing orders.

32. The relevant principles of interpretation where a statute or statutory instrument is enacted in order to give effect to the UK's obligations under a treaty may be summarised as follows:

(1) The court must first construe the statutory enactment and if its terms are clear and unambiguous then they must be given effect to, whether or not they carry out the UK's treaty obligations – see, for example, *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116, at p143 per Diplock LJ.

(2) Where the terms of the statutory enactment are not clear but are reasonably capable of more than one meaning then the terms of the treaty may be considered in order to resolve the ambiguity or obscurity – see, for example, *Salomon* at p144 per Diplock LJ; *JH Rayner Ltd v. Department of Trade and Industry and Others* [1990] 2 AC 418 at p500E per Lord Oliver; and

(3) There is a prima facie presumption that the UK does not intend to legislate so as to put itself in breach of its treaty obligations so that the court will seek to construe the relevant statute or statutory instrument and the treaty in a consistent manner – see, for example, the *Salomon* case at p144; *JH Rayner* at p502E-G per Lord Oliver.

33. The first question is therefore whether the terms of the Order are clear and unambiguous. Gard submits that they are and that they are only reasonably capable of one meaning. It contends as follows:

(1) Subparagraph (1) of Article 6 contains the general immunity from suit and legal process. Legal process in this context would include an application for a freezing order.

(2) That immunity only applies if and to the extent that the claim in question (or the legal process in question) falls outside the scope of the exceptions from immunity.

(3) Subparagraph (2) of Article 6 of the Order limits this immunity still further in relation to one particular issue, since it provides that nothing in subparagraph (1) is to prevent the taking away of the Fund's assets insofar as necessary in order to carry out certain investigations. It does not expand the immunity so as to render it applicable even in those cases where the exclusions in subparagraph (1) would apply.

(4) It follows that the Order does not preclude the making of a freezing order in cases which fall within the exceptions to the immunity. If there is no immunity from suit, then equally there is no immunity from legal process, including freezing orders.

34. The Fund submits that the words of the Order are unclear and reasonably capable of more than one meaning. It contends as follows:

(1) The structure of the HQ Agreement gave the Fund a general immunity from "jurisdiction and execution" subject to certain enumerated exceptions. These terms were not however the terms used in the International Organisations Act 1968 which instead refers in its Schedule 1 to "[i]mmunity from suit and legal process". This required some adjustment of language in the Order and, as

such, the phrase "immunity from suit and legal process" from the enabling Act had to be used in the *chapeau* of s. 6(1) of the Order.

(2) The use of this broad phrase "suit and legal process" in s. 6(1) meant that the *chapeau* of the provision could be used to give effect to all of the 1971 Fund's immunities under the HQ Agreement – including the immunity of the 1971 Fund from measures of "provisional judicial constraint … such as attachment" as provided by Article 5(2) of the HQ Agreement.

(3) The phrase "immunity from legal process" in the *chapeau* of s.6 (1) encompasses a Court process to obtain a freezing injunction.

(4) s.6(1) of the Order maintains and reflects the important immunity contained in Article 5(2) of the HQ Agreement precisely because the list of enumerated exceptions contained in the Order does not contain any exception in relation to "any form of administrative or provisional judicial constraint, such as … attachment".

(5) This construction is further supported by s. 6(2) of the Order which contains an amended version of Article 5(2) of the HQ Agreement. Indeed the substantive immunity contained in Article 5(2) must be read as being part of the *chapeau* of s. 6(1) (immunity from "legal process") since otherwise the inclusion of s. 6(2) (the exception to the Article 5(2) immunity) makes no sense.

35. The Fund's case is that the immunity granted in the introductory words of s.6 (1) is a "complete" immunity in respect of all "suit and legal process". The only exceptions to that immunity are those set out in s.6 (1) (a) to (h) and s.6 (2). None of those provisions contain an exception for freezing order or like relief and accordingly legal process seeking such relief is subject to the "complete" immunity granted.

36. As a matter of language the difficulty with the Fund's case is that the immunity conferred under s.6 (1) is not a "complete" immunity. It is a qualified immunity. Immunity is only granted if and to the extent that the suit or legal process does not fall within one of the listed exceptions. The grant of immunity is linked to and cannot be separated from the exceptions made. Further, the exceptions made clearly cover "legal process" in respect of the excepted matters. As is common ground, "legal process" includes a freezing order and therefore the exceptions cover freezing orders. Both the immunity and the exceptions cover "suit and legal process". There is no need to identify an express exception for freezing order "legal process" where the exceptions themselves cover "legal process".

37. As to the point made in relation to s.6 (2), it is not correct that on Gard's construction s.6 (1) (d) would render s.6 (2) redundant. As Gard points out, s.6(1)(d) deals with third party actions for damage arising from a Fund motor vehicle accident whilst s.6(2) addresses the wider matter of measures which may be taken in connection with the "prevention or investigation" of accidents, including administrative measures.

38. For the reasons outlined above and those given by Gard, in my judgment the words of the Order are not reasonably capable of the meaning put forward by the Fund and there is no ambiguity or obscurity. It follows that effect must be given to the terms of

the Order regardless of whether it means that the UK would be in breach of its obligations under the HQ Agreement.

39. In those circumstances it is not necessary to decide whether the Order does involve a breach of the UK's obligations under the HQ Agreement. However, the Order does not appear to confer the general immunity from "any form of administrative or provisional judicial constraint" provided under Article 5(2) and instead (save in the specific case covered by s.6 (2)) limits any such immunity to "suit and legal process" falling outside one of the exceptions. I also consider that there is force in the Fund's argument that "any form of…provisional judicial constraint" covers a freezing order notwithstanding the *in personam* nature of such orders.

40. In conclusion, in my judgment the Order does not grant immunity to the Fund from all freezing order relief, but only in respect of freezing order relief sought in respect of matters which do not fall within the s.6(1) exceptions or s.6(2).

(2)(i) Whether the Fund has immunity from the claim made in this country

41. Gard's case is set out in its Particulars of Claim and the Affidavit of Ms Kempkens.

42. In summary, its case is that a practice developed as to how claims would be dealt with as between P&I Clubs and the Fund, and that that practice was followed in this case. The main features of that practice were that:

(1) The Club would pay out in respect of the claims which were agreed or established first in time, at a time before, under the Conventions, it would otherwise have had to.

(2) By so doing, the Club achieved the result which was desired by both Clubs and Fund, namely of making the international oil pollution compensation regime workable and acceptable.

(3) The Club made these payments in reliance on the Fund's agreement firstly that once the shipowner's limit was reached, the Fund would take over the remaining claims, and secondly that at the end of the case, once all claims had been dealt with (by settlement or final judgment), a balancing payment would be made by one compensating party to the other to ensure that the total compensation payments by the Club equalled the limitation amount.

43. Gard's case is that this practice amounted to a contractual agreement. The nature of that agreement was summarised in its skeleton argument as follows:

> "Under that agreement, although, on a strict application of the Conventions, the Claimants could not recover more than their prorated share of each claim and could not recover until all of the relevant claims were in and determined, the Club and the Fund agreed that the Club would fund the full amount of any payments made to claimants, up to a total equivalent to the CLC limit, and thereafter the Fund would provide the full amount required to dispose of remaining claims, on terms that any imbalance left after all claims were settled would be settled by way of a final balancing payment from the Fund to the Club or vice versa."

44. Gard's case is that it has a good arguable case that its claim is in respect of a "loan or other transaction for the provision of finance" and therefore within the exception from immunity set out in s.6 (1) (c). Although the Fund submits that this issue should be decided before freezing order relief is granted, I accept that since it goes to jurisdiction in relation to the underlying claim at this stage only a good arguable case need be established.

45. In support of its case that the claim involves a "loan" or "other transaction for the provision of finance" Gard relies in particular on the following:

(1) The alleged agreement between the Clubs and the Fund was that the Club would make payments before it was legally obliged to do so, in relation to claims which would lie both against the relevant Club and the Fund.

(2) This agreement was entered into to enable claims to be met, in accordance with the Fund's own policy of promoting early settlements and facilitating prompt payments.

(3) The Club would fund 100% of each payment up to the CLC limit, even though, strictly speaking, it was only liable for a percentage of each such claim. The percentage for which it was liable was the prorated amount derived from the division of the total claims into the amount available under CLC.

(4) In paying these claims, the Club was paying claims which would be recoverable in part against the Fund. Had there been no agreement, then both Club and Fund would make payment, once all claims had been agreed or determined, of their own prorated liability. Because of this agreement, the Club paid both its share of the relevant claim and that of the Fund up front, up to the CLC limit, on the agreed basis that there would be a repayment. This would be by virtue of the Fund taking over the payment of claims over the CLC limit, a payment which would also be in part in satisfaction of the Fund's liability and in part in satisfaction of the Club's liability and/or or by way of a balancing payment between Club and Fund once all third party claims had been paid.

46. In these circumstances it submits that it was advancing monies on the Fund's behalf and doing so on the agreed basis that such funding would be repaid by the Fund's later payment of claims and the final balancing exercise. This advance of funds amounts to a "loan" or at least a "transaction for the provision of finance".

47. The Fund submits that there was here no loan or borrowing and, if there had been, the terms upon which monies were being loaned (such as interest) and of repayment would have needed to be and would have been agreed.

48. I accept that Gard's evidence supports the funding nature of the arrangements made. Indeed the Fund itself refers in its documentation to the arrangement being one to "fund" interim payments. It is also to be noted that one of the reasons for the adoption of the arrangement was the Fund's difficulty in financing early payments due to the need for special levies and the fact that it only meets twice a year.

49. Whilst there was no formal loan arrangement, I consider that it is reasonably arguable that paying money to satisfy the liability of another on the basis that it would be repaid in an agreed manner is a form of "loan" or "transaction for the provision of finance".

50. The Fund makes the point that on Gard's case the provision of finance operates both ways, but that does not mean that there is no provision of finance.

51. The Fund also stresses that a "loan" or "transaction for the provision of finance" cannot have been intended in relation to claims which it always stated were inadmissible. However, that does not answer Gard's case in relation to admissible claims, such as those paid by the agency, and its case is that the same analysis applies to established claims, whether or not agreed to be admissible.

52. In summary, for the reasons outlined above and those given by Gard, on the basis of the material presently before the court, I consider that Gard can show a good arguable case that its claim falls within the s.6(1)(c) exception and therefore that the Fund has no immunity.

(2)(ii) Whether the Fund has immunity from the claim made in Venezuela

53. In relation to its claim in the Venezuelan proceedings Gard stresses the following matters:

    (1) The claims brought by the Republic were held by the courts of competent jurisdiction to be "pollution damage".

    (2) As such they would be recoverable under CLC and the Fund Convention.

    (3) The Fund was notified of the existence of the claims, and intervened in the proceedings, because of its financial interest in the outcome of the proceedings.

    (4) The Fund was found to be liable, and its defences were rejected.

    (5) The Fund was notified of that decision, with the intention that the Fund be bound by that decision.

    (6) No monetary award was made against the Fund for procedural reasons.

54. It is against that background that Gard brings its claim in Venezuela seeking a declaration confirming that the effect of the judgment is that the Fund is liable under the Fund Convention to the Republic and an order that, insofar as Gard is required to satisfy the Fund's Convention liability, Gard is entitled to reimbursement from the Fund.

55. Gard submits that it has a good arguable case that its claim for relief falls within s.6 (1) (b) of the Order in that it is "in respect of" an action "brought against the Fund in accordance with the provisions of the Convention". In particular the action in Venezuela:

(1) is brought in the correct court, being the court with exclusive jurisdiction in respect of Fund Convention claims.

(2) is brought to enforce the Fund Convention liabilities of the Fund, either by obtaining an order clarifying that, contrary to the Fund's apparent belief, the Venezuelan Court has held that the Fund is liable or by ensuring that, insofar as Gard satisfy those Convention liabilities first, the Fund reimburses them.

56. I am not satisfied that Gard has a good arguable case that its claim is in respect of an action "brought against the Fund in accordance with the provisions of the Convention". In particular:

(1) There is no provision in the Fund Convention which entitles Gard to bring a claim of this nature. The only right of claim by an insurer against the Fund which is recognised in the Fund Convention is for an indemnity under Art 5(1). This is not such a claim.

(2) The fact that the claim relates to an alleged liability of the Fund to the Republic under the Fund Convention does not mean that it is a claim made "in accordance with the provisions of the Convention". It remains a claim which is not conferred by or recognised in the Fund Convention. Further, the alleged liability is not a liability to the person bringing the claim, a further reason why it is not a claim "in accordance with the provisions of the Convention".

(3) The fact that the Venezuelan court has exclusive jurisdiction over Fund Convention proceedings does not mean that the proceedings are brought "in accordance with the provisions of the Convention". If this was a Fund Convention claim the jurisdictional provisions of the Convention would be satisfied, but that does not alter or affect the substantive nature of the claim made and whether it accords with the provisions of the Convention.

(4) The fact that Gard seeks to rely on Article 7(6) of the Fund Convention and the allegedly binding nature of the facts and findings made similarly does not alter or affect the substantive nature of the claim made.

(5) Gard's claim for reimbursement/indemnity is admittedly outside the Fund Convention. There is no such right conferred under the Convention.

57. Gard accepts that its claim is not a "normal" Fund Convention claim. In my judgment it is not a Fund Convention claim, abnormal or otherwise.

58. For the reasons outlined above and those given by the Fund, in my judgment on the material before the court Gard cannot show a good arguable case that the Venezuelan proceedings fall within the s.6(1)(b) exception and the Fund accordingly has immunity in respect of the application for freezing relief made in relation to those proceedings.

Conclusion on immunity

59. Gard has a good arguable case that the Fund does not have immunity in respect of its application for freezing relief in relation to the English court proceedings, but has not made out such a case in relation to the Venezuelan court proceedings.

Freezing Order relief

(1)(i) Whether Gard has a good arguable case in respect of its claim in this country

60. In relation to good arguable case, the Fund makes no positive submissions in order not to imperil its claimed immunity, but it does make clear that its position is that there was no contract as alleged or at all.

61. In relation to the English court proceedings I can see that real issues are likely to arise as to (i) whether there was a contract at all; (ii) if so, whether its terms were as alleged, and (iii) whether any such contract would cover both the Venezuelan claims which the Fund recognised as being admissible and the claim of the Republic, which it did not. However, these are essentially factual issues.

62. The Fund draws the court's attention to the fact that the only document which looked at all like an agreement was the MOU made in 1980 and that that says nothing about rights of indemnity. However, on Gard's case that was the beginning rather than the end of the parties' arrangements and on its evidence matters developed thereafter, and did so in a sufficiently certain manner to result in a contractual agreement.

63. The Fund also draws the court's attention to the fact that from the outset it made clear that it did not consent to or approve any payments made in respect of the Republic's claim. However, it is Gard's case that the agreement related to established liabilities, not merely agreed liabilities.

64. For the reasons outlined above and those given by Gard, on the basis of the evidence presently before the court and the Particulars of Claim, as expanded upon in Gard's written and oral arguments, I consider that Gard can satisfy the good arguable case threshold.

(1)(ii) Whether Gard has a good arguable case in respect of its claim in Venezuela

65. On my findings this issue does not arise and does not need to be decided. However, it is to be noted that there is evidence before the court from Gard's Venezuelan lawyer, Mr Ulloa, that Gard has a good arguable case in Venezuela, and no contrary evidence.

(2) Real risk of dissipation

66. I am satisfied that this is a case in which a real risk of dissipation is established. The evidence is that one of the resolutions which the Fund is being asked to consider and vote on at its May meeting is a resolution authorising steps to be taken towards winding up. One of the steps identified expressly in that resolution is the return of funds held currently by the Fund to contributory oil receivers in contracting states. I accept that this means that there is a real risk that the resolution will be adopted, with the result that the funds held by the Fund will be dissipated by being given back to the contributing states.

Conclusion on Freezing Order relief

67. I am satisfied that Gard has shown a good arguable case in relation to its claim in the proceedings in this country, that there is a real risk of dissipation and that this is an appropriate case for the grant of a freezing order.

Conclusion

68. For the reasons outlined above, I consider that freezing order relief should be granted in respect of the claim made by Gard in the proceedings in this country, but not in respect of the claim made in the Venezuelan proceedings.