Neutral Citation Number: [2014] EWHC 3369 (COMM)

Case No: 2014-318

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2014

Before :

MR JUSTICE HAMBLEN

- -

Between :

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

- -
- -

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

Hearing dates: 6, 7 and 9th October 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE HAMBLEN

Mr Justice Hamblen:

Introduction

1. The Defendant ("the Fund") applies pursuant to CPR Part 11 to challenge the jurisdiction of the Court over the claims brought against it by the Claimant ("Gard"). It contends that it is immune from jurisdiction pursuant to s. 6 of the International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979 ("the 1979 Order").

2. The Fund is an international legal organisation, created pursuant to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 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 1979 Order.

3. Gard is a P & I club, a member of the International Group of P & I clubs ("the IG"), and the insurer of the owners ("Owners") of the vessel "*Nissos Amorgos*" ("the vessel").

4. 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.

5. On 7 May 2014 I granted Gard's application for a freezing injunction in support of its claims. By order dated 23 May 2014 I ordered that there be an expedited hearing of the Fund's jurisdictional challenge and gave directions for the determination of the relevant issues.

6. In the light of the fact that the jurisdictional challenge involves a claim to immunity it is common ground that the court has to decide the issues which arise on the balance of probabilities - see *JH Rayner (Mincing Lane) v Department of Trade* (CA) [1989] 1 Ch 72 at 194A-G (Kerr LJ) and at 252B-G (Ralph Gibson LJ); *Fox, The Law of State Immunity* (3rd ed., 2013), at pp. 228-230, 234-236; *Mid-East Sales Ltd v United Engineering and Trading Co (PVT) Ltd* [2014] EWHC 1457 (Comm) at [75], [88(iii)] (Burton J).

The General Background

7. Much of the general background is set out in my judgment in relation to the freezing order, parts of which I shall incorporate, with amendments, into this judgment.

The Conventions

The CLC

8. The International 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 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) Shipowners or insurers who make payment for pollution damage acquire subrogation rights against the limitation fund (Art V(5)).

(6) 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)).

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

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

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

(10) 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)).

(11) 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

9. 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 the CLC either because shipowners are not liable under the CLC, or because the amounts in question cannot be recovered from shipowners, or because the limit under the 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 Fund 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)).

10. 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.

11. Article 9(1) provides the Fund, if it pays compensation in accordance with Article 4(1), with a right of subrogation in respect of the rights the person compensated has against the owner or his insurer.

The incident and the resulting claims

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

13. The Owners and Gard established a limitation fund of Bs 3,473,462.78 (then 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.

14. 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).

15. 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.

16. The judgment against the Owners and Gard would appear to be in disregard of the provisions of the CLC and in particular the 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. 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 the Owners are entitled to limit liability under the terms of the CLC.

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

17. 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 (up to the Fund limit).

The winding up of the Fund

18. The need for a freezing order relief and for expedition of the jurisdictional challenge arises out of the fact of the imminent winding up of the Fund.

19. 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."

20. 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 up the Fund. 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 paragraphs 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."

21. At a meeting of representatives from Gard, the IG 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.

22. 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.

23. No reimbursement has yet occurred and Gard's position is currently protected by the freezing order. The evidence is that the Fund currently holds monies totalling approximately £4.6 million. At the meeting of 6-9 May 2014 it was confirmed that the Fund intended to dissolve itself at its October 2014 session.

The Issues

24. The 23 May 2014 order defined the preliminary issues in the following terms:

(a) "Whether [Gard] can establish that there is an exception to the [Fund's] immunity from suit and legal process pursuant to [Article] 6(1)(c) of the International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979; and, as such,

(b) Whether there exists a contract between [Gard] and [the Fund] on the terms alleged in paragraphs 9 to 13 of the Particulars of Claim and, if so whether such contract falls within the scope of the exception to the [Fund's] immunity".

25. The questions which the Court has to rule on at this hearing may be conveniently summarised as follows:

(1) Was there a contract between Gard and the Fund and, if so, what were its terms?

(2) Is that contract one which falls within the exception from immunity from suit and legal process in Article 6(1)(c) of the 1979 Order, namely a contract of loan or for the provision of finance?

26. As became common ground, the Court does not have to determine at this stage how such agreement as may be found to exist applied to the facts of the instant case.

27. In the light of its claim to immunity the Fund has chosen not to provide any disclosure or to call evidence, other than a statement from Charles Brown, a partner of Reed Smith LLP, solicitors for the Fund in this litigation. In his statement, Mr Brown attaches a note of a meeting held with the former Director of the Fund, Mr Måns Jacobsson. Gard submitted that the Fund could have called Mr Jacobsson and its current Director, Mr Maura, without compromising the Fund's own separate immunity.

28. Gard served witness statements from the following individuals:

(1) Ms Sara Burgess, a Senior Vice President at Gard and one of the individuals who is said by Gard to have entered into a binding agreement with the Fund on its behalf.

(2) Mr Colin de la Rue, a solicitor formerly of Ince & Co who advised Gard and other P&I Clubs in their dealings with the Fund.

(3) Mr Jonathan Hare, Senior Vice President and General Counsel of Assuranceforeningen Skuld ("Skuld"), a P&I Club who also had dealings with the Fund.

(4) Mr Grantley Berkeley, the Chairman of the IG, of which Gard is and was at all material times, a member.

29. The Fund chose not to cross examine Mr Hare or Mr Berkeley on the grounds that since it was not suggested that they had entered into any agreements on behalf of Gard their evidence was irrelevant. The only oral witness evidence was therefore that of Ms Burgess and Mr de la Rue.

Gard's case

30. Gard's case is as set out in paragraphs 10 to 13 of its Particulars of Claim, as supplemented by Further Information provided.

31. Its case is that the IG member clubs and the Fund had co-operated in the development of practices and procedures for dealing with claims under the CLC and the Fund Convention.

32. It contends that these practices and procedures comprised various matters, including:

> "the funding by the club concerned of the agreed interim payments and joint costs up to an amount equivalent to the CLC Limit, on the basis that the Defendant [i.e. the Fund] was to fund any further payments needed thereafter (subject to the 1971 Fund Convention limit)".

33. It further contends that this would be followed by a reconciliation procedure once all claims had been settled and paid.

34. Gard contends that it was contractually agreed that these practices and procedures would be followed in relation to the *Nissos Amorgos* incident.

35. This agreement was allegedly made partly orally in discussions in London between March and June 1997 between Mr Jacobsson, Ms Burgess and Mr Espeland and partly in writing in faxes from the Fund to Gard dated 3 March 1997, 23 April 1997 and 4 June 1997 (Mr Espeland of Gard was dealing with the claims in Venezeula – there was no evidence from him).

36. Gard further contends that the existence of the agreement is evidenced by the parties' subsequent conduct and in particular Gard's payment of claims up to the CLC limit in relation to the *Nissos Amorgos* incident, and the Fund's payments of claims thereafter.

37. As further explained in Gard's skeleton argument, the offer to contract was allegedly made by "the Fund's 4 June 1997 fax which completed that which was envisaged in the Fund's offer in its fax of 23 April 1997, namely the identification of specific payments 'approved by the Fund for a particular amount' that Gard could now make if it wished to accept the Fund's offer to adopt the usual practices".

38. This offer "to adopt the usual practices" was allegedly accepted by Gard making interim payments on 6 June 1997. Gard's skeleton argument continued "By making

those payments Gard accepted the Fund's offer to apply the practices and procedures for dealing with interim payments adopted in earlier cases, and a binding contract to apply them to the *Nissos Amorgos* incident came into existence on 6 June 1997 (or alternatively on 11 June 1997 when the claims agency actually handed over payments to the San Carlos boat owners.")

39. Although the alleged contract appears to extend to all the "usual practices", the crucial practice for the purpose of the present claim is that whereby the Fund would fund further payments provided the Club had funded payments and joint costs up to an amount equivalent to the CLC limit, to be followed by a reconciliation procedure once all claims had been settled and paid. This is described by Gard in its submissions as the "consecutive payment arrangement".

40. It was not suggested that Gard was obliged to make interim payments. However, if it elected to do so then its case was that the Fund became contractually obliged to take over payment of claims once Gard had paid claims up to the CLC limit.

Particular background and the parties' dealings

41. This was Gard's first major pollution incident involving the Fund Convention and therefore the first time it had had any significant direct dealings with the Fund.

42. Gard was part of the IG and Ms Burgess was a member of the IG's Pollution sub-committee so that she and Gard would have had some general background knowledge of the IG's dealings with the Funds.

43. These included a Memorandum of Understanding ("MOU") made between the IG and the Fund dated 5 November 1980. The MOU set out various matters on which the IG Clubs and the Fund would co-operate in relation to major pollution incidents. It provided, for example, that they would consult over claims and that, where possible and practical, would co-operate in the use of lawyers, surveyors and other experts and share costs on a pro-rated basis. It did not address the issue of interim payments.

44. The shared experience of the IG Clubs and the Fund in dealing with major pollution claims led to certain practices and procedures being adopted between them. As the Fund accepted, these included a practice in relation to interim payments whereby, in relation to claims approved by both parties, the Club would generally pay such claims up to the CLC Limit and the Fund would generally thereafter pay such claims once the CLC Limit had been reached up to the Fund limit.

45. This practice was referred to in a Note dated 5 April 1994 submitted by the Fund's then Director, Mr Jacobsson, to the Fund's Seventh Intersessional Working Group established by the Fund's Assembly. That Note included the following:

> "11.3 Payment of Compensation Before the Establishment of the Limitation Fund
>
> …
>
> 11.3.4 In recent years, the IOPC Fund has also in some non-Japanese cases (such as the BRAER and the KEUMDONG No. 5) started paying compensation before the limitation proceedings

> have been commenced, in order to ensure the prompt payment of compensation to victims. In these cases, the ship was entered with a P&I Club which is a member of the International Group. The Club has paid claims up to an aggregate amount corresponding approximately to the limitation amount and the IOPC Fund has paid over and above that amount.
>
> 11.3.5 It should be noted that in many cases the P & I Club pays compensation to victims before the limitation fund has been constituted, and continues to make such payments after the establishment of the limitation fund. In such cases the P & I Club acquires by subrogation the right of the person paid against the limitation fund and the IOPC Fund".

46. In its report dated 20 June 1994, the Fund's Seventh Intersessional Working Group expressed its agreement with the procedures for the assessment and settlement of claims described in the Director's Note. The Fund's Assembly endorsed the conclusions of the Working Group at its meeting on 21 October 1994 recording that "[i]n the view of the Assembly, the pragmatic approach followed by the IOPC Fund so far should be maintained, so as to facilitate out-of-court settlements".

47. Gard adduced evidence relating to the handling by Skuld and the Fund of the claims relating to *The Braer* (a January 1993 casualty off the Shetland Isles) and *The Sea Empress* (a February 1996 casualty off South Wales). In both those cases Skuld paid claims up to or close to the CLC Limit and the Fund took over payment of the remaining claims.

48. Other than providing recent examples of the "consecutive payment arrangement" being followed, I do not consider the detailed evidence relating to the handling of these claims to be of much assistance. Gard was not involved and there was no evidence that it was aware of the detail of the handling of these claims. Mr de La Rue and Mr Jacobsson were involved in both claims so they are of some relevance to their evidence. In particular, Gard stressed that a particular feature of *The Braer* incident was that at a late stage claims were put forward which meant that there was a prospect of the Fund limit being exceeded. Although this did not ultimately occur, it focussed consideration on the legal consequences of the Fund limit being exceeded in relation to claims already paid by the Club and the consequent risks involved. A particular feature of *The Sea Empress* incident stressed by the Fund was the fact that Skuld issued protective proceedings, including proceedings against the Fund making a subrogated claim.

49. The *Nissos Amorgos* incident occurred on 28 February 1997. On 3 March 1997 the Fund confirmed that it was invoking the MOU in relation to the incident.

50. There then followed co-operation in relation to the handling of claims, including the establishment of a joint claims-handling office in Maracaibo and the instruction of joint experts to evaluate claims.

51. One of the issues which arose from the outset, which had not been addressed in relation to earlier claims, was the possibility that the Owners were exonerated from liability under Article III 2(c) of the CLC Convention on the grounds that the

pollution damage had been wholly caused by the negligence of "the Government or other authority responsible for navigational aids". Gard was understandably concerned that there was a means by which it could recover back any payments made by it should exoneration be established.

52. In a fax of 6 March 1997 Ms Burgess summarised the initial discussions she had had with Mr Jacobsson about this as follows:

> "….Måns Jacobsson was not agreeable to entering into some sort of agreement that if we were found to have complete defence to the spill the Fund would reimburse us for claims paid on the basis that we had paid them out on their behalf. His first reaction was that we would be subrogated to the rights of any claimant. The disadvantage with this is that if the claims exceeded the limitation amounts then our reimbursement would be pro rated down in the same way as all other claims."

53. On 20 March 1997 there was a meeting between Gard and the Fund at the IMO Headquarters in London. The meeting was attended by, among others, Ms Burgess, Mr de la Rue and Mr Jacobsson.

54. Shortly before the meeting Ms Burgess met with Mr de la Rue. The notes of their discussions indicate that one of the matters raised during that discussion was the possibility of obtaining a letter from the Fund confirming that it would pay claims above the CLC limit, the possibility of privately arbitrating the exoneration issue with the Fund and the fact that the Club would be subrogated against the Fund if it paid claims.

55. The meeting itself was mainly taken up with a discussion of practical matters "on the ground" in Venezuela, including claims handling procedure there and the provision of an explanation to the Venezuelan Court of the Fund limit.

56. The first meeting of the Fund's Executive Committee following the *Nissos Amorgos* incident was due to be held between 14 and 17 April 1997. As was the Fund's practice, the Fund's Director produced Notes for the Committee in advance of that meeting providing information on, *inter alia*, the incident, clean-up operations and the claims situation.

57. The first Note was dated 24 March 1997. It noted that it was not possible at that stage to make any accurate estimate of the level of the claims which may be submitted, but that it was nevertheless believed that the total amount of the claims would not be anywhere near the total amount available under the CLC and the Fund Convention. It also stated at para. 4.3 that:

> "The Executive Committee 'may wish to consider whether it is prepared to authorise the Director to make final settlements on behalf of the 1971 Fund of all claims arising out of this incident, to the extent that the claims do not give rise to questions of principle which have not previously been decided by the Committee'.

58. The Note was circulated to Gard for comments and Mr de la Rue provided an alternative text relating to the assessment of the claim recently put forward by the Republic.

59. In his Note dated 11 April 1997 Mr Jacobsson referred the Executive Committee to para. 4.3 of the earlier Note and further stated as follows at para. 3.6:

> "3.6 The question also arises of whether and, if so, to what extent the Executive Committee is prepared to authorise the Director to make payments. As stated in paragraphs 4.2 and 4.3 of document 71FUND/EXC.53/7, it is not possible at this stage to make an accurate estimate of the total amount of claims which may be submitted. In that document the Director stated that he believed, nevertheless, that the total amount of the claims would not approach the total amount available under the [CLC] and the [Fund Convention] (60 million SDR, corresponding to approximately £51 million). However, the claim presented by the State of Venezuela has changed the situation. It should be noted that payments will first have to be made by the shipowner and the Gard Club up to the limit applicable to the *Nissos Amorgos*, ie approximately 5.2 million SDR (£4.5 million). The Committee may wish to consider, therefore, whether it is premature to take a decision at this session authorising the Director to make payments."

60. At its meeting on 14 April 1997 the Fund's Executive Committee authorised the Director to "make final settlements of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee" but decided that the Director "was not authorised to make any payments for the time being" in view of the uncertainty as to whether the total amount of the claims might exceed the Fund Convention limit.

61. Ms Burgess attended the meeting and reported on the decisions made at it internally within Gard, in a fax of 15 April 1997. As regards the Executive Committee's decision to authorise the Director to make final settlements she stated:

> "… The meaning of this decision is that the Fund actually has authority to agree that claims we propose to pay are claims which are acceptable to them and which will therefore be used to build up the shipowner's limitation sum. The Fund however has not been authorised to actually make any payments to claimants for claims in excess of the shipowner's limit. However it does mean that if we pay out claims in excess of the shipowner's limit we should have no difficulty claiming the sums back from the Fund unless the total sum of claims accepted exceeds the Fund limit when of course all claims have to be prorated down."

62. The Executive Committee's decision was formally communicated to Gard in a fax from the Director of 23 April 1997. The fax stated that the Executive Committee had decided that the Fund cannot at present make any payments but that the Director had been authorised to make final settlements of any claim which did not give rise to

questions of principle which had not previously been decided by the Executive Committee. It further stated that the Fund had "no objection" to Gard making payments to claimants provided that the claim had been approved and that Gard would thereby acquire subrogation rights against the Fund, although full reimbursement would not be obtained if the Fund limit was exceeded. The text of the fax will be set out later in the judgment.

63. Gard's case was that this fax was "…an offer to adopt the previous consecutive payment arrangement to this incident which was capable of being accepted by Gard starting to make interim payments that had been approved…".

64. Meanwhile, on 7 April 1997, the Club lodged a guarantee to constitute the limitation fund and secure the release of the vessel. The lodgement of that guarantee meant that, if Gard were to make interim payments, it might be exposed to the risk of double jeopardy.

65. This was a continuing concern for Gard, as was what the position would be if it was found that the Owners were exonerated from liability.

66. On 20 May 1997 Mr Jacobsson circulated a draft of a Note for the Executive Committee meeting the following month.

67. Mr de la Rue commented by letter dated 26 May 1997 on the draft Note and attached suggested revisions (agreed with Gard) relating to the exoneration issue. The letter noted that:

> "… Gard is in principle willing to pay claims without invoking the potential exoneration against the claimants, but before making any payments it would be glad to discuss the precise arrangements governing a potential reimbursement claim against the Fund, in subrogation to the rights of the claimants."

68. On 30 May 1997 there was a meeting between Gard and the Fund, attended by Ms Burgess, Mr de la Rue and Mr Jacobsson. At that meeting Gard's concerns about the exoneration issue were discussed. Mr Jacobsson expressed the view that subrogation takes care of it. He suggested that the Club pay up to the CLC Limit notwithstanding possible exoneration and then, if exonerated, claim subrogation. There was a discussion about how the entitlement to exoneration might be proved. Mr Jacobsson suggested that there were four scenarios, agreement; settlement, court proceedings or arbitration. He said that it was difficult to take a decision about arbitration at this stage. Mr de la Rue suggested an exchange of letters confirming that the Fund would pay in the event of mutual agreement or final judgment. Mr Jacobsson said that he was not keen on this and would prefer to make a statement with which the Fund's Executive Committee could agree. It was also agreed that Mr de la Rue's suggested draft Note would be put in an Addendum rather than in the Note itself.

69. By this time Gard was coming under increasing pressure to pay claims and it was felt that if it was to pay claims then that should be done as soon as possible. As Mr de la Rue explained, Gard had "all but made the decision to make" interim payments, but wanted to "take stock of the implications" of doing so. "Practical politics" was forcing Gard's hand.

70. On 3 June 1997 Mr de la Rue sent Gard a draft letter which he suggested be sent on to the Fund in the light of the discussion at the 30 May meeting. That letter stated that:

> "In the meantime we understand you agree that it would be unsatisfactory if we were to decline to pay established claims in reliance on exoneration under Art III.2(c). By virtue of Art 4.1(a) of the Fund Convention 1971 the issue should not affect the claimants, or the total amount of compensation available to them. Its only relevance should be to determine how the burden of claims is to be apportioned between the Club and the 1971 Fund.
>
> We therefore suggest that this is an issue on which the Club and the 1971 Fund should examine ways of co-operating with each other in a joint effort to ensure that the system of compensation established by the Civil Liability and Fund Conventions operates smoothly, and without undue delay in payment of approved claims.
>
> With this in mind we are prepared to pay such civil claims without invoking against the claimants any defence under Art III.2(c), provided it is understood that we may invoke it against the 1971 Fund and, if the defence is established, recover the sums we have paid. We recognise that such a claim on our part would be subject to the Fund's limit of liability under Art 4.4 of the 1971 Convention and would be subject to abatement under Art 4.5 if the aggregate of admissible claims exceeds that limit. However we would like to be sure that the Fund in principle has no objection to this procedure.
>
> We consider that once we have made payments to claimants we should be entitled to take over by subrogation the rights which they would have had against the 1971 Fund if such payments had not been made. In our view such rights would include a right to recover compensation from the 1971 Fund in the event it is shown that there is no liability on the shipowner under CLC by reason of CLC Art III.2(c). However a right of subrogation is not expressly conferred by either of the two conventions.
>
> It would therefore assist us in making such payments if you would please confirm that the 1971 Fund has no objection to this procedure and does not dispute the right of the Club or the shipowner to make a claim by subrogation as described in this letter."

71. It is not clear whether this letter was sent by Gard to the Fund but it was discussed at a meeting between them the following day, 4 June 1997. At that meeting Mr Jacobsson expressed general agreement with it and dictated a letter which he proposed to send to the claims agency in Venezuela setting out the Fund's position. He also agreed to provide the Addendum to the previous Note addressing exoneration and subrogation.

72. The letter dictated at the meeting was sent out by fax the next day, 4 June 1997. It stated that the Fund approved certain claims; that although the Fund could not at present make any payments, it had no objection to Gard paying approved claims; that claims paid would subrogate against the Fund, but that this would be subject to the Fund limit being exceeded. The full text of the fax is set out later in the judgment.

73. It is this letter which Gard contend completed "the Fund's offer to adopt the usual practices".

74. On the same day Gard wrote to the Fund in terms reflecting Ince's draft letter of 3 June 1997, including all the paragraphs cited above, culminating in a request that the Fund confirm that it had no objection to Gard making payments and that it did not dispute the right of Gard to make a claim by subrogation.

75. In an internal Gard fax of 5 June 1997 Ms Burgess updated Mr Espeland, explaining as follows:

> "However, you will recall that we said we would not agree to payments until we had received an advice from Colin de la Rue advising us that we should pay claims in case this issue should arise later. You will recall that if the total amount of claims exceed the limit under the Fund we will not be able to recoup all the money we anticipate spending now on claims settlements. Colin mentioned this again last night and I emphasised to him that this advice could be very short but that obviously it would be appropriate to have this prior to agreeing to pay the claims. I anticipate that he must be working on this now."

76. Mr de la Rue's advice was provided on 5 June 1997. He advised that it was not possible for Gard to make payments at that stage without accepting some degree of risk but that it was not "practical politics" to delay payment until the admissible amount of all claims had been agreed or determined. He stated that:

> "If the [Fund Convention] limit is *not* exceeded there should be no difficulty in making appropriate financial adjustments at a later date between yourselves and the IOPC Fund, to ensure that each of you bears in the end the correct proportion of the total claims. However, if the limit *is* exceeded, any claim you may have against the Fund for such an adjustment may be subject to pro-rata reduction in the same way as all other claims against the Fund.
>
> There is also a prospect that owners may a [*sic*.] later date be able to demonstrate that they are exonerated from any liability at all under CLC, by virtue of Art III.2(c) of the Convention. Given the course which this matter has taken to date there must be grave doubts as to the chances of such a defence being upheld by the Venezuelan courts. If it is established to the satisfaction of the IOPC Fund then there should not be any difficulty in recovering your payments from the Fund, provided that the aggregate of admissible claims is within 60 million SDR. Again, however, there is a risk of a reduced recovery if the limit is exceeded".

77. On 6 June 1997 Gard made the payments that the Fund had approved on 4 and 5 June 1997. It was Gard's case that it thereby "accepted the Fund's offer to apply the practices and procedures for dealing with interim payments adopted in earlier cases" and a binding contract came into existence.

78. On 9 June 1997 the Director produced a Note for the Executive Committee's meeting of 16-17 June 1997. It contained a section addressing "possible exoneration of the shipowner from liability" and expressed the Director's view that Gard "would be entitled to subrogation with regard to the shipowner's limitation fund and the 1971 Fund in respect of any payment made to a claimant". He then explained his understanding of the effect of that in the event that there was a judgment exonerating the shipowner, and if the total amount of established claims exceeded both limits.

79. The 16-17 June 1997 Executive Committee meeting was attended by Ms Burgess. Her notes record that the position remained that if Gard paid off claims that it was not obliged to pay, "SO [shipowner] + Club [would be] entitled to subrogation".

80. After the meeting the Fund wrote to Gard by letter dated 24 June 1997 setting out its position. The letter stated as follows:

> "I refer to our previous discussion concerning payments of claims arising out of the *Nissos Amorgos* incident.
>
> As you are aware, the Executive Committee of the 1971 Fund decided, at its 53rd session, to authorise the Director to make final settlements of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee. The Committee further decided that in view of the uncertainty as to whether the total amount of the claims might exceed the total amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR), the Director was not authorised to make any payments. At its 54th session the Executive Committee decided that it was premature to take any decision authorising the Director to make payments.
>
> Although the 1971 Fund cannot at present make any payments, the Fund has no objection to the shipowner/Gard Club paying claims for the amounts assessed and approved by the Gard Club and the Fund. The shipowner or the Gard Club will subrogate the claims paid against the owner's limitation fund and the 1971 Fund. It should be noted, however, that in the event that the established claims arising out of this incident were to exceed the maximum amount available under the 1969 Civil Liability Convention and the 1971 fund Convention, ie 60 million SDR, the payment of claims would have to be pro-rated. The shipowner/Club would in the situation only be credited by subrogation for the pro-rated amounts.
>
> As for the Gard Club's right of subrogation in respect of any amount paid by it in compensation, in the event that the shipowner were to be exonerated from liability under Article III.2(c) of the 1969 Civil Liability Convention, I refer to the position taken by the Executive Committee at its 54th session, which reads:
>
> > The Executive Committee shared the Director's view that the shipowner and the Gard Club would be entitled to subrogation with regard to the shipowner's limitation fund and the 1971 Fund in respect of any payment made to a claimant, if it were established by a final judgment that the shipowner was exonerated from his liability under

> Article III.2(c) of the 1969 Civil Liability Convention. The Committee also considered that, as a result of such subrogation, the shipowner/Gard Club would have the same rights against the 1971 Fund as the claimants whom the shipowner/Club had paid would have had if the payments to them by the shipowner/Club had not been made. The Committee agreed with the Director that this would mean that, if the total amount of the established claims were to exceed the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, and consequently all claims were reduced *pro rata*, the subrogated claims by the shipowner/Gard Club would be reduced correspondingly."

81. The Fund's case was that that statement was a "statement of position" and nothing more than that, and that this remained the Fund's position at all material times thereafter. Thereafter express reference was made to this letter in each approval of assessment and payment form in the following terms:

> "No objection to Gard's paying the approved amount. As for subrogation and pro-rating reference is made to the 1971 Fund's letter of 24 June 1997."

82. In relation to the claims, Gard made agreed interim compensation payments to third parties up to US$6,500,332.47 between 1997 and 2000. The Fund made agreed interim compensation payments to third parties totalling US$18,343,557.74 between 2000 and 2004.

83. Gard and the Fund gave joint instructions to Mr. John Maxwell to undertake an audit to reconcile, on a provisional basis, the claims settled and claims-handling costs incurred by, respectively, Gard and the Fund. On 28 April 2006 the Fund paid the balancing payment of US$303,041.58 found to be due to Gard in the provisional audit published by Mr. Maxwell.

The oral evidence

84. Both Ms Burgess and Mr de la Rue provided lengthy witness statements. Their statements and evidence addressed the oral discussions relied upon by Gard in relation to the alleged formation of the contract, namely at the meetings of 20 March, 30 May and 4 June 1997.

85. These meetings took place over 17 years ago. Neither could be expected to have a clear recollection of matters said at those meetings beyond that reflected in notes or correspondence at the time. As Mr de la Rue realistically acknowledged: "I do not claim any certain recollection of exactly what was said in any of these discussions beyond what is clear from the documentary records".

86. Both witnesses nevertheless gave evidence which went beyond the documentary records. I approach that evidence with considerable caution. Whilst both witnesses approached their task carefully and conscientiously there is a danger of wishful reconstruction, even if that be subconsciously.

87. Gard stressed that the evidence of Mr Jacobsson, as recorded in Mr Brown's attendance note, did not positively challenge this evidence. However, it is apparent

from the note that, as would be expected, he too has little specific recollection beyond that reflected in the contemporaneous documents. I take into account the fact that Gard have not had the opportunity to cross examine Mr Jacobsson (or Mr Maura) but given the passage of time it is unlikely that this would have yielded clear and reliable evidence of what was said/not said.

88. I have made certain findings relating to the relevant meetings above. In relation to the "consecutive payment arrangement" both witnesses gave evidence that this was discussed, although they were not clear at which meeting or meeting(s). Having careful regard to the documentary evidence, the witness statement evidence, the note of attendance with Mr Jacobsson, and the witnesses' oral evidence I further find as follows. At a relatively early stage, probably at the 20 March 1997 meeting, reference was made by Mr Jacobsson to the practice which had been adopted in the past of the Club paying claims up to the CLC limit and the Fund making payments thereafter. Most of the discussion of the effect of making such payments arose in the context of the exoneration issue. In that context Mr Jacobsson stressed his view that by paying claims the Club would be subrogated to the claimants' rights to claim against the Fund. The consequence of these being subrogated rights was also discussed in relation to claims which exceeded the total limit, in which case it was acknowledged by all concerned that pro-rating would occur and the Club might not recover all payments made. Although this was the main context in which issues of subrogation were discussed, it was clear that Mr Jacobsson's views on subrogation applied to all claims paid by the Club. At the 4 June 1997 meeting Mr Jacobsson did express the view that provided the Fund limit was not exceeded there should be no real problem and that when all the claims had been paid there would be a financial adjustment. I am unable to make findings which go beyond this.

Issue (1) Was there a contract between Gard and the Fund and, if so, what were its terms?

Principles of contract formation

89. The applicable general principles were not in dispute. They are set out in Chapter 2 of *Chitty on Contracts (31st edition)* and conveniently summarised by Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1WLR 753.

90. The test for determining whether a contract exists is objective. It depends not on the parties' actual intentions but on what those intentions would reasonably be understood to be from the parties' communications (by words or conduct) with each other.

91. An offer is "an expression of willingness to contract on specified terms made with the intention…that it is to become binding as soon as it is accepted by the person to whom it is addressed" – *Chitty* para. 2-083.

92. A bilateral contact is formed through an exchange of promises under which both parties undertake obligations – *Chitty* para. 1-099.

93. A unilateral contact is formed through the promise of a party to perform if the other party does (or forbears from doing) a particular act – *Chitty* para. 1-099; 2-078.

94. For an agreement to be legally binding it must be supported by consideration; be made with the intention to create legal relations; be sufficiently certain and complete, and comply with any requirements as to form.

95. As stated by Lord Clarke in the *RTS* case:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

96. Each of the parties stressed certain aspects of the law relating to contract formation.

97. The Fund relied on the distinction between a promise and a statement of position. In this connection I was referred to the Court of Appeal decision in *Kleinwort Benson Ltd v Malaysia Mining Corporation* [1989] 1 WLR 379 in which a statement of policy made in a comfort letter was found to be a statement of present fact rather than a promise as to future conduct.

98. The Fund also emphasised the need to establish an intention to create legal relations and pointed out that this is a heavy burden where what is alleged is not an express agreement but a contract to be implied from conduct. In such a case the necessity for implying the contract needs to be shown, and a contract will not be implied if the parties would or might have acted as they did without any such contract – see *The Aramis* [1989] Lloyds Rep 213; *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274.

99. Whilst Gard's pleaded case did allege that the contract was partly made by conduct after June 2007, its Further Information and skeleton for trial make it clear that that conduct was relied upon not in relation to the formation of the contract, but rather as evidence that a contract had been made.

100. For its part Gard stressed the importance of the fact that a transaction has been performed – see, for example, in *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25 at 27 per Steyn LJ. In the *RTS* case at [54] Lord Clarke described this as a "very relevant factor" in determining whether a contract has been made, whilst pointing out that it "depends upon all the circumstances of the case, of which this is but one".

101. In relation to the intention to create legal relations, Gard relied on *Chitty* para. 2-162 where it is stated that "in the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended

to create legal relations". It also relied on *Edwards v Skyways* [1964] 1 WLR 349 at 355 in which it was stated that in that context the onus of proving that there was no such intention "is on the party who asserts that no legal effect was intended and the onus is a heavy one".

102. The present case is not one of an express written agreement; nor is it one of a contract implied wholly from conduct. The alleged contract arises out of combination of an offer allegedly made by an accumulation of what was said in meetings and in writing between March and June 2007, which offer was allegedly accepted by Gard's conduct in paying claims. In such a case, notwithstanding the commercial context, I do not consider that it is appropriate to approach the matter with a presumption that there was an intention to create legal relations. In a hybrid case such as this, involving a combination of what the parties said and did and no expressly stated offer to contract in the terms alleged, I consider that in principle the onus is on the party claiming that a binding agreement was made to prove that there was an intention to create legal relations.

103. Support for such an approach is to be found in the Court of Appeal decision in *Blackpool Aero Club v Blackpool B.C.* [1990] 1 WLR 1195 in which it was held that a contract obliging the council to consider a tender was made by an invitation to tender followed by a tender posted before the stated deadline. It was treated by the Court as a case of implied contract with the burden of proof resting on the party alleging that a contract was made, notwithstanding the commercial context. Bingham LJ stated as follows at p1202:

> "I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must also, in most cases, be able to answer the question posed by Mustill L.J. in Hispanica de Petroleos S.A. v. Vencedora Oceanica Navegacion S.A. (No. 2) (Note) [1987] 2 Lloyd's Rep. 321, 331: "What was the mechanism for offer and acceptance?"

Application to the facts

104. I have set out relevant background matters above. Of particular relevance are the following:

(1) The MOU and the practice of co-operation in claims handling between the IG Clubs and the Fund in dealing with major pollution incidents;

(2) The fact that a "consecutive payment arrangement" had been adopted in relation to all those incidents;

(3) The limited subrogation rights granted under the CLC Convention and the fact that it was understood that there were potential difficulties in the recognition and/or enforcement of subrogation rights in respect of claims payments made.

(4) The Fund's express acknowledgment, as set out in the Director's Note of 5 April 1994, that where the Club makes payment of claims it "acquires by subrogation the right of the person paid against the limitation fund and the IOPC Fund".

(5) The issue of proceedings making a subrogated claim by the Club in relation to *The Sea Empress* incident in order to protect time limits.

(6) The making of claims in relation to *The Braer* which potentially exceeded the Fund limit and the recognition that that could lead to the Club only recovering a pro-rated proportion of claims it had paid.

105. The "consecutive payment arrangement" which had been adopted up to the time of the *Nissos Amorgos* incident was described by Mr de la Rue in the 1998 edition of his book, *Shipping and the Environment* as follows:

> "In order to ensure that proper claims are paid as promptly as possible it has been commonplace for P&I Clubs to pay their full amount until the shipowner's liability limit is reached, and for the IOPC Fund concerned to take over the payment of claims thereafter. This procedure has been facilitated by the fact that, in practice, the Funds have accepted that if necessary the shipowner could pursue rights of subrogation under the applicable Fund Convention…."

106. I accept the Fund's case that the background shows, as reflected in Mr de la Rue's book, that there was a general understanding that the legal underpinning of the "consecutive payment arrangement" was subrogation, and that the subrogation was mutual. The Club would, as the Fund had acknowledged, be subrogated to the right of any person paid as against the Fund. The Fund would, as set out in Article 9(1) of the Fund Convention, be subrogated to the right of any person paid as against the owner/Club and/or the limitation fund. In practice it was unlikely to be necessary for any subrogated claim to be made since the parties would arrive at a financial reconciliation of the position. However, that might not be achievable where claims exceeded the Fund limit, a risk highlighted by *The Braer*.

107. Gard's case is that the Fund's fax of 23 April 1997 "confirmed an offer to adopt the previous consecutive payment arrangement to this incident". The fax stated:

> "As you are aware the Nissos Amorgos incident was considered by the Executive Committee at its 53rd session held last week.
>
> The Executive Committee authorised the Director to make final settlements of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee.
>
> As regards the question of payments by the 1971 Fund at this stage, the Executive Committee took the following decision:
>
> > As for the question of whether and, if so, to what extent the Director should be authorised to make payments, the Executive Committee

> noted that it was not yet possible to make an accurate estimate of the total amount of claims which might be submitted, in particular due to the claim presented by the State of Venezuela and its request for security to be provided by the shipowner. The Committee considered it necessary, therefore, for the 1971 Fund to exercise caution in the payment of claims. It was noted that the 1971 Fund was liable to pay compensation only when the total amount of the payments made by the shipowner exceeded the limitation amount applicable to the vessel, in this case approximately £4.5 million. In view of the uncertainty as to whether the total amount of the claims might exceed the total amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR, corresponding to approximately £51 million), the Committee decided that the Director was not authorised to make any payments for the time being.
>
> A copy of the relevant pages of the Record of Decisions is enclosed.
>
> The consequence of the decision taken by the Executive Committee is that the 1971 fund cannot at present make any payments. I have on the other hand been authorised to make final settlements in respect of any claim subject to the proviso referred to above.
>
> I presume that the Gard Club wants to start making payments as soon as possible. The 1971 fund certainly has no objection to the Club making payments to claimants, provided that the claim has been approved by the Fund for a particular amount. The Gard Club would then acquire by subrogation the right of the claimant against the shipowner's limitation fund and the 1971 Fund. However, if the total amount of the established claims were to exceed the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, ie 60 million SDR, the Club would only be reimbursed for a certain percentage of these payments, as all claims will have to be pro-rated."

108. The fax does not describe or refer to the making of consecutive payments. It does not state that the Fund will be making any payments, still less promising to do so. Indeed the only reference to payments by the Fund is to the decision of the Executive Committee that no payments can be made at present. The fax does envisage payments being made by the Club, but it does not state that such payments are required or even agreed to. All that is said is that the Fund has "no objection" to such payments. The *quid pro quo* for so doing is not said to be any payment or promise of payment by the Fund, but rather recognition that rights of subrogation would be acquired thereby.

109. Gard submitted that against the background of the established practice of the "consecutive payment arrangement", the statement that the Director was authorised to "make final settlements" would reasonably be understood as authority to adopt that arrangement, of which approved settlements was the first step. However, read as a whole, the fax was making no commitment to payment by the Fund.

110. As stated above, an offer is "an expression of willingness to contract on specified terms made with the intention…that it is to become binding as soon as it is accepted by the person to whom it is addressed". In this case, that means (or includes) willingness to contract so as to undertake an absolute commitment to pay any and all claims, regardless of the circumstances, once Gard had paid claims up to the CLC limit. I find it impossible to construe the fax as making such an offer expressly or impliedly, let alone doing so clearly and unequivocally.

111. Gard's case is that the offer was completed by the Fund's fax of 4 June 1997, which stated that:

> "The 1971 Fund has examined the claim documents submitted by the Claims Agency in respect of the claims covered by your telefax of 4 June 1997. The 1971 Fund approves claims 70, 72, 74, 76, 78 and 81 for the amounts set out in the assessments.
>
> Although the 1971 Fund cannot at present make any payments, the Fund has no objection to the shipowner/Gard Club paying these claims for the amounts assessed. The shipowner or the Gard Club will subrogate the claims paid against the owner's limitation fund and the 1971 Fund. It should be noted, however, that in the event that the established claims arising out of this incident were to exceed the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, ie 60 million SDR, the payment of claims would have to be pro-rated. The shipowner/Club would in that situation only be credited by subrogation for the pro-rated amounts.
>
> Payments may be made only after detailed instructions concerning the procedure for signing receipts and releases and the procedure for payment have been given by the Gard Club and the 1971 Fund. These instructions will be given soon."

112. I agree with the Fund that this fax sets out a statement of position which is materially the same as that set out in the fax of 23 April 1997. The Fund cannot make payments; it has "no objection" to Gard paying claims; claims paid by Gard will subrogate against the Fund; subrogated rights will be pro-rated in the event that the claims exceed the Fund limit.

113. The main difference relied upon by Gard is that some claims have now been approved. However, such approval was envisaged in the 23 April 1997 fax. Both faxes contemplate that the Club will pay approved claims. That is on the basis that the Flub has "no objection" to Gard so doing and that it will thereby acquire subrogated rights against the Fund. It is not on the basis of a reciprocal promise by the Fund to pay claims itself. Indeed there remained no Executive Committee authority for any payment of claims.

114. Nor do I consider that the position had been materially changed by the further discussions which had taken place between the parties. As found, those discussions included Mr Jacobsson expressing the view that there should be no real problem provided the Fund limit was not exceeded and that once all claims had been paid there would be a financial adjustment. That reflected both parties' expectation that the "consecutive payment arrangement" would be followed and would not be

problematical. However, there was no specific agreement or promise that it would be followed, still less that it would be followed "come what may", as would be the effect of the alleged unconditional contract.

115. Gard submitted that in a case where there was no exoneration issue and the Fund limit was not exceeded, "subrogate" would be reasonably understood to refer to the "consecutive payment arrangement" followed by financial reconciliation. It was only in those two exceptional cases that true subrogation would matter. However, subrogation is a legal term of art with which all involved were well familiar, both in the general insurance context and in the context of the CLC and the Fund Convention. It had been expressly stated to be, and was understood to be, the legal entitlement conferred by payment of claims. It was an entitlement conferred in respect of the payment of all claims, not just claims where there was exoneration or claims over the Fund limit. The statement made in the fax, in common with earlier statements by the Fund, is expressed in general terms and relates to all claims paid. To construe it as having one meaning (its accepted legal meaning) in relation to some claims and an entirely different meaning (bearing no relation to its legal meaning) in relation to other claims is implausible, if not impossible.

116. For all these reasons I am unable to accept that the contract contended for by Gard was made as alleged or at all. There are a number of further facts and matters which support that conclusion. They include the following:

(1) The alleged contract is vague and uncertain. It is said to be a contract to apply "practices and procedures" which had developed through co-operation between the IG Clubs and the Fund. Although some of these are identified in the pleading, the plea is that all "relevant" practices and procedures were contractually agreed to apply. It is unclear exactly what this would cover. Nor is it likely that the parties would intend to be bound contractually to apply all of them regardless of the circumstances of the particular incident in question.

(2) Even if one focuses on the "consecutive payments arrangement", there are obvious difficulties in treating it as involving a contract. For example: is Gard obliged to pay claims up to the CLC limit or is that a matter of choice? Do claims have to be paid up to the limit before the Fund becomes obliged to pay or may there be circumstances where it becomes so obliged before that stage is reached (as happened in some instances)? Are joint costs to be taken into account in relation to the payment of claims up to the CLC limit (as Gard's pleading asserts)? Are there any circumstances in which the Fund is not obliged to pay claims, or is relieved from that obligation? What happens if the claims are not approved or agreed? Does the Fund have to take over the handling of claims as well as paying them? What if the parties are unable to agree the reconciliation? Is the time of payment (or interest) to be taken into account? Where and how should any disputes between the parties be resolved? If commercial parties wished to enter into a contract for "consecutive payment" these are the types of issues which would be expected to be addressed, but none of them are. Gard's case involves it, at its election, being able to impose a wholly unconditional obligation of payment of claims on the Fund. As the facts of the present case illustrate, there may well be circumstances in which the Fund would wish to question whether there is any obligation of payment. To give up any right to do so would be an improvident and implausible bargain which would require clear and unequivocal agreement.

(3) Gard's case as to when and how the contract was made has shifted and changed. The first clear assertion of such a contract was made in June 2013 and that relied on a contract allegedly made by the parties' correspondence between 2007 and 2011. The pleading relied on discussions, faxes and conduct over the period from March 1997 to May 2011. The Further Information relied on exchanges in 1997 only, culminating in the Executive Committee's decision at its 16-17 June 1997 meeting. Gard's skeleton at trial relied on the completed offer made on 4 June 1997 being accepted by payment of claims. Further, its pleaded case asserts an obligation on Gard to pay claims; its case at trial was that this was a matter of choice. If the circumstances in which an agreement was entered into, and its terms, cannot be stated clearly then this suggests that no such agreement existed.

(4) It is clear from the parties' exchanges in March to June 1997 that Gard was seeking a formal statement of the Fund's position. What was being sought was clearly stated in Gard's fax of 4 June 1997, namely confirmation that the Fund had no objection to Gard making payments and that it did not dispute the right of Gard to make a claim by subrogation. This is what it received in the Fund's 4 June 1997 fax. The Fund did indeed state that it had "no objection" to Gard making payments on the basis proposed and that it accepted its right of subrogation. There was no response that this was insufficient or incorrect. Where parties go to the trouble of formally setting out their position in this way it is reasonable to presume that it sets out the full extent of that position.

(5) Ms Burgess accepted in evidence that if she had asked Mr Jacobsson to include within the 4 June 1997 fax a statement that an agreement existed along the lines alleged by Gard, she could not say that he would have included it: "I really cannot comment on what he would not, would or would not have done"; "I cannot say of course he would agree it. We can see that we had various discussions with the director".

(6) The parties' exchanges show that the Fund was reluctant to commit itself beyond a statement of position. For example, as reflected in Ms Burgess' note of 6 March 1997, Mr Jacobsson was not prepared to enter into an agreement on the exoneration issue. At the 30 May 1997 meeting he was not prepared to agree to arbitration of the exoneration issue or an exchange of letters confirming that the Fund would pay. The most he was prepared to do was to make a statement with which the Executive Committee could agree. This is what then occurred. As anticipated, it was no more than a statement of position.

(7) There is no contemporaneous documentary evidence of the alleged agreement. None of the documentary exchanges record it. None of the meeting notes record it. The oral evidence goes no further than I have found.

(8) The contemporaneous evidence reflects an expectation that the "consecutive payment arrangement" would be followed and that there "<u>should</u> be no problem"; not that that there <u>would</u> be no problem because it was contractually agreed. Thus on 15 April 1997 Ms Burgess reported that Gard "should have no difficulty" in claiming sums back. Importantly, on 5 June 1997, the day after the alleged confirmed offer, Mr de la Rue said that there "should be no difficulty" if the Fund limit is not exceeded and a financial adjustment is made. This reflected the language used by Mr Jacobsson at the previous day's meeting. It is the language of expectation, not obligation.

(9) Although the Fund did not formally take any point on authority, the "offer" faxes relied upon make it clear that Mr Jacobsson had no authority to make payments. In such circumstances, it is difficult to see how the faxes could reasonably be understood as providing an unconditional contractual undertaking to make payments. If he had no authority to make payments he would surely be understood to have no authority to promise to make such payments – yet that is the contractual undertaking alleged. Further, the reason given, concern that the Fund limit might be exceeded, applied not just to the making of payments, but also to any promises to make such payments. Contrary to Gard's submission, in the light of the Executive Committee's expressly stated position in relation to the payment of claims for this incident, I do not consider that its earlier general approval of the Director's "pragmatic approach" to claims handling covered the matter.

(10)If, as I have held to be the case, the confirmation given by the Fund of subrogation rights was of general application and applied to all claims, the giving of that confirmation is inconsistent with a contractual commitment to make consecutive payment. If the Fund had contractually agreed to pay all claims above the CLC limit there would be little point in confirming that Gard had subrogation rights against it.

(11)When Mr de la Rue wrote to Mr Jacobsson on 5 March 1998, seeking a new approach to interim payments, he did not refer to a contract or binding agreement. He stated that: "It has always been possible, so far as we know, for any necessary financial adjustments to be made at the end of the case to the satisfaction of the Fund and the Club". This is not the language one would expect an experienced solicitor to use if there was a contract governing these matters.

(12) No reference to the alleged contract or binding agreement was made when Gard started to assert its claims against the Fund in 2011 and 2012. As Ms Burgess accepted in evidence neither her letter to Mr Maura of 20 May 2011 or her follow up letter of 28 March 2012 made any reference to an agreement. No clear assertion of any such agreement was made until June 2013, sixteen years after the binding agreement was allegedly made.

117. In support of its case Gard relied upon a number of matters, some of which have already been addressed above. In particular Gard stressed that:

(1) There was no disapplication of the prior "consecutive payment arrangement".

(2) The Fund's case acknowledges that it was making a legally binding commitment and it would make little sense for that to be limited to subrogation.

(3) There is a presumption that commercial parties intend their agreements to create legal relations.

(4) Events after 1997 evidence that there was a binding agreement as alleged.

118. As to (1), at times Gard's argument came close to asserting that the alleged agreement "went without saying". However, Gard's case correctly acknowledged the need to prove the making of an agreement in relation to the *Nissos Amorgos* incident, and it set out how it alleged that agreement was made as a matter of offer and acceptance.

Prior practice is relevant background but it does not prove the agreement. That prior practice would be particularly important if it had been contractual, but that was not Gard's case. As Gard's counsel acknowledged, "nobody thought in terms of contract at that stage". The prior practice was not reduced to contract, nor was it ever asserted that it was contractual. It was an "arrangement"; nothing more. As such it had worked perfectly satisfactorily in the past and there was an expectation that it would continue to do so. These were sophisticated parties used to trusting and co-operating with each other in relation to the handling, settlement and payment of pollution claims and other matters of mutual interest.

119. As to (2), the Fund acknowledged that its statement of position, as ultimately set out in its letter of 23 June 1997, would be likely to have the consequence that as a matter of English law the Fund would be estopped from denying that Gard had subrogation rights against the Fund in respect of claims it had paid, subject to such claims not exceeding the Fund limit. Although that may have a similar effect to a contract, it is not a contract. The letter is not expressed in terms of an exchange of promises or agreement, but rather in terms of a statement of the Fund's position should Gard decide to pay approved claims, a course of action to which the Fund "has no objection". Even if it is a contract, there is nothing uncommercial about it being limited to the issue of subrogation, being the recognised legal underpinning of the payment of claims. Gard stressed that reliance on subrogation rights would be uncertain (since they would have to be asserted in the Venezualan courts), wasteful (since it would require the commencement of proceedings rather than simply a financial adjustment) and unnecessarily complex (at least if claims were within the Fund limit). However, this ignores the fact that both parties expected that the "consecutive payment arrangement" would be followed, as it had been in the past, and that subrogation rights would only need to be enforced as a last resort or, as Mr de la Rue put it in evidence, "if that became necessary". There had been no need to make the "arrangement" contractual in the past, and there was no particular reason for it to be made so in this case.

120. As to (3), this depends on proof of the alleged agreement, a burden which Gard has not discharged. In any event, for reasons already set out, I do not consider that the presumption applies in a hybrid case such as this. Even if there is a presumption, I am satisfied that the Fund has rebutted it. If an agreement was made as alleged, I find that there was no intention to create legal relations in relation to such an agreement for the reasons set out in paragraph 116 above, and in particular sub-paragraphs (1) to (2), (4) to (6) and (8) to (10).

121. As to (4), Gard relied on a number of matters, and in particular:

> (1) The parties later corresponded with a view to varying the arrangements which had been agreed in 1997. Thus, in 1998, Ince & Co wrote to the Fund, copied to Gard, seeking to agree that, instead of the Club paying all claims up to the CLC limit, the Fund should drop down and pay a portion of claims below the limit. Mr. Jacobsson's immediate response was that the Executive Committee had in the past been "adamant that the CLC limit should be reached by the shipowner/Club before the Fund started to make payments". However, Mr. Jacobsson agreed to, and did, submit a Note setting out the proposal to the Executive Committee on 20 January 1999. At the outset of that Note Mr. Jacobsson reminded the Committee that the Fund had in the past

"required" the Club to pay compensation up to the CLC limit before the Fund started paying and that an adjustment was then made between the Club and the Fund when the exact limitation amount had been determined. The Executive Committee declined to agree to change the agreed procedures. Gard submitted that if there had been no agreement, this would make no sense; it was because there was an agreement that the Club needed the Fund's agreement.

(2) The parties followed the procedures which had been employed in earlier cases in this case. Thus:-

(i) The Director approved settlements;

(ii) The Club paid the claims which were approved until their CLC limit was reached;

(iii) The Fund then took over the payment of claims.

(3) The Fund took the lead in the negotiations with the Republic. Gard submitted that this was because, once the CLC limit had been reached, further claims were perceived as the responsibility of the Fund, and the Fund had the interest in resolving them. In 2004 the Fund's Administrative Council instructed the Director to approach the Venezuelan authorities to search for a global solution and meetings between Fund and Republic representatives took place in Venezuela in March 2004. The Administrative Council instructed the Director to seek an assurance by the Republic that it would "Stand Last in the Queue" and the Director duly obtained "the necessary assurance" in August 2004. This in essence meant that the Fund was no longer concerned that the Fund limit might be exceeded, with the result that the Fund could pay other claims in full, rather than in their prorated amount, which the Fund then did.

(4) Gard and the Fund gave joint instructions to Mr. John Maxwell to undertake an audit to reconcile, on a provisional basis, the claims settled and claims-handling costs incurred by, respectively Gard and the Fund. The Fund paid the balancing payment of US$303,041.58 found to be due to Gard in the provisional audit published by Mr. Maxwell on 28 April 2006.

(5) Gard sent various letters to the Fund pointing out that, whether the Fund's defences in Venezuela were successful or not, there would need to be a further financial adjustment as between the Fund and Club, as set out in Gard's letters to the Fund dated 30 July 2007, 3 February 2010 and 20 May 2011, with which letters the Fund did not take issue. The Fund never questioned the need for such an adjustment. Further, the Fund's current Director, Mr. Maura said, at a meeting with Gard on 10 September 2013, that "the Fund had agreed to pay and there had not been a response to the letters since there had not been a problem".

(6) Mr. Maura, acknowledged that a claim by Gard for a balancing payment was based on rights and obligations between Gard and the Fund arising from the claims-handling practices and interim payment procedures they agreed to follow, not on the Conventions, as reflected in a note of meeting on 10 September 2013.

(7) At a meeting of the Sixth Intersessional Working Group of the 1992 Fund, the Fund's Director noted that "there was no legal basis for interim payments in the Civil Liability and Fund Conventions, and thus it was not a matter of interpretation of the Conventions but rather a matter of practice and agreement" adding that under the usual practice "the Club concerned and the 1992 Fund would carry out a reconciliation, which was simply an accounting exercise, whereby each party would determine what each party had paid in compensation to victims, what were the joint expenses, what was the final percentage of liabilities between the Club and the Fund after all payments had been made, and thus how much was owed by one party to the other as a result of the reconciliation".

(8) In a Note by the Fund's Secretariat of 22 April 2014 the Director stated that "[t]here is an agreement between the Gard Club and the 1971 Fund to make interim payments in respect of the Nissos Amorgos incident. … Under this agreement the Gard Club and the 1971 Fund have paid compensation for some US$24.4 million".

(9) The existence of the practices and procedures relied on by Gard was confirmed in a number of later Fund documents, including the Note by Mr. Jacobsson dated 20 January 1999 to the Fund's Executive Committee, Mr. Jacobsson's letter to Mr. Stephen Martin (of Steamship Mutual) dated 21 January 2003 re *The Erika* incident; Mr Jacobsson's explanation of the procedures to the Executive Committee on 7 February 2003 re *The Prestige* incident and the Study by Messrs Jacobsson and Shaw of February 2012.

122. The difficulty in Gard's reliance on many of these matters is that the conduct relied upon is equally consistent with there being a non-contractual expectation or understanding that the "consecutive payment arrangement" would be followed. Dealing briefly in turn with each matter relied upon:

(1) It was obviously sensible to seek agreement in relation to any departure from previous practices in relation to the "consecutive payment arrangement" even if, as I find to be the case, that "arrangement" was not contractual. Further, as already found, Ince & Co.'s letter of 5 March 1998, does not refer to a contract or binding agreement, and is expressed in terms inconsistent with there being such an agreement.

(2)(3)(4) This conduct is equally consistent with the parties' having such an arrangement, but it being non-contractual.

(5) Whilst Gard's letters referred to the need for further adjustment they did not refer to there being a contract or other binding agreement, or to the adjustment being required thereunder. Mr Maura's reference to the Fund having agreed to pay claims does not expressly or necessarily connote a contractual agreement.

(6) Again, Mr Maura was not expressly or necessarily referring to a contractual agreement. Even if he was, what he said is consistent with the Club having subrogation rights outside the Convention, a right which the Fund had long recognised.

(7) The Director refers to a "practice" and whilst he mentions "agreement" he is not expressly or necessarily referring to a contractual "agreement". The recognised legal basis for the "consecutive payment arrangement" and the consequent accounting reconciliation was mutual subrogation.

(8) The Note is not expressly or necessarily referring to a contractual agreement.

(9) The existence of the practice and procedures is not in doubt. The issue is whether they are contractually binding. None of the documents referred to address this.

123. For all these reasons, I conclude and find that there was no contractual offer as alleged; that there was no contractual agreement as alleged and, if there was, that there was no intention to create legal relations in relation to such an agreement. Gard has accordingly not proved its case on Issue (1). I shall nevertheless address Issue (2) on the basis that Gard has succeeded on Issue (1).

Issue (2) Is that contract one which falls within the exception from immunity from suit and legal process in Article 6(1)(c) of the 1979 Order, namely a contract of loan or for the provision of finance?

The proper approach

124. There was a difference between the parties as to the proper approach to the immunity issue.

125. The Fund's case was that there is a strong presumption in favour of the Fund's immunity from suit. It relied in particular on the following:

(1) An analogy with the presumption of immunity under s.1 of the State Immunity Act 1978 ("the 1978 Act");

(2) The reasons why Parliament conferred immunity on the Fund;

(3) The distinction between "public" and "commercial" acts and the fact that the Fund's activities in the present case have the character of *acta jure imperii* not *acta jure gestionis.*

126. Gard submitted that the Fund's case was misconceived and based on a false elision between an international organisation such as the Fund and a sovereign state.

127. I agree with Gard that there is an important distinction between an international organisation such as the Fund and a sovereign state. The Fund is not a state. States have long had a right to immunity, an immunity now governed by the 1978 Act. Organisations such as the Fund have no such historic right and only have immunity if and to the extent it is granted by statute. There is no room for the application of the doctrine of *acta jure imperii* in the case of the Fund since, as it is not a state, no action on the part of the Fund falls within this description.

128. The distinction is clearly explained in Bingham LJ's judgment in the International Tin Council case, *Standard Chartered Bank v ITC* [1987] 1 WLR 641, 647-8, where he stated as follows:

> "First the absolute doctrine of sovereign immunity grew up in reliance on a theory that sovereign states were characterised by what Marshall C.J. *in Exchange (Schooner) v. M'Faddon* (1812) 7 Cranch. 116 described as "perfect equality and absolute independence." It followed from this that one sovereign would not insult the dignity or undermine the independence of another by seeking to assert jurisdiction over him. Whatever the merits of this doctrine as between personal sovereigns or sovereign states, it is not obviously apt to be applied to a body such as the I.T.C. of which sovereign states are no more than members and whose own sovereign status is said to have a certain Cheshire cat quality. The I.T.C could scarcely be seen as enjoying perfect equality with the United Kingdom or the same absolute independence. It is not therefore to be assumed that the strict principles established by authority would have been applied in these different circumstances or that such application would in 1972 have been expected. Second, and perhaps more importantly, international organisations such as the I.T.C. have never so far as I know been recognised at common law as entitled to sovereign status. They are accordingly entitled to no sovereign or diplomatic immunity in this country save where such immunity is granted by legislative instrument, and then only to the extent of such grant. In the present case the I.T.C. enjoyed such immunity as was granted by article 6(1) of the Order of 1972, no more and no less."

129. Since the Fund has no immunity as of right Gard submitted that any legislation granting such immunity should be strictly construed.

130. I respectfully agree with Bingham LJ (as he then was) that the Fund enjoys such immunity as is granted by the 1979 Order, "no more no less". The Order falls to be construed according to its terms in the context of its legislative purpose and scheme. That task is not to be approached with a presumption one way or the other.

131. The Order was made to enable effect to be given to the Headquarters Agreement. That Agreement stated that its primary objective was "enabling the Fund at its Headquarters in the United Kingdom fully and efficiently to discharge its responsibilities and fulfil its purposes and functions."

132. The Fund submitted that the exceptions to immunity should be construed narrowly in a case where, as here, the alleged agreement being sued upon related to the Fund's public rather than its commercial functions.

133. Gard submitted that the Fund's purposes and functions are to pay compensation for oil pollution damage to the extent that the protection afforded by the CLC is

inadequate, that the agreement was made to further that purpose and that the exceptions should be construed so as not to frustrate that purpose.

134. In my judgment the court's approach to the proper construction of the exceptions should not depend on the nature of the particular agreement alleged in this case. However, I accept that it may be illustrative and that the Order and the exceptions to immunity should be construed purposively.

135. Section 6 of the Order 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 any 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;

…"

136. It was common ground that the alleged agreement falls within the scope of the Fund's "official activities". As such, the Fund has a prima facie right to immunity under s.6(1).

137. There will be no such right in so far as one of the exceptions applies, but, since it is Gard who is so contending, in my judgment it is for Gard to prove that. It is not for the Fund to prove a negative. The fact that the issue arises in the context of a jurisdictional dispute does not alter that. If there is immunity then there is no jurisdiction and the Fund has made out a prima facie case of immunity. In those circumstances the burden is on Gard to establish that the contract it alleges falls within the exception it relies upon, namely s.6(1)(c). That said, this is not a case which turns on the burden of proof.

"loan or other transaction for the provision of finance"

138. *Chitty* at para. 38-253 defines a loan as follows:

> "A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest"

139. In the present case there is no allegation that there was a payment of money by one party to another (e.g. from party A to party C), but rather a loan is said to arise (between parties A and C) from a payment from party A to party B on behalf of party C.

140. The circumstances in which such a payment may constitute a loan were considered by the House of Lords in *Potts' Executors v IRC* [1951] AC 443. That case concerned an arrangement between a director and a company whereby the company paid various accounts on behalf of the director, debiting him with the payments in its books, and crediting him with director's fees and sums paid by him to the company. The House held that this did not constitute a loan for the purpose of the Finance Act 1938 (a taxing statute).

141. Lord Oaksey observed (at 460):

> "In my opinion in the particular circumstances of this case the payments were not made by way of loan. They were made in accordance with the practice which had long existed by which the governing director of the company in which he had held all the shares directed or requested the company to make payments on his behalf as a matter of ordinary convenience. The company had never carried on a business of bankers or moneylenders and it is not in my opinion a fair use of language to describe payments made for the governing director in such circumstances as loans".

142. Lord MacDermott observed (at 465):

> "Now, I entertain little doubt that in certain circumstances it may properly be said that, if A out of his own moneys pays a sum to B for and at the request of C, A has paid the sum by way of loan, and by way of loan to C in the sense, and only the sense, that he has thereby created the relation of lender and borrower between himself and C. But this is not to say that all transactions of that kind are loans. They may be but incidents in some wider relationship, other than that of lender and borrower, and take, as it were, their colour from it. For example, a rent agent may have to pay rates and a solicitor may have to pay stamp duties for clients whose accounts are not in credit at the time of payment. But in the ordinary course of events I do not think it would occur to anyone, or be a correct use of language, to say that such disbursements were loans or made by way of loan. On the other hand, the kind of wider relationship to which I am referring may provide opportunity for transactions within it which are exceptional and beyond the normal scope of the relationship and which may properly be describable as loans and nothing else."

143. In *Gadhok v Shamji* [2003] EWHC 931 (Ch) Patten J explained the exception contemplated by Lord MacDermott in *Potts* at [25]-[26]:

> "25. It seems to me that Lord McDermott in [*Potts*] is there recognising that there may be some tripartite situations and the one involving a bank referred to by Lord Normand is the most common and obvious one, where notwithstanding that there is no direct payment as between lender and borrower but rather a direct payment from the lender to the third party, that, nonetheless, can still be as a matter of law a loan.
>
> 26. For that to be the case, it seems in my judgment that there must be either a pre-existing relationship of debtor and creditor to which that new transaction is attributable and which, to use Lord McDermott's words, gives it its colour, or alternatively it must actually be agreed between the parties, and in particular the alleged lender and borrower, that as between themselves the contract is to be one of loan, in other words, that the money is to be treated as paid to the borrower and repaid by the borrower on whatever terms have been agreed. Where the provider of the funds, the payer simply agrees to pay money to a third party in satisfaction of the liabilities of the other party to that third party, that does not of itself constitute a contract of loan, particularly whereas in this case the pre-existing relationship was one of guarantor and principal debtor."

144. As to what is meant by "other transaction for the provision of finance", the same wording is used in the 1978 Act. In that connection I was referred to the discussion in *State Immunity: Selected Commentary and Materials (2004), Dickinson, Lindsay and Loonam* (at p. 360):

> "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: two aspects of this element of the definition are of note. The first is that the provision of finance may be either by or to the State. Secondly, there would appear to be a distinction drawn between a "transaction for the provision of finance" and "any other financial obligation" (a mere financial

> obligation does not fall within the definition of "commercial transaction" in its own right), but the nature of the distinction is elusive. The former phrase would certainly encompass any bond or other bearer debt instrument, derivative transaction, letter of credit, bill of exchange or promissory note as well as the provision of security for indebtedness. Bank overdrafts would also seem to be covered. The intention behind the latter phrase is less clear, but it may well cover other monetary obligations of third parties, such as the price under a sale of goods contract, rental payments or maintenance obligations".

Application to the facts

145. It was common ground that the guidance provided by *Gadhok* should be followed. Applying that guidance, I find that the "consecutive payment arrangement" is not a loan. There was no pre-existing relationship of creditor and debtor; nor was it actually agreed between the parties that their contract was to be one of loan.

146. I further find that it is not a "transaction for the provision of finance" for a number of reasons (and these are further reasons why it is not a loan). In particular:

(1) The transaction is not akin to any of the examples given in *Dickinson*. That list of examples is not exhaustive and Gard was able to suggest other examples in a tripartite context, namely a credit card agreement and a hire purchase agreement. However, nor is the transaction akin to any of these further examples.

(2) The essence of the "consecutive payment arrangement" is the payment of claims, not the provision of funding. The claims are paid up to the amount of each relevant limit. They are consecutive because Gard's CLC liability comes first and it is only once the CLC limit is found to be too little to provide adequate compensation that the Fund's liability is engaged. The amount paid and the sequence of payment did not arise out of or relate to the borrowing needs of the Fund.

(3) Although the effect of the arrangement could be regarded as providing funding (since, once the claims exceeded the CLC limit, the Club's liability was only for a prorated amount of each claim), that was not its purpose. Its purpose was to provide a convenient and efficient means for the making of interim claims payments and for the discharge of each party's claims liabilities.

(4) The legal basis of the arrangement was mutual subrogation.

(5) An agreement that Gard will pay first and the Fund will pay second is essentially a hold harmless or indemnity agreement.

(6) At the time that Gard paid claims it would not be known whether it is paying more to claimants than it is obliged to or, if it is, by how much. It is a curious loan or transaction for the provision of finance where it is not clear at the time of the payment that any loan or transaction for the provision of funding has taken place.

(7) There was no discussion or agreement as to the terms on which any finance was being provided. There was no agreement either to pay or not to pay interest. The matter was simply not addressed.

(8) The alleged contract was to adopt the usual practices and procedures. The "consecutive payment arrangement" was simply one element of those practices and procedures.

147. Gard submitted that the purpose of the exceptions to immunity are to allow the Fund to perform its activities and that the agreement concerns the performance of those activities through the payment of compensation. However, an exception is provided in respect of any obligation to pay compensation "in accordance with the provisions of the Convention" and it is acknowledged that this is not a Convention claim. In any event the proper construction of the exception cannot depend on the agreement sought to be enforced. The logic of Gard's case is that all agreements entered into for the purpose of paying compensation are enforceable, but they are not. They are only enforceable if and to the extent that they fall within one of the stated exceptions.

148. Gard further submitted that it would be anomalous if the Fund were not immune from suit in respect of its obligations to a Bank to repay loans taken out in order to pay claims, but is immune from suit in respect of this transaction, which had the same function as the taking out of a loan in that it enabled claims to be paid without requiring the Fund to utilise its own resources for so doing. However, although that may, after the event, have been the effect of the arrangement, that was not its purpose, rationale or legal basis. Further, Gard had its own reasons for making payments and its doing so was not the consequence of any request by or need for funds on the part of the Fund.

149. Finally, Gard submitted that the exception should be construed as covering the alleged agreement since otherwise the grant of immunity would be a disproportionate interference with Gard's right to access a court under Article 6 of the ECHR since there would be no forum in which Gard could sue the Fund for breach of that contract. However, as already observed, the proper construction of the exception depends on its terms in the context of the 1979 Order's legislative purpose and scheme. That meaning cannot alter according to the consequences in any particular case.

150. In any event, as the Fund submitted, any interference with Gard's right of access is in accordance with the law (the 1979 Order), pursues a legitimate end (respecting the Fund's immunity), and is in accordance with international law (i.e. the Headquarters Agreement) – see, for example, *Al-Malki v Reyes* [2014] ICR 135. In any case Gard had a right of access available to it in that it has always been open to it to pursue subrogated claims against the Fund before the Venezuelan courts.

151. For all these reasons I conclude and find that the alleged contract is neither a loan nor a transaction for the provision of finance falling within the exception to immunity from suit and legal process in Article 6(1)(c) of the 1979 Order.

Conclusion

152. I have some sympathy with the Club's position. It has paid claims up to the CLC limit and now finds that there is judgment against it for a substantial sum over and above and regardless of that limit. Although there was no contract, there was a mutual expectation that the "consecutive payment arrangement" would be followed in this case and that payments over the CLC limit and up to the Fund limit would rest

with the Fund. That expectation has not been met. Nevertheless, the Fund is entitled to rely on its strict legal rights, if it so chooses.

153. For the reasons outlined above I find for the Fund on Issues (1) and (2). It follows that the Fund is immune from Gard's suit in this country, that the Court has no jurisdiction over the claim and that the Fund's application must be granted.