



6 July 2011

PRESS SUMMARY

NML Capital Limited (Appellant) v Republic of Argentina (Respondent) [2011] UKSC 31
On appeal from [2010] EWCA Civ 41

JUSTICES: Lord Phillips (President), Lord Walker, Lord Mance, Lord Collins and Lord Clarke

BACKGROUND TO THE APPEALS

This appeal relates to bonds issued by the respondent, the Republic of Argentina ('Argentina'), in respect of which, together with all its other debt, Argentina declared a moratorium in December 2001.

The appellant NML Capital Limited ('NML') is an affiliate of a New York based hedge fund, which purchased the bonds at little over half their face value between June 2001 and September 2003 and then pursued the respondent for the return of their full principal value and interest in the New York courts. On 11 May 2006 NML obtained summary judgment on the bonds from a Federal Court in New York for over \$284m. It then sought to enforce the judgment against assets held by Argentina in England by bringing a common law action on the judgment in London.

NML applied for permission to serve the claim form out of the jurisdiction on Argentina, initially alleging two reasons why Argentina was not entitled to state immunity. The first was that Argentina had waived immunity as a term of its agreement with Bankers Trust to issue the bonds, and the second that the claim constituted 'proceedings relating to a commercial transaction' and so fell within the exception in section 3(1)(a) of the State Immunity Act 1978 ('the 1978 Act'). Permission was granted and the proceedings were served. Argentina then applied to have the order for service set aside.

NML resisted this application by reliance on two different grounds: the provisions of section 31 of the Civil Jurisdiction and Judgments Act 1982 ('the 1982 Act') and terms as to waiver and jurisdiction in the bonds themselves. The High Court dismissed Argentina's application but this decision was reversed by the Court of Appeal, which held that Argentina was protected by state immunity from the claim.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Phillips and Lord Clarke find that the claim falls within the scope of section 3(1)(a) of the 1978 Act. Lord Mance, Lord Collins and Lord Walker disagree on this point but all agree that the appeal should in any event succeed by reason of the provisions of s 31 of the 1982 Act and by Argentina's submission and waiver of immunity in the bonds.

REASONS FOR THE JUDGMENT

The scope of s 3(1)(a) of the 1978 Act

Sections 1-11 of the 1978 Act are a comprehensive statement of the scope of state immunity under the law of the United Kingdom. During the twentieth century there was a growing recognition around the world of the ‘restrictive doctrine’ of state immunity, under which immunity was given to governmental acts in the exercise of sovereign authority but not to commercial activities carried on by the state [10]. S 3(1)(a) made it clear that the UK was adopting the restrictive doctrine. The context for interpreting the phrase ‘proceedings relating to a commercial transaction’ in this case was the enforcement of a judgment which absent state immunity would be permitted by Civil Procedure Rule 6.20(9).

Lord Phillips and Lord Clarke considered that the words ‘relating to’ should be given a broad rather than a narrow meaning. The proceedings related both to the foreign judgment and to the transaction underlying that judgment [26]. Although Parliament was unlikely to have thought the 1978 Act to apply to a class of foreign judgments at a time when there was no procedural machinery to serve a defendant out of the jurisdiction, s 3(1)(a) should be given an updated meaning consistent with the statutory purpose of the act [152].

Lord Mance did not think it was justified to treat the wording of s 3(1)(a) as applying to a foreign judgment against a foreign state, which had long been recognised as a special area of private international law [80]. S 31 of the 1982 Act was the means by which Parliament had achieved for the first time a comprehensive treatment of the issue of state immunity in respect of foreign judgments [98][118]. Lord Collins (with whom Lord Walker agreed) pointed to the almost invariable use in international loan agreements and bond issues since the 1970s of clauses providing for submission to national jurisdiction and waivers of immunity [103]. He preferred a narrow interpretation of s 3(1)(a). There was no policy reason to give it a wider meaning in the light of s 31 of the 1982 Act and the widespread use of express waivers [116].

Effect of s 31 of the 1982 Act

S 31 of the 1982 Act reflected and in part replaced the categories of exemption from state immunity set out in the 1978 Act as far as foreign judgments were concerned. It was an alternative scheme rather than an additional hurdle [47]. State immunity could not be raised as a bar to the recognition and enforcement of a foreign judgment if, under the principles of international law recognised in this jurisdiction, the state against whom the judgment was given was not entitled to immunity in respect of the claim [49].

Did the bonds contain a submission to the jurisdiction of the English court?

The High Court had correctly held that the agreement in the bond was more than a mere waiver and amounted to a submission to jurisdiction [59]. It was the only meaning the provision could sensibly bear [62] [128].

Could NML rely on new issues at the High Court hearing?

Lord Phillips considered that the rule in *Parker v Schuller* (1901) should no longer be applied. Allowing a party to amend a pleading where no prejudice was caused to the other party that could not be dealt with by an appropriate order for costs accorded with the overriding objective [75]. The other justices did not think that the rule applied on the facts of this case, but agreed with his observations.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgements are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html