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SAMPLE REPORT

Wilhelm Finance Inc v Ente Administrador Del
Astillero Rio Santiago

5th June 2009

Description of the Case: State Immunity Act 1978 – State-owned entity – Claim form – Definition of State – Separate entity – Capacity to sue or be sued

Case name: *Wilhelm Finance Inc v Ente Administrador Del Astillero Rio Santiago*

Date of Judgment: 19th May 2009

Court: Queen’s Bench Division

Judge: Justice Teare

Citation: [2009] EWHC 1074 (Comm)

Background: The Defendant applied to the Court to set aside an order made by Flaux J. on 25 November 2008 permitting substituted service on the Defendant. The grounds of the application were that the Defendant was a State-owned entity within the definition of a State for the purposes of the State Immunity Act 1978 (“the Act”) and service on a State was only permitted via the method prescribed in s.12¹ of the Act and rule 6.44² of the CPR, and accordingly the Court had no jurisdiction either to make the order or hear the proceedings unless and until validly served.

to serve the Claim Form by the alternative method of sending it by first class post to the Defendant’s solicitors Eversheds LLP pursuant to CPR 6.15³. The Defendant referred to s.14⁴ of the Act which excluded from the definition of State “any entity (hereinafter referred to as a separate entity) which is distinct from the executive organs of the government of the State and capable of suing and being sued” and submitted that the Defendant was a separate entity. The Defendant submitted that it was “*a shipyard which entered into a shipbuilding contract with a private purchaser. It was not on any sensible view one of the executive organs of the government of the State*”.

Flaux J. ordered that the Claimant was not obliged to adhere to the procedural requirements of s.12 of the Act and rule 6.44 of the CPR. He gave the Claimant permission

¹ S.12(1) of the State Immunity Act provides that any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State.

²Service of claim form or other document on a State

³ Service of the claim form by an alternative method or at an alternative place

⁴ S.14 (1) provides that references to a State “include references to a) the sovereign or other head of that State in his public capacity; b) the government of that State; c) any department of that government, but not to any entity (hereinafter referred to as a separate entity) which is distinct from the executive organs of the government of the State and capable of suing and being sued.”

The claim in this action was for a declaration that two Deeds arising out of a contract for the construction and sale of a ship were void. The shipbuilding contract described the Defendant as “a corporation organised and existing under the laws of Argentina” and the vessel to be built as a bulk carrier of about 27,000 DWT. Notwithstanding that the contract contained a condition precedent that the contract be approved by the Government of the Province of Buenos Aires the contract had every appearance of being a standard commercial contract.

The question for the Court to determine was therefore whether the Defendant was “a State” or a “separate entity”. The Act referred to two qualities which a separate entity must possess, namely, that it is distinct from the executive organs of the government of the State and is capable of suing or being sued.

Issues: The issues before the Court were:

1. Whether the Defendant lacked the capacity to sue or be sued.
2. Whether the Defendant was a separate entity within the meaning of s.14 of the Act

Held: The Court was unconvinced that the Defendant lacked the capacity to sue or be sued. The Court considered that, on the balance of probabilities, the Defendant had the capacity to sue and be sued. The Court found that it had been sued in two cases in Argentina in recent years and it had entered into shipbuilding contracts in its own name which suggested that it was capable of being sued and being sued. The Defendant’s constitution, function, powers and activities as revealed by the 1993 decree made it probable that the Defendant had the capacity to sue and be sued. The Court took the view that it was improbable that an entity which, by the 1993 decree which created it, had a domicile and was given power to sign agreements lacked capacity to sue and be sued. It was also improbable that an entity which, in addition to contracting with government bodies such as the Argentine Navy, contracted with foreign

shipowners such as the Claimant in this action did not have a capacity to sue and be sued.

The Court therefore found on the balance of probabilities that the Defendant was an entity which had the capacity to sue and be sued.

The second essential quality of a separate entity mentioned in s.14 of the Act was that it must be “distinct from the executive organs of the government.”

The Court stated that the Defendant was a department of government, at any rate in the sense in which that expression was used in s. 14 (1) of the Act. On the contrary the Court considered, on the balance of probabilities, that it was not a department of government and was an entity distinct from the executive organs of the government of the State, for the following reasons:

1. The Defendant was created with the object of managing the shipyard until the time when the shipyard was privatised.
2. It determined and carried out the commercial policy of the shipyard
3. It had power “to act either in the public or private areas” and did so.
4. The Defendant was, “an organisation aimed at the production of goods and services”.
5. The work the Defendant did was not work of a type associated with the executive organs of government. It was on the contrary work such as a private company might do.

The Court stated that it had not overlooked the facts that the Defendant was owned by the state, that the government nominated the board of directors, that the Chief of Cabinet of the Province of Buenos Aires was assigned the responsibilities of the President of the board, that the Defendant was responsible to the government through the Ministry of

Production or that financial support was provided by the government. These factors showed that the entity was “of the state” but the English authorities⁵ made it clear that such characteristics were insufficient to make the Defendant a department of government or an entity which was not distinct from the executive organs of government of the state in circumstances where its functions or activities were those which a private company might have in trade or commerce.

The Court having considered, the constitution, function, powers and activities of the Defendant and of its relationship with the state, the Court concluded that the Defendant was a separate entity within the meaning of s. 14 of the Act. It followed that the order made by Flaux J. for alternative service on Eversheds was not in conflict with s.12 of the Act.

Therefore, the Court dismissed the application.

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⁵ *Kuwait Airways Corporation v Iraqi Airways* [1995] 1 WLR 1147 *I Congresso del Partido* [1983] 1 AC 244 and others