UK Supreme Court Rules on European Lis Pendens

On 6 November 2013, the UK Supreme Court delivered its judgment in the three cases *in the Matter of the Alexandros T*.

The Court issued the following press release:

BACKGROUND TO THE APPEALS

On 3 May 2006, the vessel Alexandros T sank and became a total loss 300 miles south of Port Elizabeth with considerable loss of life. Her owners were Starlight Shipping Company ("Starlight"). Starlight made a claim against their insurers, who denied liability on the basis that the vessel was unseaworthy with the privity of Starlight. In response, Starlight made a number of serious allegations against their insurers including allegations of misconduct involving tampering with and bribing of witnesses.

On 15 August 2006, Starlight issued proceedings in the Commercial Court against various insurers ("the 2006 proceedings"). One group of insurers was described as the Company Market Insurers ("CMI") and the other group was described as the Lloyd's Market Insurers ("LMI"). Before the hearing, the 2006 proceedings were settled between Starlight and the insurers and the proceedings were stayed by way of a Tomlin Order.

In April 2011, nine sets of Greek proceedings, in materially identical form, were issued by Starlight although they were expressed as torts actionable in Greece. The insurers sought to enforce the earlier settlement agreements. Starlight applied for a stay of these proceedings, firstly pursuant to Article 28 then Article 27 of Council Regulation (EC) No 44/2001 ("the Regulation")

The judge refused to grant a stay under Article 28 and gave summary judgment to the insurers. The Court of Appeal held that it was bound to stay the 2006 proceedings under Article 27, which provides for a mandatory stay, and it was not therefore necessary to reach a final determination of the position under Article 28. Before the Supreme Court, the insurers challenge the correctness of the Court of Appeal's conclusion under Article 27 and submit that the judge was correct to

refuse a stay under Article 28. Starlight cross-appeal on the Article 28 point.

JUDGMENT

Subject to the possibility of a reference to the CJEU on some limited questions, the Supreme Court unanimously allows the CMI's and LMI's appeal. Lord Clarke gives the lead judgment, with which Lord Sumption and Lord Hughes agree. Lord Neuberger agrees adding a short judgment of his own. Lord Mance agrees with the result.

REASONS FOR THE JUDGMENT

Article 27

Article 27 must be construed in its context. The purpose of Article 27 is to prevent the courts of two Member States from giving inconsistent judgments and to preclude, so far as possible, the non-recognition of a judgment on the ground that it is irreconcilable with a judgment given by the court of another Member State [23, 27].

In the case of each cause of action relied upon, it is necessary to consider whether the same cause of action is being relied upon in the Greek proceedings. In doing so, the defences advanced in each action must be disregarded [29]. The essential question is whether the claims in England and Greece are mirror images of each other and thus legally irreconcilable [30]. There are three heads of claim in England: indemnity, exclusive jurisdiction and release [32].

None of the causes of action relied upon in the Greek proceedings has identity of cause or identity of object with the CMI's claim for an indemnity. The subject matter of the claims is different. The Greek proceedings are claims in tort (or its Greek equivalent) and the claims in England are claims in contract. As to object, that of the Greek proceedings is to establish a liability under Greek law akin to tort, whereas the object of the CMI's claim is to establish a right to be indemnified in respect of such a liability and to claim damages for breach of the exclusive jurisdiction clauses [34].

The same is true of the CMI's claims in respect of the exclusive jurisdiction clauses in the settlement agreement and/or in the insurance policies [36]. The causes of action based upon an alleged breach of the settlement agreement are

not the same causes of action as are advanced in Greece [37].

The same is also true of the claims based on the release provisions in the CMI settlement agreement [40]. The Greek claims are claims in tort and the English proceedings are contractual claims. The factual bases for the two claims are entirely different. Moreover, the object of the two claims is different [41]. The Supreme Court is unanimous that that is the position with regard to the claims for damages for breach of the release provisions in the settlement agreements. However, in so far as the insurers claim declarations, while the majority reaches the same conclusion, Lord Mance reaches a different conclusion on the basis that the claims for declarations in the two jurisdictions are mirror images of each other. The court unanimously decides that, unless the insurers abandon those claims for declarations, the relevant question should be referred to the CJEU for an opinion [59].

In the event, the CMI have now abandoned their claims for declarations based on the release provisions and it is not necessary to refer the question to the CJEU. It follows that the CMI's appeals under Article 27 are allowed. The position of the LMI is essentially the same as in the case of the CMI [55]. If the LMI do the same within the time permitted, their appeals will also be allowed under Article 27. A similar position has been reached in respect of LMI's submission that the appeals under Article 27 should have been rejected by the Court of Appeal as being too late [123].

Article 28

The discretion to stay claims under Article 28 is limited to any court other than the court first seised [74]. On the assumption that the English court is second seised for the purposes of Article 28, the question arises whether the actions should be stayed as a matter of discretion [91]. The circumstances of each case are of particular importance but the aim of Article 28 is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay [92]. However, the natural court to consider the issues raised by CMI and LMI is the High Court in England because they raise contractual questions governed by English law and because it is at least arguable that the parties have agreed that they should be decided by the High Court, where the proceedings are more advanced than in Greece [96]. The decision of the judge in refusing a stay under Article 28 is upheld and the cross-appeal is dismissed [97,

125].

References in square brackets are to paragraphs in the judgment.