

NOVA SCOTIA COURT OF APPEAL

Citation: *Homburg v. Stichting Autoriteit Financiële Markten*, 2017 NSCA 62

Date: 20170629

Docket: CA 458458

Registry: Halifax

Between:

Richard Homburg, Homburg Bondclaim Limited and Homburg Shareclaim
Limited

Appellants

v.

Stichting Autoriteit Financiële Markten, De Nederlandsche Bank N.V.,
Belastingdienst, Theodor Kockelkoren, Marcus E. Wagemakers and the
Government of the Kingdom of the Netherlands

Respondents

Judge: The Honourable Justice Joel Fichaud

Appeal Heard: June 13, 2017, in Halifax, Nova Scotia

Subject: State immunity from civil lawsuit – *State Immunity Act*,
R.S.C. 1985, c. S-18 – sovereign equality of states

Summary: Homburg Invest Inc was licensed by the Respondents, Dutch regulatory agencies, to offer collective investment schemes to investors in the Netherlands. Homburg Invest offended aspects of the Dutch legal standard for offering securities, for which the Respondents sanctioned Homburg Invest. The principals of Homburg Invest sued the Dutch regulators in the Supreme Court of Nova Scotia. They claimed that the regulatory agencies' sanctions were tortious. On the Dutch regulators' motion, a judge of the Supreme Court of Nova Scotia dismissed the Homburg principals' action. The judge's reason was that, under the *State Immunity Act*, s. 3, organs of a foreign state are immune from civil action in a Canadian court. The *State Immunity Act*, s. 5, says that state immunity does not protect "commercial activity".

The judge held that the Dutch regulators' sanction did not constitute "commercial activity".

The Homburg principals appealed to the Court of Appeal.

Issues:

There were two issues:

1. Did the judge err by ruling that the Dutch regulators did not engage in "commercial activity" within s. 5 of the *State Immunity Act*?
2. Did the judge misapply the principle of sovereign equality of states?

Result:

The Court of Appeal dismissed the appeal.

The analysis for "commercial activity" under s. 5 of the *State Immunity Act* involves a contextual inquiry into the nature and purpose of the activity of the Dutch regulators. The judge applied that test without any error of law or palpable and overriding error of fact.

The judge found that the Dutch regulators committed no extraterritorial act in Canada. The judge's finding embodied no palpable and overriding error. Further, the *State Immunity Act* codifies the law and occupies the field respecting state immunity. The Dutch regulatory agencies were immune under s. 3 of that *Act*.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 13 pages.