Sovereign immunity - Foreign sovereign defendant in action relating to local land - Appearance and counterclaim by foreign sovereign - Whether submission to jurisdiction - Sultan of component state of Malaysia - The law of Australia

KUBACZ v SHAH [1984] WAR 156 (Kennedy J)

SUMMARY: The facts: The defendant, the Sultan of the State of Selangor within the Federation of Malaysia, agreed to buy land in Western Australia from the plaintiffs, but failed to complete the purchase. The plaintiffs claimed damages against the defendant, and obtained leave to serve the defendant outside the jurisdiction and in Malaysia. In response, the defendant's solicitor, pursuant to a general retainer and without express instructions, entered an unconditional appearance and filed a defence and a counterclaim for a declaration that the contract had been discharged. On the plaintiffs' claim for summary judgment the defendant pleaded sovereign immunity. The Department of Foreign Affairs in reply to a request from the plaintiff's former solicitors, stated inter alia that:

> ... Selangor forms only part of the Sovereign State of Malaysia. The Sultan is not the principal representative of Malaysia in its international relations. Accordingly, His Highness cannot be considered as the Head of a Sovereign State, as that term is normally understood in international diplomatic practice.

Held:

(1) The statement from the Department of Foreign Affairs did not address the crucial question whether the Sultan should be regarded as the sovereign head of a foreign state for the purposes of immunity. On the basis of the English authorities, he should for the purposes of the case be so regarded.

(2) However, the defendant had submitted to the jurisdiction by asserting the counterclaim and also by entering the unconditional appearance. It was not necessary to determine the extent of the submission (i.e. whether it extended to execution of the judgment) or the extent of immunity in the absence of submission. The application for summary judgment was granted.

NOTE: The rather curious procedural steps taken by the defendant's solicitor in this case made consideration of the underlying question of foreign state immunity unnecessary. The "counterclaim" relied on was merely a declaration that the contract had been discharged, and could equally have been raised as a simple defense. The fact that the defendant subsequently pleaded foreign state immunity may suggest some earlier misunderstanding, but it is doubtful whether that would have been sufficient to entitle the defendant to rescind the defense and counterclaim, even had clause 10(9) of the Australian Law Reform Commission's Draft Foreign States Immunities Act been in force. This clause, which in relevant respect follows the United Kingdom State Immunity Act 1978, provides that a step in proceedings taken by a person who did not know and could not reasonably have been expected to know of an immunity does not amount to submission if immunity is asserted without unreasonable delay.

The solicitors were at all times aware of the defendant's identity as Sultan of Selangor, and the existing decisions on the status of the Malay Sultanates (especially Duff Development Co. Ltd v The Government of Kelantan [1924] AC 797) were reasonably well known. However, the principal interest of the case revolved around two other points. First, Kennedy J was critical of the Department of Foreign Affairs' letter, quoted above, which inferred, if it did not suggest, that the Sultan was not entitled to foreign state immunity in international practice. Although there may have been reasons (not necessarily legal reasons) for the elevated status accorded to rulers of the Malay States under British protectorate earlier this century, it is far from clear that the same reasons apply today, and the Department of Foreign Affairs comment could well have been treated as an invitation to re-examine the applicability of the earlier, pre-independence, cases. However, the implicit invitation was sternly rejected. Kennedy J commented that the Department's

> "letter does not appear to me to answer the critical question. The question is not whether the Sultan of Selangor is the principal representative of Malaysia in its international relations. He would not assert that he was. The question is whether he is the sovereign head of a "foreign state", which constitutes an integral unit of the Federation of the Malaysian States. On this question, I have the evidence from the High Commissioner for Malaysia ... together with the evidence of the defendant's private secretary. In neither case is the basis of the assertion [sc of immunity] clearly expressed. However, notwithstanding this, in all the circumstances, and in particular by reason of the conclusion which I have reached on the question of waiver, I am prepared to accept that, for the purposes of the present application, within the applicable principles, the defendant is a "foreign sovereign" having the necessary attributes of independence and sovereignty ... ". ([1984] WAR 156, 160, citing among other cases Duff Development.)

The real question was surely whether the Sultan of Selangor under the Malaysian Constitution performs governmental functions as the government of one of the constituent units of the Federation, or whether his title is a purely honorific one. On this point there was little or no evidence before the Court.

If Kennedy J was able to reject the invitation to reassess the Sultan's status for the purposes of foreign state immunity, he was also able to avoid deciding on the application of restrictive immunity within Australia, in particular as it related to contracts for the sale of local land. This was probably an exception even under the old common law rule, and it would certainly be under the common law rule enunciated in the Trendtex case [1977] QB 529, or under any likely Australian legislation; cf ALRC 24 Foreign State Immunity (1984) para.116.

JRC