Lesson learned

Foreign state immunity can't always be invoked

By MICHAEL LEE

Michael Lee is a solicitor at Mitry Lawyers practising in the area of international law, who acted for the plaintiff/appellant.

The Queensland Court of Appeal finds that Saudi Arabia has no immunity under the Foreign States Immunities Act in a claim for unpaid school fees.

A foreign state being joined in suit may not always invoke immunity, the full bench of the Queensland Court of Appeal has confirmed. Under the *Foreign States Immunities Act 1986* (Cth)(the Act), foreign states have immunity unless the proceeding concerns a commercial transaction.[1] This is subject to an exception to the exception which restores the foreign state's immunity if the commercial transactions concerns, inter alia, payments of a scholarship.[2]

For the first time, the court adopted a narrow construction of the exception to the exception. This statutory provision has never been tested in Australia and is probably the only example in the world where a court has ruled on the application of foreign state immunity to scholarship payments.

The case marks a further development in the 'restrictive theory' of foreign state immunity underpinning the Act as well as cognate legislation across the common law world.[3] The Court of Appeal's reasoning is consistent with the High Court's recent jurisprudence in this domain of public international law.[4]

NEED TO KNOW

Foreign state immunity

- A foreign state has immunity unless the proceeding concerns a commercial transaction.
- Foreign state immunity does apply if the commercial transaction concerns payment of a scholarship.
- The decision supports the restrictive theory under which a foreign state will be amenable to the jurisdiction of another state's municipal court whenever it acts in a private rather than sovereign capacity.

Lawyers should also be aware that an application for special leave to appeal in the High Court has now been filed.

Meanwhile, for those advising clients dealing with foreign states, the lesson to be drawn is one of pragmatic pre-emption: secure the payments upfront from the foreign state or secure a waiver of its immunity[5] (if not both).

Background

The plaintiff is the administrating authority of a Queensland primary school which educated school children of the Muslim faith. The defendants are the Kingdom of Saudi Arabia and the Saudi Deputy Minister of Higher Education

The primary school alleged that since 2004 it has been enrolling Saudi children as pupils. The parents of these pupils were Saudi tertiary students enrolled in various Queensland universities who were also recipients of tertiary education scholarships provided by the kingdom. The school alleged that it agreed to enrol the Saudi children as pupils in reliance upon various assurances that the kingdom would meet their school fees.

The school alleged that for a number of years it had been misallocated education funding from the federal government as well as the Queensland government, with the effect that the Saudi children's school fees were subsidised by Australian taxpayers. When discovered in 2009, the school entered into payment plans to repay over $2.1 million to the governments. At the same time, it began making requests to the kingdom to pay those unpaid school fees in accordance with its assurances.

With no payments forthcoming for some time, in 2011, a delegation of the school travelled to Riyadh to meet with the Deputy Minister of Higher Education. There, it is alleged, the Deputy Minister made various promises to pay the school in consideration of, inter alia, its forbearance to sue. With payments still not forthcoming by early 2012, proceedings were commenced in the Supreme Court of Queensland.

Application

Without purporting to defend the school's claim, the kingdom and the Deputy Minister filed an application disputing the jurisdiction of the Supreme Court to hear the proceedings due to their entitlement to foreign state immunity.

Both sides accepted that the kingdom, a foreign state, and the Deputy Minister, an agent of a foreign state, were prima facie immune from the jurisdiction of the Australian courts.[6] In answer to their application, the school relied on s.11(1) of the Act, which stipulated that "a foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction". It submitted that the kingdom's assurances as well as the Deputy Minister's promises were commercial transactions for which foreign state immunity was excluded.

In response, the kingdom and the Deputy Minister submitted that neither the "assurances" nor the "promises" could be construed as commercial transactions. Even if they could be so construed, they submitted that, in regards to the hitherto untested s.11(2)(b), immunity would be restored as any unpaid school fees allegedly payable by them "concerns a payment in respect of ... a scholarship".

The school countered that a wide interpretation of s.11(1) should be applied to construe the alleged assurances and promises.[7] Further, it argued that the defendants were conflating the unpaid school fees, which was a debt, with the scholarships of their respective parents. The kingdom and the Deputy Minister, citing the *Macquarie Dictionary*, replied that the unpaid school fees should be construed as 'scholarships' according to its natural and ordinary meaning.[8]

The Supreme Court at first instance ruled that the kingdom and the Deputy Minister were immune from its jurisdiction under the Act but expressly declined to resolve the controversy over s.11(1). In its view, any purported commercial transaction between the school on one hand and the kingdom and the Deputy Minister on the other would be "a payment in respect of ... a scholarship" under s.11(2)(b) for which there would be foreign state immunity.[9]

Appeal

The school appealed the Supreme Court decision to the Court of Appeal. The kingdom and the Deputy Minister filed a competing application seeking to affirm it. The hearing focused on two issues:

- whether the primary judge erred in his interpretation of s.11(2)(b); and
- if so, whether the proceedings "concerns a commercial transaction" for which foreign state immunity is excluded under s.11(1).

In answering the first question, the Court of Appeal accepted the school's submission that the Supreme Court's construction of scholarship was too wide. Citing the Australian Law Reform Commission report leading to the creation of the Act,[10] it ruled that the immunity contemplated by s.11(2)(b) could only be invoked where the litigants were foreign nationals suing their own government in an Australian court for payments manifesting that foreign state's policy or legislation.

The rationale behind the commission's recommendation that immunity be allowed in such circumstances was to avoid causing diplomatic offence in the situation where foreign nationals might sue their own governments in an Australian court.[11] In this proceeding, however, where school fees, under a scholarship or otherwise, were allegedly owed by a foreign state to an Australian entity, s.11(2)(b) had no application.

The Court of Appeal also dismissed the alternative argument that any school fees allegedly payable by the kingdom and the Deputy Minister would be immune from suit as they were nevertheless of incidental benefit to the Saudi children's parents, who did in fact hold scholarships. Holmes JA indicated the kingdom and Deputy Minister's argument that a

scholarship would fall within s.11(2)(b) "whatever the nature of the service and whether or not the service provider was aware of the existence of the scholarship" seemed an "extraordinary result, and not one … which reflects a proper reading of the provision or the legislative intent".[12]

As for the second question, the school reiterated its submission that the scope of s.11(1) was sufficiently wide to encompass the assurances and promises alleged. The kingdom and the Deputy Minister countered that the apparent vagueness of the pleadings as well as the seemingly political overtones of the alleged dealings precluded their characterisation as commercial transactions. They also sought to re-adduce (against objection) hearsay evidence in an attempt to refute any alleged agreements to meet or pay for school fees of the Saudi children who attended the school. Further, they cited a number of historical authorities predating the Act which variously decided that immunity would not be excluded if an arguable case for its existence could be demonstrated.[13]

Noting that the Act was a statutory scheme rather than one based on common law, the Court of Appeal reasoned that its focus should be, in accordance with the relevant provisions, "the nature of the transaction which is the subject matter of the proceeding, rather than whether that transaction can be proved".[14] The exclusion of foreign state immunity by s.11(1) could not be displaced by any evidentiary issues which purported to cast doubt on the provability of claims. Accordingly, the Court of Appeal allowed the appeal as it considered that the effect of its pleadings established that the school was alleging "commercial transactions" with the Kingdom of Saudi Arabia and the Deputy Minister.

Lesson

This case is currently the leading authority on s.11(2) and probably the only example in the world where a court has ruled on the application of foreign state immunity to scholarship payments. The Court of Appeal's decisions is consistent with the basic tenet to the restrictive theory of foreign state immunity, according to which a foreign state will be amenable to the jurisdiction of another state's municipal court whenever it purports to act in a private (usually in commerce) rather than in a sovereign capacity: "It involves no challenge to the sovereignty or dignity of a foreign State to require it to answer a claim arising from an alleged commercial transaction".[15]

However, this restrictive theory to foreign state immunity does not have universal acceptance. A number of states around the world still subscribe to the older 'absolute theory', according to which states cannot be juridically subject to one another as they are sovereign equals' under international law. The Kingdom of Saudi Arabia, among others, is one such adherent and has not shied from insisting upon its immunity from suits in foreign courts.[16]

With this in mind, the adage 'prevention is better than cure' is appropriate for lawyers advising clients contemplating dealings with foreign states. The time and resources spent litigating on foreign state immunity in addition to any substantive disputes may well outweigh what the client ultimately recovers (minus legal fees as well as the loss of business goodwill). The client to a prospective commercial transaction to a foreign state and, depending on the jurisdiction, other state entities,[17] should be advised on the following:

- Choice of law: the relevant clauses to should stipulate the appropriate governing law and forum such that recourse to legal remedies is not precluded by absolute immunity.
- Security for payment: whenever it is possible and convenient to do so, the foreign state or state entity should explicitly waive its immunity from suit and its immunity from enforcement;[18] ideally, payment from them should also be upfront.

ENDNOTES

1. *Foreign States Immunities Act 1986* (Cth), s.11 (1).
2. Ibid s.11(2)(b).
3. For example, Foreign Sovereign Immunities Act of 1976 (USA); State Immunity Act 1978 (UK); State Immunity Act 1985 (Canada). Hong Kong S.A.R. is a notable exception: *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* [2011] HKCFA 43.
4. *P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission* [2012] HCA 33.

5. Above n.1, ss.10 and 31.
6. Above n.1, s.3; *Zhang v Zemin* (2010) 79 NSWLR 513.
7. *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2011] FCAFC 52.
8. *Re Leitch (deceased)*[1965] VR 204.
9. *Australian International Islamic College Board Inc. v Kingdom of Saudi Arabia & Anor* [2012] QSC 25 at [24]-[28].
10. ALRC 24 (1984).
11. Ibid p.93.
12. *Australian International Islamic College Board Inc. v Kingdom of Saudi Arabia & Anor* [2013] QCA 129 at [10].
13. *Juan Ysmael & Co Inc v Government of the Republic of Indonesia* [1955] AC 72; *Australian Federation of Islamic Councils Inc v Westpac Banking Corporation* (198) 17 NSWLR 623.
14. Above n.12 at [25].
15. Ibid.
16. For example, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26.
17. Above n.1, s.11(3).
18. Above n.5.

Back to top ^