

**Lindsay-Smith v South Pacific Alliance for Family Health
Duve & Commonwealth of Australia**

Supreme Court, Nuku'alofa

10 Hampton CJ

C.885/95

21 February 1996

*Practice & procedure - leave to serve without the jurisdiction
Sovereign immunity - commercial transactions - restrictive theory*

20 The plaintiff sued the first defendant for wrongful dismissal; the second defendant for wrongful interference in the contract of employment; and the third defendant as the funder of the first defendant. The third defendant disputed the jurisdiction and, in argument, raised questions as to service of the third defendant.

Held:

1. Service out of the jurisdiction can be done only with leave of the court.
2. The third defendant had not been properly served.
3. Leave to serve would be allowed, given the plaintiff's argument and the effect of the English State Immunity Act 1978.
- 30 4. Matters of sovereign immunity could be looked at when considering a matter of granting leave to serve out of the jurisdiction.
5. The modern restrictive theory of Sovereign immunity applies in Tonga and the English State Immunity Act 1978 applies a state in not immune as to a commercial transaction entered into by it and a commercial transaction includes any loan or other transaction for the provision of finance. A claim therefore to that exception to sovereign immunity was arguable here.
6. Leave to serve would be allowed, but the procedure to be followed would be based on s12 State Immunity Act 1978 as modified so it complied as best it could with the Tongan circumstances.
- 40 7. None of the documents filed on behalf of the third defendant could be seen as being any sort of waiver of dispute as to the jurisdiction, or of acceptance of the jurisdiction.

Cases considered : Marine Steel v Marshall Islands [1981] 2 NZLR 1
Tu'itavake v Porter & Commonwealth of Australia [1989] Tonga LR 14

Statutes considered : Civil Law Act
State Immunity Act 1978 (UK)

Regulations considered : 07, O. 12 Supreme Court Rules 1991

Counsel for plaintiff : Mr Macdonald

Counsel for defendant : Mr W. Edwards

Judgment

I do not intend reviewing this action or the argument which I have heard this morning and again this afternoon in any detail. Suffice to say that the plaintiff has brought action in the Supreme Court in Tonga against three defendants alleging in effect a wrongful termination of his employment. That employment was with the first named defendant.

There are allegations of interference in that contract, leading to the dismissal, in relation to the second defendant and there are claims made that the third named defendant, the Commonwealth of Australia, is responsible as well in terms of an Australian Aid initiative which is at least in part responsible for funding the first defendant and a particular project; those funds as well being, at least partly responsible for the ability to engage the plaintiff as an employee of the first defendant.

The proceedings were initially brought in some haste because of the particular circumstances of the plaintiff. It may be that the plaintiff's advisors, and indeed this Court, at the relevant time did not turn their minds to the question of the joinder of the Commonwealth of Australia as a defendant and what might be involved in relation to that.

From what is before me it is evident that the Writ and Statement of Claim, in relation to the third defendant, has been purportedly served by leaving or serving a copy on the High Commissioner for Australia in the Kingdom.

The third defendant, through Mr. Edwards, has disputed the jurisdiction and has applied to strike out the action against the third defendant. One of the initial submissions made by Mr. Edwards today, before he got on to the issue of a Sovereign State's Immunity, was as to the naming and the service of the third defendant. It seems to me, having listened to the argument, that the Commonwealth of Australia is the party, or rather the Government of the Commonwealth of Australia is the party, who is intended to be served and intended to be named in the writ.

In the ordinary course of events service on a party who is obviously outside of the jurisdiction should be done by leave of this Court pursuant to Order 12 of the Supreme Court Rules of 1991. I note in passing that in one of the cases referred to me in the course of argument on another aspect, this morning, that is the case of Marine Steel v. Government of Marshall Islands, [1981] 2 NZLR 1, the issue of Sovereign Immunity and the application of the doctrine in the particular circumstances there were discussed by Mr. Justice Barker of the High Court of New Zealand on an ex parte application for leave to serve out of New Zealand.

In the circumstances and having heard argument, it seems to me that the third defendant here has not been properly served at all in relation to these proceedings. I am not prepared in those circumstances to embark on a full consideration of, let alone give a decision on, the matter of Sovereign Immunity from jurisdiction, and as to the other matters raised by Mr. Edwards as to why the action should be struck out.

Order 12 provides that an application for leave shall be made ex parte to a Judge with an affidavit setting out certain matters as to the cause of action, the grounds on which the application is made and the address at which it is desired to effect service.

I am satisfied in the circumstances, particularly with the materials on oath from the plaintiff himself in the affidavit already filed, that the materials necessary under Order 12 Rule 2 are in front of me:

Such an application as I have said may be made *ex parte*. Mr. Macdonald in making the application now for service out of jurisdiction has referred under Order 12 Rule 1 to the following three provisions:

A Writ may with leave be served without the jurisdiction if :-

- 110 1. The first is in (iii) and is this: "the claim is brought against a person within the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto." In relation to that Mr. Macdonald, says that the first two defendants are people within the jurisdiction, and the claim is properly brought against them. The third defendant, is out of the jurisdiction but is a necessary or proper party thereto in terms of the argument which he has, at least, partially advanced before me today.
2. The second is contained in (iv) "the claim is brought in contract" and there are certain other conditions set out which I will not read in full. That seems to me to be not as clear, in terms of the documents in front of me, but Mr. Macdonald maintains there is an argument there that can be made.
- 120 3. The third alternative he here relies on is (v) "the claim is brought in Tort and the tortious act was committed or the damage was sustained within the jurisdiction". Here he says the tortious act that is the unlawful dismissal and the alleged interference and the damage flowing there from, all occurred within the jurisdiction of Tonga.

I am prepared in the circumstances to allow leave to serve out of the jurisdiction. I do so primarily on the argument which has been made earlier by Mr. Macdonald, in relation to the effect of the English State Immunity Act of 1978.

130 My first reaction as to the question of Sovereign Immunity, which I would be entitled to look at, (as Barker J did in the Marine Steel case at this stage of the proceedings), was that applying the doctrine as a matter of Common Law, the acts complained of by the plaintiff against the third defendant could properly be seen as falling within the concept of Sovereign Immunity in the classic sense and that would prevent proceedings being brought against the Foreign State, for acts which might be described as being done *jure imperii*. Further that the acts complained of did not relate to an exception in the Common Law which has become more recently established, that is relating to ordinary trading transactions, (the so-called restrictive theory). It did not seem to me that the type of transaction under discussion here could be described as an ordinary trading transaction.

140 Mr. Macdonald has drawn my attention to the decision of this Court in Case 24 of '89, the decision of Mr. Justice Webster, Tu'itavake and Others v Porter and the Government of Australia [1989] Tonga LR 14 where that Judge, after a comprehensive review of various matters including the laws of Sovereign Immunity, concluded that the modern restrictive theory of Sovereign Immunity applies in Tonga, and went on to find that, under sections 3 and 4 of the Civil Law Act (Cap.25), the U.K. State Immunity Act 1978 applied in Tonga. In the circumstances, although I am not bound to so do, I follow that decision.

150 That U.K. Act contains, as Mr. Macdonald pointed out, a provision in section 3, subsection 1, which provides that "A State is not immune as respect proceedings relating

to a commercial transaction, entered into by the State". I read only part of the sub-section. Likewise I only read part of the definition in section 3 sub-section 3 (b): "In this section, 'commerical transaction' means, any loan or other transaction for the provision of finance" and I read no further.

At least on the face of it, as Mr. Macdonald points out, the agreement which he relies on and which has been exhibited to the plaintiff's affidavit clearly involves the provision of finance and the making of financial grants from the Commonwealth of Australia to the first defendant. It seems to me arguable, therefore, that there is an exception to the doctrine of State Immunity in these circumstances here. I stress arguable. I do not make
160 any concluded finding in relation to it, and I am only dealing with the matter in a very preliminary way on an application for leave to serve out of the jurisdiction.

It is that aspect which persuades me that leave should be granted and that service should be effected properly on the third defendant.

As to the format that service should take, I am guided by a number of matters. The first is that our own Order 12 Rule 4 provides that service of the writ pursuant to an Order allowing service out of the jurisdiction, "shall be deemed effective if it is served personally or in compliance with an Order for substituted service in accordance with the law of the country in which service is effected."
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Mr. Macdonald has helpfully provided me with the copy of the Australian Judiciary Act 1903 - 1973, section 63 of which states that where the Commonwealth is a party any process in the suit required to be served upon that party shall be served upon the Attorney General of the Commonwealth or upon some person appointed by him to receive it. That seems to be the position applicable in Australia itself.

I am minded in these circumstances however to be guided by (and I will make it a condition of the Order for allowing leave to serve out of the jurisdiction, that service should be effect on the third defendant in terms of) another provision of the State Immunity Act of 1978. That provision is section 12 and it seems to me it provides a quite
180 appropriate and proper procedure for service as follows.

Sub-section 1, in its applicable parts, reads this way: "Any writ 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 and service shall be deemed to have been effected when the writ is received at the Ministry". If, in terms of our Civil Law Act, that is modified so it complies as best as it can with our circumstances, that would provide that any writ should be served by being transmitted through the Ministry of Foreign Affairs in Tonga to the Ministry of Foreign Affairs in Australia, and service shall be deemed to have effected when the writ is received at that
190 Ministry of Foreign Affairs in Australia.

Sub-sectin 2 of section 12: also provides that "Any time for entering an appearance shall begin to run 2 months after the date on which the writ is received as aforesaid."

It seems to me that, given the lack of any guidance in our Supreme Court Rules or in any other legislation, subsidiary or otherwise, in Tonga, as to service of processes on Foreign Sovereign States, that I should be guided, in terms of our Civil Law Act by those provisions of the State Immunity Act in the U.K. As I have stated that Act is applicable in Tonga.

I will therefore grant leave to serve the Government of the Commonwealth of
200 Australia, such being service out of the jurisdiction. Service will be effected in the way

I have described that is pursuant to section 12 sub-section 1 as appropriately amended for Tongan conditions, (that is section 12 of the State Immunity Act of the United Kingdom) and time will be the 2 months period mentioned in sub-section 2 of section 12. I should also add that, in my view, none of the documents thus far filed on behalf of the third defendant (which are the notice of motion disputing the jurisdiction and applying to strike out, and the affidavit of the Australian High Commissioner, Mr. Mullin) nor the argument today should be seen, and cannot be seen, as being any sort of waiver of dispute as to the jurisdiction or of acceptance of the jurisdiction of this Court.

210 It seems to me that the steps taken (leaving aside the question of the validity or otherwise of service) to dispute the jurisdiction were quite appropriately taken within the provisions of Order 7 of our Supreme Court Rules. Rule 6 of Order 7 provides that a defendant who makes such an application to dispute the jurisdiction "shall not be treated as having submitted to the jurisdiction of the Court by reason of having taken a step in the action." All the steps taken thus far by the third defendant, or by Mr. Edwards on its behalf, have been in pursuance of the application to dispute the jurisdiction and cannot be seen as being a submission to the jurisdiction.

220 This ruling means that it is probable that this Court will be faced at some later time with hearing full argument as to the matters of jurisdiction and as to the application to strike out, if that dispute as to the jurisdiction is found against the Commonwealth. To some extent that is regrettable, and some might say that this can be seen as this Court going round in a circle, but given the significance of the attempted joinder of a Sovereign State, it seems to be entirely appropriate that that Sovereign State must be properly served. On the basis of the materials before me at the present time, it has not been so served.

Last I suppose is the question of costs in this matter. I reserve the issue of costs at the present time; if either party wants to raise the matter for argument, then they can file a memorandum setting out the basis of their claims for costs and I would then see Counsel and hear argument on the issue.

230 **This Court Orders:-**

1. Plaintiff granted leave to serve the third defendant out of the jurisdiction.
2. Service to be effected by the Writ and Statement of Claim, and other originating documents, being transmitted through the Ministry of Foreign Affairs in the Kingdom of Tonga to the Ministry of Foreign Affairs in the Commonwealth of Australia.
3. Service shall be deemed to have been effected when the Writ and the other documents are received at the Ministry of Foreign Affairs in the Commonwealth of Australia.
- 240 4. The time for the third defendant to enter an appearance, dispute jurisdiction, file a defence, or take any other step shall begin to run two months after the date on which the Writ is received as in (3) above.
5. All questions of costs are reserved.