

**BEWARE OF THE CONTRACTING DIPLOMAT: A
REVIEW OF *REDDY V AMBASSADOR OF THE
INDEPENDENT STATE OF PAPUA NEW GUINEA* [1999] 45
FLR 142; [1999] FJHC 75**

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BACKGROUND

Action

This case was decided by Justice Fatiaki (as he then was) at the High Court in Suva on 30 July 1999. The case came before the court by way of an originating summons issued on 11 March 1998 under which the plaintiff sought various declarations, the return of various plant and machinery left at a construction site and damages for unpaid work.

Facts

This case arose from a Fiji Standard Form of Building Contract which was entered into on 17 November 1995 between the plaintiff trading as Landmark Construction and the Independent State of Papua New Guinea, which was vicariously bound because the contract was executed by its Ambassador to Fiji, His Excellency Babani Maraga (the Ambassador).

The main purpose of the contract was for renovations to be carried out by the plaintiff to the PNG Head of Mission's official residence in Suva for an agreed contract sum of Fijian \$565,685. Under the contract, the works were to be carried out under the supervision of a local architect and were to be completed eight months after possession of the building site or by the specified date of completion, being 19 August 1996. The court observed that although the work was incomplete by the completion date almost two thirds of the contract sum had been paid out.

The immediate cause of the court action was that on 27 September 1996 a winding up order was made by the High Court against Landmark Construction (Suva) Limited. When the project architect learnt of this, he wrote to the plaintiff on 13 December 1996 to terminate the contract '... in accordance with Clause 25(2) of the contract ... with effect from 27th September 1996'.¹ By a letter dated 16 December 1996, the plaintiff disputed the notice of termination because 'The contract has been signed and sealed under the personal name of Govind Reddy with annexe trading as Landmark Construction... (and

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¹ *Reddy v Ambassador of the Independent State of Papua New Guinea* [1999] 45 FLR 142; [1999] FJHC 75 <http://www.paclii.org>. In writing this case note the PacLII edition of the case has been used. As this does not include page or paragraph numbers no pinpoint references are used for quotes from the case.

the liquidation of Landmark Construction (Suva) Ltd. company should have no legal effect on the above contract...'²

This disagreement led to the issuance of the originating summons on 11 March 1998. After various preliminary procedures and numerous adjournments, the papers were finally placed before the High Court for directions on 3 August 1998. Upon perusing the papers, His Honour 'became immediately concerned at the clear possibility that the plaintiff's claim constituted an action impleading a sovereign state or a diplomatic agent of an independent sovereign state to whom various privileges and immunities are accorded'³ by international law and the domestic laws of Fiji.

Issue

'[T]he Court with the agreement of counsel formulated a preliminary question as follows:

“Assuming that the Independent State of Papua New Guinea is the proper defendant, does this court have jurisdiction to entertain this claim by the plaintiff?”⁴

Further question

The parties were ordered to make written submissions on this question which were then provided to the court on 4 November 1998. Before considering these submissions, the court posed a further procedural question which arose from the plaintiff's claim, namely, 'what is the appropriate procedure (if any) for suing and serving an independent Sovereign State?'

By way of *dicta*, the court considered the following options:

- 'Is it... by issuing proceedings in the name of the local diplomatic agent of the State and serving it on him in this country?'
- '[O]ught the proceedings... be entitled in the name of the Attorney General of the State with service effected upon him after obtaining leave to serve out of the court's jurisdiction pursuant to Or. 11 of the High Court Rules 1988?'
- '[Shall] a suit against an independent sovereign State... only be instituted in the domestic Courts of that State?'

This is an interesting issue but because it was not raised or addressed in counsels' submissions the court left it to be considered on another day. The court then proceeded to

² Ibid.

³ Ibid.

⁴ Ibid.

deal with the main question by separating the issues of diplomatic and sovereign immunity.

DIPLOMATIC IMMUNITY

The law

The law in Fiji is provided for under the *Diplomatic Privileges and Immunities Act* [Cap 8] (the Act) ‘which incorporates into the domestic law of Fiji, “the provisions of Articles 1, 22 and 24 inclusive, and 27 to 41 inclusive, of the (Vienna Convention on Diplomatic Relations)”’⁵ (the Convention). The relevant Articles of the *Convention* for the purposes of the case were Articles 1 (definitions) and 31 – 32 which deal with the jurisdictional immunities of a diplomatic agent and the manner and circumstances under which such immunity might be waived.

General rule

The basic rule on diplomatic immunities is stated in Article 31 which says in part:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction.
2. A diplomatic agent is not obliged to give evidence as a witness.

All parties agreed that ‘the defendant Ambassador is a diplomatic agent... [and that] the premises... which the plaintiff claims he was contracted to renovate is the existing head of mission official residence in Fiji and in terms of Art. 22 of the Convention “shall be inviolable”.’⁶

Waiver of immunity

But the immunity conferred by Article 31 may be waived expressly by the sending state as per Article 32 of the convention. The plaintiff argued that in executing the building contract and in initialling every page thereof, the Ambassador had expressly waived his diplomatic immunity. On this argument, the court held as follows:

- ‘In executing the building contract and in initialling every page of it, the Ambassador was acting at all times, in his official capacity as Ambassador for and on behalf of the Independent State of Papua New Guinea and cannot be said... to have either expressly...waived (his) diplomatic immunity or been engaged in a

⁵ Ibid.

⁶ Ibid.

‘commercial activity ... outside his official functions’ which is an excepted category in Art.31’;⁷

- An ‘inter partes agreement cannot and does not imply an express waiver of immunity nor does it amount to an actual submission or undertaking given to this court, in these proceedings, to exercise jurisdiction over the defendant Ambassador...’;⁸ and
- ‘[The] relevant time or occasion when waiver must occur or be expressed is when the Court is about (sic) or is being asked to exercise jurisdiction and not at any previous time’.⁹

Finding

In light of these considerations and given the absence of any clear and express waiver of diplomatic immunity given by either the defendant Ambassador or the Independent State of Papua New Guinea as the sending State, the court ruled that the defendant Ambassador was immune from the civil jurisdiction of the court and, accordingly, was improperly named in the proceedings. The originating summons against him was therefore set aside.

SOVEREIGN IMMUNITY

The court then considered the doctrine of sovereign immunity as it applied to the proceeding which cited the Independent State of Papua New Guinea as a defendant.

The law

The court began by noting that Fiji did not have any relevant legislation on this subject so it turned to ‘the common law to ascertain the nature and extent of the widely-held doctrine of international law.’¹⁰ In doing so, the court noted that it was ‘immediately faced with two schools of thought, with the older school being in favour of an absolute rule of sovereign immunity, and the other, more recent view, favouring a more limited or restrictive approach.’¹¹

The court then reviewed various authorities which stated the absolute view and its justification. It cited Lord Atkin in *The Christina*¹² where his Lordship said:

[The] Courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² (1938) 60 Ll L Rep147.

whether the proceedings involve process against his person or seek to recover from him specific property or damages.

[Also] they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.¹³

After doing so, the court then reviewed various authorities which stated the restrictive view and its justification such as the judgment of the Privy Council in the *Phillipine Admiral*¹⁴ where the court said it was prepared:

to draw a distinction between acts of a State which are done *jure imperii* (i.e. public or sovereign acts) and acts done by it '*jure gestionis*' (private actions) and (to) accord the foreign State no immunity either in actions in personam or in actions in rem in respect of transactions falling under the second head.¹⁵

After stating this rule and its rationale, the court noted that the task of making a distinction between public/sovereign acts and the private acts of a state is often difficult. To illustrate this difficulty, the court referred to various cases from other common law jurisdictions which supported one or the other view.

So, in the present case, the court could conclude 'that in entering into a contract to carry out renovation works to its Ambassador's official residence in Fiji, the Government of Papua New Guinea was undertaking an ordinary contractual obligation of a private or commercial nature which any private citizen could have entered into.'¹⁶ The contrary argument is 'that the provision of a safe and suitable residence for its accredited Ambassador in Fiji is undoubtedly and legitimately a concern, even a duty, of the Independent State of Papua New Guinea as the sending State and, therefore, any building contract entered into to achieve that end is and ought to be categorised as an act *jure imperii*.'¹⁷

Held

The court confessed that its 'view had waxed and waned between the restrictive view and the absolutist'¹⁸ but in the end concluded 'that the contract between the parties is not so clearly and exclusively a private or commercial transaction that the restrictive view should inevitably prevail.'¹⁹ That is "Fatiaki-speak" for the court's preference for the absolute immunity of the Independent State of Papua New Guinea from the civil jurisdiction of the Fijian courts.

¹³ *Ibid*, 156.

¹⁴ (1976) 1 Lloyd's Rep 234.

¹⁵ *Ibid*, 244.

¹⁶ *Reddy v Ambassador of the Independent State of Papua New Guinea* [1999] 45 FLR 142; [1999] FJHC 75 <http://www.paclii.org>.

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

END RESULT

The originating summons against the Ambassador was set aside and because the Independent State of Papua New Guinea did not expressly agree to waive its sovereign immunity, the Fijian courts could not entertain the claim. Nevertheless, the court was happy to grant the defendant's application for a stay of the proceedings pursuant to an exercise of the court's discretion under section 5 of the *Arbitration Act* [Cap 38]. The matter went to arbitration instead.

ANALYSIS

This case is interesting because it involves, as the court put it, the 'rather infrequently encountered question of sovereign immunity'. I add "diplomatic immunity" to that statement as well. As an indication of its rare appearance in Fiji and the Pacific Islands region, the court did not refer to a single case from this region as illustrative of these issues.

From this case what legal principles have been enunciated?

First, the case creates precedent for the principle that diplomatic immunity is respected. If it is to be waived, the waiver must be expressed, not implied, and must be expressed when the court is being asked to exercise jurisdiction and not at any previous time. This evidences a strict reading of the *Vienna Convention* and its enabling legislation. In my view, the legal reasoning and conclusion on this question are correct and are consistent with both international law and the common law.

As to sovereign immunity, the court's conclusion seemed to favour the absolutist view but the reason given does not actually support this view. To repeat, the reason stated by the court for the finding on this point is 'that the contract between the parties is not so clearly and exclusively a private or commercial transaction that the restrictive view should inevitably prevail.'²⁰ In other words, the court said that it chose not to apply the restrictive view because the facts do not clearly and exclusively show the existence of a private or commercial transaction. The implication is, were the facts otherwise, the court would prefer the restrictive view. The unhappy legal result is that although the court fell back on the absolute doctrine and applied it, it has not stated any *ratio decidendi* for it. The outcome is that the court seems not to have created any precedent on this question so in future cases the courts in Fiji will still have to decide whether the absolutist view or restrictive view applies when it comes to pleas of sovereign immunity.

Better yet, the legislature may decide to enact legislation on this matter, as has been done in many other jurisdictions.

²⁰ Ibid.

For the benefit of the business and general community, this case provides very good reasons why one should be careful when entering into contracts with a diplomat. Beware that diplomats have legal immunities from the laws of a receiving state so if a contract leads to legal disputes the courts will not deal with the contractual dispute unless the sending state expressly waives the diplomat's immunity. Sending states rarely do that. Thankfully, in this case, there was the fall-back option of arbitration process available in Fiji. However, not all Pacific Island countries have that luxury. So I say, "Beware of the contracting diplomat who covenants on behalf of his/her state!"