Case No: CL-2019-000509
Neutral Citation Number: [2020] EWHC 890 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

7 Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 4 March 2020

BEFORE:

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

BETWEEN:

DYNASTY COMPANY FOR OIL & GAS TRADING LIMITED

Claimant

- and -

(1) THE KURDISTAN REGIONAL GOVERNMENT OF IRAQ
(2) DR ASHTI HAWRAMI

Defendants

MR J RAMSDEN QC, MR D BENEDYK and **MR R DOUGANS** (instructed by Preiskel & Co LLP) appeared on behalf of the Claimant
MR G DUNNING QC and **MR D SPELLER** (instructed by WilmerHale LLP) appeared on behalf of the Second Defendant
The First Defendant is not represented

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

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1. JUDGE PELLING: This is an application made by the second defendant for an order that, in effect, bifurcates the determination of issues concerning the jurisdiction of the court to entertain a claim brought by the claimant against the second defendant. The order sought is for an order that a hearing fixed to take place on 22 June 2020 be limited to the determination to (i) whether the second defendant is immune from the jurisdiction of the court by reason of the State Immunity Act 1978; and (ii) whether service of the claim form on the second defendant has been effected in accordance with section 12 of the State Immunity Act 1978.

2. The second defendant was served personally and within the jurisdiction in the arrivals hall at Heathrow Airport. The second defendant will submit at the jurisdiction hearing, that this is contrary to section 12(1) of the State Immunity Act 1978, which requires that any:

> "… Document 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 …" in question.

It will be submitted that this provision applies as much to the second defendant as to the state because it is said that the second defendant was a minister of the relevant state for these purpose, being the first defendant.

3. The substantive immunity question is governed by section 14 of the Act and it is submitted by the claimant that if the requirements of that section are satisfied then that will provide a complete answer as to the jurisdictional issues that arise. There will no need then to determine the other jurisdictional issues identified by the defendant which the second defendant wishes to be put off to be dealt with on a subsequent occasion, that is to say domicile, act of state and foreign conveniens issues.

4. The claimant submits that the course proposed by the defendant is an invitation for delay, expense and is in every respect contrary to the basic principles that should apply to the case management in particular of jurisdiction disputes. The claimant submits with some force is that if bifurcation is to be ordered that could result in as many as two appeals stretching over a number of years if the issues concerning state immunity are dealt with separately and are then subject to an appeal to the Court of Appeal

followed by, if the Court of Appeal overturns any decision concerning state immunity made in favour of the second defendant, a hearing in this court dealing with all the remaining issues, followed by yet another appeal with the result that the jurisdictional issues could take literally years to resolve. It is submitted that is something that the court should strive to avoid.

5. It is said the court should strive to avoid such an outcome, not least because the case law in relation to jurisdictional challenges over many years has emphasised the summary nature of the process or at any rate the ideally summary nature of the process, which is designed to ensure that the interest of a foreign defendant dragged before the English court is adequately protected whilst at the same time ensuring that the substantive dispute is resolved suitably speedily if jurisdiction is established.

6. The particular circumstances of this case are these. The proceedings were served on the evening of 31 October in the circumstances that I have explained. The jurisdictional challenge was served on 12 December and there were various extensions granted in relation to the filing of evidence but critically both parties agreed to the fixing of a hearing for the determination of all jurisdictional issues. Both parties at that stage estimated that one day would be sufficient. The application to fix was on 17 January and the application was listed for a hearing on 22 June 2020. That illustrates a point that I made in the course of argument which is that if the hearing on 22 June is to be vacated on the basis that what is required is a three-day or possibly four-day hearing then it is highly unlikely that it will take place earlier than six months from June, ignoring the summer vacation period. Thus, it is likely to be heard some time in early 2021.

7. The jurisdictional challenges are those I have identified and the point made by Mr Dunning QC who appears on behalf of the second defendant on this application is that state immunity issues need to be resolved at the earliest opportunity and ahead of all other issues that cocnern the court's jurisdiction. In support of that submission he maintains in paragraph 14 of his submissions that:

> "It is axiomatic that if the defendant is entitled to state immunity the court has no power to determine any other issues as regards that defendant."

As the submission developed it became clear that what was being submitted was that that applies not merely to the question of resolving substantive issues between the parties but applies in a situation such as this where there is a challenge to jurisdiction on multiple different grounds. The issues concerning state immunity must be resolved before the court turns to any of those other issues, since otherwise that would be contrary both to the effect of the State Immunity Act 1978 and to the relevant case law, to which my attention was drawn.

8. In support of that proposition Mr Dunning relied upon the decision of Lawrence Collins LJ, as he then was, *in ETI Euro Telecom International NV v The Republic of Bolivia & Anr* [2008] EWCA Civ 880, [2009] 1 WLR 665. At paragraph 110 Collins LJ said this:

> "I come to this point last, simply because it was treated in that way by the judge, and by the parties on this appeal. But it is in fact a matter of the greatest importance (as is made clear by the provision in section 1(1) of the State Immunity Act 1978 that the court must give effect to immunity even if the State does not appear) and would normally fall to be considered first. I am satisfied that Bolivia is entitled to immunity, and that the appeal on this ground fails."

Stanley Burton LJ, in a concurring judgment, has said at paragraph 128:

> "I would wish to commend the judge's decision to hear the jurisdictional issues when he did. Any claimant who wishes to bring proceedings against a State must be in a position to address the issue as to the jurisdiction of the court when he seeks to invoke the jurisdiction of the court … The court must then consider the question of State immunity, since it is required section 1(2) of the 1978 Act to give effect to the immunity even if the State does not appear … It is simply not open to such a claimant to complain that he is not in a position to deal with such jurisdictional issues on its application without notice; and this is even more so on an application on notice. In a case such as the present, the court must consider and decide the question of State immunity at as early a stage on the proceedings as practicable. This is what the judge did …"

9. This is submitted by Mr Dunning to lead to the conclusion that the court should bifurcate the jurisdictional issues that arise in this case, so as to determine the state

immunity issues first and turn to the other issues that arise only if it concludes that the state immunity points fail.

10. Mr Dunning also relies on the decision of Saville J, as he then was, in A Company Ltd v B Company Ltd, unreported but decided on 1 April 1993. This was an unusual case because a state was, in effect, put to an election by the judge to decide whether or not the court should determine in advance of all issues concerning whether England was the appropriate forum for the resolution of the claimant's claim before turning to the question of whether the state had submitted to the jurisdiction of the English court. The answer to those questions given by the state concerned was affirmative as the judge records, which led him then to conclude in relation to state immunity issues this:

> "If under the State Immunity Act a foreign sovereign is immune from the jurisdiction of the United Kingdom courts that is the end of the matter. In such a case the court has no power to decide whether or not, for example, England is the convenient forum nor any other questions whether of jurisdiction or otherwise that might arise in the context of litigation between non-sovereign bodies … It is for this reason that I concluded in *A v Republic of X* [1992] Lloyds Reports 520 at 524-5 that when a question of state immunity arises it must be finally determined at the outset relying on the decision of the Court of Appeal in *Rayner v Department of Trade* … It is not permissible to proceed on the basis that the point can be determined late. For if immunity in fact exists the court should **ex hypothesi** be purporting to exercise powers which it does not possess."

11. Both counsel are agreed that there is no authority which goes as far as Mr Dunning submits should be the position. So, the question that I have to ask myself at this stage is whether that point is at least realistically arguable because if it is realistically arguable then bifurcation has a much stronger claim than perhaps might otherwise be the case.

12. In my judgment there are real difficulties that arise in this case in determining that issue on an application of this sort which does not provide for perhaps the reflection or the detailed submission or consideration that might arise if the issue were to appear in a substantive context. There is, for example, quite a difficult issue concerning waiver that arises in the circumstances of this case because the claimant asserts that by issuing the application challenging jurisdiction the second defendant is to be deemed to have

submitted to the English court's jurisdictions because it has intervened or taken a step in the proceedings - see section 2(3) of the 1978 Act. In those circumstances it is submitted that it has lost any right it might have had to challenge jurisdiction by reference to the State Immunity provisions relied upon. Clearly if that is correct, then it would in principle be open to the claimant to submit that any further steps by the defendant relevant to any issue other than the state immunity issues would be a step in the proceedings within section 2(3) of the 1978 Act.

13. That led leading counsel for the claimant to concede in reply that having resisted the bifurcation application, it would be wrong for the claimant then to rely upon any subsequent activity on the part of the second defendant in furthering the jurisdiction application as further material on which there could be submitted to be a deemed acceptance of jurisdiction and that they should be confined to an argument that arises by reason of the filing of the application in the way it has been filed.

14. In the light of that concession, there is no necessary reason why all the issues could not be resolved together and I am at the moment unpersuaded that the effect of the authorities relied on by Mr Dunning preclude the court from at least entertaining the other jurisdictional challenges that arise, particularly having regard to the principles which apply, set out in the authorities decided under CPR Part 11 concerning how jurisdictional challenges are to be made, which appear to require that a defendant wishing to advance alternative grounds of challenges should rely on all grounds in one application - see the notes in the current edition of the White Book at paragraph 11.1.3.

15. But for the concession referred to earlier, I would have decided that caution required me to make the order sought by Mr Dunning. However, in light of the concession that level of caution is no longer necessary and the broader case management issues relied on by the claimant become relevant.

16. It is submitted by Mr Dunning that the attractions from a case management point of view of a bifurcation are simply these. The state immunity issues are tightly confined ones; they can be determined within one day, as has been allowed so far for the fixing of the application; and if decided in favour of the second defendant that would lead to the conclusion that much cost and further effort would be saved by not having to

address all the various points that arise in the alternative. He says that that is a much more attractive and proportionate way of approaching a case of this sort.

17. The claimant submits that this is wrong. I cannot assume what the outcome of the application will be one way or the other and in all sorts of legal proceedings it is often required that a judge determine different issues, even though they are potentially irrelevant if the judge is right in the way he or she has decided another issue in dispute between the issue. The point that Mr Ramsden QC makes is that it is within sensible contemplation that if there is a bifurcation the proceedings will take significantly longer, the jurisdiction hearing will be measured in years and that is so even if there are no appeals at the end of the first stage and the claimant has been successful. In the result he says that the balance of convenience lies in resolving all of these issues in one hearing, so that if there is to be an appeal there is one appeal and if there are no appeals so that the court can move fairly rapidly to determine the substantive dispute.

18. As I have indicated, but for the concession that has been made on behalf of the claimant, I would have ordered the bifurcation of the hearing in order to preserve the position so far as the second defendant is concerned against the risk that any further steps taken by the second defendant would constitute a waiver. However, the concession made on behalf of the claimant eliminates that the need for such a course and therefore I am faced with two relatively unattractive case management alternatives. In the end I have come to the conclusion that the least unattractive solution lies in there being a single albeit longer hearing at which all the jurisdiction issues can be resolved. This is likely to enable the claimant to have its claim determined as quickly as possible whilst ensuring that if the defendants are to succeed on the jurisdictional challenge they can do so in a single and final hearing at which all issues concerning jurisdiction are resolved. It would be wrong for there to be two hearings with a judge faced with the unenviable task of having to resolve or possibly come back and resolve all other jurisdictional issues after perhaps a gap of some months if there was a successful appeal in relation to state immunity issues. It is difficult to see how it would be sensible to direct that a different judge should deal with the balance of the issues without actually very significantly increasing the cost delay and work load for all concerned.

19. In those circumstances I propose to reject the bifurcation solution in favour of there being a single hearing and in my judgment one which needs to be listed for three days in order to resolve all outstanding issues.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge