FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 45
PD120/19

Lord President
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motion

in the cause

SIMON MORRISON

Pursuer

against

(FIRST) MAPFRE MIDDLESEA INSURANCE plc

First Defenders and Reclaimers

(SECOND) CITY SIGHTSEEING MALTA LIMITED

Second Defenders

and

AWTORITÀ GHAT-TRANSPORT F'MALTA (TRANSPORT FOR MALTA)

Third Parties and Respondents

Pursuer: no appearance
First Defenders and Reclaimers: AN McKenzie, Scullion; Kennedys Scotland LLP
Second Defenders: no appearance
Third Parties and Respondents: Dewar KC, Hawkes KC; Keoghs LLP

6 October 2022

Introduction

[1] On 9 April 2018, the pursuer was on a tour bus in Malta. The bus hit the branch of a

tree on the Valletta Road in Żurrieq. The pursuer has raised an action against the tour company's insurers, seeking reparation for the injuries sustained by him in the accident. The first defenders have convened the third parties averring that they were in breach *inter alia* of their duty to maintain the road. The third parties contend that they were exercising sovereign authority delegated by the Maltese state. As a result, they were entitled to immunity in terms of section 14(2) of the State Immunity Act 1978.

[2] By interlocutor dated 16 December 2021 ([2021] CSOH 126), following a preliminary proof, the Lord Ordinary sustained the third parties' plea of no jurisdiction. He dismissed the action *quoad* the third parties. The issue is whether he was correct to do so; that is whether section 14(2) of the 1978 Act applies.

Facts

[3] On 8 April 2018 the pursuer, accompanied by members of his extended family, arrived in Malta on holiday. The following day, they took a tour on an open topped, hop on, hop off bus operated by City Sightseeing Malta Ltd. The pursuer sat on the top deck. The bus was going at about 60 miles per hour along a country road known as the Valletta Road in Żurrieq. It collided with branches of overhanging trees. As it continued along the road, it struck a large branch which tore through the top deck. Two passengers were killed and many others were injured. The pursuer sustained severe injuries to the head. He is suing for £1 million.

[4] By third party notice, the first defenders convened the third parties, who were a body corporate established by the Authority for Transport in Malta Act 2009. The third parties were responsible for the grant of licences to tour bus operators. In granting a licence to CSM, it is averred that the third parties had entered into an implied contract, or made an

implied representation, that the road was fit for purpose. The third parties were liable either for breach of contract or misrepresentation. The first defenders also found on duties imposed on the third parties by the 2009 Act. These include a duty to ensure the safety, maintenance and security of the distributor roads in Malta. The Valletta Road is a distributor road. The duty included ensuring that trees did not present a danger to road users.

[5] The third parties do not dispute that certain duties were incumbent upon them. However, they maintain that they were carried out under delegated authority from the state. They were exercising sovereign authority. The third parties' functions in relation to licensing arrangements for sightseeing routes were set out in the Passenger Transport Services Regulations 2009. The third parties were not entering into commercial transactions when issuing licences, albeit for a fee. They were performing a statutory function. The relevant government Minister retained a power to issue directions to the third parties. If the transport functions had not vested in the third parties, the Minister would have had to carry them out. A private citizen could not do so. Had the Minister been so responsible, he would have been entitled to immunity. That being so, in terms of section 14(2) of the 1978 Act, the third parties would also be so entitled.

The evidence

[6] The third parties adduced the testimony of their Chairman and Chief Executive Officer, Joseph Bugeja. He explained that the 2009 Act established the third parties as a body corporate; merging three predecessor bodies responsible for maritime, aviation and land transport. They were endowed with various powers and functions in the transport sector. At the time of the accident the third parties had the duties averred by the first

defenders. Those duties had since been passed on to Infrastructure Malta. The third parties' expenditure was met out of its revenue, although that included an annual grant of 13.5 million euros from the Government. When the third parties carried out their functions, they were exercising sovereign authority on behalf of the Government. Dr Ian Borg, the Minister for Transport, Infrastructure and Capital Projects, provided an affidavit in which he adopted the view of Mr Bugeja.

[7] Professor Ian Refalo, a Maltese lawyer experienced in public law, spoke to the approach of the Maltese courts to state immunity. They interpreted immunity in line with English law. The third parties ought to be entitled to immunity for two reasons. First, they were *longa manus* (an extension of the state), having been created by, and deriving their authority from, the 2009 Act. The Minister retained an ultimate power to provide directions to them. Secondly, the duty to maintain the Valletta Road was delegated under the 2009 Act and thus of a governmental and public character. They were *acta jure imperii* and not ones that a private individual could carry out.

[8] The first defenders led evidence from two witnesses. Kim Degabriele, the Director of CSM, explained the process by which CSM applied for and obtained a licence from the third parties to operate on sightseeing routes. Dr Phyllis Aquilina, a Maltese lawyer and senior lecturer in private law, referred to the Minister's powers. The functions vested in the third parties were not absolute or unlimited. In performing them, they were acting in the capacity of private individuals and carrying out ordinary administrative and commercial functions. They entered into contracts for the construction and maintenance of roads. The purpose of an act, which may be public in nature, had to be distinguished from the act itself, which may not be. It was important to consider the juridical character of the proceedings arising from the act in question, which in the present case was of a private law character.

The Lord Ordinary

[9] The Lord Ordinary recorded that there was no dispute about the facts, or the constitution, powers, duties and activities of the third parties. They were a separate entity. The issue turned on the application of section 14(2) to the facts. The question was whether the proceedings related to the exercise of sovereign authority. This was to be determined by Scots and not Maltese law. The connection between the proceedings and the third parties was either a breach of their duty to ensure the safety of distributor roads or its regulatory function as a licensing body. The first defenders' submission that the focus should be on the juridical character of the proceedings arising from the act (being delict or negligence) was misconceived. *I Congreso* [1983] 1 AC 244 provided the authoritative test. *Benkharbouche* v *Embassy of the Republic of Sudan* [2019] AC 777 had not sought to innovate on that test. Consideration of the potential wrongs was secondary to the principal exercise of deciding whether the character of the act was of a governmental or public nature.

[10] In performing their duties under the 2009 Act, the third parties had been exercising sovereign authority. The duty fell within an important area which was vital to the economic and social wellbeing of the state (cf *La Générale des Carrières et des Mines* v *FG Hemisphere Associates* [2013] 1 All ER 409, at para 49). The duties were of a governmental nature and not such as a private citizen could perform. The significance of the particular aspect of the third parties' failure or omission was irrelevant to the characterisation exercise. *Trendtex Trading* v *Bank of Nigeria* [1977] QB 529 and *La Générale des Carrières* did not assist the first defenders. At the time of *Trendtex Trading*, only the state, or a body that could demonstrate it was part of the state, could benefit from immunity. In *La Générale des Carrières*, the court was not concerned with whether a separate entity was entitled to immunity.

[11] The first defenders had led no evidence about the characterisation of the licensing arrangements under Maltese law. Applying *Svenska Petroleum Exploration* v *Lithuania (No 2)* [2007] QB 886 (at para 132), the arrangements were not commercial. The third parties had carried out their responsibilities under the 2009 Act and the 2009 Regulations. A private entity could not have done so. The third parties were precluded from contracting out their licensing functions.

Submissions

First defenders

[12] The first defenders submitted that the Lord Ordinary erred in not recognising that the third parties' failure to ensure that the trees did not present a danger to road users was not a governmental act. He approached the characterisation exercise too broadly, by erroneously focusing on the overall duty incumbent on the third parties under Maltese law. The focus ought to have been more specific; that the pursuer's cause of action was the third parties' failure to ensure that the trees did not present a danger. The overall duty was not determinative of whether the relevant act was *jure imperii* or *jure gestionis* (*La Générale des Carrières* at paras 47-48). The Lord Ordinary ought to have had regard to the particular aspect of the failure. He failed to carry out a proper analysis of whether the act was a private act of a private law character or a sovereign or public act of a governmental character. He ought to have had regard to the fact that the third parties' omission gave rise to a claim by an individual using a private law remedy.

[13] The Lord Ordinary ought to have taken into account the third parties' status as a separate entity which was capable of suing and being sued. Not every act of a separate entity, which was carrying out government policy, attracted immunity. The Lord Ordinary

failed to consider whether the sovereign quality of the train of events might have "died away" by the time the third parties came to play their part (*Kuwait Airways Corpn* v *Iraqi Airways Co* [1995] 1 WLR 1147 at 1172). The Lord Ordinary ought to have searched for the "gravamen" of the pursuer's claim (*ibid* at 1161). This was a private law matter involving tree pruning. Pruning trees was not a governmental act. The Lord Ordinary ought to have considered whether it was "of its own character" a governmental act "as opposed to an act which any private citizen can perform" (*ibid* at 1160; see also 1157 citing *I Congreso* at 269). If the approach of the Lord Ordinary were correct, the third parties would be exercising sovereign authority in respect of all of their acts and omissions. Not every act by a government was a governmental act (*Benkharbouche* v *Embassy of the Republic of Sudan* at para 55). Putting in place a structure for the maintenance of roads was a sovereign act, but implementing it was not.

[14] The whole context had to be considered in determining the juridical character of the act (*Benkharbouche* at paras 8 and 58; *La Générale des Carrières* at paras 48-49). The relationship between the Maltese Government and the third parties did not support the Lord Ordinary's conclusion. His approach ran contrary to *Trendtex Trading* v *Bank of Nigeria* (at 555) in which the activities were regarded as commercial. The degree of control was not a definitive indicator that sovereign authority was being exercised.

[15] The unchallenged evidence of Dr Aquilina was left out of account. She said that the third parties had previously contracted out their responsibility for the construction and maintenance of roads. That contradicted the proposition that maintenance was not something which could have been done by a private party. The performance of their functions for the benefit of the state was insufficient to constitute an exercise of sovereign

authority. The Minister retained ultimate control of government policy; the third parties' responsibilities were limited to its implementation.

Third parties

[16] The third parties responded that the Lord Ordinary set out the correct approach and applied it to the facts. The act had to be considered in context, *viz.* the third parties' exercise, or failure to exercise, their overall duty to ensure the safety of distributor roads. The duty should not be atomised into the granular. The Maltese state had delegated this duty to the third parties in the 2009 Act. It was subject to its ultimate control. Had the 2009 Act not been passed, the duties and responsibilities would have remained with the Minister. The duty did not have a private law character. The third parties acted as an arm or agent of the state in performing an assigned task (cf *Arango* v *Guzman Travel Advisors Corporation* (1980) 621 F.2d. 1371 cited in *Kuwait Airways Corpn* v *Iraqi Airlines Co* at 1160). The act was not to be looked at in isolation (*Kuwait Airways Corpn* v *Iraqi Airlines Co* at 1163 and 1172). The third parties, although a separate entity, were not acting autonomously. They were closely involved with the state. They performed their functions as part of the process of ensuring the overall safety of principal roads in order to serve the needs of the Maltese state.

[17] It would be erroneous for the court to focus on the juridical character of the cause of action. To focus on the juridical character of the cause of action would be to focus on the consequences of the act rather than its essential character. It was axiomatic that focus on a cause of action would invariably identify a private law matter. The question was whether the act itself was of a private law character. The act was the third parties' statutory duty to maintain roads.

[18] *Benkharbouche* was concerned with a sovereign authority and not a separate entity. *La Générale des Carrières* was not a state immunity case. The nub of the case involved the application of *Kuwait Airways Corpn* v *Iraqi Airlines Co* (at 1163; see also *Holland* v *Lampen-Wolfe* [2000] 1 WLR 1573 and *Littrell* v *USA* (No 2) [1995] 1 WLR 82).

Decision

[19] The rationale for the principle of state immunity from suit in a foreign jurisdiction is well expressed in the maxim *par in parem non habet imperium* (an equal has no power over an equal; Traynor: *Latin Maxims*). The courts in one state ought not to adjudicate on the acts of another state. Traditionally, the principle was applied in an absolute manner (*The Cristina* [1938] AC 485, Lord Atkin at 490). States were immune from suit in respect of all of their acts, whatever their nature.

[20] *The Philippine Admiral* [1977] AC 373 and *Trendtex Trading* v *Bank of Nigeria* [1977] QB 529 marked a move away from an absolute approach towards a restrictive one. Consistent with the practice which had been adopted by most other major trading nations, a distinction was recognised between *acta jure gestionis* (acts involving commercial or private rights) and *acta jure imperii* (acts arising from the exercise of sovereign power). Since the former were neither threats to the dignity of the state, nor an interference with its sovereign functions, there was no immunity from suit in the foreign state (*I Congreso* [1983] 1 AC 244, Lord Wilberforce at 262).

[21] The State Immunity Act 1978 codified state immunity in terms of the restrictive rather than absolute approach. Section 1 provides:

> "1 General immunity from jurisdiction.

> (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions ..."
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings ..."

Section 14 states:

> "(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—
>
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
>
> (b) the circumstances are such that a State … would have been so immune."

[22] The manner in which section 14(2) is to be interpreted was set out in *Kuwait Airways Corpn* v *Iraqi Airways Co* [1995] 1 WLR 1147. The reference to "a separate entity" is not to some body which is independent of the state, but one which remains "an entity or separate entity of a state" (*ibid* Lord Goff at 1158). That would include a statutory corporation which is under the control of the state, including the third parties. Although the statutory provision refers to acts "done … in the exercise of sovereign authority", this is simply a reference to what were previously regarded as *acta jure imperii* as distinct from *acta jure gestionis* (*ibid* at 1159-1160). Thus, the ultimate test is "whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform … where an act done by a separate entity of the state on the directions of the state does not possess the character of a governmental act, the entity will not be entitled to state immunity …" (*ibid* at 1160, following *I Congreso* at 267).

[23] The court must consider the whole context in which the claim is made, with a view to deciding whether the claim is within the area of trading or commercial activity, or otherwise of a private law character, or whether it is done outside that area and within the sphere of governmental or sovereign activity.

[24] Applying the test as set out in *Kuwait Airways Corpn* v *Iraqi Airways Co*, the act, or rather omission, founded upon by the first defenders falls into the category of *acta jure imperii* rather than *jure gestionis*. The omission, when looked at in context, was not one which was concerned with trading or commercial activities but with a public duty to maintain the safety of distributor roads throughout Malta. That is a governmental act. In terms of section 14(2) of the 1978 Act it is in the field of an act "done" by the third parties "in the exercise of sovereign authority". It was not one which could be performed by a private citizen. In essence, therefore, and without repeating the detail of his analysis, the court agrees with the reasoning of the Lord Ordinary. The fact that, in terms of Dr Aquilina's testimony, the third parties' contract with private entities to carry out the maintenance work is not relevant to an analysis of the third parties' duties, as delegated to them by the state. What is relevant, and was confirmed by unchallenged affidavit evidence from the government minister, Dr Borg (agreeing with Mr Bugeja), is that the third parties viewed themselves as carrying out the Maltese state's obligation to maintain major public roads.

[25] The court will refuse the reclaiming motion and adhere to the interlocutor of 16 December 2021.