Woo Anthony v Singapore Airlines Ltd (Civil Aeronautics Administration, Third Party) [2003] SGHC 190

Case Number : Suit 1277/2002, RA 236/2003, Suit 1061/2002, 1278/2002, 1279/2002, 1280/2002, 1281/2002, 1282/2002, 1283/2002, 1291/2002, 1292/2002, 1295/2002, 1296/2002, 1297/2002, 1299/2002, 1300/2002, 1301/2002, 1302/2002, 1303/2002, 1304/2002, 1307/2002, 1308/2002, 1

Decision Date : 28 August 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Loo Choon Chiaw, Lim Tong Chuan and Goh Hui Nee (Loo & Partners) for the appellant/third party; Lok Vi Ming, Ng Hwee Chong and Delphine Ho (Rodyk & Davidson) for the respondent/defendant; Lee Wei Yung (Wee Ramayah & Partners) for the plaintiffs

Parties : Woo Anthony — Singapore Airlines Ltd — Civil Aeronautics Administration

International Law – Sovereign immunity – Third party proceedings against civil aviation authority of Taiwan – Aviation authority claiming immunity under State Immunity Act without certificate of recognition from Singapore Ministry of Foreign Affairs – Whether court may grant immunity on ground that Taiwan is recognised de facto – State Immunity Act (Cap 313, 1985 Rev Ed)

1 The defendant operates the airline known as Singapore International Airlines or, more commonly, 'SIA'. They are being sued by a number of plaintiffs in respect of an accident in Taipei, Republic of China involving an aeroplane of the SIA. The defendant joined the Civil Aeronautics Administration of Taiwan ('CAA') as a Third Party to the actions. The CAA applied to set aside the third party proceedings on the ground that it, being a department under the Taiwan government is entitled to immunity from suit under s 3(1) read with s 16(1)(c) of the State Immunity Act, Ch 313. The application was heard by the learned assistant registrar who dismissed the third party's application. The latter appealed before me on the narrow issue, here and below, that the CAA is immune from suit because it is part of the machinery of state, that is, the Republic of China, known as Taiwan.

2 It is not disputed that the third party is a department of the Ministry of Transportation and Communications of the government of the Republic of China. Under the Civil Aviation Law and the Statute for Organisation of the Civil Aeronautics Administration, Ministry of Transportation and Communications, the third party is charged with the administration of civil aviation in the Republic of China. The application herein was for a declaration 'that the third party be immune from the jurisdiction of the Courts of Singapore by virtue of s 3(1) read with s 16(1)(c) of the State Immunity Act, Ch 313'. Section 3(1) reads as follows:

> 'A state is immune from the jurisdiction of the Court of Singapore except as provided in the following provisions of this part.'

Section 16(1) provides as follows:

> 'The immunities and privileges conferred by Part II apply to any foreign or Commonwealth State other than Singapore; and references to a state include references to
>
> (a) the sovereign or other head of that state in his public capacity;
>
> (b) the government of that state; and

(c) any department of that government,

but not to any entity (referred to in this section as a separate entity) which is distinct from the executive organs of the government of the state and capable of suing or being sued.'

It is also necessary to consider s 18 of the Act, which provision reads:

'A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question –

(a) whether any country is a state for the purposes of Part II, whether any territory is a constituent territory of a Federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a state.'

3 On 20 June 2003, the defendant wrote to the Ministry of Foreign Affairs and sought a certificate under s 18. The letter is important and I shall set out the relevant portions verbatim:

'We are representing Singapore Airlines in Third Party actions against the Taiwan Civil Aeronautics Administration (CAA) arising from the SQ006 air crash in Taipei, Taiwan, on 30 October 2000. The CAA made an interlocutory application to set aside the action on the basis that, as a department of the Ministry of transport and Communication of the Republic of China, it is immune from the jurisdiction of Singapore courts pursuant to section 3 of the State Immunity Act (Chapter 313)("the Act").

Under section 18 of the Act, a certificate by or on behalf of the Minister for Foreign Affairs is necessary to conclusively indicate whether any country is a "state" for the purposes of Part II of the Act. Enclosed herewith are extracts of Part II and section 18 of the said Act for your easy reference.

In a similar application by CAA before the Canadian court, the Department of Foreign Affairs and International Trade of Canada has informed our Canadian counterparts that a certificate cannot be issued to establish that Taiwan is a foreign state for the purpose of the Canadian State Immunity Act. A copy of the Canadian State Immunity Act and the response from the Canadian Department of Foreign Affairs and International Trade are also annexed for your reference.

We would be required to appraise the Court at the hearing of the application whether your Ministry is prepared to issue a certificate confirming Taiwan (the Republic of China) is indeed a state for the purposes of the State Immunity Act.' (my emphasis)

The Ministry replied by letter dated 24 June 2003. The substantive passage in this reply reads:

'I wish to inform you that we are unable to issue the certificate pursuant to s 18 of the State Immunity Act.'

The reply was signed on behalf of the Permanent Secretary of the Ministry. The third party had, similarly, applied for a s 18 certificate and was also given the same reply.

4 Mr Loo, counsel for the third party submitted that the Republic of China is a state under s 3 and must be so recognised. He submitted further that even if there is no official recognition of that state by the government of Singapore, I ought to follow the principles of international law and draw a distinction between '*de jure* and *de facto* recognition'. Counsel argued that based on the history of

dealings between the government of the Republic of China and Singapore, the Republic of China had been given a *de facto* recognition by the government of Singapore. Accordingly, this court ought to adopt the *de facto* position accorded to the Republic of China. Counsel submitted that if the government of Singapore had not made its position clear, then the court is entitled to enquire and determine whether there is a *de facto* recognition of the Republic of China. Mr Lok, counsel for the defendant submitted that the inability of the parties to obtain a s 18 certificate means simply that the Republic of China is not recognised as a state by the government of Singapore for the purposes of the State Immunity Act. As a subsidiary argument, Mr Lok submitted that in the event that the government's position is found to be ambiguous, then this court should refer the question back to the Ministry rather than decide on its own whether there is a *de facto* recognition of the Republic of China.

5 In support of his submission that this court ought to take into account the instances or circumstances relevant to the determination as to whether there is a *de facto* recognition of the Republic of China, Mr Loo set out a long history of the chronology of the landmark events in the relationship between the government of Singapore and the government of the Republic of China, including the signing of the double-taxation treaty to support his argument that there is a *de facto* recognition of the Republic of China. Mr Loo's argument on the latter point was that a double-taxation treaty may only be signed by the government with another that is recognised *de facto* if not *de jure*.

6 Mr Loo cited various authorities for his propositions that a state or government would enjoy *locus standi* in the courts of the United Kingdom whether it is recognised *de jure* or *de facto* (see International Law, 3rd Ed. Rebecca Wallace). *The Government of the Republic of Spain v S.S. Arantzazu Mendi.* [1939] AC 256 and *Bank of Ethiopia v National Bank of Egypt and Liquori* [1937] 3 AER 8, are examples of cases in which the courts in the United Kingdom have recognised a *de facto* state. It is true that in some cases, such as that in the *Arantzazu Mendi* the government may recognises the *de jure* as well as the insurgent *de facto* states. The recognition of statehood is a matter that requires a common stand to be taken by all the organs of the recognising state. A view expressed in similar vein may be gleaned from the judgment of Roche J. in *Aksionairnoye Obschestvo Dlia Mechaniches-Koyi Obrabotky Diereva (1) A. M. Luther (Company for Mechanical Woodworking A.M. Luther) v James Sagor and Company* [1921] 1 KB 456. The legislature in the State Immunity Act conferred upon the executive, the power to make a conclusive determination whether a state or government is recognised for the purposes of the Act. In such circumstances, unless a clear discretion (emanating from a duty) is given to the courts, the question of the recognition of statehood will be determined by the certification under s 18 of the Act. The notion that a *de facto* recognition has equal importance as a *de jure* recognition may be an exaggerated idea. Lord Reid's observation in *Carl Zeiss Stiftung v Rayner and Keeler*, *Ltd and others (No. 2)* [1966] 2 AER 536 case must not be overlooked. Indeed, I feel that it ought to be marked and hoisted as an early reminder. He there said: '*De facto* recognition is appropriate – and in my view is only appropriate – where the new government have usurped power against the will of the *de jure* sovereign.' *ibid* page 547.

7 The Act makes no distinction between a *de jure* or a *de facto* state and must, therefore, be read as inclusive of both. The notion of a *de jure* state opposed by a *de facto* state is not new and has been recognised in international law long before the Act came into force. The Minister may recognise both the *de jure* or *de facto* states as the U.K. government did in *Carl Zeiss Stiftung*'s case or it may recognise one but not the other. In the present case, the application for a certificate under s 18 was made in very explicit terms, leaving the reader no doubt as to what was sought and why. The reply to that application, couched in polite and diplomatic terms was nonetheless, equally clear. It said 'no' in effect. There is no ambiguity in the answer from the Ministry of Foreign Affairs that the Republic of China is not a state, whether *de facto* or *de jure*, for the purposes of the Act. No

reasons were given and none is required under the Act. There being no ambiguity in my view, there is, therefore, no need to proceed further, either to make a determination on the court's own accord, or to refer the matter back to the Ministry. I would, however, express my view, obiter-wise, that in the event of an ambiguous reply from the Ministry, the preferred route is to refer to the maker of the statement for clarification. I say this because there maybe many instances, the present included, where a judicial inquiry will have to take into account large bodies of disputed evidence, thereby rendering this a more cumbersome, lengthier, more costly, and yet not necessarily more reliable avenue for clarifying ambiguity in a ministerial statement. This was also the option elected by the defendants in the *Carl Zeiss Stiftung* case which was approved expressly by the Court of Appeal there, and implicitly, by the House of Lords subsequently.

8 Mr Loo advanced two ancillary arguments which I can deal with as briefly as they were advanced. First, he argued that if Taiwan is not a state because, in Mr Lok's submission, the Singapore government recognises it as part of the Peoples Republic of China (Mainland China), then it must have immunity under the Act since the Republic of China has immunity and it is a recognised state, *de jure* and *de facto*. If the third party, claiming to be a department of the government of the Republic of China advances this as a serious argument then it will obviously be a strong argument, but unless it does so, I am not bound to consider this argument seriously. Mr Loo prefaced this submission with a strong caveat that that was not Taiwan's stand.

9 Mr Loo's third and last argument was based on the proposition that if the Republic of China is not a foreign state recognised by the Singapore government then it will not have requisite *locus standi* in the courts to sue or be sued. It was an argument taken from the U.K. Supreme Court Practice, 1997 (Whitebook) at paragraph 4676:

> 'Foreign Sovereigns and States recognised by H.M. Government are admitted to sue here. An unrecognised foreign state and any of its subordinate bodies cannot sue or be sued in the English courts.'

Lord Reid in the *Carl Zeiss Stiftung*'s case expressed a powerful opinion in respect of the consequences that would flow if the German Democratic Republic (then East Germany) was not recognised. The Law Lord said:

> '[W]e must not only disregard all new laws and decrees made by the German Democratic Republic or its government, but we must also disregard all executive and judicial acts done by persons appointed by that government because we must regard their appointments as invalid. The result of that would be far reaching. Trade with the Eastern zone of Germany is not discouraged; but the incorporation of every company in East Germany under any new law made by the German Democratic Republic or by the official act of any official appointed by its government would have to be regarded as a nullity so that any such company could neither sue nor be sued in this country. Any civil marriage under any such new law or owing its validity to the act of any such official would also have to be treated as a nullity so that we should have to regard the children as illegitimate; and the same would apply to divorces and all manner of judicial decisions whether in family or commercial questions. That would affect not only status of persons formerly domiciled in East Germany but also property in this country the devolution of which depended on East German law.' *Ibid*, page 548.

The *Carl Zeiss Stiftung*'s case was commenced by the plaintiffs, a charitable foundation incorporated in 1986 in Jena, a district in the Grand Duchy of Saxe-Weimar. This district subsequently came under the jurisdiction of the German Democratic Republic (known as 'East Germany'). Since 1945 when Germany was partitioned, East Germany was administered by the Union of Soviet Socialist Republic

(USSR). In 1949 the USSR set up the German Democratic Republic to administer East Germany, purportedly as a sovereign state. The USSR, in fact, retained overall control. When the East German plaintiffs sued various parties for infringing its intellectual property rights, one of the defences of the defendants was that the courts in the plaintiffs should not be recognised as having legal authority to commence the action. Their argument was based on a certificate issued by the UK government. As early as 1945 the UK government recognised the USSR as the *de jure* entitled to exercise governing authority in East Germany. Then in 1964, it granted a certificate stating that Her Majesty's government has not recognised either *de jure* or *de facto* any other authority, that is, in the context any other authority than the government of the USSR. The Court of Appeal accepted this argument and allowed the appeal by the defendants (whose application was rejected by Cross J at first instance) on the basis that the East German government received no recognition by the U.K. government. The House of Lords allowed the plaintiffs' appeal on the grounds, *inter alia*, that there was nonetheless a governing authority and that governing authority of East Germany was still the USSR, as so certified by the government in its certificate of 1964. Thus, Lord Reid, in the passage quoted above, was anticipating adverse and disastrous consequences should the plaintiffs and other corporate entities be not recognised as legally incorporated because the government under which they belong is itself not recognised. In the present case, there is, in my view, no danger of deracinating Taiwanese companies trading here. Nonetheless, the fears expressed by the Law Lords in *Carl Zeiss Stiftung*, particularly Lord Reid and Lord Upjohn who said that it would be 'a most deplorable result in respect of any highly civilised community, with which we have substantial trading relationships I believe, which should be avoided unless our law compels that conclusion' (*ibid* page 569), need to be addressed. In short, if the CAA is a department of a government that is not given *de jure* or *de facto* recognition by this state, then what is it? It is an entity that is real but is not a state recognisable for the purposes of the State Immunity Act. That leads to the next question. Are we creating a third category of states apart from *de jure* and *de facto*? In my view, there is only one kind of state. It must be real and satisfies all the criteria for statehood. That is, it must have territory, a population, and a government capable of maintaining effective control. There is, however, more than one aspect of recognising such a state. The state may be recognised as *de jure* or *de facto*, or in the courts of a foreign state, merely as an existing entity proclaiming to be a state. In this situation, no immunity is accorded and the 'state' so recognised, may be sued in the courts of the foreign state. It follows, conversely, that it can also sue in those courts. And lastly, such a 'state' may not receive any recognition at all; that is, to be regarded as a non-entity. The consequences feared by the British courts can also be overcome or mitigated in many ways, some of which have been applied by the American courts in cases such as *U.S. v Home Assurance Co* (1874), 89 U.S. 99 and *Sokoloff v National City Bank of New York* (1924) 239 N.Y. 158.

10 Mr Loo relied on the American case of *Wulfsohn v Russian Socialist Federated Soviet Republic* 234 N.Y. 372, 138 N.E. 24 in which Andrews J expressed the view that the Russian Federated Soviet Republic was the existing *de facto* government, as admitted by the parties, '[o]therwise there is no proper party defendant before the court'. Hence, he concluded that if the government of the Republic of China is not recognised, then, in the words of the court in another American case, the government of the Republic of China was not an existing government and cannot be sued because 'there was no party before the court'. See *Russian Socialist Federated Soviet Republic v Cibrario* 235 N.Y. 255, 139 N.E. 259. The paradoxical nature of the above proposition that an unrecognised government enjoys immunity in the courts of foreign states seems to find its root in *Wulfsohn*'s case and given implicit endorsement in academic texts such as Professor von Glahn's 'Law of Nations', sixth ed. Page 87, 108 which explained that the proposition was based on the logic that 'you cannot sue something whose existence you deny'. This is a paradoxical puzzle not unlike Russell's Paradox (the set of all sets that do not contain themselves as members), a simpler version of which is expressed in this way: 'The barber cuts the hair of everyone in the village who does not cut his own hair.' Does the barber cut his own hair? Philosophical and mathematical paradoxes are contradictions with no

solutions. The present matter before me need not, and in my view, should not be expressed in a paradoxical form merely to avoid a solution or result that is not attractive. First, the definition of a *de facto* state is necessary solely for the purposes of giving effect to the State Immunity Act. The incongruous situation of having an entity that looks like a state, behaves like a state, is treated like a state, and yet not be recognised by a court of law as a state, is in my opinion, the lesser contradiction. It is a greater contradiction to have an entity given immunity when its existence is recognised *de jure* or *de facto*, and also when it is not recognised at all.

11 Secondly, if *Wulfsohn* represents judicial thinking since the 1920's, the policy may require a re-examination. It is to be noted that this principle of according immunity to a state that is not recognised as such, rose from judicial policy and found widespread acceptance as such. I hold the view that any entity that purports to be a state or a government of a state that is not recognised *de jure* or *de facto* does not enjoy immunity from suit. I will, for my part, decline to fashion an alternative name for such so-called 'governments' or 'states' and will refer to them as I did above, as entities. Such entities can be as spurious as a group of insurgents who had installed itself as the government in some small territory; or it can be one which is established and stable, and with which governments elsewhere deal with on friendly terms, such as the Republic of China. Whether such entities are given *de jure* or *de facto* recognition is best left to the executive, as the legislature in enacting the State Immunity Act has seen fit. Otherwise, it will not be possible - if I may use the words of Lord Atkin in the *Arantzazu Mendi* case - for the executive and the judiciary to speak with one voice on such matters. The proper recognition of a sovereign or a sovereign state is not normally a function of the judiciary. Recognition by the court follows recognition by the state to which that court belongs.

12 For the reasons above, the appeal is dismissed. I shall hear the question of costs at a later date if parties are unable to agree costs.

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