[2022] HCATrans 039

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S104 of 2021

B e t w e e n -

KINGDOM OF SPAIN

Applicant

and

INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L.

First Respondent

ENERGIA TERMOSOLAR B.V.

Second Respondent

Application for special leave to appeal

KEANE J
EDELMAN J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA BY VIDEO CONNECTION

ON FRIDAY, 18 MARCH 2022, AT 9.29 AM

KEANE J: In accordance with the Court's protocol when sitting remotely, I will announce the appearances for the parties.

MR C.S. WARD, SC appears with **MR P.F. SANTUCCI** for the applicant. (instructed by K & L Gates)

MR B.W. WALKER, SC appears with **MR J.A. HOGAN-DORAN, SC** and **MR C.W. BROWN** for the respondents. (instructed by Norton Rose Fulbright Australia)

KEANE J: Yes, Mr Ward.

MR WARD: Thank you, your Honour. May it please the Court. Your Honours, we appear on this application for special leave to appeal in the context of and only for the purpose of seeking to continue to assert the sovereign immunity of the Kingdom of Spain.

The application raises two questions for determination, which are identified at page 128 of the application book. The questions are both domestically and internationally significant. They take place and arise in the context of decisions of the United Kingdom Supreme Court and the European Court of Justice, each of which recognises the ambiguity that we say arises in construing, as the Full Court did, the mere act of becoming a party to the ICSID Convention as either an express or implied waiver of sovereign immunity by agreement before the courts of this country.

The first question which is said to arise – at page 128 – is whether sovereign immunity is capable of being waived other than by a clear and unambiguous action of a state – that is, when it comes to an agreement. We, of course, say that the mere act of Spain becoming a party to the ICSID agreement does not amount to a sufficiently clear and unambiguous waiver of immunity.

The second question then arises, and it is a question of construction of the ICSID Convention, but in the context of section 35 of the *International Arbitration Act*, that is, whether on the approach taken by the Full Court, there is an interpretation of Articles 54 and 55 of the ICSID Convention, such that the preservation of immunity in Article 55 no longer has any application to the agreement said to arise in Article 54. That is said by the Full Court to be the result of what the Court finds to be a strict dichotomy between recognition on the one hand and enforcement and execution on the other, that being a dichotomy which we say does not arise textually in the treaty itself.

Before I turn to the Convention, could I set the scene simply by saying that, as your Honours would be well aware, sovereign immunity is a rule of customary international law. It is an accepted and well-understood principle of both customary international law and, in some instances, treaty law. It has been given domestic effect in the *Foreign States Immunities Act 1985* (Cth) and, for the reasons that the Court has given in, for example, *Firebird*, it is necessary only to turn to the content of the *Foreign States Immunities Act* for the purpose of determining the extent of Australia's obligations under the immunities provisions that would be otherwise applicable at international law.

If your Honours turn to page 139 of the application book, there are extracts, relevantly, of the provisions of the *Foreign States Immunities Act*. We are dealing in particular with section 9, which preserves the general immunity. Then, as your Honours may recall from the Australian Law Reform Commission Report No 24, the absolute immunity in this Act is subject to enumerated exceptions.

Those exceptions give effect to what is known as the restrictive theory of state immunity, which essentially provided for exceptions based upon commercial transactions of states. The extension that we are dealing with deals with exceptions based upon the agreements of states. Your Honours will find that in section 10(1):

> A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.

Then subsection (2):

> A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise –

and the proviso is then not applicable to the present circumstances. Your Honours should also be aware - - -

EDELMAN J: Mr Ward, none of this is controversial, is it? Is not the controversial issue just really the operation of Articles 54 and 55, and whether those two articles amount to a submission within the Immunities Act?

MR WARD: Yes, subject to this, your Honour. We say that a narrow construction ought to be given to the *Foreign States Immunities Act* because of the context in which it arose. We say that is consistent with the decision of the New South Wales Court of Appeal to which we have made reference in a number of places in *Li v Zhou* (2014) 87 NSWLR 20, and in particular

to the passage at paragraphs 36 and 37 – the application of the principle of respect for autonomy:

> *militates against the easy acceptance of the conclusion that any party to a treaty as acceded to the jurisdiction of other national courts through inadvertence or based on ambiguity or derived from uncertain inference."*

So, that is the framework in which we seek to put the ICSID Convention. Alternatively, provisions of the treaty - your Honours, it is significant, in our submission, that the submission to jurisdiction by agreement which is said to arise in this case is a piggyback submission, that is, it is said to be the mechanism of Article 26 of the Energy Charter Treaty, which entitled the investors to approach an ICSID Tribunal for arbitral relief. It is then of course the arbitral award from ICSID which considered jurisdiction as part of its ruling, which is the subject of the application for recognition and enforcement in this country. I will return to that at the conclusion of the submissions.

Could I take your Honours, please, to paragraph 37 at page 85 of the application book. At paragraph 37, his Honour Justice Perram deals with the first of the two questions, that is whether there is an agreement simply by reason of accession to the ICSID Convention. His Honour interpreted, at paragraph 37, the content of Articles 54(1) and (2) as constituting an agreement by Spain:

> to submit to the jurisdiction of the Federal Court –

of Australia. If your Honours then turn to the text of the treaty itself, at page 143, there is little or no textual support, in our submission, for the proposition that Article 54 amounts to a submission by Spain to the jurisdiction of the Federal Court. In terms, Article 54 places obligations on contracting states to recognise awards rendered pursuant to the Convention as binding:

> as if it were a final judgment of a court in that State.

In other words, the obligation that we say arises clearly on the text of Article 54 is an obligation upon Spain and other countries to recognise awards when they are presented to them. It is not a waiver of immunity by Spain in respect of awards against us. The obligation goes only so far as to say, if the party approaches the courts of Spain seeking to recognise or enforce an award, Spain would be subject to the considerations of immunity, obliged to, under Article 54, recognise that award.

So, the first proposition that we put is that the text of Article 54 simply does not support the conclusion that is drawn by Justice Perram, with whom other members of the Court agreed, at paragraph 37. The second - - -

EDELMAN J: Mr Ward, what is the role of Article 55, then?

MR WARD: Well, that is where the second of the issues arises, your Honour. It is at that point that we come to the real dilemma…..and the dichotomy that his Honour found between recognition and enforcement. The primary judge's approach, your Honour - and I think I need to deal with it by addressing both of the approaches that were taken - the primary judge - - -

EDELMAN J: Sorry, Mr Ward. My question was really the anterior point, which is, if you are right about your construction of Article 54, then Article 55 is not only redundant, but it is confusing.

MR WARD: With respect, no, your Honour. Article 55, on our construction, applies equally to the recognition and enforcement of awards under Article 54, because they are relevantly indistinguishable, that is, the enforcement of an award which applies throughout Article 54 is taken to be, or should be, on the – at least on the Spanish and French text, which his Honour Justice Perram, with whom the Court agrees, finds controls the interpretation, such that enforcement and execution are both the subject of the immunity in Article 55.

Perhaps the way to do it, your Honour – could I ask the Court to turn to paragraph 76 of his Honour's reasons – of Justice Perram's reasons, application book page 94. His Honour draws a:

> distinction between recognition, on the one hand, and enforcement and execution, on the other –

and his Honour reads Article 55, the immunity preservation:

> as not applying to –

recognition, but does apply to enforcement and execution. The reason his Honour took that approach appears in paragraph 79, by reference to what the primary judge did. The primary judge took a different approach. The primary judge decided that "recognition and enforcement" ran together something in the nature of "executor", as known to the civil law system, but found that Article 55 applied or referred to execution only, not to "recognition and enforcement". That did not sit neatly, as his Honour Justice Perram found, with the inconsistency of the approaches of the

Spanish and French texts, and therein lies the problem with the primary judge's approach.

185 The Full Court in the passage in – Justice Perram at paragraph 79, deals with the problem essentially by reasoning, with respect to his Honour, from the conclusion backwards. If your Honours see at paragraph 79, in the middle of the paragraph, his Honour Justice Perram says:

> 190 The problem in a nutshell is this: wherever the word 'execution' appears in the English text, the French word 'l'execution' appears in the French text and the Spanish word 'ejecutar' (or variants of that word) appear in the Spanish text. By itself this does not cause a problem. What does cause a problem, however, is that wherever the
> 195 word 'enforce' (or 'enforcement') appears in the English text, the self-same words - 'l'execution' and 'ejecutar' - appear in the French and Spanish texts.

Now, that leads his Honour to the conclusion then at paragraph 95, page 99:

> 200 That having been said, one can well understand why the primary judge was driven to his approach of giving the different meanings to 'execution' and 'enforcement'. Since his Honour had characterised the proceeding as being for recognition and enforcement it followed
> 205 that to have concluded otherwise would have resulted in Art 55 applying to the proceeding –

that is, the immunity provision:

> 210 and his Honour thereafter being forced to accept Spain's dyspeptic plea of foreign state immunity.

That rather sounds the bells, your Honours. That is indeed Spain's submission, and it does suggest that his Honour treated the conclusion as
215 somewhat distasteful and decided that it was appropriate to apply reasoning to avoid that outcome, which Spain asserts as being well open, if not correct, on the texts of Articles 54 and 55.

Your Honours, the distinction that is drawn between recognition on
220 the one hand and "enforcement and execution", does not find favour with the commentators, particularly the learned commentator, Professor Schreuer, whose work we have extracted at the applicant's submissions at application book 134, where the professor states that:

> 225 a distinction between enforcement and execution cannot be sustained –

but:

> A triad of concepts . . . is also not useful.

That is a passage which was cited with some approval by the United Kingdom Supreme Court in the case of *Micula v Romania*, to which we have made reference.

In our submission, Article 55 – and this is a long answer to your Honour Justice Edelman's earlier question – should apply, and textually does apply to the content of Article 54 because there is no distinction between recognition and enforcement - execution on the other hand – that is recognition on the one hand and enforcement and execution on the other hand – such that the strict dichotomy found by Justice Perram simply does not exist.

There are other reasons to suggest that that distinction does not exist either within the ICSID system or for the purposes of the *International Arbitration Act* section 35 – and I will come to those. First, as his Honour Justice Perram acknowledges at application book 84, paragraphs 35 and 36, the ICSID Convention uses the terms "recognition" and "enforcement" interchangeably in other parts of the Convention. As his Honour accepts:

> there are some parts of the ICSID Convention where 'enforcement' must include 'recognition'.

We additionally draw the Court's attention at appeal book 145 to the French text of the Convention, which uses the word "and", not "or", in Article 54(2). That is enforcement – recognition and enforcement – not recognition or enforcement, in the French language - - -

EDELMAN J: Mr Ward, on one view "enforcement" would always include "recognition", but "recognition" might not always include or require "enforcement"?

MR WARD: That is certainly possible, and the problem with that is that the *International Arbitration Act* section 35 does not seem to provide for a recognition procedure of the type relied upon by the Full Court or found by the Full Court. Section 35(4) of the *International Arbitration Act*, although appearing under a heading called "Recognition", provides that:

> An award may be enforced in the Federal Court of Australia with the leave of that court as if the award were a judgment or order of that court.

Justice Perram's judgment at paragraph 26 seems to also reach the point that your Honour Justice Edelman just noted, which is that:

> formal confirmation by a municipal court that an arbitral award is authentic and has legal consequences –

may, in a practical sense, amount to the execution of a judgment in ways that affect the substantive rights and obligations of the sovereign state. It is clear that recognition of an award carries with it obligations. Recognition carries with it, for example, the consequences of res judicata and issue estoppel and the like. Those are substantive problems which a state – a sovereign state which has not acceded to the jurisdiction of a domestic court, should not face, in circumstances where it is asserting its sovereign immunity.

The very proceedings that were brought below were not proceedings commenced by the investors seeking recognition. They were proceedings seeking the enforcement of a judgment. The difficulty with the Full Court's approach, we say, is identified clearly in the orders that were ultimately made, those orders, which are in the nature of orders of enforcement, not merely recognition. There was a second round of appearances and argument as a result of which orders were made, and those orders were orders that plainly refer to, in terms, recognition and enforcement of the judgment as what had occurred.

Could I then say, your Honours, for all those reasons there has been no unambiguous or clear acceptance of jurisdiction or waiver of immunity. That position is made even more obvious by the decision of the European Court of Justice in the decision of *Moldova v Komstroy*, to which we, I think, made reference yesterday. We raise the decision solely for the point of saying that, at paragraph 66 the European Court of Justice concluded that Article 26(2) of the Energy Charter Treaty, was not applicable:

> disputes between a member state and an investor of another member state concerning –

investments. That is obviously a jurisdictional argument that went to the ICSID Tribunal's jurisdiction. We raise it simply for this purpose, to say that in circumstances where European law does not recognise the jurisdiction of ICSID in the circumstances of this case, it cannot be said that the jurisdiction – or that the ICSID Convention applies with such clarity and unambiguity so as to amount to a waiver of sovereign immunity before the courts of this country. Those are our submissions, your Honour.

KEANE J: Thank you, Mr Ward. Yes, Mr Walker.

MR WALKER: May it please your Honour. May I deal with that last….. It is simply not admissible in this Court, not least because of section 73, to put something which would require to be proved as a matter of fact, not simply by listing something in a supplementary list of authorities concerning the effect of what I am going to call the law of the EU. …..was no challenge to jurisdiction within the self-contained ICSID system made compulsory by the terms of the ECT, and it is for those reasons that that is a matter which does nothing to diffuse the clarity of the section 10 submission, constituted by the plain agreement to…..dispute resolution.

It is for those reasons, in our submission, that the issues in this case do not present as ripe for special leave, particularly as there is no reason to doubt the correctness of the outcome or of the reasons in the court below. It is not correct to say that the orders that your Honours have seen were eventually made in the Full Court, pages 124 and 125, go beyond enforcement in defence of recognition - - -

KEANE J: Mr Walker, I am sorry to interrupt you, but can I ask Mr Ward - could you please mute yourself? We are getting feedback from you. Thank you. Sorry, Mr Walker. Please continue.

MR WALKER: Not at all, your Honour. So, if one looks at the terms of the order settled after further argument in this proceeding at pages 124 and 125 of the application book, you will see there that the – if I can call it this – the executive force of the court's order, choosing from the array of choices internationally and nationally that their Honours had noted in earlier reasons, was to express the term as being a recognition:

> The Court hereby and in these orders recognises –

and then consistently with that:

> orders that judgment be entered in favour –

in the specified sums. Then following debate concerning the propriety or wisdom of the matter, added at (b), on page 125 that:

> Nothing . . . shall be construed as derogating from the effect of any law relating to immunity of the respondent from execution.

So that what one can see here, the perfectly intelligible grappling with the various senses in which, out of context, or in general terms, the word "enforcement" might encompass both recognition and execution, and perhaps other things as well. Perhaps an award is enforced, for example, if

it were – without any intervening step – able to provide the foundation for set-off or a res judicata.

We can put those theoretical considerations aside, in our submission. It is clear that their Honours entirely and properly observed that which…..was fully entitled to, namely, the application in its favour of the protection given by Article 54(3), the text of which, as you have seen, is at application book page 143, and which by section 32 of the *International Arbitration Act*, seen at page 141, has the force of law in Australia.

The Full Court of the Federal Court has, in our submission, authoritatively and clearly – by which I mean unambiguously, among other things – determined that the effect of the agreement by Spain for ICSID dispute resolution, including the self-contained system for recognition enforcement of its awards, is one which necessarily, as explained concisely and convincingly by Justice Perram, involves acceptance of the jurisdiction of other contracting state's courts for the purpose of enforcement.

There is not a hint, with respect, in Articles 54 and 55, nor for that matter in the provisions of the ECT requiring ICSID dispute resolution, that it runs one way but not the other. So that by some kind of fiscal valve in its favour, Spain can require recognition and enforcement against non-sovereign parties in other contracting state's courts, but it cannot run the other way.

The protection for Spain which is carved out by Article 55 in particular is one which has meaning only if there is otherwise, as the heading to section 6 in Chapter IV of the Convention set out at page 143 plainly indicates that it is dealing with what are conceptually described as "Recognition and Enforcement of the Award" - - -

EDELMAN J: Mr Walker, what do you say to the submission by the applicant that there is an unusual principle of interpretation that one applies to issues relating to waiver, where waiver is only possible if it is done without ambiguity?

MR WALKER: Your Honour, at the end of the day, the notion of requiring an absence of ambiguity is itself, I intend the jest, ambiguous. It cannot suffice that there are contrary arguments – that is opposed arguments concerning the meaning of something – to render it for all time thereafter ambiguous, notwithstanding the clear outcome of that argument by the tribunal in question. That is the first thing.

The second thing is, plainly enough, whether there be a waiver depends upon the meaning of the words – in this case, in writing – which are said to constitute the waiver. If there is doubt to an extent sensibly

conveyed by the notion of ambiguity, then no doubt it can simply be said, these are not words that import a waiver if you need to add it, unnecessarily, with sufficient clarity to constitute a waiver.

It is for those reasons, in our submission, that there is nothing in that as a matter of principle as adjectival law, that is, concerning particular judicial method for construing agreements within the meaning of section 10 and section 3 of the *Foreign States Immunities Act*, there is no worth at all in this Court looking at it. It is not imaginable that there will be some special approach to the meaning of the words of an agreement, bearing in mind, as your Honours appreciate, the drafting history by which it will be for a court, an Australian court, using familiar techniques, to determine whether or not an agreement in a treaty, for example, constitutes the submission to arbitration for the purposes of section 10.

It is for those reasons, in our submission, that just as a matter of principle or judicial method, there really is nothing in this point fit for this Court to consider as if to lay down special rules concerning ambiguity. That is the first thing. The second thing is that in any event it has no purchase in the issues as contested in the courts below, in this sense.

It can hardly be said that the outcome to which Justice Perram reasons with the agreement of the Chief Justice and Justice Moshinsky, lends itself to any doubt as to the clarity with which his Honour sees the outcome produced by an analysis of the conduct constituted by the words of the treaty. That is the first thing.

The second thing is one simply cannot – without going into evidence that this Court could not entertain on an appeal – one simply cannot point to the fact that in a different tribunal between parties where the substantive law is the law of the European Union, in order to say that they order things differently in different places, and accordingly for the purposes of the Australian – and the reception in the Australian statute of the conduct of Spain in a treaty which is required to be interpreted by an Australian court, there is created any ambiguity.

It is not suggested, nor could it be, that the decision of the European court contains anything persuasive concerning section 10. One only has to see the issues in that case to understand it was a completely different milieu, in which the provisions of Article 26 of the ECT fell into question in that European court. It had nothing - - -

EDELMAN J: Mr Walker, what do you say then about the submission that "recognition" and "enforcement" are used interchangeably, and, potentially, I would infer from the applicant's submissions, also with "execution" throughout the Convention?

MR WALKER: It is plainly incorrect textually – I am just coming back to page 143:

> A party seeking recognition or enforcement –

does not mean those words are interchangeable, even if, of course, they overlap or intersect. Their Honours below, convincingly and satisfyingly from the point of our domestic legal system, see "recognition" as an aspect of "enforcement", though "enforcement" can and does in an ordinary case not involving sovereign immunity, extend beyond mere recognition at least where there is not a voluntary compliance with judgments or orders. That is the first thing.

The second thing is that plainly execution is, by the text of Article 53(2) and (3), quite differently dealt with, and execution, obviously, is an aspect of enforcement which does not describe the whole realm of enforcement. Article 55 then plainly ensures that execution is carved out from the submission to jurisdiction which is conveyed by Article 54, and it is for those reasons that there is simply nothing in the point that some mystery continues to obtain which this Court should seek to dispel as to the boundaries of definition and the degree of overlap between "enforcement", "recognition" and "execution".

It is for those reasons, in our submission, that, were special leave to be granted, the actual issues in this case, bearing in mind the form of the order made in the Full Court below, would not touch upon any of the – what might or might not be – still interesting subject matter for learned commentators.

Now, by that last comment I should not be taken as conceding that there is much of further interest to be extracted at the level of international commentary, because this Court is obviously and properly seized with the question of the proper understanding and application of an Australian statute by reference to facts, namely accession to the relevant treaties, which can hardly be questioned as to their clarity.

It is for those reasons, in our submission, that there is nothing worthy of the grant of special leave in that which in the rather colourfully described international treaty negotiations as canvassed by their Honours in the court below, there is nothing that arises which involves any useful further argument about the differences which are manifest between recognition on the one hand and execution on the other.

That both and each may be regarded, at least in our legal usage, as being aspects of enforcement does not mean that they are and are only

enforcement, and it does not mean that all enforcement is always both recognition and execution. Article 55 makes crystal clear that cannot be right.

It is for those reasons, in our submission, that there is simply nothing in what might be described as a phantom issue, namely whether the undoubted immunity from execution in Article 55 carries with it – by execution being a species of enforcement – an equal immunity from recognition, which may also be regarded as another species of enforcement. That is an illegitimate form of reasoning - I call it a phantom point because it does not appear, perhaps in those full colours, but there is nothing in any such supposition for the reasons that have been expressed in the court below, and in our submission this Court would not take on an appeal to investigate such sterile issues. May it please the Court.

KEANE J: Thanks, Mr Walker. Yes, Mr Ward.

MR WARD: Just briefly, your Honours. For the purposes of section 35, the Full Court in the reasons for the pronouncement of orders, found at application book 114, paragraph 7, identified that:

> For the purposes of s 35 the order . . . gives the award the recognised status of a judgment and is enforceable as such.

That is, the court, having found a strict dichotomy to exist in the primary reasons, then recognised – as this Court has previously found in *TCL*, for example, that enforcement and recognition tend to be conceptually identified in the same way, in at least Australian courts, such that the distinction – the strict dichotomy – in truth does not exist.

This is a treaty, your Honours, of general application. Plainly ICSID is a treaty of extraordinarily wide import. It could not be said, as my learned friend, Mr Walker, put, that this is an issue which is not deserving of special leave to appeal if in truth there be an ambiguity that requires clarification. Those are our submissions in reply, your Honours.

KEANE J: Thanks, Mr Ward. The Court will adjourn for a moment to consider the course it will take in this matter.

AT 10.05 AM SHORT ADJOURNMENT

UPON RESUMING AT 10.08 AM:

KEANE J: There will be a grant of special leave in this matter. Mr Ward, what is your estimate so far as time is concerned?

MR WARD: Your Honour, I think I will take between two and three hours, not more.

KEANE J: Mr Walker?

MR WALKER: I think we would plainly finish within the day, your Honour.

KEANE J: It will finish within a day, notwithstanding Mr Ward's estimate of possibly three hours.

MR WARD: I will limit myself to two and a half, your Honour.

MR WALKER: I was about to say, I will probably discuss that with my learned friend. I have no doubt we can agree to finish it within a day.

MR WARD: I agree.

KEANE J: Very well. Special leave is granted.

Adjourn the Court, please.

AT 10.09 AM THE MATTER WAS CONCLUDED