Neutral Citation: [2016] IEHC 552

THE HIGH COURT

[2012 No. 10930 P]

BETWEEN

PAUL BRADY

AND

JOHN BRADY

PLAINTIFFS

AND

OLIVER CHOISEUL TRADING AS POTATO SERVICES,

S.J. MCCREIGHT (POTATOES) LIMITED

AND

DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 12th day of October, 2016

1. In this application, the third defendant ("DARD") seeks an order pursuant to O.12, r. 26 of the Rules of the Superior Courts and the court's inherent jurisdiction setting aside the service of the plenary summons and statement of claim herein on DARD on the primary ground that it enjoys the benefit of sovereign immunity. Other technical objections to service are raised by DARD on the basis of non-compliance with the Rules of the Superior Courts.

Background facts

2. The plaintiffs are potato farmers with lands in Kilcoole, Co. Wicklow. In March 2012, the plaintiff purchased two batches of "Premier Elite" potato seed from the first defendant, a seed supplier in Co. Offaly. The first defendant sourced this seed from the second defendant, a seed potato business in Northern Ireland. The first batch of seed was supplied to the plaintiffs on 5th March, 2012, directly by the second defendant. On 16th March, 2012, a second batch was supplied by the second defendant to the first defendant, who supplied it to the plaintiffs. The seed in question is alleged by the plaintiffs in their statement of claim to have been certified by DARD in its capacity as the statutory and legal authority in Northern Ireland designated for the purposes of implementing statutory requirements in respect of crop certification. The plaintiff pleads that DARD is the ministry responsible for implementing policy pursuant to the provisions of the Seed Potatoes Regulations (Northern Ireland) 2010 and the Marketing of Potatoes Regulations (Northern Ireland) 1989.

3. The seed was duly planted by the plaintiffs and the essence of their claim is that the crop failed because the seed in fact was not "Premier Elite" but of inferior quality and unknown origin, contrary to its certification by DARD. The plaintiffs claim for the losses they have suffered on the following basis, as pleaded at para. 15 of the amended statement of claim:

> "(15.) The said loss, damage, inconvenience and expense was occasioned the plaintiffs by the breach of contract, negligence, breach of duty, breach of statutory duty and failure of the defendants or any one or other of them to comply with the requisite procedures as set forth in the Seed Potatoes Regulations (Northern Ireland) 2010 and the Marketing of Potatoes Regulations (Northern Ireland) 1989 which provide specific controls and requirements with regard to inspection of seed tubers on farm, seed for export, home trade seed and ware, and in the State with Department of Agriculture, Food and the Marine seed potato certification scheme, which scheme requires that all certified seed comply with the legal standards with regard to varietal purity, and plant health standards".

4. Particulars of this plea are raised against each defendant in turn. In relation to DARD, the plaintiffs claim that it permitted certification labels to be issued to suppliers which were pre-stamped without the requisite inspection by DARD having taken place, thus leaving the certification system open to significant abuse. The particulars allege that DARD failed to inspect, manage and control the seed certification system in accordance with its policy and the relevant regulations and further that it was negligent in the manner in which it implemented the regulations.

5. Judgment in default has been obtained against the second defendant.

The Evidence on this Application

6. In dealing with the issue of sovereign immunity, DARD places particular reliance on the affidavit of Jim Crummie, head of Plant Health Directorate of what is now called the Department of Agriculture, Environment and Rural Affairs of Northern Ireland or "DAERA". He avers that the affidavit is made with the authority of the Minister of Agriculture, Environment and Rural Affairs in the Northern Ireland Executive. He avers that DAERA is a statutory corporation which exists independently of the Minister and has statutory powers but is under the direction and control of the Minister by virtue of the Northern Ireland Act of 1998 and the Departments (Northern Ireland) Order of 1999. He avers that section 22 (1) of the Northern Ireland Act 1998 provides that the executive power in Northern Ireland shall continue to be vested in Her Majesty and accordingly departments such as DAERA exercise the executive powers conferred under statute on behalf of the Crown. DAERA also oversees the application of EU Agricultural and Rural Development Policy in Northern Ireland pursuant to European Communities (Designation) (No. 3) Order 2000 (S.I. 2000/2812). He avers that DAERA does not have any commercial role in seed marketing. In para. 6 of his affidavit, Mr. Crummie says:

> "(6.) At para. 5 of his affidavit, Mr. Cullen also disputes that "the Minister of Agricultural and Rural Development is a Minister of a foreign government" and that the Minister is "entitled in her own right to maintain a claim of sovereign immunity". These assertions are also misplaced. The Minister is a Minister within the Northern Ireland Executive which is a devolved government within the United Kingdom pursuant to the Northern Ireland Act 1998. Northern Ireland Departments are Crown bodies and the functions in question are conferred on DAERA as such a department. The Executive, the Minister and DAERA are agents of the Crown."

7. In opposing this application, the plaintiffs place particular reliance on an affidavit from Professor Gordon Anthony, a leading academic lawyer and practising barrister with expertise in the sphere of public law in Northern Ireland. In his affidavit, Professor Anthony exhibits a detailed opinion which deals with state immunity and the status of Northern Ireland Departments. In his opinion, Professor Anthony analyses the doctrine of state immunity in the context of the devolved institutions of the Northern Ireland Government. Professor Anthony expresses his conclusion in the following terms:

> "(27.) To recap, the following, core points can be taken from this opinion:
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> i. State immunity, as an international law doctrine, can be claimed only by sovereign states. One of the key indicators of sovereign statehood is the capacity to enter into international relations with other sovereign states.
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> ii. There appear to be two main approaches to the question whether sub-state units can claim state immunity: the first considers whether the sub-state unit share sovereign powers with the state proper; the second considers whether the sub-state unit has the capacity to enter into international relations with sovereign states.
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> iii. The application of the first approach to the circumstances of Northern Ireland Departments and Ministers would suggest, certainly as regards sovereignty, that they cannot claim state immunity. This is because the Northern Ireland institutions are not legally sovereign and/or competent to act only in relation to transferred matters under the Northern Ireland Act 1998.
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> iv. On the other hand, the position of the Crown may be a complicating consideration in relation to the first approach. All executive power in the UK, including the devolved territories, is exercised under the authority of the Crown, which acts as a constitutional constant in government. That said, the Northern Ireland Act 1998 makes a clear distinction between the Northern Ireland and UK governments and the functions performed by their Ministers. While Northern Ireland Ministers are therefore competent to act only in relation to transferred matters, no such limits apply to Ministers of the Crown who have, among their responsibilities, the high matters of state.
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> v. The application of the second approach would lead unambiguously to the conclusion that Northern Ireland Ministers and Departments cannot claim state immunity. International relations are an excepted matter under Schedule 2 to the Northern Ireland Act 1998, and there are examples from the realm of EU law that illustrate the fact that the Northern Ireland institutions have no international legal personality.
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> vi. Even if Northern Ireland ministers and departments can claim state immunity, it might be doubted whether the facts of this case are such as would merit recognition of such immunity. This is notably true given the EU context to the case and the possible restriction on the plaintiff's right of access to justice under, *inter alia*, Article 47 of the Charter of Fundamental Rights of European Union."

8. At para. 15 of his opinion, in commenting on Mr. Crummie's affidavit, Professor Anthony states that Mr. Crummie's averment that the Executive, the Minister and the Department are agents of the Crown is a correct statement of the law and corresponds with a number of other provisions that place the Crown at the centre of executive power in Northern Ireland.

Sovereign Immunity.

9. In *Canada v. EAT* [1992] 2 I.R. 484, the notice party was employed at the Canadian Embassy in Dublin driving the ambassador's car. He alleged that he was wrongfully dismissed and brought a claim before the Employment Appeals Tribunal which was successful. The Canadian Government sought judicial review to quash the award on the ground that the EAT had no jurisdiction by virtue of Canada's sovereign immunity. The Supreme Court agreed with this proposition and quashed the decision. McCarthy J. commented on the doctrine of sovereign immunity in the following terms (at p. 491):

> "It is a generally recognised principle of international law that foreign states and their agents at one time enjoyed sovereign immunity from being impleaded before any court or administrative tribunal in the domestic arena. The history of that immunity is detailed in the judgment about to be read by O'Flaherty J. I accept his conclusion that it is now clear that the general principles of international law have so developed as to depart radically from the absolute state immunity doctrine to a much more restrictive view of sovereign immunity. It is, still, immunity but its application is restricted. I adopt the observations of Lord Wilberforce in *Congreso del Partido* [1983] A.C. 244 at p. 267 as being a correct statement of the current generally recognised principles of international law - one must decide 'whether the relevant acts upon which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character . . . or whether' it 'should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.'"

10. In his judgment, O'Flaherty J. analysed the evolution of the principles of sovereign immunity and reached the following conclusions (at p. 500):

> "[1.] I doubt if the doctrine of absolute sovereign immunity was ever conclusively established in our jurisdiction.
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> [2.] Assuming that it was, I believe that it is a doctrine that has now expired.
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> [3.] The doctrine flourished at a time when a sovereign state was concerned only with the conduct of its armed forces, foreign affairs and the operation of its currency. Now with so many states engaged in the business of trade, direct or indirect, the rule of absolute immunity is not appropriate to such conditions.
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> [4.] However, if the activity called in question truly touches the actual business or policy of the foreign government then immunity should still be accorded to such activity.

Mr. Burke's claim

> Into which category does Mr. Burke's claim fall, public or private? The employment of a chauffeur at the Canadian Embassy is clearly not a commercial contract in the ordinary sense of the word; it is a contract of service. Is it any different to having the heating system in the embassy repaired? (cf. the claim against the *Empire of Iran* (1963) 45 I.L.R. 57). I believe it is. I think once one approaches the embassy gates one must do so on an amber light. Prima facie

anything to do with the embassy is within the public domain of the government in question. It may be that this presumption can be rebutted as happened in the *Empire of Iran* case. I believe that the element of trust and confidentiality that is reposed in the driver of an embassy car creates a bond with his employers that has the effect of involving him in the employing government's public business organisation and interests. Accordingly, I hold that the doctrine of restrictive state immunity applies to this case."

11. In *McElhinney v. Williams and Secretary of State for Northern Ireland* [1995] 3 I.R. 382, the first defendant was a corporal in the British Army alleged to have assaulted the plaintiff in this jurisdiction in the course of carrying out his duties at a checkpoint on the Northern Ireland border. The plaintiff's cause of action was a claim for damages in tort. The Supreme Court held, applying *Canada*, that the principle of sovereign immunity no longer applied in respect of commercial or trading activities in which a foreign government participated. However, in the instant case the first defendant was engaged in governmental activity on behalf of a sovereign state and was thus entitled to immunity. The court rejected the plaintiff's submission that it was a principle of international law that immunity should be restricted in respect of tortious acts causing personal injuries, even where resulting from governmental activity.

12. In opposing this application, the plaintiffs relied in particular on the judgment of the Supreme Court in *Short v. Ireland & Ors* [1996] 2 I.R. 188 ("*Short No. 1*"), where an application to set aside the summons was made by the third defendant, British Nuclear Fuels ("BNF"), a private body responsible for the development of a nuclear reprocessing facility at Sellafield in the UK. The issue in that case was whether or not leave to serve the summons outside the jurisdiction ought to have been granted under O.11 of the Rules of the Superior Courts since the claim more properly lay within the ambit of O.11A. BNF argued further before the Supreme Court that as they were compliant with UK legislation as found by the English High Court, the Irish courts could not entertain the claim as to do so would interfere with decisions of a neighbouring sovereign power by embarking on a form of judicial review of the decisions of another sovereign state. Barrington J., delivering the judgment of the Supreme Court, dealt with this argument in the following manner (at p. 218):

> "But what gives the plaintiffs a cause of action, if they have one, is not the activities as such but the allegedly harmful results of these activities in Ireland in the area where the plaintiffs reside. It is these allegedly harmful results which give the Irish courts jurisdiction to deal with the complaints, and, if they find the complaints established, to attempt to give the plaintiffs relief, without trespassing on the jurisdiction of the courts of any neighbouring state. *Prima facie* the matter would appear to be simply a matter of national law; the plaintiffs would appear to be entitled to bring their claim; and the Irish courts would appear to have jurisdiction to entertain it.

European law

> The case may of course develop in a much more complicated way. *Prima facie* it is difficult to see how any provision of English law could make legal in Ireland injury or damage which would otherwise be tortious under Irish law. Certainly it is hard to see how any provision of English Law could deprive the Irish courts of jurisdiction which they would otherwise have. Prima facie the relevant law would appear to be the *lex loci delicti* rather than the law of the United Kingdom."

13. It will be seen therefore that this case was not specifically concerned with the issue of sovereign immunity nor could British Nuclear Fuels make such a claim as a private body.

14. In *Schmidt v. Home Secretary of the Government of the United Kingdom* [1997] 2 I.R. 121, the plaintiff was a German national living in Ireland who was wanted for drug trafficking in Germany. He was tricked by the third defendant, a police constable in the UK Metropolitan Police, to travel to the UK where he was arrested and subsequently extradited to Germany where he was convicted and sentenced. On his release from prison and return to Ireland, he instituted proceedings claiming damages for, inter alia, false imprisonment and trespass to the person. The defendants sought to set aside the summons in reliance upon sovereign immunity. The plaintiff's answer to this contention was not that the defendants could not invoke the immunity but rather that in acting as he did, the third defendant had been on a frolic of his own and could not avail of the immunity. This argument was rejected by the Supreme Court. In delivering the court's judgment, Lynch J. said (at p. 128):

> "It is clear that the actions of the third defendant in this case were not commercial or civil activities. They related to his position as a constable at the relevant time assigned to the Extradition Passport and Illegal Immigration Squad of the International and Organised Crime Branch of the Metropolitan Police in England."

15. The court went on to hold that although the third defendant had acted wrongfully, he had done so in the purported performance of his duties and thus enjoyed immunity. Had he behaved properly, immunity could not arise as there would be no wrongful conduct which could ground a claim.

16. In *Short v. Ireland* (No. 2) [2006] 3 I.R. 297 ("*Short No. 2*"), at a preliminary hearing in the High Court relating to jurisdiction, British Nuclear Fuels argued that the plaintiffs' claim insofar as it related to the granting of licenses and permissions by a foreign government fell outside the jurisdiction of the Irish Courts as the validity of the granting of any such authorisations could not be reviewed here. British Nuclear Fuels' contention was upheld by the High Court and on appeal by the Supreme Court whose judgement was delivered by Fennelly J. He said (at p. 315):

> "[48.] What is at issue is the jurisdiction of an Irish Court to determine the lawfulness or validity, under the law of the United Kingdom, of administrative decisions made in that jurisdiction in accordance with national law and procedures. It seems to me elementary that our courts have no power to review the lawfulness of administrative decisions made by English administrative bodies under English law, any more than the English courts would have corresponding power to pass judgment on Irish administrative decisions. The courts of each country alone have the power to review the legality, within their own frontiers, of decisions of their own government and administration.
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> [49.] McGuinness J. decided as much in *Adams v Director of Public Prosecutions and Her Majesty's Secretary of State for Home Affairs* [2001] 1 I.R. 47. The applicant had been extradited to Ireland from Northern Ireland, with his consent, on larceny and forgery charges, for which he was tried and convicted. He served his sentence but was then charged with a number of sexual offences. The British Home Secretary gave a certificate waiving specialty in respect of the latter. The applicant applied to the High Court for an order of certiorari in respect of the Home Secretary's certificate. Leave to apply was granted, and purported service was effected at the Foreign and Commonwealth Office in London. Proceedings were brought, successfully, to set aside the leave and to dismiss the proceedings. On appeal to this court, McGuinness J., giving the unanimous judgment of the court, stated at p. 51:

> 'At the hearing before this court, however, the basic issue of jurisdiction was raised by the court. It seemed to the court that the question as to whether the High Court (or this court on appeal) had any jurisdiction whatever to judicially review the administrative or executive actions of a Minister of a foreign government carried out in his own country was fundamental to the entire proceedings. If such a jurisdiction did not exist, the question of service of the proceedings, and indeed the question of sovereign immunity, did not truly arise.' "

17. Fennelly J. continued (commencing at p. 318):

> "[55.] I do not believe it to be necessary to lay down any broad principles in order to determine the present case. We are not concerned with sovereign immunity or acts of state. We are concerned with the much simpler and narrower question of whether the courts of one state have jurisdiction to determine the validity of administrative acts of the authorities of another state which are not claimed to have any legal effect outside the borders of the latter state…
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> [58.] The ultimate question in the present case is whether the courts of one Member State (Ireland) have jurisdiction to determine the lawfulness and validity of administrative procedures and decisions of another Member State (the United Kingdom), where, as is claimed here, those decisions have rendered lawful, by authorising them to be carried out within the boundaries of that other state, activities alleged to cause damage in the first Member State.
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> [59.] I am satisfied that Peart J. was correct to hold that the High Court does not have that jurisdiction…
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> The principle of comity requires that the courts of one state abstain from pronouncing on matters such as the regulatory claims, in respect of which the primary and obvious jurisdiction rests with the courts of another state.
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> [61.] In addition, there are practical considerations. Only an English court will be familiar with English law and procedure. It is a matter for English courts, where they are obliged to do so, to interpret national law in the light of Community law. It would be patently absurd for the courts of another Member State to exercise such power. Apart from anything else, there would be a real risk of conflicting decisions, if the same administrative act were to be reviewed according to the laws of two or more Member States."

18. As can be seen from the foregoing, *Short (No 2)* was not concerned with the issue of sovereign immunity. It was however, concerned with the court's jurisdiction to review the validity of both administrative decisions and, as in *Adams*, executive actions of the authorities of another jurisdiction.

Discussion.
19. The primary issue is whether DARD is entitled to the benefit of sovereign immunity in our courts. That is a question of Irish law. Professor Anthony's opinion, helpful and comprehensive though it is, comprises an expert view on Northern Irish law. At its height from the plaintiff's perspective, Professor's Anthony's opinion suggests that DARD does not possess an international legal personality sufficient to enable it to mount a claim of sovereign immunity. Professor Anthony considers that Northern Ireland institutions such as DARD do not enjoy the capacity to enter into international relations by virtue of the provisions of Schedule 2 of the Northern Ireland Act of 1998 and in consequence cannot be regarded as entitled to sovereign immunity. However, I do not think that is the appropriate test to be applied in this jurisdiction. It seems to me to be clear from the decisions in *Canada*, *Schmidt* and *McElhinney* that once the actor concerned can properly be regarded as an agent of the state, the only question to be answered is whether the activity concerned is of a public rather than private nature.

20. In the present case, it cannot be doubted that DARD was at all material times engaged in governmental activity. It is common case that such activity was carried out as agent and on behalf of the Crown. This is not in dispute. That seems to me to be sufficient to ground a claim for immunity. Were it otherwise and Professor Anthony's view to be applied, it would have the rather surprising result that a police constable or a soldier carrying out their duties on behalf of the United Kingdom Government when sued in tort in this jurisdiction is entitled to claim sovereign immunity but a similar claim against a Northern Ireland Ministry does not attract such immunity. Nor can it be doubted that DARD in administering the seed certification programme is doing so in a public law capacity and is not engaging in trade or commerce.

21. In addition, the plaintiff's claim, whilst fundamentally sounding in tort, specifically relies on breach of statutory duty as against DARD. As I have already pointed out, the plaintiffs plead that DARD acted in breach of relevant Northern Ireland regulations and the correctness or otherwise of such plea would necessarily involve this court in an analysis of those provisions and a determination of whether there had been compliance with them. As pointed out by Fennelly J. in *Short (No. 2)* and McGuinness J. in *Adams*, the courts of this jurisdiction are not competent to adjudicate upon the validity of such administrative and executive acts by the agent of a foreign sovereign acting solely within its own jurisdiction.

Conclusion.
22. For these reasons therefore, I am satisfied that this court does not have jurisdiction in relation to this matter and I propose to set aside the service of the amended plenary summons and statement of claim on DARD. As this disposes of the matter, it is unnecessary to consider the separate grounds herein relating to compliance with the Rules.