

PAKISTAN'S ATTEMPT TO END ENGLISH HIGH COURT CLAIM RULED AS AN ABUSE OF PROCESS

High Commissioner for Pakistan in the United Kingdom v National Westminster Bank & Ors
[2015] EWHC 55 (Ch)

Introduction

In a decision handed down on 16 January 2015 in *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank & Ors* [2015] EWHC 55 (Ch), the English High Court (Mr Justice Henderson) refused permission for the Claimant High Commissioner to discontinue proceedings instituted to recover funds (now amounting to approximately £35 million held by the Defendant bank since the 1950s) in an attempt to preserve its sovereign immunity.

Legal principles

By virtue of the English State Immunity Act 1978, a state is immune from the jurisdiction of the courts of other states, unless it has submitted to the jurisdiction of those courts by, for example, instituting proceedings. In English procedural law, a claimant is entitled to discontinue proceedings that it has commenced, but there are circumstances where such discontinuance requires the permission of the court.

Background

Following the formation of India and Pakistan in 1947, the Nizam of Hyderabad was permitted to elect to join either of the two new states or to remain independent. The Nizam chose independence, but Hyderabad was annexed by India in 1948. After the Nizam's army surrendered, a transfer of £1 million of the Nizam's money was made to an account in the name of the High Commissioner of Pakistan at the Defendant bank. Shortly afterwards, the Nizam sought to reverse the transfer on the grounds that it had been made without his authority. Pakistan refused to transfer the money back.

The Nizam commenced proceedings in London in 1954 against the Defendant and the High Commissioner to recover the funds. Pakistan's defence of sovereign immunity was upheld by the House of Lords and the proceedings were stayed. India later made a claim to the funds, as did the grandchildren of the Nizam.

In 2013, the current High Commissioner of Pakistan (the Claimant in the present action) commenced proceedings against the Defendant, asserting that Pakistan was entitled to the funds. By way of a Notice of Discontinuance, the Claimant then discontinued its claim, later stating that it was under no obligation to explain why the Notice had been served. The

Defendant applied to the court to set aside the Notice of Discontinuance, as did India and the Nizam's grandchildren (who were applying to join the proceedings).

Decision

The court decided that it was clearly appropriate for India and the Nizam's grandchildren to be joined to the proceedings in light of the fact that there was an existing issue between them and an existing party to the proceedings. It would in any event have been necessary to join them to the proceedings to decide issues related to costs.

The court considered that, when deciding whether to set aside a Notice of Discontinuance, it is necessary to have regard to the overall position between the parties, and to examine what the claimant is attempting to achieve by serving a Notice of Discontinuance.

Having considered the inconsistencies in the reasons advanced in court by Pakistan as to why it had served a Notice of Discontinuance, and having rejected Pakistan's assertion that it was under pressure from India to withdraw the proceedings, the court concluded that the objective of Pakistan's purported discontinuance was solely to preserve its immunity for the purposes of negotiations.

However, Pakistan had initiated proceedings in England & Wales. Having considered Section 2 of the State Immunity Act 1978, the court took the view that initiating proceedings constituted a submission to the jurisdiction and, by necessity, a waiver of immunity. Such a submission to the jurisdiction must be irrevocable and must extend to procedural steps and interim measures taken by the court in the course of the proceedings.

Accordingly, the court exercised its discretion to set aside Pakistan's Notice of Discontinuance.

Conclusion

The decision is an example of the English courts finding practical solutions to enable and further the resolution of a dispute that has been in effective legal stalemate for over 50 years.

It is important for governments and state entities, when considering whether to commence a claim in another state, to be aware of the possibility that by so doing they will be viewed as having submitted to the jurisdiction of that state and, as a consequence, their state immunity will have been waived.

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