CONTROLLER AND AUDITOR-GENERAL V DAVISON: THREE COMMENTS

W K Hastings[1]

Documents belonging to the European Pacific group of companies came into the possession of Winston Peters, a Member of Parliament. These documents were in a winebox. He tabled them in the House of Representatives and alleged that the documents were evidence that several New Zealand companies evaded New Zealand income tax by using the Cook Islands tax haven. He also alleged that the Commissioner of Inland Revenue and the Director of the Serious Fraud Office had been incompetent in failing to detect the alleged tax evasion. A Commission of Inquiry was established to investigate these matters. In the course of this Inquiry, the Auditor-General sought a declaration that the "Winebox" Commission of Inquiry had no authority to order it to produce documents. These documents were possessed by the Auditor-General in the exercise of its function as Government Auditor under Article 71 of the Cook Islands Constitution.

In *Controller and Auditor-General v Davison*[2] the Court of Appeal took three distinct roads to withhold state immunity from the Auditor-General of the Cook Islands. The case involved an application for judicial review of an order by the "Winebox" Commission of Inquiry to the Audit Office and KPMG Peat Marwick to produce documents relating to their functions as Government Auditor of the Cook Islands. This brief comment is limited to the sovereign immunity aspects of the case involving these two defendants and does not venture into a discussion of the second and third judicial review proceedings involving the incrimination of witnesses.

Briefly stated, the President of the Court of Appeal invoked a "public policy-based approach"[3] and held that "it would subvert the intention of the New Zealand Parliament if New Zealand Courts were to hold that ... the Commissioner's Inquiry into these tax matters

1 Senior Lecturer in Law, Victoria University of Wellington.

2 Unreported, CA 226/95, 16 February 1996.

3 Cooke P, 8.

could be frustrated by invoking the doctrine of sovereign immunity ...".[4] Thomas J, along with Henry J, accepted that the restrictive theory of sovereign immunity applied on the facts, and after examining the "nature and purpose of the transaction" and "the whole context of the claim" was "left in no doubt that the Cook Islands Government cannot properly claim to be outside the scope of the 'commercial' or non-governmental exception to the doctrine of sovereign immunity."[5] Richardson J also accepted the restrictive theory of sovereign immunity but rejected its application on the facts when he decided that the documents held by the Audit Office relating to the selling of tax credits related to an act that only a sovereign state could do. Under the commercial exception to sovereign immunity, the Audit Office was consequently protected. Richardson J found however that there is another exception to sovereign immunity, the "iniquity" exception. This exception operates to deny a claim to sovereign immunity when "the impugned activity, if established, breaches a fundamental principle of justice or some deep-rooted tradition of the forum state."[6] Applying that test to deny the Audit Office immunity, His Honour stated that "[d]efrauding the public revenue strikes at the heart of government. It would be indefensible for a friendly state to be party to an attempt to evade or abuse our tax laws. It would also undermine those values generally acceptable to New Zealanders which the Cook Islands has committed itself to uphold."[7]

It is often somewhat difficult to discern the ratio decidendi in the decisions, with the exception of Richardson J's. For example, Thomas J purported to "warmly endorse" Richardson J's "iniquity" exception,[8] even calling it the "preferable approach"[9] although he also called it his "alternative approach"[10] which implies that his reasoning was based on the commercial exception. Henry J stated that whether or not the court should adopt Richardson J's "iniquity" exception was "debatable"[11] but then said that there are "compelling reasons for excluding the doctrine of sovereign immunity, even if the restrictive theory did not apply ...".[12] The President, after stating that a court "cannot fall back on a

4 Cooke P, 6-7.

5 Thomas J, 9.

6 Richardson J, 21.

7 Richardson J, 24. The commitment is found in the 1973 Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands about which see below Angelo comment.

8 Thomas J, 3.

9 Thomas J, 10.

10 Thomas J, 3, 10.

11 Henry J, 4.

12 Henry J, 5.

bland answer" that immunity applies when faced with a "serious issue of illegality or iniquity"[13] went on consider the claim to sovereign immunity and held that the "commercial aspect" of the activities of the Cook Islands Government "is so significant that one can have no doubt that the doctrine of sovereign immunity must be excluded ...".[14] His Honour stated that Richardson J's "iniquity" exception to sovereign immunity was to "peer optimistically into the future far beyond the bounds of anything falling to be decided in the present judicial review proceedings,"[15] but also said he sympathised with the concluding part (the "iniquity" part) of his judgment.[16] Having squarely characterised the activities of the Cook Islands as within the commercial exception, the President preferred "to confine the reasoning in this judgment to issues of tax avoidance or evasion under investigation by a national commission of inquiry"[17], thereby reinforcing his view that a successful plea of sovereign immunity on any ground would subvert the intention of Parliament.

Each judgment relied on Lord Wilberforce's dicta in *I Congresso del Partido*[18]:

> ... the Court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) on 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, in which the state has chosen to engage or whether the relevant act(s) should be considered as having been done outside that area and within the sphere of governmental activity.

Yet the decisions relying on this dicta and applying the doctrine of restrictive immunity to the facts reached opposite conclusions on how to characterise the Cook Islands' involvement. The President stated *obiter* that "ostensibly commercial sale-and-purchase contracts" were a "key component of the arrangements."[19] Thomas J said that what was involved was a "financial arrangement in which the Cook Islands Government was a participant and, as with its commercial associates, it looked for and received what was a commercial profit."[20] The relevant acts of the Cook Islands in both judgments were

---

13 Cooke P, 8.

14 Cooke P, 13.

15 Cooke P, 15.

16 Cooke P, 14.

17 Cooke P, 15.

18 [1983] 1 AC 244, 262, endorsed by the House of Lords in *Kuwait Airways Corporation v Iraqi Airways Corporation* [1995] 1 WLR 1147.

19 Cooke P, 13.

20 Thomas J, 9.

characterised as commercial and therefore not subject to immunity. Richardson J, also applying Lord Wilberforce's dicta, stated that "the issue of a tax certificate for tax stated to have been paid was an integral feature". "It was a public act of the state,"[21] was characterised as governmental and was therefore subject to immunity. It is apparent that reasonable persons confronted with identical facts are capable of applying the *Congresso* test to produce results that could not be more widely separated. The continued utility of this common law test, albeit widely endorsed, must surely be questioned, at least in its application to complex, or as the President called them, "mixed-up" transactions[22] that are of both a governmental and commercial character. Might a carefully drafted statute of the kind that exists in many Commonwealth countries, but not in New Zealand, be of more use?

The facts supporting "iniquity" were used in very different ways by the President and Richardson J. Cooke P stated that a "warning seems appropriate that older doctrines such as sovereign immunity ... will not necessarily be apt when dealing with this sophisticated modern phenomenon."[23] The sophisticated modern phenomenon is the illegal use of tax havens. This "public-policy approach"[24] was described as analogous to that applied in the *Spycatcher* case[25] where the public policy of the forum allowed a publication in breach of duties of confidence owed to the British Crown. This approach was also supported by a statement in Cheshire and North's *Private International Law* to the effect that courts will not countenance a fraudulent tax evasion scheme knowingly designed to violate a revenue law of a foreign state.[26] *Spycatcher* of course did not involve the British Crown in any allegation of wrongdoing, and the Cheshire and North statement is concerned with individuals attempting to defraud the revenue of a foreign state rather than with an allegation that a foreign state itself is involved in attempt to defraud the revenue of the forum state, an allegation which is at the heart of the documents sought to be produced from the Audit Office and KPMG Peat Marwick. These dicta state in short that it is contrary to comity for a court to assist in the breach of foreign revenue laws. The laws alleged to be breached in the Winebox inquiry were New Zealand revenue laws. The dicta say nothing about what a court should do when it is alleged that a foreign state assisted in the breach of the forum's revenue laws. The principle found in these dicta was used nevertheless by the

21 Richardson J, 14.

22 Cooke P, 13.

23 Cooke P, 8.

24 Cooke P, 8.

25 *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129.

26 12th ed., 1992, 117.

President as the reason for deciding not to interfere with the Commissioner's order to produce documents.

Richardson J on the other hand used the iniquity factor in a way sympathised with, but not expressly adopted by the President. Rather than use the inquity factor to pre-empt application of the doctrine of restrictive sovereign immunity, His Honour used it to support the existence of an exception in addition to the commercial exception. The President was right to point out that if the seizure by Iraq of a Kuwaiti aircraft was protected by sovereign immunity[27] it is difficult to see how one state's involvement in a scheme to defraud another state's revenue would not be protected. State involvement in terrorist activities[28] is certainly not protected by sovereign immunity, but that is to date where the line is drawn. If Richardson J's "iniquity" exception is taken up by other courts, it will certainly mark an extension of the common law doctrine of restrictive sovereign immunity, and an erosion of the circumstances entitling states to immunity. Are the limits to this erosion sufficiently clearly drawn, or will future arguments by analogy virtually either eliminate sovereign immunity or make it even more subject to a forum court's determination of what is proper or legitimate governmental activity?

One might also ask why the House of Lords, knowing that Iraq's seizure of a Kuwaiti aircraft took place in circumstances involving the use of force contrary to the Charter of the United Nations and condemned by the Security Council, did not predict the President's approach and argue that it was contrary to the public policy and interest of the United Kingdom to countenance the seizure in those equally, if not more, iniquitous circumstances. The fact of the United Kingdom's membership in the United Nations might have indicated to the House of Lords the United Kingdom's public policy and interest. It was the 1995 amendment of the Commissions of Inquiry Act 1908 to increase the powers of the Commissioner that made it clear to the President that any attempt to frustrate these powers by invoking sovereign immunity "would subvert the intention of the New Zealand Parliament".[29] The amendment made no mention of sovereign immunity. For this reason, Richardson J stated that the amendments "cannot be construed as barring a claim to sovereign immunity."[30] Cooke P on the other hand stated that it was "common knowledge" when Parliament passed the amendments that the Commissioner's difficulties stemmed partly from witnesses invoking Cook Islands domestic legislation requiring secrecy.[31] On the basis

27 *Kuwait Airways Corporation v Iraqi Airways Corporation* [1995] 1 WLR 1147.

28 *Letelier v Republic of Chile* 488 F Supp 665 (DDC 1980).

29 Cooke P, 6.

30 Richardson J, 19.

31 Cooke P, 6.

of this common knowledge, and notwithstanding the silence of the statute on the matter, the President decided that any invocation of the doctrine of sovereign immunity would subvert the intention of Parliament in passing the amendments.

There is no indication of the relationship between "common knowledge" and judicial notice, or of whether common knowledge may well be judicial notice given a new label. If common knowledge is in fact judicial notice, it is now difficult to predict how it will be used as a principle of statutory interpretation given the directly opposite conclusions of the President and Richardson J. It is interesting to consider how far this "common knowledge" principle of statutory interpretation could be carried. It could be used for example in current proceedings in which the High Court is being asked to determine whether or not the Marriage Act allows same-sex marriages. It is silent on the matter, but it was surely common knowledge when it was passed that only opposite-sex marriages were possible.[32] The President is undoubtedly correct as to what was common knowledge at the time of the Winebox inquiry. Perhaps courts should be more aware of the political context in which they operate, but it may become a rather fine line between mere awareness of political context and giving such common political knowledge legal effect.

At the end of the day, one is left wondering (a) when sovereign immunity may be invoked or preempted altogether by the public policy and interest of the forum, (b) when sovereign immunity is claimed, how the commercial exception will be consistently applied, and (c) when sovereign immunity is claimed, whether there is now another exception, the "iniquity" exception, and what are its limits. The time is surely ripe for a sovereign immunity statute.

A H Angelo

The case of the *Controller and Auditor-General* v *Sir Ronald Keith Davison* appears to be principally a case of private international law.[33] There is also a strong public international law aspect to the case seen through its constitutional law reflection in the relationship between the state of New Zealand and the freely-associated state of the Cook Islands. This public international law aspect was put in issue in the case[34] and is a matter of interest not only to the Cook Islands but also to Niue (which has a similar international status),[35] and with an eye to the future, Tokelau, and a broader international audience.

---

32 *Hyde v Hyde* defines marriage to require a man and a woman. Although this definition does not form part of the Act, it assists or reinforces the effect of the common knowledge principle.

33 It may, on analysis, be much less of a conflict of laws case than a case of overriding forum legislation.

34 Paragraph 17.1 of the pleading, as quoted on p 7 of the judgment of Richardson J.

35 Niue Constitution Act 1974 (NZ).

A potentially serious public international law issue was averted by the judgment. The particular international status of the Cook Islands (and more recently of Niue) was at the time of the act of self-determination of the Cook Islands a novel one. It was an idea promoted strongly by the New Zealand government[36] and accepted by the United Nations[37] that the choice of a status of free association with another state was an acceptable form of self-determination and equivalent to independence for international law purposes. The matter turned, as the Cook Islands Constitution Act makes explicit, on continuing links between the associated states on matters relating to defence, foreign relations, and citizenship.[38]

In practice, a number of states in the international community have accepted that the Cook Islands and Niue are independent, that their governments control the destiny of their states, and further that they have a treaty-making power which they may, if they wish, exercise without the intervention or good offices of the New Zealand government.[39] Some other states, at least in some particular contexts, take a more limited view of the matter and do not contemplate any activity affecting Niue or Cook Islands without interaction with the government of New Zealand. Given the background which is well recorded in the United Nations Resolutions and most recently in the 1995 celebratory publication of the New Zealand Ministry of Foreign Affairs and Trade, it would have been ironic if the plea of the Commissioner as to the subordination of the Cook Islands to New Zealand had been accepted. It would have been ironic because the situation would have arisen where the New Zealand government at the international level was proclaiming and supporting one view while the highest domestic court within the country was supporting a different view as a matter of domestic law. In the event, and it would be good to say predictably, the claim of the Commissioner was given short shrift by the Court of Appeal. Sir Ivor Richardson dismissed the plea as "hopeless"[40] and the President Sir Robin Cooke made it clear that the status of associated statehood did not affect the rules relating to sovereign immunity.[41] The court was unanimous on the question of the independent status of the Cook Islands.

---

36 Parliamentary Debates Vol 338, 3 July 1964 (p 543); vol 339, 11 August 1964 (p 1211); vol 340, 21 October 1964 (pp 2829-2865)).

37 UN GA Resolution 2064(XX) 16 December 1965 (referring to resolutions 1514(XV) and 2005(XIX).

38 The Cook Islands Constitution Act 1964 (NZ) ss 5-6.

39 New Zealand Declaration to the Secretary-General of the United Nations of 10 November 1988, circulated as UNGA LE 222 New Zealand.

40 Judgment of Richardson J, p 9.

41 Judgment of Cooke P, p 10.

The judgment is therefore salutary from the point of view of public international law and of the rules relating to self-determination of colonial and non self-governing territories and the application internationally of the rules as set out, inter alia, in United Nations Resolutions 1514 and 1541. The independence argument also found support in the references in the judgment of Cooke P to recent decisions of Quilliam CJ in the Cook Islands High Court concerning the interpretation and purport of the Cook Islands legislation which was an issue in the New Zealand Court of Appeal case.[42]

A claim to sovereign immunity was therefore potentially well-founded. The strength of that claim was doubtless constitutionally weakened somewhat by the fact that the Auditor-General as an important part of the constitutional structure of the Cook Islands appeared to be treated, and to treat his office, more as an independent contractor to the government of the Cook Islands than as an integral part of the government of the Cook Islands. The Auditor-General with his office in Wellington, New Zealand invoiced the Cook Islands government for the fees for his services. The expectation of an organ of government might have been that there would have been specific allocation in the Cook Islands budget for the Audit Office. This shift in perception does not preclude the operation of the immunity claim but does put a commercial rather than state function view on what the auditor thought was being done.

The Kirk/Henry letters were used in a supporting role by three of the judges in the Court of Appeal.[43] The most extensive use was by Richardson J in the context of the argumentation relating to the good faith principle.[44] It appears that the presence of the letters themselves made no difference, but that they did provide specific evidence, in the context of the Cook Islands/New Zealand relationship, of the general international law principle. Those letters have particular relevance to the access by Cook Islands citizens to New Zealand citizenship and passports. The principle however goes wider as indicated by Thomas J in the context of his discussion of the operation of tax havens in the international order.[45] Citizenship is a matter particularly personal to a state. It is clear that the New Zealand government would wish to maintain the integrity of its citizenship laws.[46] Less

42 Judgment of Cooke P, pp 16-17.

43 Exchange of letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the nature of the special relationship between the Cook Islands and New Zealand, AJHR 1973, vol 1, A 10.

44 Judgment of Richardson J, p 21.

45 Judgment of Thomas J, p 21.

46 Citizenship Act 1977 (NZ); also the Kirk/Henry letters, above n 43. "The very survival of a state may depend upon the belief of its citizens in common ideals and their sense of loyalty towards each other. It is therefore unusual for a state to extend its citizenship to people living in areas beyond the reach of its own laws. That New Zealand has taken this step in relation to the Cook Islands is the strongest proof of its regard for and confidence in the people of your country".

critical but nevertheless important are the policies and attitudes that affect a shared defence policy, the joint participation in international activities such as treaty ratification and the securing of special financial assistance. It appears clear that the matters dealt with in the Kirk/Henry letters could be dealt with by treaty and that may well now be their status.[47]

The iniquity principle had the support of all the judges to varying degrees. The strongest statement was in the judgment of Richardson J[48] and the most tentative though still supportive statement was in the judgment of the President.[49] Whether the principle of iniquity suggests a line of development for the future which is to be approached *lente* or whether, as alluded to by Thomas J,[50] is the antithesis of the basis of the rule of sovereign immunity (ie good faith and trust) is an open question. Historical analysis may well support the latter view given that the grant of sovereign immunity has sprung from the need in good interstate relations for courtesy and interaction in good faith. At the other extreme is the hostile or war situation where no courtesies are granted. The analysis of the rule of sovereign immunity would then become a question of whether good faith did inform the interaction of the two states in this particular case and whether, in the light of the answer to that question, the courtesy and mutual respect that would normally inform international relations should operate in respect of this particular activity. On this approach, the commercial law exception that is now well acknowledged in the courts of the world[51] is but one aspect of the much broader based principle — those who enter the market place and wish to trade on a commercial basis take the market as they find it and need no special courtesy.

And in a different context, in the letter of understanding addressed to the General Fono and Council of Faipule of Tokelau by the Administrator of Tokelau in 1994, "it is ... important to remember the general expectations that the New Zealand government has of its citizens. It expects that they will accept and live by international standards of behaviour supported by New Zealand. New Zealand has for instance very clear and strong views about respect for human rights".

47 The Vienna Convention on the Law of Treaties article 2.1(a) - 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

48 Judgment of Richardson J, pp 20-25.

49 Judgment of Cooke P, pp 14-15.

50 Judgment of Thomas J, p 20-21.

51 *I Congreso del Partido* [1983] 1 AC 244, 262 quoted by Richardson J, p 12.

Y-L Sage[*]

An analysis of this decision[52] leaves reservations both as to the level of the application of the rules of private international law and as to the result.[53]

The Court of Appeal was seised of the matter in the context of a request for a declaration that the opposition to the Commissioner's order was well founded in the rules of immunity which protect a foreign state from prosecution and claims and from the process of execution which may be taken against it in a foreign country. This particular type of legal problem was not a new one for the Court of Appeal which, in rather different fact situations, has already pronounced on the matter on several occasions[54] in the context of the applicability of the general principles in New Zealand law. Although the present decision deals with the application of the rules relating to the theory of sovereign immunity, it at the same time touches on many cloudy areas and surprises in its legal reasoning. It has presented not only a new dimension to the traditional commercial exception, but has also introduced a new element, that of iniquity.

There is some difficulty in discerning what was the basis upon which the Court of Appeal proceeded. Has it, for instance, made a decision on the application of the principle of immunity as it relates to jurisdiction, or as it relates to enforcement? This is not a purely academic matter as is seen by the different legal consequences that can follow from the different lines of argument.

In this comment,[55] the two aspects of the procedural rule will be considered in the light of two other principles of international law. First, that which operates to exclude the advantage of immunity from commercial activities, and second the influence of iniquity on these same immunities. It will be argued that on neither of these hypotheses is the decision of the Court of Appeal convincing.

---

* Maître de Conférences, Université Française du Pacifique, Honorary Fellow in Law, Victoria University of Wellington.

52 Unreported, CA 226/95, 16 February 1996.

53 The discussion which follows is concerned principally with the application of principles of private international law; the question of incrimination of witnesses is not dealt with. For an analysis of this decision from the point of view of public international law, see the note of W K Hastings above, and in relation to the consequences for other island states of the Pacific, see the note of A H Angelo.

54 Sir R Cooke, p. 11. See especially *Marine Steel v Government of the Marshall Islands* [1981] 2 NZLR 1, *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738, *Reef Shipping Co Ltd v The Ship "Fua Kavenga"* [1987] 1 NZLR 550, *The Governor of Pitcairn, Henderson, Ducie and Oeno Islands v Sutton* [1995] 1 NZLR 426.

55 Necessarily brief at this time.

1 The difficulties of deciding the true procedural basis of the case

Procedurally speaking, if one looks at the circumstances of the case a few certainties may be identified:[56] First, the court has decided on the request of the Controller and Auditor-General which followed the order, made by the Commissioner of Inquiry in the exercise of the powers vested in him by legislation, for the production of documents.[57] The plaintiff made it clear that the documents requested were in his possession for a particular purpose by virtue of article 71 of the Cook Islands Constitution.[58] The plaintiff maintained that according to the principles of international law he was "immune ..., from interference by any other state or by courts and instrumentalities of any other state".[59]

With such a formulation it is difficult to know precisely whether the decision that the Court of Appeal had to give on the role of immunity was in respect of jurisdiction, or in respect of enforcement for the benefit of the Cook Islands. The somewhat vague character of the terms used by the plaintiff[60] and the strategy adopted, does not help resolve the ambiguity. In theory, according to the Commissions of Inquiry Amendment Act 1995 the case would follow these steps:

- a notice from the Commissioner to the Controller and Auditor-General;
- a refusal of the Controller and Auditor-General to comply for the reason that the rules relating to immunity from jurisdiction prevented any claims against the Cook Islands or its agents;
- a decision of contempt by the Commissioner;
- and, finally, an appeal from this decision based as the earlier objection on the application of immunity to jurisdiction.

If this sequence were followed the discussion would be limited to the applicability or non-applicability of the rules of immunity from jurisdiction.

Reading the decision it appears that if a notice was issued, the contempt order of the Commissioner was not. What happened is that shortly after the request to produce

---

56 There was agreement by all members of the Court of Appeal that the Cook Islands is a sovereign state. See particularly Cooke P p 10.

57 Commissions of Inquiry Amendment Act 1995, s 13 C. Commissions of Inquiry Act 1908 s 4 C, amended by the Commissions of Inquiry Amendment Act 1995, ss. 13 A and 13 B, empowering the Commissioner to impose sanctions on a witness who, without valid excuse, refuses to answer question or produce documents.

58 Cook Islands Constitution Act 1964 (NZ).

59 Richardson J, p. 8.

60 Richardson J, p. 8.

documents the plaintiff instituted proceedings by way of judicial review. The Commissions of Inquiry Amendment Act did not prevent such step, but by taking it, a formal refusal to comply[61] with the request of the Commissioner, and consequently a decision taken for enforcement against the plaintiff was not made. On the facts, the process moved directly from the request presented by the Commission to the challenge by the plaintiff. This happened within the context of initiation of the proceedings for judicial review.[62]

What were the reasons that motivated this approach to the matter: Did the Commissioner immediately regard the refusal of the Controller and Auditor-General as a given? If so, why did he not decide against the plaintiff as the legislation authorises him to do? And did the plaintiff take as a fact that he would be condemned by the Commissioner because of refusal? And why was the Court of Appeal seised of the matter before the decision of condemnation, particularly given the fact that condemnation in the present instance would have been impractical given the nature of the plaintiff?[63]

With the lack of precision in the process, it would have been useful for the purpose of analysis to have had a clear indication of the basis upon which the Court of Appeal was proceeding. The procedural vagueness affected the reasoning of the Court of Appeal.

In reading the decision there is the impression of having moved from an *in personam* procedure to an *in rem* action which, in terms of legal consequences, is a not insignificant shift. Prima facie, logic requires that in this type of circumstance litigation relates to actions *in personam*. Suffice it here to note the definition in Dicey and Morris:[64] "An action in personam may be defined positively as an action brought against a person to compel him to do a particular thing." However, because of the consequences attached to the decision, the Court of Appeal seems rather to have given judgment[65] on the appropriateness of the taking of measures of enforcement in relation to moveable property. This would tend to identify the action as an *in rem* one.

2 *The differences between the two aspects of immunity*

Although they are identical in form, the two types of immunity — that of immunity from enforcement and immunity from jurisdiction — are quite distinct in private international

61 The Court of Appeal was not dealing with the case because of an order against the plaintiff, but on the basis of "preventive" action taken by the plaintiff.

62 Here again, the discussion will be limited to the question of immunity enjoyed by a foreign state.

63 It cannot be denied that the plaintiff would be entitled to the benefit of the application of the rules of immunity from enforcement because of acting in the capacity of representatives of a foreign state which was linked to New Zealand by a special relationship. The nature of the relationship was not denied by the Court of Appeal.

64 *The Conflict of Laws* (12 ed, Sweet and Maxwell, 1992) chapter 11, p. 270.

65 See in particular Henry J p. 5.

law.[66] These immunities have a jurisdictional character of a kind which can on first consideration lead to convergence of the principles, but in fact and in law each responds to a different purpose which is specific to it.

Immunity from jurisdiction prevents a judge from hearing an action brought against a foreign state or one of its agencies whereas immunity from enforcement has the object of protecting the beneficiary from the enforcement of a decision which has been made against that beneficiary.

Furthermore, each type of immunity plays its role at different stages in the exercise of the court's authority. Immunity from jurisdiction is concerned only with the possibility that a court may make a decision in regard to a foreign state and find against that foreign state, and raises for decision by the forum the question whether acts are properly within its field of jurisdiction.

The situation is different for immunity from enforcement which is concerned rather with the power of the forum judge to order or to refuse effectiveness to a judgment pronounced against a state. Here, the question for the forum judge can only relate to property which can be destrained.

If the two notions of immunity are followed to their conclusions in respect of sovereignty of states, it is clear that the impact of the principle of respect will be substantially more important when the question is one of authorising enforcement of a decision against a foreign state than when it is a question of the power to bring that same state before the court.

From the point of view of procedure and taking account of the primary purpose of immunity from enforcement, that immunity can only arise in the context of a plea which would require enforcement. It can be logically deduced that if the immunity, which would have prevented the forum from hearing the case, has been set aside, the possibility that the foreign state may still claim the benefit of immunity from execution remains.

In earlier times, case law affirmed the absolute character of immunity from enforcement and then softened this attitude and progressively identified another criterion according to which the nature of the property which had been the subject of enforcement had to be taken into account. The distinction was made between property in respect of which no enforcement could proceed and that which was exclusively private and therefore did not entitle a state to make a claim of immunity from enforcement.[67] Consequently in applying this principle, courts must restrict immunity from enforcement to those items of property

66 See particularly Dicey and Morris, above n 15, 244, 245.

67 *République Démocratique du Vietnam*, Cass. Civ. 2 November 1971, Rev. Crit, D.I.P. 1972. 310, note Bourel.

"which serve a function of sovereignty or a public service".[68] The burden of proof is on the proponent[69] that the piece of property concerned has its principal purpose as fulfilling a private activity.[70] In the present case, the property belonged to the Cook Islands Government, and was related to a sovereign activity (the raising of taxes), so the strict application of the principles set out in *Kuwait Airways Corporation v Iraqi Airways Company* would lead to a decision in favour of the plaintiff.[71]

3 *The role of the commercial exception*

Three of the judges accepted that the commercial exception applied in this case. The common point of reference for all members of the Court of Appeal was the decision of the *I Congresso del Partido* in which the House of Lords apparently rejected the absolute theory of sovereign immunity. This decision need not be so interpreted to lend support to the decision in the present case. Indeed, an analysis of the House of Lords decision does not indicate a categorical rejection of the absolute theory because it applies to immunity from enforcement when the matter litigated relates clearly to matters within the exclusive zone of activity of a foreign state.[72]

On this point, Sir Ivor Richardson noted the true extent of this precedent by referring to the speech of Lord Goff in *Kuwait Airways Corporation v Iraqi Airways Company*[73] where it is said "It is not just that the purpose or motive of the act is to serve the purposes of the State, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform".[74] This is therefore the contrary of what was decided — the issue does not lie in knowing whether the activities of the Cook Islands Government can be properly described as arising from a commercial or purely governmental act. The

---

68 P. Meyer *Droit International Privé*, (4ieme édit, 1991, Montchretien) 214.

69 *Eurodif*, Cass. Civ. 1ere Chambre, 20 Mars 1989, Rev. Crit. 1990. 346, note Bishoff.

70 See especially, *Sonatrach*, Cass. Civ. 1ere Chambre, 1 October 1985, Rev. Crit. 1986. 53, note Audit.

71 Looking at the facts of *Kuwait Airways Corporation v Iraqi Airways Company*, in which immunity was granted to the Iraqi Airways Company, there are some conceptual difficulties in not giving the benefit of the same rule to the Cook Islands government because there is an obvious difference between the acts of confiscation of aeroplanes and the granting of tax credit certificates. The latter are the regular and ordinary practice of states all around the world: that cannot be said of the former.

72 There is nothing to prevent the development of the absolute theory in *in personam* actions along a line of reasoning similar to that of Lord Denning in *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] 1 All ER 881, 891 (where by not applying the rule of stare decisis to international law he held himself not bound by the *Philippine Admiral* [1977] AC 373) so that the rule has its full extent and thereby significantly weakens the reasoning of the Court of Appeal.

73 [1985] 3 All ER 694.

74 Richardson J, p. 13.

question is rather one of asking whether the documents claimed by the Commissioner were related or not either to a sovereign activity or a public service activity, or to a commercial activity. The categorisation here takes on a quite particular aspect because it clearly separates commercial activities and the purely state activities that a foreign country may engage in.

4 *The iniquity theory*

There is here a preliminary question relating to the terminology.

The Court of Appeal reproached the beneficiaries of the tax credits for having indulged in forum shopping with the object, the court said, of escaping the rigours of New Zealand legislation and even of seeking to subvert it.[75] The practice of forum shopping has its place, only in the context where several states are ready to exercise jurisdiction in the matter, and the parties make a choice from among the jurisdictions which are open to them.[76] Forum shopping is therefore characterised by a manipulation of the criteria relating to jurisdiction.[77] The situation is quite different from that of this case, because here nobody denied that the only law in question was New Zealand law. The question submitted to the Court of Appeal was not, properly speaking, a question of conflict of jurisdictions, but it arose rather from aspects of the application of New Zealand internal law, the interpretation of which is always in accordance with the law of the forum.

The concept of iniquity (also called illegality),[78] as it is presented in this case, seems to resemble the concept of fraud against the law (*fraude à la loi*). But the use of the illegality terminology is deceptive. Though there can be no doubt that in domestic law fraud against the law nullifies the action in question, it is not the same thing in private international law or conflict of laws. The case before the Court of Appeal is of a different kind since no rules were in a state of conflict, and there was no basis for saying that the rules relating to immunity from jurisdiction are affected by this principle. Furthermore, in admitting that fraud against the law existed, it could only be claimed against New Zealand beneficiaries who took advantage of the Cook Islands law to attempt to avoid their fiscal obligations in New Zealand. The Government of the Cook Islands is not in any way concerned with this. The granting of tax certificates was, as a matter of its internal law, a perfectly valid operation. This same line of reasoning may be adapted to the application of the fraud against the law doctrine in the context of the application of immunity from enforcement.

---

75 Cooke P, p. 7.

76 See Bell "The Why and Wherefore of Transnational Forum Shopping" (1995) 69 ALJ 124, 140.

77 P. Meyer, above n. 68, p. 177.

78 Cooke P, p. 8.

Also, in order to apply in the present case, fraud against the law would require formal proof of some fraud or default relative to New Zealand domestic law, because the presumption of innocence should, as a matter of principle, be granted to the beneficiaries of tax credit certificates which are perfectly valid from the point of view of Cook Islands law. Consequently, there arises a presumption that the operation was proper and this should work to the benefit of the plaintiff. A reading of the Court of Appeal decision tends, however, to deny the operation of this principle. Indeed, the formal proof that the documents claimed were property whose principal purpose was a private one, was not, at least from a legal point of view, clearly made out by the Commissioner.[79] At this point it is a necessary precondition that the proof be made, for if the private nature of the documents had been proved, that alone would have permitted, within the context of immunity from enforcement, full justification for recourse to the iniquity exception which Richardson J applied.

Sir Ivor Richardson[80] in the first part of his decision shows clearly that the activity of the Cook Islands — the granting of tax credits — could not be categorised other than as a pure exercise of the sovereignty of the State. The logic of this position was not pursued to its conclusion and the result is that the request of the Commissioner became blurred by the necessity to apply the rules of immunity from enforcement. Indeed, in this particular area of private international law, respect for domestic public policy, must give way before the principles which regulate or relate to immunity from enforcement except in the case of a activity of a commercial nature.

Taking strength from the position indicated in *Rahimtoola v Nizam of Hyderabad* [1958] AC 378, 404 by Lord Reid, Richardson J affirmed that "the principle of sovereign immunity is not founded on any technical rules of law: it is founded on broad considerations of public policy, international law, and comity".[81] By way of a response to this argument, it could be said that the rules set out by Lord Reid do not correspond to the present state of the rule in private international law. Though it is not possible to speak of a true rule of public international law in relation to immunity, immunity is nevertheless either obligatory or not for a State.[82] It is a rule for the courts from the moment that domestic law prescribes it as such a rule.

---

79 The result is that the judges of the Court of Appeal had to speculate on this matter.

80 Richardson J, pp. 11, 17.

81 Richardson J, p. 20.

82 Particularly by the operation of a treaty or international convention.

The New Zealand courts have already made several decisions on this matter.[83] The judges all agreed that the Controller and Auditor-General acted as agent of the Cook Islands, and therefore could be assimilated to the Cook Islands Government and benefit from any immunities which would attach to the Cook Islands Government as a result. Although there is no principle which prevents a New Zealand court from taking an independent line on the content of the legislation of a foreign state, it cannot in any case give orders to the agents of a foreign state, because that would involve its intervening in the functioning of a public service of another country and would go against the principles of public international law. The request to produce the documents is similar to an order given by a court to a foreign institution. Accepting the decision in this case without reservation amounts to validating the intervention of a New Zealand court in the functioning of a state organisation of the Cook Islands.[84]

Conclusion

Two supplementary comments may be made by way of conclusion.

First, one might wonder what would happen if in practice the Government of the Cook Islands demanded the return of documents that the Commissioner wishes to see. The decision of the Court of Appeal at no stage denied or contested the property rights of the Cook Islands in these documents. So far there is nothing to prevent the Cook Islands government from doing that. If the documents may be returned to the Cook Islands government, the effect of the judgment of the Court of Appeal is substantially reduced.[85]

Second, on reading the decision and following the procedural strategy of the parties, the reader is left with the feeling of the affirmation of control of New Zealand courts over the conduct of the affairs of certain island states of the Pacific. Not only were the accounts of the Cook Islands controlled by a foreign state (New Zealand in the instance), but, New Zealand has reserved to itself through an application of the rules and principles of international law, a way of limiting sovereignty each time that the acts which take place go against the values generally accepted by New Zealand citizens.[86] Similar arguments could

83 See above n 54.

84 It should be noted that the New Zealand government, when requested by the Commissioner to do so, refused to raise the matter with the Cook Islands Government: See Richardson J, p 4.

85 If the documents were no longer in the possession of the Controller and Auditor-General, and could therefore not be delivered to the Commissioner, it is difficult to conceive that the Controller and Auditor-General could be imprisoned because that would be, to say the least, paradoxical when it is noted that the office is an emanation both of the Cook Islands and also New Zealand.

86 Sir Ivor Richardson stated that "defrauding the public revenue strikes at the heart of government". However, it is by no means certain that recourse to tax havens is per se fraudulent. The judgment of the members of the court is instructive on this point.

readily be used against its author. Indeed, if there is a question of respecting fundamental values, what may be said by the Government of the Cook Islands in considering the value of New Zealand legislation which is tailored to suit the particular circumstances of the case in hand in order to depart from the principles of international public and private law: Is this not contrary to the principles of courtesy which inspire behaviour towards a foreign sovereign state?[87]

Many lawyers awaited this decision with interest because of the small number of New Zealand decisions on the topic and the special implications that it had for the Cook Islands. One can only be disappointed that considerations of New Zealand domestic public policy have taken precedence over other established rules of international law. A sure way to resolve the doubts and difficulties for the future would be the passage of legislation on the question of immunity.

Commentaire de la décision Controller and Auditor-General v Davison rendue par la Cour d'Appel de Nouvelle Zélande le 16 Février 1996 par A H Angelo, W K Hastings et Y-L Sage

Attendue, par beaucoup de praticiens du droit néo zélandais, compte du nombre relativement peu important de décisions en la matiere mais aussi des implications particulières qu'elle pouvaient avoir sur les relations avec l'Etat des îles Cook, cet arrêt est quelque peu décevant.

La Cour d'Appel était saisie dans le cadre d'un recours tendant à faire déclarer, entre autres arguments soulevés, valable une opposition fondée sur l'application des règles d'immunité qui protègent un État étranger de l'ensemble des poursuites et des voies d'exécutions qui pourraient etre prises à son encontre par une juridiction étrangère. En des circonstances de faits différentes, il est vrai, la Cour d'Appel s'était déjà prononcé, sur les conditions de l'applicabilité de ces principes dans le droit néo zélandais.

L'analyse de la décision *Controller and Auditor-General v Davison* appelle quelques réserves tant sur le plan de l'application des règles du Droit International Privé et Public que sur leur finalité. Si la décision aujourd'hui commentée, s'inscrit, à n'en pas douter dans l'élaboration des principes d'application de la théorie de la Sovereign immunity (Immunité de juridiction et d'exécution) en Nouvélle Zélande, elle laisse néanmoins planer beaucoup de

87 See here Cooke P at p 6, and Richardson J at p 10. See above the comment of A H Angelo. On the particular institutional arrangement of the Cook Islands in the context of its relationship with New Zealand, see Y-L Sage, "Remarques sur la représentativité des Iles Cook dans les rapports internationaux" (1994) 1 Rev. jur Polynesienne 183, and A Frame (1987) 17 VUWLR, 141 and (1992) 22 VUWLR (Mono 4) 85.

zones d'ombres et surprend par le raisonnement juridique retenu par la Haute Juridiction qui sans convaincre, a cru pouvoir donner non seulement une dimension nouvelle à l'exception traditionnelle dite de commercialité, mais plus surprenant encore, a en introduit une nouvelle, qualifiée *d'iniquity*.

De plus des considérations de politiques intérieures néo zélandaise semblent avoir prévalues sur les règles du droit international. L'ordre public néo-zélandais certes triomphe dans la conception retenue par la Haute Juridiction mais au prix de libertés conceptuelles qui dans la conception actuelle du droit international, ne seraient prévaloir. On peut se demander, non sans de bonnes raisons, s'il ne s'agit pas d'une simple décision d'opportunité, et toutes choses étant égales par ailleurs si la solution n'aurait pas été quelque peu différente si l'Etat concerné eut été une puissance de rang égal à la Nouvelle Zélande. Reste que l'un des moyens d'éviter que ces déviances ne se reproduisent est assurément le vote d'une loi sur les immunités.