

Diplomatic Privileges and Immunities - Proceedings for divorce, custody and property distribution against foreign ambassador - Local real property bought for investment purposes - Whether ambassador immune - Vienna Convention on Diplomatic Relations 1961 Art 31 - The law of Australia

DE ANDRADE v DE ANDRADE (not yet reported)

(Family Court of Australia, 18 June 1984, Renaud,J)

SUMMARY: The facts: The respondent was the ambassador of a foreign country to Australia. The applicant, his wife, applied for dissolution of their marriage, for orders restraining the husband from disposing of certain property, for a property settlement pursuant to the dissolution, and for the guardianship of a child of the marriage. Pursuant to the Domicile Act 1982 (Cth) s.6, the wife was capable of acquiring a domicile of choice independent of her husband's: she claimed that the Family Court had jurisdiction to determine her applications under the Family Law Act 1975 (Cth) because she was at the time of the application domiciled and ordinarily resident in Australia. Counsel appearing by leave as *amicus curiae* asserted that the husband was immune from the court's jurisdiction in respect of all three applications, under Article 31(1) of the Vienna Convention on Diplomatic Relations 1961, given the force of law in Australia by the Diplomatic Privileges and Immunities Act 1967 (Cth) s.7. Part of the property claimed was a home unit purchased in the husband's name as an investment and let to tenants.

Held: The husband was immune by virtue of Article 31(1) in respect of all the applications. Both the divorce and custody applications were against the husband personally, and none of the exceptions to Article 31(1) applied. So far as the property application was concerned, the purchase of the home unit for investment was not 'commercial activity exercised by the diplomatic agent ... outside his official function' (Article 31(1)(c)) within the ordinary meaning of those terms. In any event the proceedings did not 'relate to' that activity in the required sense, being essentially matrimonial in character. Nor was the application 'a real action relating to private immovable property' within Article 31(1)(a); rather it involved *in personam* proceedings against the husband seeking an alteration of existing legal interests in property.

NOTE: With respect, Renaud J was plainly right in holding that the divorce proceedings themselves, and the custody proceedings as ancillary to the divorce proceedings, could not be proceeded with because of the respondent's diplomatic immunity. So far as the custody application was concerned, Renaud J commented (transcript, p.11) that "it does indeed seem to me regrettable that there are children otherwise within the jurisdiction of this Court with whose welfare it cannot be concerned, but compassion does not, unfortunately, confer jurisdiction". However, there was some suggestion (transcript, p.10) that in some circumstances the wardship or protective jurisdiction of a Supreme Court might be available in the case of a child one of whose parents was a diplomat, (though this too might be doubtful). Equally, there seems no doubt that Renaud J's conclusion as to the property application was correct. Surprisingly, he took the view that the purchase and letting of a home unit

for investment was not "commercial activity" as specified in article 31(1)(c) of the Vienna Convention. Had the proceedings related to a dispute over the purchase of the home unit, or over the terms of the lease, one would have thought it plain that the "commercial activity" exception to diplomatic immunity applied. However, the point here, as Renaud J held, was that the action was not one "relating to a commercial activity" in the required sense. Merely because property is in use for commercial purposes does not mean that any action whatever which has an impact or effect on that property relates to the commercial activity. The action here was clearly in the nature of matrimonial proceedings rather than an action relating to a commercial transaction.

JRC