IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S29 of 2015

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN:

FIREBIRD GLOBAL MASTER FUND II LTD

Appellant

and

REPUBLIC OF NAURU

First Respondent

WESTPAC BANKING CORPORATION

Second Respondent

APPELLANT'S REPLY

Part I:

1. The appellant certifies that these submissions in reply are in a form suitable for publication on the internet.

Part II:

2. These submissions reply to the respondent's submissions dated 20 April 2015 ("**RS**"). The appellant's submissions in chief, dated 20 March 2015, are referred to as "**AS**".

3. Firebird does not oppose the intervention of the Attorney-General provided it is limited to intervention by way of written submissions. In these submissions Firebird also replies to the Attorney-General's submissions dated 27 April 2015 (**"AGS"**) in case leave to intervene is granted.

Immunity from application for registration of foreign judgment (RS [6]-[36]; AGS [9]-[33])

4. At RS [6]-[7], RON refers to the history of the registration of judgments legislation, and the fact that: (a) the absolute doctrine of foreign state immunity held sway in English and Australian law until, on RON's chronology, the late 1970s; and (b) prior to the enactment of the Immunities Act in 1985 there is no reported instance of the foreign judgments legislation being used to register a foreign judgment against a foreign state. The Immunities Act is said to have been enacted in "that context" and because the Act does not "expressly deal with registration of foreign judgments" it is said that the most likely explanation is

Filed by:
Clayton Utz, Lawyers
Level 15, 1 Bligh Street
Sydney NSW 2000
DX 370 Sydney

Telephone: (02) 9353 4000
Fax: (02) 9220 6700
Ref: Douglas Bishop
60020/16708/80160442

that neither the ALRC nor the Parliament "intended to alter the existing position that foreign States were immune from the regime for the registration of foreign judgments". Such an analysis should be rejected.

5. The "existing position" referred to by RON was nothing more than the practical consequence of the fact that the absolute doctrine of sovereign immunity held sway for most of the period up to 1985 and there was accordingly minimal opportunity for the question of the application of the foreign judgments legislation to arise. It was not something which was reflected, expressly or impliedly, in any pre-1985 legislation. To the contrary: the foreign judgments legislation provided (by predecessors to the Foreign Judgments Act, s 7(4)(c)) that the question of the foreign court's jurisdiction so far as sovereign immunity was concerned was to be determined in accordance with the rules of public international law. The pre-1985 legislation thus clearly contemplated registration of a foreign judgment against a foreign state, albeit that while the absolute theory of sovereign immunity held sway, that would in practice be limited to cases of voluntary submission. Furthermore, the reference to the rules of public international law would have been understood as an ambulatory one. The Parliament must be taken to have recognised that those rules (or, at least, the courts' understanding of their content) were not static and might evolve or change over time. The legislation thus accommodated, and it would be inferred, contemplated changes in the scope of sovereign immunity, and hence changes in the reach of the legislation. RON's submission that the Act recognised and adopted for all time some conception of absolute foreign state immunity should be rejected. It was plainly enacted at a time after the absolute theory of sovereign immunity had been rejected.

6. RON submits (RS [8]) that the Immunities Act and the Foreign Judgments Act should be construed to render a foreign state immune from registration of judgments, save in the case of voluntary submission. This submission inverts the ordinary process of statutory construction by assuming an intended result and then attempting to accommodate the statutory language to that result. For reasons given above, the assumption as to legislative intent is based on an incorrect premise and accordingly the argument goes nowhere. RON's attempt to explain away the anomaly that this construction produces is unpersuasive, as RON does not in fact advance any reason as to why the situation described is not anomalous.

Immunities Act does not, as a matter of construction, apply (RS [10]-[19]; AGS [9]-[33])

7. RON contends that s 9 should be interpreted consistently with the broad meaning of the term "*proceeding*" adopted in *Cheney v Spooner* (RS [12]). On that view, virtually any act or process of a court would be a "*proceeding*", so that, for instance, the issue of a garnishee notice in respect of a debt owed to a foreign state would involve the exercise of "jurisdiction" against that foreign state for the purposes of s 9 (as RON itself contends at RS [18]). That cannot be correct. It would make the provisions of Part IV otiose and thereby undermine the whole structure of the Immunities Act. It shows that s 9 cannot apply to every curial procedure which affects, or has the potential to affect, the foreign state's economic interests.

8. In similar vein, RON's submissions repeatedly refer to the registration procedure under the Foreign Judgments Act as an exercise of the judicial power of the Commonwealth, as if that were sufficient to render the procedure an exercise of "*jurisdiction*" over the judgment debtor for the purposes of s 9 (RS [14], [17], [18]). Firebird accepts that the registration of a foreign judgment involves the exercise of the judicial power of the Commonwealth (AS [23]; this is acknowledged by the Attorney at AGS [11]). But Firebird's argument, not squarely addressed by RON, is that s 9 focuses on a more limited category of circumstances in which federal judicial power is exercised – namely the impleading of a foreign state calling upon it to appear in an Australian court and have adjudicated a substantive determination of rights and liabilities. To the extent that RON points to s 7(4) of the Immunities Act (RS [18], footnote 6), the Court of Appeal did not rely on this provision, and in any event, it is plainly a transitional provision. The Attorney places no reliance on it.

9. The Attorney's position is that the registration creates new rights against the judgment debtor because of s 6(7) (AGS [13]ff, [31]). That submission does not pay proper regard to sub-s 12(1) of the Foreign Judgments Act, which gives the judgment creditor rights against the judgment debtor regardless of registration. The only additional effect of s 6(7) is to create a deemed judgment for the purpose of curial enforcement. The Attorney also seeks to conflate the process of registration under s 6, and setting aside of registration under s 7, as one procedure, and to characterise them both in some overarching way. But it should be recalled that the Court of Appeal held that the Immunities Act required Firebird's application to register the Japanese judgment to be dismissed at the threshold. The question required to be answered here was thus whether an application under s 6 involved the exercise of jurisdiction over RON in the relevant sense.

10. Contrary to AGS [27], the fact that under the NSW procedure the judgment debtor is named as a party and labelled the "defendant" in the initiating Summons cannot determine the issue of construction presented in this case. That is so for two reasons. First, as the Attorney acknowledges (AGS [21], [27]) the question should be determined according to considerations of substance, not form. Furthermore, the question should be determined according to the provisions of the Foreign Judgments Act itself, rather than the procedural rules applicable to the court in question. If it were otherwise, then on the Attorney's argument, the position could be different under the procedure in South Australia (referred to at AS [47]) where the foreign state is not named as a defendant.

11. Contrary to AGS [19]-[22], Firebird does not contend that the fact that the registration procedure may (in NSW) operate ex parte, of itself, means that it falls outside s 9. Of course the fact that ex parte relief may be obtained in an appropriate case in a conventional claim for damages or equitable relief does not mean that the court's jurisdiction over the defendant is not being invoked. But that is because the proceedings require the defendant to submit to the litigation in the court and the determination by the court of its substantive rights and liabilities. Proceedings for the registration of a foreign judgment are not, however, of that character.

12. The Attorney's submissions (AGS [23]) invoke the principle of construction that legislation should be construed "in conformity ... with the comity of nations and established rules of international law". There are however important words of qualification in the Attorney's submission (AGS [23]), namely: "so far as their [i.e. the statute's] language permits". In applying such an approach one must also remember that foreign state immunity is not the only principle of public international law, other principles, like mutual recognition of judgments by national states, are also in play.

13. The statement that the courts "*will not by their process make him* [a foreign sovereign] *a party to legal proceedings*" repeatedly relied upon by the Attorney (AGS [22], [24], [26]-[27], [28]) is a judicial summary of the principle of jurisdictional immunity made in the context of a conventional claim against a foreign sovereign; it should not be treated as if it were a statute to be parsed in order to find the answer to the question in these proceedings. Similarly the characterisation of *exequatur* proceedings in each of the *Kuwait Airways* and *Jurisdictional Immunities* cases would have depended upon the particular statutory context (as seems to be accepted at AGS [57]); those decisions do not give rise to an "*established rule of international law*" which could assist in resolving the construction issue in this case. If any principle of international law is relevant, it is that a judgment obtained a foreign state in the courts of one country may be enforced in the courts of another country even if the courts of that other country would not have had jurisdiction over the underlying dispute: see *NML* at [29].

Implied repeal by Foreign Judgments Act (RS [20]-[23]; AGS [34]-[45])

14. RON's submission (RS [20]) again assumes an outcome and then advances a construction that arrives at the outcome. RON's submissions do not in any adequate way grapple with the presence of s 7(4)(c) of the Foreign Judgments Act, nor Firebird's submission, that it evidences that Parliament dealt with immunity under public international law insofar as it deemed fit to do so.

15. The Attorney (AGS [40]) adverts to the possibility that acceptance of Firebird's contentions might arguably place Australia in breach of its customary international obligations. The Attorney does not identify what those obligations are, how they arise, or how they might be breached. The further submission (AGS [41]) about the preliminary nature of the immunity does not sit well with this Court's rejection in *PT Garuda* at [22] of the proposition that the court has an obligation itself to raise and consider whether there was immunity regardless of whether a claim for it had been made.

16. The Attorney's submissions (AGS [42]ff) seeking to limit the inferred intent of the Parliament from the presence of s 7(4)(c) again makes no allowance for the deliberate selection of clear and broad ambulatory language by the Parliament. The suggestion that "person" in the equivalent of s 7(4)(c) of earlier state Acts would not have included foreign states is not justified, at least in the case of NSW. Section 21(c) of the *Interpretation Act 1897* (NSW), which remained in force until repealed in 1987, provided that "person" "shall include bodies politic, or corporate as well as individuals". The decision in *Bass* relied upon by the Attorney does not lead to a contrary conclusion.

Exception for commercial transactions (RS [24]-[36]; AGS [46]-[57])

17. The question framed at RS [24] is not the relevant question, rather that question is: assuming that Firebird's application to register the Japanese judgment is a "*proceeding*" involving the exercise of jurisdiction over RON for the purposes of s 9, is it a proceeding which "*concerns*" a "*commercial transaction*", namely the Nauruan government borrowing represented by the Japanese bonds. The reference to the *TCL* case (RS at [25]) does not advance matters, because the ultimate statutory question remains: do the registration proceedings "concern" the commercial transaction, whether the rights being enforced in the registration process stem in a technical sense from the foreign judgment itself, rather than the underlying contractual obligations assumed by RON as part of the bond issue. The term "*concerns*" can readily encompass (and, in Firebird's submission, in its ordinary and natural meaning, does encompass) the relationship between the registration proceedings and the underlying bond transaction, even if it is an indirect one.

18. RON's contentions that "*concerns*" should be given a narrower meaning (RS at [28]ff) proceed on the assumption that the various exceptions in ss 10-20 must be mutually exclusive and are incapable of overlap. There is no warrant for such an assumption. The majority decision in *NML*, relied upon by both RON and the Attorney, is not determinative here. In particular, RON relies on the reasoning of Lord Mance (RS at [30], [32]) however the other members of the majority, Lord Collins and Lord Walker, did not adopt the same reasoning (see [111]-[116]);[1] so far as the existence of specific provisions governing arbitration was concerned, their reasoning was to the contrary: compare Lord Mance at [89] with Lord Collins at [112]. All members of the majority in *NML* pointed to the circumstance that a broader view of the term "*relating to*" in the relevant UK legislation would have rendered subsequent UK legislation at least partially otiose, but this consideration, if it can legitimately be taken into account, does not apply to the Australian legislation. Furthermore, in *NML* the judgment creditor was seeking to bring common law proceedings on the foreign judgment (see at [1]) rather than seeking to register the foreign judgment in accordance with the statutory procedure; the members of the majority pointed to the fact that such a common law action would not have been permissible at the time the relevant UK legislation was enacted; but in Australia in 1985 this Court had already held (in *Hunt v BP*) that there was no such restriction on the registration of foreign judgments. In these circumstances, the broader approach of Lord Phillips (at [26]-[29]) and Lord Clarke (at [139]) is a better guide to the construction of the Australian provision.

19. As to RS [34], it may be accepted that Firebird referred in the registration proceedings only to submission to the Japanese court's jurisdiction. But the fact remains that Firebird was required to demonstrate that the Japanese court had jurisdiction, and that in order to do so, Firebird put the bonds into evidence.[2]

---

[1] AGS [50] states that Lord Walker agreed with Lord Mance but this is incorrect: see at AC 536D-E.

[2] Although not adverted to by Firebird in it application, there was some doubt under the absolute theory of sovereign immunity as to whether a contractual submission was effective: see ALRC [21]; *Mighell v Sultan*

This still provides additional support for Firebird's contention that the registration proceedings "*concern*" the bonds.

Service of application for registration of foreign judgment (RS [37]-[45]; AGS [58])

20. RON (RS [38]) refers to ss 23 and 24, but these apply only to "originating process" and only to service within Australia, not for instance, service on the foreign state in the foreign state or elsewhere. Part III is not a code in respect of all aspects of service on a foreign state.

21. RON's alternative contention (RS [42]-[43]) that the requirement for service of the initiating process is not to be found in an implication derived from Pt III of the Act, but rather is an express requirement of s 27 was rejected by the Court of Appeal (AB at 378 at [45]). The Court of Appeal's decision on this point should be upheld. It is consistent both with the ordinary and natural meaning of the term "default judgment" and with authority on the meaning of that term: *Dsane v Hogan* [1962] Ch 193.

22. At RS at [44] RON seeks to suggest that it suffered, or might have suffered, prejudice from the manner in which notice of the judgment was served upon it (albeit that the notice was served in accordance with orders made by the Supreme Court). But at the hearing no point was taken about the validity of service and as a result factual questions which might have arisen about how and when the notice came to RON's attention have not been the subject of any evidence or finding.

Immunity of the RON bank accounts from execution (RS [46]-[69]; AGS [59]-[66])

23. In order to support its contentions on the application of the relevant provisions of Part IV, RON relies heavily on the wording of the s 41 certificate (RS [53], [56], [59], [61], [69]) which it characterises as "a mechanism by which the foreign State can establish prima facie the purpose for which property is used" (RS [50]). That characterisation is wrong. Section 41 does not provide that the certificate is *prima facie evidence* - only that it is *evidence*. The certificate has no presumptive effect, in contrast for example, to a certificate under s 40, which is given conclusive effect under sub-s 40(5). And as evidence, the certificate had little, if any, weight. On RON's approach, the critical factual issues were the purposes for which the accounts were established and subsequently drawn upon. It emerged at the hearing that the best evidence on these issues could have been obtained from officials of the Nauruan Ministry of Finance, but RON did not lead evidence from them: see AB 42.30, 45.30-46.50.[3] It also emerged that the official who provided the certificate, the Nauruan Consul-General, had no personal knowledge of the facts in question and no relevant responsibility for the activities of the Nauruan government officials who did: AB 47.30-49.20. In

---

of Johore [1894] 1 QB 149; *Duff Development Co v Kelantan Government* [1924] AC 797; *Kahan v Pakistan Federation* [1951] 2 KB 1003.

[3] RON did lead evidence from the relevant Minister, Mr Adeang, but, not surprisingly, he lacked specific knowledge on most of the relevant issues: AB 60.30-61.50, 69.30-50.

these circumstances, the bald assertions in the certificate can hardly be used to overcome the gaps in RON's case.

24. RON (RS at [53]) seeks to challenge the finding of the Court of Appeal that the Term Deposit was not in use. RON's contention is that the Term Deposit funds were "*in use*" as "reserves" for future expenditure. This contention (which was not put, at least in these terms, to the Court of Appeal) should be rejected. It cannot be reconciled with the dichotomy in Part IV between property (including money) which is "in use" for a particular purpose and property which is not "in use" but has been "set aside" for a specified future purpose.[4]

25. RON's next argument is that the term "*set aside*" does not require any formal appropriation, so that, apparently, the Term Deposit was "*set aside*" simply by being held for a term (RS [55]). This argument should also be rejected. The statutory requirement is not merely that the property be *set aside* but that it be *set aside otherwise than for commercial purposes*. That cannot be achieved without some form of appropriation for a specific non-commercial purpose or purposes.[5]

26. RON's final argument on the Term Deposit is that in fact there was a relevant appropriation because it was part of Nauru's "Consolidated Revenue" (RS [56]). This argument (which is not even supported by a notice of contention) seeks to attribute some sort of determinative significance to the use of the term "Consolidated Revenue" by the relevant Minister which goes beyond the findings of fact made by the Court of Appeal. Even if this were permissible, it would lead nowhere. The whole point of the term "Consolidated Revenue" is that it describes funds generally available to the government, in other words funds which have *not* been appropriated to any particular purpose.

27. So far as the transaction accounts are concerned, RON does not directly address Firebird's contention that the undrawn balance of a bank account is necessarily not in use (AS [56]). Nor does RON address Firebird's contention that, on the evidence, three of the accounts were apparently idle (AS [57]). Instead RON argues that each of the transaction accounts was "*in use*" simply by virtue of being "a facility for the collection and application of funds" (RS [58]). This argument would apply to any and all transaction accounts held by a foreign state with a bank irrespective (as RS [61] recognises) of the purposes for which the account was drawn on, or even whether it was drawn on at all. The proposition that a bank account could, by its status as such, necessarily and always be "in use" within the meaning of the legislation flies in the face of the ALRC report (ALRC at [127]). It must be rejected.

28. RON's alternative argument that the transaction accounts were "in use" as "reserves (or Consolidated Revenue)" (RS [59]) should be rejected for the same reasons that the equivalent arguments in relation to the Term Deposit should be rejected.

---

[4] This dichotomy, of course, is not obstacle to accepting Firebird's contention (AS [54]) that the Term Deposit funds were "in use" for the (commercial) purpose of earning interest. That was a present use.

[5] See *Fox & Webb on State Immunity* (3rd ed, 2013) at 507-508, under the heading "intangibles".

29. So far as the accounts relating to government business activities are concerned, it is clear, and accepted by Firebird, that the restrictive theory of sovereign immunity as it applies to transactions cannot be transposed, word-for-word, to immunity from execution (cf RS [47], [48]). Equally clearly, however, immunity from execution is subject to its own restrictive theory, and the two theories are both designed to prevent sovereign immunity being invoked in "commercial" contexts. The theories are analogous, and the drafting of the Immunities Act reflects that. Notwithstanding that the Act deals separately with commercial transactions and commercial purpose, they are treated as related concepts, as the definitional provisions in ss 3(5) and 11(3) make clear by the use of the words "trading", "business", "professional" and "industrial" in relation to both transactions and purpose.

30. RON seeks to resurrect (RS [63]-[64]) an argument that a commercial purpose must have at its "heart" an aim or objective of making profit. The effect of RON's submission is to render a subjective statement by the foreign state as to its purpose for utilising property in the way it does as the overriding or governing criterion by which the nature of the use should be judged. Such an approach would arrogate to the foreign state almost complete control over whether its property would be amenable to execution. Once the analogy between the two restrictive theories of sovereign immunity is recognised, there is every reason to distinguish between commercial and non-commercial purposes according to criteria that are objective, and do not depend upon the subjective motivation of the foreign state in using the property, just the distinction is made for the purposes of transactional immunity according to similarly objective criteria. This must result in the rejection of RON's argument in favour of the approach for which Firebird contends and which focusses on objective features of how the particular property is used. On that approach, the purposes would be commercial, whatever the Nauruan government's motivation and whatever expectation it had of making a profit.

Dated 11 May 2015

T G R Parker
Tel: (02) 8221 3890
Facsimile: (02) 9233 1850
Email: parker@newchambers.com.au

J A C Potts
Tel: (02) 9232 0989
Facsimile: (02) 9232 7740
Email: jpotts@eightselborne.com.au

Counsel for the appellant