FIREBIRD GLOBAL MASTER FUND II LTD v REPUBLIC OF NAURU & ANOR (S29/2015)

Court appealed from: Supreme Court of New South Wales
(Court of Appeal)
[2014] NSWCA 360

Date of judgment: 23 October 2014

Special leave granted: 13 February 2015

In October 2011 in the Tokyo District Court, the Appellant ("Firebird") obtained a judgment in its favour against the First Respondent ("Nauru") for more than 1.3 billion yen ("the Judgment"). Firebird then registered the Judgment with the Supreme Court of New South Wales ("the Registration") under the *Foreign Judgments Act* 1991 (Cth) ("FJA"). This was by following the procedure set out in Part 53 of the *Uniform Civil Procedure Rules* 2005 (NSW) ("UCPR"). In accordance with that procedure, Firebird served on Nauru the resulting notice of registration of the Judgment ("the Notice") and did not serve the summons it had filed to seek the Registration ("the Summons").

Nauru does all of its banking through various accounts it maintains with the Westpac Bank in Australia, against which Firebird sought execution for the sum awarded by the Judgment.

Nauru did not apply to set aside the Registration within the 14-day time limit that applied under the procedure prescribed by the FJA and UCPR. Later however Nauru applied for the Registration to be set aside under s 38 of the *Foreign States Immunities Act* 1985 (Cth) ("FSI Act"), invoking the general immunity from the jurisdiction of Australian courts provided by s 9 of that Act.

On 3 October 2014 Young AJA set aside the Registration. This was on the basis that it had been obtained without service of the Summons on Nauru, contrary to s 27(1) of the FSI Act. His Honour held that the FSI Act was a specialised Act which operated as an exception to the procedure under the FJA and UCPR for the registration of foreign judgments (and the setting aside of such registrations). Justice Young held that the exception under s 11 of the FSI Act to the general immunity from suit provided by s 9 did not apply to Nauru, as the Judgment was not a "commercial transaction" within the meaning of s 11.

On 23 October 2014 the Court of Appeal (Bathurst CJ, Beazley P & Basten JA) unanimously dismissed Firebird's appeal. Their Honours held that the requirement under the FSI Act for service of originating process did not conflict with the FJA, as the latter did not require such service. Nauru was therefore entitled to seek relief under the FSI Act regardless of the time limit under the FJA. The Court of Appeal held that the "commercial transaction" exception to immunity in s 11 of the FSI Act did not apply to the Registration, as the word "concerns" in that section did not extend to the subject matter of the Judgment. Bathurst CJ, with whom Beazley P agreed, found that the general immunity from execution provided by s 30 of the FSI Act applied to the funds in Nauru's accounts with the Westpac Bank. This was because their uses or purposes, in the circumstances of Nauru as a small island

nation, were such that the funds were not “commercial property” so as to attract the exception in s 32 of the FSI Act.

The grounds of appeal include:

- The Court erred in holding that, where a foreign court has given judgment against a foreign state and Part 2 of the FJA applies to that foreign judgment:

    a) the FSI Act, s 9, renders a foreign state immune to an application to the Court for an order for the registration of the foreign judgment under the FJA, s 6 (“Application”), as involving the exercise against the foreign state of “jurisdiction of [the Court] in a proceeding”, and, as so construed, has not impliedly been repealed by the FJA, ss 6 and 7; and

    b) the FSI Act implicitly requires that an order for the registration of the foreign judgment under the FJI, s 6, cannot be made unless the summons commencing the Application has first been served on the foreign state, and, as so construed, has not impliedly been repealed by the FJI.

On 27 April 2015 the Attorney-General of the Commonwealth of Australia filed a summons, seeking leave to intervene in this matter.

On 1 June 2015 the First Respondent filed a summons, seeking leave to file a notice of contention out of time. The grounds of that proposed notice of contention include:

- The Court of Appeal erred in holding that s 27 of the FSI Act relates only to a judgment in default of appearance after service has been effected. The Court of Appeal should have held that s 27 of the FSI Act expressly prohibits the entering of a judgment against a foreign State in circumstances where the initiating process has not been served in accordance with Part III of the FSI act (CA [39]-[45).