DLA PIPER

NOVEMBER 2014

LITIGATION UPDATE

SOVEREIGN IMMUNITY vs COMMERCIALITY: ENFORCING A FOREIGN JUDGMENT AGAINST A NATION STATE IN AUSTRALIA

The recent decision by the NSW Court of Appeal in Firebird Global Master Fund II Ltd v Republic of Nauru [2014] NSWCA 360 illustrates the complex considerations involved in enforcing a foreign judgment against a foreign State under Australian law. The decision should be used as a guideline for any foreign States with assets in Australia against which judgments might be enforced, as well as for businesses that transact with such foreign States. It is not the first decision involving a foreign State being pursued by a business and there is no doubt that it will not be the last.[1]

On 23 October 2014, the NSW Court of Appeal dismissed an appeal by Firebird Global Master Fund II Ltd (**Firebird**) from the decision of Young AJA, who had held that a Japanese judgment in favour of Firebird had been wrongly registered against the Republic of Nauru (**Nauru**) and as a consequence the garnishee order which had been made over a number of Nauru's Australian bank accounts with Westpac Banking Corporation should be set aside.

In his decision, Young AJA approved the statement that "*until the twentieth century, sovereign immunity from the jurisdiction of foreign courts seemed to have no exception*" but emphasised that the *Foreign States Immunities Act 1985* (Cth) (***Immunities Act***) redefines the rights of foreign States to the extent that they are involved in commercial activities, as they increasingly tend to be.[2]

In this context, the Court of Appeal considered the interaction between the Immunities Act, which provides immunity to foreign States and their assets from proceedings in Australian courts and the *Foreign Judgments Act 1991* (Cth) (***Foreign Judgments Act***), which provides for the registration and the setting aside of foreign judgments.

[1] For example, see *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] NSWSC 1394 a case in which a vulture fund enforced an arbitral award against the Democratic Republic of Congo.

[2] *Judgment* at [17]; *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2012] HCA 33 at [5]; *Firebird Global Master Fund II Ltd v Republic of Nauru* [2014] NSWSC 1358 at [38]-[40].

BACKGROUND TO THE DISPUTE

On 28 October 2011, the Tokyo District Court handed down a judgment in favour of Firebird against Nauru for the sum of 1.3 billion yen, plus interest. The proceedings related to Japanese bearer bond certificates held by Firebird, issued by the Republic of Nauru Finance Corporation and guaranteed by Nauru. Subsequently, Firebird filed a summons with the NSW Supreme Court seeking registration of the Japanese judgment pursuant to the *Foreign Judgments Act*. The summons was never served on Nauru but the Japanese judgment was registered.

On 10 September 2014, Firebird obtained a garnishee order over 30 Westpac accounts through which Nauru conducted its banking, the result of which required Westpac to pay the full amount of the judgment debt, in excess of AUD 31 million, within 14 days of the service of the order. On 19 September 2014, Nauru filed a notice of motion seeking to set aside the registered judgment and the ensuing garnishee order.

On 3 October 2014, Young AJA granted these orders and Firebird appealed to the Court of Appeal. His Honour considered that Nauru was protected under the *Immunities Act* and that garnishment was used in relatively small cases (that is, not in circumstances involving a judgment debt of AUD 31 million). The Commonwealth of Australia appeared on the motion on the basis that approximately AUD 11 million of the funds in Nauru's accounts represented aid funding recently provided by Australia.

THE COURT OF APPEAL JUDGMENT

In dismissing Firebird's appeal, the relevant aspects of the Court of Appeal's decision were as follows:

- Firstly, the Court of Appeal held that an application to register a foreign judgment is a 'proceeding' within the meaning of section 9 of the *Immunities Act*, which provides that a foreign State is immune from the jurisdiction of the courts of Australia in a 'proceeding'. The Court relied upon the High Court statement that, for the purposes of section 9, *"immunity is a freedom of liability from the imposition of duties by the process of the Australian Courts."* [3]

- Secondly, in the context of section 11 of the *Immunities Act* provides a general exception to immunity insofar as a proceeding concerns a commercial transaction, the narrower view was that the proceedings simply concerned the registration of the Japanese judgment and, on such an analysis, the proceedings did not fall within the exception (even though the underlying subject was the liability of Nauru under bond instruments which plainly concerns a commercial transaction). Bathurst CJ, Beazley P and Basten JA agreed in separate judgments with the narrower view.

- Thirdly, Bathurst CJ and Beazley P held that the filing of a notice of motion by Nauru did not constitute a submission to the jurisdiction for the purposes of section 10(6) of the *Immunities Act*. The proceedings were simply an assertion of immunity by Nauru.

- Fourthly, the *Immunities Act* prescribes a process by which to serve a foreign State. In the primary decision, Young AJA found the judgment was registered in non-compliance with this section and this was not contested on appeal. Instead, Firebird submitted that the *Foreign Judgments Act* impliedly repealed the Immunities Act on the basis that the registration of judgments is exclusively dealt with under the Act. The Court of Appeal did not accept this submission. Basten JA observed that the *Immunities Act* was introduced when a previous equivalent version of the *Foreign Judgments Act* was in force. Bathurst CJ held that it is *"implicit in the terms of the Immunities Act that a judgment cannot be entered against a foreign State unless the process which gives rise to the judgment has been served"*[4] . This entitled the Court of Appeal to set aside the registration under section 38 of the *Immunities Act* or, alternatively, using its inherent jurisdiction.

- Finally, Bathurst CJ and Beazley P considered each bank account which Nauru held with Westpac, and held that even if Firebird had been entitled to register the Japanese judgment, the Westpac accounts were immune from execution. The funds within the accounts were not used for substantially commercial purposes. They were used for the purpose of government administration and provision of government services. Where the property of a state is used to further its sovereign mandate, the Court stated that achieving this object by entering into commercial transactions did not equate to the funds being used for substantially

[3] PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2012] HCA 33
[4] Paragraph 44

a commercial purpose. From a practical perspective, this means that if a foreign State held money in an interest bearing account it would be classified as commercial property.

CONCLUSION

The case illustrates the politically sensitive nature of matters involving the *Immunities Act*. If the Court of Appeal had found in favour of Firebird, it could have brought Nauru to a halt, unable to pay its public servants. This would have flow-on effects for Australia which relies on Nauru to assist it with asylum seekers. Also to the extent that Australia had provided AUD 11 million in aid funding, that aid could have been garnished by Firebird. Incidentally, and helpfully, Young AJA considered that if aid money is given to a foreign State for a particular humanitarian purpose and that purpose cannot be achieved, the recipient holds the funds on trust in a form of Quistclose Trust. [5]

Like large corporations, States are often a target for litigants because they have deep pockets. However, this decision is a reminder of the immunities afforded to foreign States and that parties must carefully consider the strict requirement of service required by Court rules, as well as under legislation such as the *Immunities Act*. From a State perspective, foreign States should be mindful of whether the methods by which they obtain finance or hold assets puts them at risk of litigation and if so, whether they remain protected by immunity in the relevant jurisdiction. In some cases, foreign States might consider operating using a state owned corporation to minimise the risk of liability.

MORE INFORMATION

For any enquiries relating to the enforcement of a foreign judgment or the setting aside of a registered foreign judgment, please speak to one of the following contacts:

Gitanjali Bajaj
Partner
T +61 2 9286 8440
gitanjali.bajaj@dlapiper.com

Kirk Simmons
Senior Associate
T +61 2 9286 8111
kirk.simmons@dlapiper.com

Or contact your nearest DLA Piper office:

BRISBANE

Level 29, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park 152–
158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 21, No.1 Martin Place
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

[5] *Firebird Global Master Fund II Ltd v Republic of Nauru* [2014] NSWSC 1358 at [149] to [172]