

When foreign state immunities and foreign judgments collide

Nicolas Kirby reports on *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; 90 ALJR 228; 326 ALR 396.

This case deals with the collision of the *Foreign States Immunities Act 1985* (Cth) and the *Foreign Judgments Act 1991* (Cth).

The Republic of Nauru Finance Corporation issued bonds. The appellant, Firebird Global Master Fund II Ltd, held most of those bonds. The Republic of Nauru guaranteed the bonds and then refused to pay Firebird.

Firebird sued Nauru in the Tokyo District Court and obtained judgment for the sum of ¥1,300 million. Firebird then registered that judgment in the NSW Supreme Court – without notice to Nauru – under the Foreign Judgments Act. The registration of the Japanese judgment gave Firebird the same rights to enforce the judgment as if it was a judgment of the Supreme Court. Firebird sought to execute its judgment against certain accounts Nauru held with Westpac.

First Instance and Court of Appeal

Nauru applied to set aside the registration of the foreign judgment on the basis of its immunity under the *Foreign States Immunities Act 1985* (the Immunities Act) and, further, because it was not properly served with the proceedings under that Act.

Young AJ found for Nauru on both points. The Court of Appeal (Bathurst CJ, Beazley P, Basten JA) agreed. Firebird appealed to the High Court.

The immunities and exceptions

The Immunities Act relevantly provides for two kinds of immunity. Section 9 provides an immunity from the jurisdiction of Australian courts in a proceeding. Section 30 provides for an immunity from execution of an order or judgment against a foreign state's property in Australia. The Immunities Act then provides for certain exceptions to those immunities.

The exceptions under scrutiny in this case were the exception to the jurisdictional immunity for commercial transactions (section 11) and the exception to the immunity from execution for property which is commercial property (defined as property used for substantially commercial purposes) (section 32).

Nauru maintained that its general immunity from jurisdiction applied in proceedings for the registration of a foreign judgment and that the immunity from execution applied in relation to the garnishee order made against its Westpac accounts.

Firebird argued, first that the jurisdictional immunity did not apply because the registration of a foreign judgment was not a relevant 'proceeding'. The High Court rejected this argument.¹ It held that wide meaning should be given to 'proceeding' in

order to give effect to the immunity conferred by the statute as well as giving effect to the immunity recognised in international law.²

Firebird alternatively argued that the registration of the foreign judgment came under the commercial transactions exception because the underlying, Japanese judgment concerned a commercial transaction. The High Court upheld Firebird's alternative argument, holding that a wide construction should be accorded to the commercial transaction exception, in order to give effect to the object of the commercial exception immunity.³

Service

Nettle and Gordon JJ held that registration of a foreign judgment is not an action *in personam* and the Foreign Judgments Act contemplates an *ex parte* procedure which the judgment debtor may later apply to set aside.⁴

French CJ and Kiefel J held that the Immunities Act only dictated how a foreign state is to be served but not when it must be served.⁵ They held that the Foreign Judgments Act permitted the *ex parte* registration of the Japanese judgment but that Nauru could then apply for the registration to be set aside by asserting its immunity.⁶

Gaeger J agreed with Basten JA's analysis and upheld the finding of Young JA and the Court of Appeal that the registration of the foreign judgment should be set aside for failure to serve Nauru in accordance with the Immunities Act. His Honour based his decision on his opinion that:

the Immunities Act is structured on the assumption that an exercise of judicial power against a foreign State will occur only in a proceeding to which the foreign State is a party.

Of course, the Republic of Nauru was a party to the registration proceedings. But Firebird registered the foreign judgment *ex parte*, leaving Nauru to apply to set it aside once it was notified of the judgment and the ensuing garnishee order. Gaeger J's reference should be understood to refer to a foreign state who is a party *who has appeared* in the proceedings.

Execution against the Westpac accounts

So, up to this point, Firebird's appeal was travelling pretty well. All five judges accepted that Nauru was not here protected by the jurisdictional immunity and four of the judges had found that there was no invalidity for failure to serve Nauru prior to registering the foreign judgment. The only issue that remained

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to be determined concerned Nauru's claimed immunity against execution against its Westpac accounts. This is where Firebird's success ended.

The High Court found that the Westpac accounts were not commercial property.⁷ Some of the funds were used for purposes which, *prima facie*, had a commercial character (such as operating an airline, selling residents fuel, providing electricity and water and lending to small businesses). But the court took into account that Nauru is a small, remote nation of small population. It has no central bank (and seemed to be using Westpac as a *de facto* treasury). Most of the ostensibly commercial transactions were, in fact, conducted on a non-profit basis. Each of these was, in fact, a government providing goods and services to a small population which would not otherwise receive them due to the remote location and tiny population.

In a separate judgment, Firebird, despite some measure of success with respect to the jurisdictional immunity and service points, was ordered to pay the respondents' costs.⁸

Endnotes

1. French CJ and Kiefel J at [36] and [49]; Gaegeler (who agreed with the judgment and reasons of French CJ and Kiefel J in all matters except as to service) at [131]; Nettle and Gordon JJ at [187].
2. French CJ and Kiefel J at [44].
3. French CJ and Kiefel J at [70], [71.]
4. Nettle and Gordon JJ at [213].
5. French CJ and Kiefel J at [94].
6. French CJ and Kiefel J at [96].
7. French CJ and Kiefel J at [118]ff; Nettle and Gordon JJ at [226]ff.
8. *Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]* [2015] HCA 53; 90 ALJR 270; 327 ALR 192.

Identification of privies in interest for the purpose of issue estoppel

Tarik Abdulhak reports on *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28.

In this case, the High Court clarified the circumstances in which a person may be subject to an issue estoppel by virtue of being a privy in interest with a party to prior court proceedings. In summary, where the person's legal interests were represented by a party to the prior proceedings, he or she will be treated as a privy in interest with that party if he or she had an opportunity to control the conduct of the previous proceedings, and the potential detriment to him or her from creating such an estoppel was taken into account in the conduct of those proceedings.¹

The first and second proceedings

In 2010, the Fair Work Ombudsman (the 'Ombudsman') took enforcement action in the Federal Court of Australia against Ramsey Food Processing Pty Ltd ('Ramsey'). The Ombudsman alleged that, as an employer, Ramsey had breached an applicable award² by failing to pay a number of its employees, including Mr Tomlinson, certain amounts to which they were entitled. Mr Tomlinson was not a party to, but did give evidence in, the proceedings. The Federal Court determined that Ramsey (and not Tempus, a labour services company) was the employer. The Court ordered Ramsey to pay Mr Tomlinson and the other employees the outstanding amounts.

Mr Tomlinson subsequently brought an action against Ramsey in the District Court of New South Wales, seeking damages at common law for injuries alleged to be the result of Ramsey's negligence. In this action, Mr Tomlinson alleged that Tempus, and not Ramsey, was his employer, and that Ramsey was liable as the entity in control of the workplace.³ Following a trial on the merits, the District Court held that Tempus was indeed the employer. The court found that Mr Tomlinson established his cause of action, and awarded damages against Ramsey. It rejected Ramsey's argument that the Federal Court judgment gave rise to an issue estoppel which would bar Mr Tomlinson from alleging that Ramsey had not been his employer.

Court of Appeal Judgment

The New South Wales Court of Appeal upheld an appeal by Ramsey from the judgment of the District Court, holding that the Federal Court's declaration and orders gave rise to an issue estoppel as to who was Mr Tomlinson's employer.⁴ The Court of Appeal found that there was privity of interest between Mr Tomlinson and the Ombudsman because the latter had made the claim in the Federal Court 'under or through', or on behalf of, Mr Tomlinson.⁵