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

FIRST RESPONDENT'S SUBMISSIONS

PART I: Publication Certification

1 The first respondent (**RON**) certifies that these submissions are in a form suitable for publication on the Internet.

PART II: Statement of Issues

2 This appeal gives rise to the following issues:

a. First, does Part II of the *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**) apply to proceedings under the *Foreign Judgments Act 1991* (Cth) (**Foreign Judgments Act**) for registration and enforcement of a foreign judgment obtained against a foreign State and, if so, do those proceedings "concern" the underlying transactions the subject of the foreign proceedings?

b. Secondly, does Part III of the Immunities Act require that a foreign judgment cannot be registered in New South Wales unless the originating process is served on the foreign State in accordance with that Part?

Filed on behalf of the First Respondent by
Ashurst Australia
123 Eagle Street Brisbane QLD 4000
DX 388 BRISBANE

Tel: (07) 3259 7080
Fax: (07) 3259 7111
Reference: John Lobban

c. Thirdly, in what circumstances is a chose in action representing a bank account held by a foreign State immune from execution under Part IV of the Immunities Act?

PART III: Notice Certification

3 RON certifies that it has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth). No notice needs to be given.

Part IV: Appellant's Narrative of Facts

4 In relation to AS [10], RON's claim for sovereign immunity in the Japanese proceedings was rejected on the basis that there was a contractual submission to jurisdiction. No contention was made on the application to register the Japanese judgment in Australia that the Japanese court had jurisdiction because the subject matter of that proceeding was a commercial transaction.

Part V: Appellant's Statement of Provisions

5 Relevant provisions also include ss 10, 12-16 and 19 of the Immunities Act.

Part VI: Submissions

Jurisdiction immunity (AS [18]-[45])

6 Before turning to the specific matters raised by Firebird, it is convenient briefly to refer to the relevant chronology. From as early as 1933 in the United Kingdom[1] and the 1950s to 1970s in Australia[2], statutes had provided, in substantially similar terms, for the reciprocal enforcement of certain judgments by registration. At the time those statutes were enacted, there was no question that a foreign State would be subject to the registration procedure due to the principle of absolute immunity. That principle began to be eroded in the UK in the late 1970s, and what is now known as restrictive immunity was enshrined in the *State Immunity Act 1978* (UK) (**UK Act**): Australian Law Reform Commission, Report on Foreign State Immunity, [1984] ALRC Report 24 (**ALRC**) at [11]-[16]. At the time the Australian Law Reform Commission considered the issue, there were no recent Australian cases assessing the position under Australian law, although it was likely that Australian courts would follow the development of the

[1] *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK).
[2] *Foreign Judgments (Reciprocal Enforcement) Ordinance 1954* (ACT) and the legislation referred to at items 5 and 6 of Firebird's annexure to its submissions.

English common law: ALRC at [17]. There appear to be no cases from that period suggesting that a foreign judgment against a foreign State could be registered.

7 The Immunities Act was enacted in that context. The Act does not expressly deal with registration of foreign judgments and the Law Reform Commission made no reference to that issue. The most likely explanation is that neither the Commission nor Parliament intended to alter the existing position that foreign States were immune from the regime for registration of foreign judgments. The Immunities Act should be construed to achieve that result. In 1991, the federal Parliament passed the Foreign Judgments Act. The purpose of that Act was to replace the existing state and territory regimes with a single uniform regime and in some cases, such as in relation to certain judgments of inferior courts, to extend the prior regime. There is no reference in the explanatory material to foreign state immunity and no indication that the statute was intended to alter the position on that issue.[3] Again, the most likely explanation is that Parliament did not intend to alter the existing position that the regime for registration of foreign judgments had no application to foreign States.

8 The Foreign Judgments Act and the Immunities Act should be construed such that their interaction, save in effect for cases where a foreign State submits to jurisdiction, renders a foreign State immune from the regime for registration of foreign judgments. The Court of Appeal adopted such a construction. Contrary to AS [18] and [39], this does not produce an anomalous outcome. The fact that a foreign State may not have jurisdiction immunity if it were to be sued in Australia in respect of a commercial transaction does not mandate, much less suggest, that it also lacks immunity in respect of an application to register a foreign judgment in Australia.

9 Whilst the text of the Australian legislation itself is of primary significance (and is the principal focus of these submissions), it is relevant to note that the position in respect of the UK Act, being the closest analogue to the Immunities Act, is that (i) the jurisdiction immunity conferred by s1 of the UK Act applies to a proceeding to register a foreign judgment and (ii) such a proceeding is not one "relating to" the underlying transactions the subject of the foreign proceedings: *AIC Limited v Nigeria* [2003] EWHC 1357 (QB) at [18]-[22] and [24]-[28]; *NML Capital Limited v Republic of Argentina* [2011] 2 AC 495.

---

[3] See the Explanatory Memorandum to the Foreign Judgments Bill 1991, and the Second Reading Speech to the Bill in House of Representatives, Official Hansard, 29 May 1991, pp 4218-4219.

Meaning of "jurisdiction ... in a proceeding" (appeal ground 1(a))

10 Firebird submits that the proceeding for registration of the Japanese judgment did not involve the "jurisdiction of the courts of Australia in a proceeding", such that the immunity in s9 of the Immunities Act did not operate to prevent registration of that judgment: AS [20]-[29].

11 The term "jurisdiction" is a "generic term used in a variety of senses": *PT Garuda Indonesia Ltd v ACCC* (2012) 247 CLR 240 at [14]. In the context of s9, the term is used to identify the amenability of a defendant State to the process of Australian courts and the immunity may be understood as a "freedom from liability to the imposition of duties by the process of Australian courts": *PT Garuda* at [17]; CA [58].

12 No doubt the term "jurisdiction... in a proceeding" is a composite expression. However, the two components of the expression are well-understood and their combination produces no unusual or unexpected meaning. The immunity is concerned with a foreign State's "personal immunity from the jurisdiction of Australian courts": ALRC at [2]. There was no suggestion in the ALRC Report that the words "in a proceeding"[4] were intended to narrow the circumstances in which the immunity would apply. There is a long line of authority establishing that the word "proceeding", when applied to a court, has a wide meaning that encompasses any "*method permitted by law for moving a Court or judicial officer to some authorized act, or some act of the Court or judicial officer*": *Cheney v Spooner* (1929) 41 CLR 532 at 536-537; *McIvor v Watson* (1960) 103 CLR 658 at 664. As Basten JA put it, the term "proceeding" means "*the invocation and carrying through of [the court's] function in the exercise of some part of its jurisdiction*": at CA [244]. The words of s9 were intended to cover any exercise of jurisdiction "of whatever nature affects [the foreign State's] interests".[5] They were not intended to confine the immunity to any particular kind of action known at common law.

13 The following features of the Foreign Judgments Act are relevant. First, s6(1) gives a judgment creditor "under a judgment to which this Part applies" a right to apply to have the judgment registered. Secondly, the application is to be made to a specified Court: sub-ss (1)-(2). Thirdly, the relevant Court makes an "order" for the judgment to be registered: sub-s (3). Fourthly, the Court must make the order "*[s]ubject to this Act*

[4] These words do not appear in s1 of the UK Act.
[5] Fox and Webb, *The Law of State Immunity* (3rd ed, Oxford University Press, 2013) at p231.

and to proof of the matters prescribed by the applicable Rules of Court": sub-s (3). The relevant Rule of Court in the present matter is UCPR (NSW) r 53.3, which sets out the evidence to be included in an application for registration. Fifthly, the court may, "by order", extend the period within which an application may be made under s7 to set aside registration: sub-s (5). Sixthly, sub-s (7) provides that a registered judgment is enforceable, and proceedings may be taken on it, as if it were a judgment of the relevant Court.

14 As Bathurst CJ held (Beazley P agreeing), there is no doubt that the application to register a foreign judgment is a proceeding in the relevant sense: CA [59]-[60]; see also Basten JA at CA [244]. There is equally no doubt that Firebird's registration application invoked an exercise of jurisdiction in that proceeding. The jurisdiction being exercised was an exercise of judicial power to determine the right of Firebird to have the Japanese judgment registered. The immediate and direct effect of that exercise of judicial power was that the registered judgment was enforceable as if it were a judgment of the Court. That process resulted in the imposition, "by" process of an Australian court, of duties on RON.

15 It is not to the point that the mechanism for the imposition of those duties on RON is s6(7) of the Foreign Judgments Act operating on the judicial order. In both a practical and legal sense, the two steps are indistinguishable; the making of the order leads directly to the imposition of duties "as if" the registered judgment were a judgment of the court: cf *Brandy v HREOC* (1995) 183 CLR 245 at 269-270. Account must also be taken here of the extended definition of "court" in s3 of the Immunities Act as including tribunals and other bodies that do not exercise judicial power in the strict sense. The orders of such bodies necessarily bind parties through a statutory mechanism. The fact that there is a statutory right, arising upon registration, to seek to set aside the registered judgment does not alter this analysis.

16 At AS [23]-[25], Firebird seeks to characterise the procedure for registration of a foreign judgment as simply "enforcement" of a judgment already obtained. It submits that the jurisdiction immunity in s9 does not apply to proceedings for enforcement and therefore does not apply to an application to register a foreign judgment: AS [23].

17 Neither proposition can be sustained. As to the first proposition, the registration of a foreign judgment is the first occasion on which any judicial power is exercised in

Australia. That it is exercised by reference to a foreign judgment does not alter the character of the proceeding from the Australian perspective: cf *Ruhani v Director of Police* (2005) 222 CLR 489 at 500 [10], 511 [51], 528 [108].

18 As to the second proposition, an application for execution process is an exercise of federal judicial power (eg *The Society of Lloyd's v Marich* (2004) 139 FCR 560 at [23]) and an exercise of "jurisdiction... in a proceeding" within the meaning of s9. The scheme of the Immunities Act when it comes to consider execution process is that there already will have been an exercise of jurisdiction in a proceeding, at which point questions of jurisdiction immunity will have been resolved for that proceeding and any related proceeding, including any separate execution process: s21.[6] Accordingly, the question of jurisdiction immunity ordinarily would not arise at the point of execution. However, if, contrary to RON's position, the proceedings for registration of the Japanese judgment did not involve "jurisdiction ... in a proceeding", then the same questions of jurisdiction immunity would fall to be determined at the point when the garnishee order was sought and obtained. Firebird cannot fashion a situation where there is no jurisdiction of an Australian court in a proceeding upon which s9 can operate.

19 In relation to AS [24] and [26], there is no basis to confine or read down the immunity in s9 by reference to common law principles or procedures such as the former writ of summons procedure. The decision in *Hunt v BP Exploration Co (Libya) Ltd* (1980) 144 CLR 565 does not advance matters (cf AS [26] and [28]). In that case, one argument raised by the appellant was that at common law a judgment creditor who sought to enforce judgment in Queensland by suing on the judgment was required to serve the writ commencing the action. As the writ had not been served, so the argument went, the Queensland Supreme Court had no jurisdiction. The joint judgment (Stephen, Mason and Wilson JJ) rejected that argument. Their Honours noted that the State Act dispensed with the old procedure and held that the application for registration "*does not involve an action in personam requiring service of the Supreme Court's process in or outside the jurisdiction*": at 573. That statement was not directed at the Immunities Act (and the Court was not there concerned with questions of sovereign state immunity). It does not mean, or even suggest, that an application to register a foreign judgment

[6] Section 7(4) provides that Part IV only applies where the foreign State is not immune under Part II in the particular proceeding. Section 7(4) appears to have been inserted to deal with the transition to the Immunities Act: ALRC at p131. However, textually it is not so confined and it reflects and reinforces what flows from the scheme of the Act in any event, including the terms of Part III discussed below.

involves no exercise of jurisdiction in a proceeding. It simply means that under the relevant State legislation, service was not required to enliven the Court's jurisdiction.

Implied repeal (appeal ground 1(a) and (b))

20 There is no actual contrariety between the Immunities Act and the Foreign Judgments Act, such that the latter is not capable of sensible operation if the former stands: eg *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [18]; *MIMIA v Nystrom* (2006) 228 CLR 566 at 585 [48]; *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35]. There is an obvious way to read the two statutes together so as to produce a sensible and harmonious operation; namely, that s6 of the
10 Foreign Judgments Act applies if the judgment debtor is amenable to the Australian court's process, and the Immunities Act deals with one circumstance where there may be immunity from (ie absence of) that amenability: see CA [56].

21 As noted by Bathurst CJ, "*it would be surprising ... if the Foreign Judgments Act ... has the effect of impliedly repealing the Immunities Act*": CA [47]. The only way that Firebird can manufacture an inconsistency in the relevant sense is to construe the Foreign Judgments Act as conferring an absolute entitlement on a judgment creditor to obtain registration of a relevant foreign judgment against any person, irrespective of any immunity from jurisdiction created by other federal statutes. However, there is no warrant in the Act itself or in history or policy to arrive at such a construction.

20 22 Section 7(4)(c) of the Foreign Judgments Act is not relevant here (cf AS[33]). It is concerned with lack of jurisdiction of the foreign court (not the Australian court) and operates at the stage of setting aside, after a registration order has been made. It is not directed at the amenability of a party to the making of a registration order: CA [54].

23 Contrary to AS [34], the fact that subsequent Parliaments, many years later, passed legislation which was expressly made subject to the Immunities Act does not justify an inference that, at the time of enactment of the Foreign Judgments Act, Parliament intended the statute to override the Immunities Act.

Exception for commercial transactions (appeal ground 2)

24 The question here is whether the interaction of the Foreign Judgments Act and the
30 Immunities Act produces the result that a proceeding for registration of a foreign judgment "concerns" the subject matter of that foreign judgment.

25 Firebird submits that the registration of the Japanese judgment is "part of the process of enforcing RON's liabilities under" the bond issue the subject of the Japanese proceedings (AS [41]). Legally, however, the registration of the Japanese judgment was a process of enforcing, in Australia, the rights and obligations created by the Japanese judgment. That is, the subject matter of the Australian proceedings is the fact of the Japanese judgment. The obligations sought to be enforced are those which were created by the Japanese judgment in substitution for the rights and liabilities which were the subject of the dispute referred to that court: *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 567 [79]-[80]. There is no interference with, or re-agitation of, the anterior foreign judicial process: *South Australia v Totani* (2010) 242 CLR 1 at 64 [136]; CA [70]. In that context, it is far from axiomatic that in the ordinary use of language, the registration proceeding "concerns" the transactions the subject of the Japanese judgment.

26 The structure of Part II of the Immunities Act is to confer an immunity in s9 and then to create a series of exceptions to that immunity in ss10-20. In each of ss11-16, 19 and 20, the formula adopted for the exception to immunity is "[a] foreign State is not immune in a proceeding in so far as the proceeding concerns" the relevant matter. Sections 10 (Submission to jurisdiction), 17 (Arbitrations) and 18 (Actions in rem) adopt slightly different wording because of the different subject matter of those exceptions.

27 The word "concerns", like the phrase "relating to", is used to identify a connection or relationship between "the proceeding" and the relevant matter in respect of which an exemption is conferred. The question of the degree and directness of the connection or relationship required depends on the terms of the legislation: cf *Commissioner of Taxation v Scully* (2000) 201 CLR 148 at [39]; *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1989) 167 CLR 45 at 47; CA [280]. The terms of Part II of the Immunities Act support the construction adopted by the Court of Appeal. A similar result was reached, by a similar reasoning process, by the majority of the UK Supreme Court in *NML Capital* at [85]-[89], [94]-[95] and [116]. The word "concerns" is certainly no wider than the phrase "relating to" in the UK Act and, if anything may be narrower: see CA [280].

28 Consideration of the terms of the Immunities Act itself indicates that the word "concerns" does not have the meaning contended for by Firebird. First, in each case

where the focus is not the immediate subject matter of a proceeding, but rather what might be described as the "underlying transaction", the relevant sections expressly provide the mechanism by which the underlying transaction is examined.

29 In relation to enforcement of arbitral awards[7] in s17, the exception to immunity in s17(2) operates if the foreign State would not be immune in a proceeding concerning a particular transaction (eg under s11) and it has agreed to submit a dispute about that transaction to arbitration. That is, s17(2) expressly looks to the transaction the subject of the arbitration rather than to the matter that the enforcement proceeding "concerns". In relation to bills of exchange in s19, the immunity will apply if the bill was drawn, made, issued or indorsed by the foreign State in connection with a transaction and the foreign State would not be immune in a proceeding in so far as it concerns that transaction. That is, s19 expressly turns on the nature of the transaction in connection with which the bill was drawn, made, issued or indorsed.[8]

30 To adopt the phrase used by Lord Mance in *NML Capital* at [89], there is an "unlikely dichotomy" between the express treatment of immunity in respect of those matters and the "*suggested tacit, but nonetheless (if achieved) very important, removal of state immunity in respect of [foreign] judgments relating to commercial transactions*".

31 Secondly, Firebird's construction of the word "concerns" produces a partial elimination of a foreign State's immunity against the registration of foreign judgments. Where the exception to immunity before the foreign court is the equivalent of the commercial transaction exception in s11, the foreign State would have no immunity from registration of the foreign judgment in Australia. However, where the exception to immunity before the foreign court is the equivalent of one of the other exceptions in ss12, 13, 14, 15 and 16 of the Immunities Act, then the foreign State would be so

---

[7] From the perspective of the Australian court, enforcement of an arbitral award is closely analogous to the enforcement of a foreign judgment. An arbitral award may arise from a consensual arrangement, but the enforcement of it operates in a materially similar way to the enforcement of a foreign judgment. In each case, there is a resolution of an underlying dispute by something other than an exercise of Australian judicial power. In each case, legislation operates by reference to that factum to create new rights and obligations which are given effect by the exercise for the first time of Australian judicial power: *TCL Air Conditioner* at 555 [32]. From an Australian perspective, it is irrelevant whether the underlying rights in dispute between the parties have been resolved by a consensual arrangement or a foreign coercive (ie judicial) power. What matters is that in neither case is the resolution by the exercise of Australian judicial power.

[8] The purpose of the provision in s19, and the exclusion of bills of exchange from the definition of commercial transaction, is to ensure that a proceeding on a bill of exchange is not automatically one concerning a commercial transaction simply because of the nature of such a bill. However, that does not detract from the force of the argument.

immune. This is because each of those sections defines a specific nexus with Australia and that Australian nexus ordinarily would not be satisfied in respect of a foreign proceeding. For example, consider a foreign judgment against a foreign State for allowing an inherently dangerous substance to escape from property in the foreign State which then causes loss or damage. The exception in s14 would not apply to an application to register the foreign judgment because the proceeding would not "concern" an obligation of the State arising out of its possession of immovable property in Australia. The same position would apply, for example, in relation to applications to register foreign judgments respecting the ownership or infringement of foreign intellectual property rights (s15) or foreign contracts of employment (s12).

32 The jurisdictional nexus in those sections of the Immunities Act makes sense when the focus is on the determination of the underlying cause of action. It makes no sense when the focus is on a regime for registration of foreign judgments that is intended to ensure foreign judgments can be enforced in Australia. As Lord Mance said in *NML Capital* at [194], the territorial limits in the equivalent sections of the UK Act are understandable in proceedings "*actually relating to such contexts or interests*" (ie domestic proceedings on the underlying cause of action), but "*they make no real sense as a basis for distinguishing between foreign judgments in respect of which state immunity is and is not said to exist*". If Firebird is correct, Parliament has, without alluding to the subject, given a "*very partial and haphazard mandate for enforcement of foreign judgments*" against foreign States: *NML Capital* at [95].

33 Thirdly, s21 of the Immunities Act ensures that a foreign State cannot invoke immunity in respect of an appeal from a judgment in a proceeding on the basis that the appeal is a new proceeding which "concerns" the correctness of the judgment below and not the underlying matter or transaction.[9] It could be said that s21 is there for avoidance of doubt, but it is at least consistent with the approach taken by the Act elsewhere as summarised above and tends to point towards the construction adopted by the Court of Appeal.

34 The last sentence of AS [41] is factually incorrect. Firebird did not need to, and did not in fact, demonstrate that the Japanese proceedings arose out of or concerned a commercial transaction. In the Japanese proceedings, the Japanese court held that RON had consented or submitted to jurisdiction. The Japanese judgment did not hold that a

[9] Another example would be an application for certiorari directed to an inferior court or tribunal.

commercial transaction exception applied. On the application to register the Japanese judgment under the Foreign Judgments Act, Firebird relied solely on consent or submission to jurisdiction and did not contend that the Japanese proceeding concerned a commercial transaction: Affidavit of Mark Christopher Fisher sworn 4 May 2012 at 18(d)(i)-(iii) and (m).

35 In relation to AS [42], the scenario put forward is that a claim against a foreign State arising out of a commercial transaction is submitted to arbitration pursuant to agreement and the other party commences proceedings in an Australian court to enforce an award made under that agreement. In that situation, the exception to immunity would be enlivened not because the enforcement proceedings "concerned" the underlying transaction, but because the express terms of s17(2) would be satisfied. There is no anomaly; it is the result intended by the legislation.

36 In relation to AS [43], it is not correct to say that at the time the Immunities Act was passed, the common law had already adopted the restrictive theory of sovereign immunity. The common law of England had moved to that position, but the common law of Australia had not been established: ALRC at [17]. The Immunities Act was enacted to create for the first time in Australia a form of "restrictive immunity" having the features the ALRC considered appropriate. In that context, CA [78] is correct.

Service of the application for registration (appeal ground 1(b)) (AS [46]-[49])

37 For the reasons that follow, the scheme of Part III (ss23-29) of the Immunities Act is that the foreign State must be served with an initiating process prior to any judgment being entered or steps being taken to enforce the judgment. The summons filed by Firebird for an order registering the Japanese judgment (and other orders) was plainly an "initiating process" within the definition of s3 of the Immunities Act.

38 Sections 23 and 24 exhaustively set out the means by which service of an initiating process in Australia on a foreign State may be effected (s25). Section 25 recognises that service also may be effected in the foreign State in accordance with the laws of the foreign State: ALRC at [150] and footnote 17. Importantly, s24(5) operates to leave standing any requirement under applicable court rules for the plaintiff to obtain the leave of the court before effecting service under any of s23, s24 or the laws of the foreign State: ALRC at [151]. The Law Reform Commission said *"[i]n most jurisdictions this will require the plaintiff to obtain leave to serve out, a requirement*

which will go far to eliminate vexatious and frivolous claims": ALRC at [151]. Section 24(5) does not authorise a court to make an order permitting a form of service outside of those permitted under s23, s24 and the laws of the foreign State.

39 Section 26 deals with waiver of objection to service. Section 27 provides that a "judgment in default of appearance" shall not be entered against a foreign State unless it is proved that (a) service of the initiating process was effected and the time for appearance has expired; and (b) the court is satisfied that the foreign State is not immune. Section 28 provides, relevantly, that a judgment in "default of appearance" is not capable of being enforced against a foreign State until 2 months after service of the judgment (sub-s (1)) and that the time, if any, for applying to have the judgment set aside shall be at least 2 months after service (sub-s (5)).

40 Read together, the scheme of Part III is as follows. Sections 23 to 25 ensure that an initiating process is served on a foreign State in a manner which (i) will actually come to its attention and will do so in a timely fashion sufficient to allow adequate response[10] and (ii) will cause it minimal offence, vexation and disruption. Section 27 ensures that a foreign State's rights and obligations cannot be altered by the exercise of jurisdiction in a proceeding without the issue of its immunity being considered (either because the foreign State asserts immunity or because the court considers the question of immunity for itself). Once those requirements have been met in a proceeding, the Immunities Act imposes no further requirements for service or consideration of immunity in respect of any subsequent execution or enforcement action. The assumption is that the foreign State will be sufficiently aware of the proceeding by reason of service on it of the initiating process under Part III.

41 As Basten JA observed, "*[t]he hypothesis that an Australian court is entitled to exercise jurisdiction over a foreign State without notice to it would itself constitute a derogation from the fundamental principle*" that "*one State will not seek to exercise 'imperium' over another independent sovereign State*": CA [258]. The Immunities Act would not lightly be construed to permit such a derogation in the absence of express words.

42 The better view may be that the requirement that the initiating process be served is express in s27 rather than to be implied from the terms and structure of Part III. As a

[10] Fox and Webb, *The Law of State Immunity* (3rd ed, Oxford University Press, 2013) at p231.

matter of ordinary language, the expression "judgment in default of appearance" means a judgment given in circumstances where there is no appearance by the foreign State (ie appearance is lacking: see definition of "in default of" in the Shorter Oxford English Dictionary, sixth edition (2007)). That may be because the procedure invoked by the other party is a familiar "default judgment" application. It may be that a judgment is given after a final (but uncontested) hearing. In either case, the judgment would be one "in default of appearance": ALRC at [156]. A judgment on an *ex parte* application is similarly one in respect of which the appearance of the other party is lacking.

10 43 Bathurst CJ considered that s27 "plainly relates to a judgment in default of appearance after service has been effected in accordance with Part III (note s 27(1)(a))" and that it did not extend to judgments made in circumstances where no appearance was sought or required: CA [45]. However, sub-paragraph (1)(a) does not condition the meaning of the expression "judgment in default of appearance". Rather, it provides that such a judgment may not be entered unless, amongst other things, the initiating process has been served. That construction gives effect to the structure of Part III and the considerations identified by Bathurst CJ at CA [42] and above, but does so by use of an express term rather than by implication.

44 Contrary to AS [47], the fact that notice of the registration of judgment is to be served
20 does not adequately protect the foreign State or meet the purpose of Part III identified above. First, the notice is given after jurisdiction has been exercised against the foreign State and after its rights have been affected. Secondly, the method of service may not in fact bring the notice to the attention of the foreign State in a relevant way. That appears to be what occurred in this case. The notice of registration of the Japanese judgment apparently was left at the office of the Secretary for Justice in Nauru: AS [13]. Firebird submits that "RON took no action at that point": AS [13]. That is hardly surprising. Merely leaving a notice at the office of the Secretary would not be expected necessarily to come to the attention of any relevant person, let alone expediently. The facts of the present case are more an illustration of why a requirement for service of the
30 initiating process is necessary. Urgent proceedings were only commenced after the garnishee order had issued. Had service of the summons seeking registration been effected in accordance with Part III of the Immunities Act, a more timely response could have been expected.

45 It should be noted that in *AIC Limited* at [23], Stanley Burnton J said that the registration of a foreign judgment precedes the service of any UK proceedings on the foreign State, and that registration of a foreign judgment is not the equivalent of a judgment in default of appearance. However, the effect of that paragraph is not entirely clear. In particular, his Lordship appears to have considered that the application for registration of a judgment must be made by the "issue and service of a claim form", which tends to suggest that service prior to registration is necessary in the UK.

Immunity from execution (appeal ground 3) (AS [50]-[67])

46 Section 30 provides that "the property of a foreign State is not subject to any process or order ... of the courts of Australia for the satisfaction or enforcement of a judgment...". Section 32(1) provides that s30 "does not apply in relation to commercial property". Section 32(3)(a) defines commercial property as, relevantly, property "that is in use by the foreign State concerned substantially for commercial purposes". Section 32(3)(b) provides that property apparently not in use "shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes".

47 The task mandated by s32 is to look not at the form the particular use of property takes, but at the purpose (no doubt assessed objectively) for which the property is in use. The distinction is made plain by the Immunities Act itself, but is one ignored or elided by Firebird. The exception from jurisdiction immunity in s11 focuses on the form a specific transaction takes. Questions of purpose are irrelevant to that exception. If, for example, a foreign State enters into a contract for the supply of essential health services, there is a commercial transaction simply because of the form the transaction takes (s11(3)(a)). In contrast, the question for execution immunity is whether property is "in use... substantially for commercial purposes".

48 Three points should be made here. First, that choice of drafting reflected a deliberate choice that "*although no other recent legislation does so ... commercial purposes in the context of execution be defined independently of the use of 'commercial' in the context of jurisdiction*": ALRC at 77 [125], lines 13-16. The background to that choice is instructive. The UK Act provided that entry into a contract for the supply of goods or services was a "commercial purpose", even if the purpose of entering into that contract was to provide government services and not to make a profit. That position was

acknowledged, but plainly regarded as unsatisfactory and ultimately circumvented, by Lord Diplock in *Alcom Ltd v Republic of Colombia* [1984] 1 AC 580 at 603-604. The Law Reform Commission considered the UK Act as construed in *Alcom* and decided to adopt the different approach indicated above (see ALRC at 76).

49 The second point to be made here is that the adverb "substantially" in s 32(3)(a) is important. The definition appears to contemplate that property may be in use for a number of different purposes, some of which may be commercial and some of which may not. Unless the property is in use "substantially" for a commercial purpose, the immunity applies. Where a putative commercial purpose is pointed to, the Court must assess whether the evidence supports the conclusion that the property was "substantially in use" for that purpose.

50 The third point is that the Immunities Act itself provides a mechanism in s41 by which the foreign State can establish *prima facie* the purpose for which property was in use. The mechanism is a certificate in writing given by the person performing the functions of the head of the foreign State's diplomatic mission in Australia to the effect that particular property "is or was at a specified time in use for purposes specified". Section 41 would be otiose if the enquiry was limited to asking whether the use occurs by way of a transaction of a commercial nature.

51 In this case, a certificate was given by the Consul General for Nauru in Australia (**Certificate**): CA [93]. The facts stated in the Certificate were that each account was "in use" for the purposes set out at the time of the hearing before the primary judge. Further, Mr Adeang, the Finance Minister for RON gave evidence and was cross-examined. Bathurst CJ summarised the effect of the Certificate and the evidence of Mr Adeang, and made factual findings regarding the property and the individual circumstances of Nauru, at CA [94]-[171], [176]-[205]. His Honour held that each of the accounts was in use for, or in one case (the Trust account) set aside for, a non-commercial purpose.

Trust account (AS [54], [58]-[59])

52 The Trust account (defined by the Court of Appeal as the Term Deposit) was held on term deposit such that one might expect that the funds would not be withdrawn for the period of the term (unless a decision was made to break the term deposit and forego interest). The Court of Appeal held that the account was not "in use", but was "set

aside" for a non-commercial purpose, being the purpose stated in the Certificate: CA [205], [317].

53 The Certificate stated that the Term Deposit was "in use" to hold funds as "cash reserves to provide future Government Services". That was a present use of the chose in action representing the Term Deposit, being a use that would or might call for future application of funds presently held. The Court of Appeal should have held that the Term Deposit was in use for that purpose.

54 Contrary to AS [54], the question is not whether the Term Deposit was "in commercial use in some other way". The question is whether the chose in action was "in use ... substantially for a commercial purpose". The fact that interest may be earned on an account does not mean that it is in use substantially for the purpose of earning interest or that it is in use for a commercial purpose. No doubt the investment of monies in a term deposit and the payment of interest by the bank are commercial transactions. But that is not the question posed by s32 of the Immunities Act.

55 In the alternative, if the Term Deposit was not in use, the Court of Appeal was correct to be satisfied that the chose in action was set aside otherwise than for commercial purposes (CA [205]). Firebird submits that the term "set aside" requires some formal action by the state requiring that property be devoted to the specified purpose, such as Parliamentary appropriation: AS [59]. First, the term "set aside" should not be confined in the manner suggested. As a matter of ordinary language, funds placed into a six month term deposit may be said to have been "set aside". The question under s32(3)(b) then, is for what purpose have those funds been set aside? In this case, the Certificate answered that question. There was no need to explore the mechanism by which that setting aside occurred.

56 Secondly, even if the term "set aside" is confined to some formal action such as an appropriation, there was evidence that the accounts constituted RON's Consolidated Revenue and were subject to Parliamentary appropriation: Tr 40.36-39 and 47.19-33. That evidence, in conjunction with the Certificate, would support the holding that the Term Deposit had been set aside for non-commercial purposes even on the basis advanced by Firebird.

Funds said to be not in use and not set aside (AS [55]-[59])

57 Firebird submits that all the "account balances" were "apparently not in use": AS [56]. The steps in Firebird's reasoning appear to be as follows:

a. a bank account can be "in use" only for three purposes: to earn interest, to act as security, or to be drawn upon;

b. the credit balance of an account is a single inseverable item of property and one cannot characterise that item by reference to past or intended future drawings on part of that balance; and

c. as the accounts were not earning interest, acting as security or being drawn upon (in the present continuous sense), then they were "apparently not in use".

58 The fundamental flaw in that reasoning lies in seeking to confine the circumstances in which the chose in action represented by the account balance can be said to be "in use". As a matter of ordinary language, a person's bank accounts are in use whether or not they are transaction accounts, savings accounts or other accounts. A transaction account is "in use" whether or not it is being drawn on at any particular point in time and whether or not it has been drawn on recently or regularly. The chose in action is "in use" as a facility for the collection and application of funds.

59 The evidence establishes that the accounts were in use as RON's reserves (or Consolidated Revenue) to meet its non-commercial government expenses as described in the Certificate: CA [177].

60 In relation to AS [52], the ALRC recognised that there were particular difficulties in relation to bank accounts. It did not express any view as to how bank accounts were to be treated or how the provisions would apply to them. Beyond expressing confidence that the legislation could be applied to bank accounts, the ALRC left the resolution of the issues that might arise up to the courts: see ALRC [125].

61 Contrary to AS [57], it was not necessary or even relevant "to consider whether the funds had been drawn on sufficiently frequently and recently to be regarded as being in use." The choses in action were in use in the manner described above even if there had been no recent activity on the accounts. Further, if it be relevant, the only evidence going to recent activity on the accounts was the Certificate, the evidence of Mr Adeang

(CA [171]), and bank statements covering a 4 week period, 3 of which were within the period when the accounts had been frozen by the issue of the garnishee order. There was no evidence capable of overcoming the Certificate and therefore no error in CA [171].

Funds said to be used or set aside for government business activities (AS [60]-[67])

62 The central flaw in Firebird's submissions on this issue is that they wrongly conflate the form that a use of property takes with the purpose for which the property is "in use". Contrary to AS [61], the relevant distinction for the purposes of execution immunity, as distinct from "immunity from suit" or jurisdiction immunity (with which *Republic of Argentina v Weltover Inc* 504 US 607 (1992) was concerned), does not turn on the nature of the activity the State is engaged in. For the reasons explained above, there is no close analogy (cf AS [62]) between the approach to jurisdiction immunity and the approach to execution immunity.

63 A particular use of property may in form be a trading, business, industrial or commercial transaction. Questions of whether the foreign State intended to make a profit from, for example, a sale of goods transaction would not affect the character of the transaction as a commercial transaction. However, the question of purpose has a different focus. The objective circumstances of the foreign State, the reasons why the property is in use and the consequences of that use (including making of a profit) are all relevant to assessing whether the property is substantially in use for a commercial purpose.

64 The hypothetical example given by Firebird at AS [64] of property being used to run a factory does not advance matters. First, the case does not concern property potentially in use for industrial purposes. Secondly, commercial, trading, business and professional purposes all have at their heart an aim or objective of making profit (whether or not that objective is successfully achieved). Property may be applied for a "trading activity" without it being in use substantially for a trading purpose. Thirdly, running a factory is an industrial activity, but there may not necessarily be a corresponding industrial purpose. Much would depend on the meaning to be given to the words "industrial purpose" and on all the circumstances.

65 Contrary to AS [65], close attention should not be directed at "how" the particular property is used, but rather the purposes for which it is "in use". In relation to the fuel

accounts, no doubt the transactions by which fuel was purchased were commercial transactions. However, the Immunities Act was expressly drafted on the basis that the purpose for which property is in use is not linked to the nature of the transaction by which a use takes place. The considerations at CA [176] demonstrate that the fuel accounts were not used for a commercial purpose.

66 Whilst Firebird now confines its argument on this point to certain accounts which it erroneously describes as "business" accounts, the argument (if it were correct) would hold true for any account used to purchase any goods or services. For example, on Firebird's argument, the use of funds in an account to acquire the services of Australian health providers to provide essential medical services in Nauru would be a commercial purpose because the form of the transaction was as a contract for the acquisition of services. On Firebird's argument, it would be irrelevant that RON provided those services free of charge to its citizens because it did not have sufficient resources within its Health Department to do so. Perhaps because of the inherent lack of plausibility of such an argument, Firebird no longer makes the contention before this Court (although the argument was made below). However, the logic of its current position leads to the same result. The scenario just described is that which applies under the UK Act. Section 32 of the Immunities Act expressly departed from that position. Effect must be given to that choice.

67 As Bathurst CJ said, "*[i]f the funds are to be used for the purpose of government administration, performance of government's civic duties and functions to its citizens, or for the advancement of the community, it does not seem to me that the fact that that object is achieved by entering into commercial transactions means that the funds are used for commercial purposes*": CA [172].

68 Firebird refers to *Weltover* as support for a proposition that "in this area" an intention to profit is not an essential requirement of operating a business: AS [65]. *Weltover* provides no such support. *Weltover* concerned jurisdiction immunity, not execution immunity. The US Supreme Court in *Weltover* held that "*because the Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose'... the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives*", but rather whether "*the particular actions ... are the type of actions by which a private party engages in 'trade and traffic or commerce'*": at 504 US at 614. The Court noted

in that context that *"[e]ngaging in a commercial act does not require the receipt of fair value"*: at 616. The Immunities Act draws a materially similar distinction to that drawn in *Weltover* at 614 and expressly provides that the exemption to execution immunity in s32 is to be determined by reference to purpose.

69 The terms of the Certificate, the considerations at CA [176]-[177], and the findings made in relation to the accounts the subject of this ground of appeal (CA [97]-[99], [100]-[104], [112]-[114], [125]-[126], [137]-[138], [152]-[154], [179], [182]-[190], [198], [202]) establish that RON was using the accounts for the purpose of fulfilling sovereign objectives and not with a commercial or profit motive. The accounts were not in use substantially for a commercial purpose.

Part VIII: Estimate

70 Counsel for RON estimates it will take three hours to present its oral argument.

Dated: 20 April 2015

Robert Dick **Darrell Barnett** **Naomi Oreb**

Banco Chambers
Tel: 8239 0200
Fax: 8239 0299
Email: darrell.barnett@banco.net.au

Counsel for the first respondent