

HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, NETTLE AND GORDON JJ

FIREBIRD GLOBAL MASTER FUND II LTD

APPELLANT

AND

REPUBLIC OF NAURU & ANOR

RESPONDENTS

Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]
[2015] HCA 53
23 December 2015
S29/2015

ORDER

Appellant to pay the respondents' costs of the appeal to this Court.

On appeal from the Supreme Court of New South Wales

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]

Civil procedure – Costs – Where appellant succeeded on certain issues on appeal but unsuccessful in overall outcome – Whether costs order apportioning costs between parties or order that each party bear their own costs appropriate.

Words and phrases – "costs follow the event".

1 FRENCH CJ, KIEFEL, NETTLE AND GORDON JJ. On 2 December 2015, this Court made orders that, save in one respect, upheld the decision of the Court of Appeal of the Supreme Court of New South Wales from which the appellant ("Firebird") appealed to this Court¹. The exception was that a variation was made to the order made by the Court of Appeal which had the effect that Firebird retained its registration of the foreign judgment against the first respondent ("Nauru").

2 The issues on the appeal to this Court were:

- (1) whether Nauru was immune from the jurisdiction of the Supreme Court of New South Wales in the proceeding for registration of the foreign judgment by virtue of the *Foreign States Immunities Act* 1985 (Cth) ("the Immunities Act");
- (2) whether the relevant provisions of that Act were impliedly repealed by the *Foreign Judgments Act* 1991 (Cth);
- (3) whether registration of the foreign judgment should be set aside because Firebird had not served Nauru in accordance with the requirements of the Immunities Act;
- (4) whether Nauru was immune from execution over certain property it held in Australia by reason of the Immunities Act.

3 The first issue involved two questions: whether the application for registration of the foreign judgment was a "proceeding" within the meaning of s 9 of the Immunities Act; and whether the exception to that immunity, provided by s 11, applied. This Court held that the application was a "proceeding" to which s 9 applied and that Nauru therefore would have enjoyed immunity from jurisdiction pursuant to s 9, but that the exception in s 11 operated to deny that immunity.

4 Firebird's success on this appeal was limited to the issues concerning s 11 and service. It was unsuccessful on all other issues, including the issue as to whether Nauru was immune from execution over its property in Australia. Regardless of whether Firebird could succeed on the issue concerning immunity from jurisdiction, so that its registration of the foreign judgment was not set aside, it remained necessary for it to show, contrary to the findings of a majority

1 *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43.

French CJ
Kiefel J
Nettle J
Gordon J

2.

of the Court of Appeal, that Nauru's property was not immune from execution under Pt IV of the Immunities Act. It did not do so.

5 If the question of costs is to be determined on the basis of success on issues, rather than on the outcome of the appeal, these factors would not suggest as appropriate an order apportioning costs, let alone one that Firebird and Nauru pay their own costs, for which Firebird contends.

6 In any event, the preferable approach in this case is the one usually taken, that costs should follow the outcome of the appeal. This is not a case where it may be said that the event of success is contestable, by reference to how separate issues have been determined². There are no special circumstances to warrant a departure from the general rule, and good reasons not to encourage applications regarding costs on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like. The fact that Firebird retains its registration is immaterial to the overall outcome of this appeal.

7 There should be an order that Firebird pay the respondents' costs of this appeal.

2 Cf *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 393 [241]; [2013] HCA 53.

