



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 07 Mar 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S135/2023
File Title: Greylag Goose Leasing 1410 Designated Activity Company &
Registry: Sydney
Document filed: Form 27F - Appellants' Outline of oral argument
Filing party: Appellants
Date filed: 07 Mar 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

GREYLAG GOOSE LEASING 1410 DESIGNATED ACTIVITY COMPANY
First Appellant
and
GREYLAG GOOSE LEASING 1446 DESIGNATED ACTIVITY COMPANY
Second Appellant
P.T. GARUDA INDONESIA LTD
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANTS

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. The text read in the context of the FSIA as a whole (AS [14]–[29]; Reply [4]–[8])

- (1) Section 14(3)(a) means what it says. For the construction below to be sustained, a limitation must be read into it.
- (2) The appellants’ construction is supported by the context supplied by the other parts of s 14.
- (3) It is supported by the context supplied by ss 3(1) (“separate entity”) and 16.
- (4) It is supported by *Adeang v The Nauru Phosphate Royalties Trust* (Unreported, VSC, Hayne J, 8 July 1992) (**JBA Vol 4 Tab 16 p 262**).
- (5) The Parliament substantively amended the FSIA following *Adeang* but did not amend s 14 so as to depart from Hayne J’s interpretation of s 14(3).
 - *Foreign States Immunities Amendment Act 2009* (Cth) Sch 1
 - *Courts and Tribunals Legislation Amendment (2021 Measures No 1) Act 2022* (Cth) ss 1–3, Sch 1 (Pt 14, items 75-95)
 - *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at [52]

2. Purpose and extrinsic material (AS [30]–[39]; Reply [9]–[14], [17]–[18])

- (1) The purpose of the FSIA as a whole — to clarify and codify the principles of immunity from jurisdiction applicable in Australia — supports construing s 14(3)(a) according to its terms, without any assumption that it reflects antecedent common law or international practice.
- (2) The FSIA should not be approached on the assumption that the immunity in s 9 is given the fullest effect possible and the exceptions the narrowest effect possible.
- (3) An overarching policy of the exceptions is that commercial or trading activities conducted by foreign States should not attract an immunity. The appellants’ construction of s 14(3)(a) is more consistent with this.
 - FSIA, ss 11, 12, 15, 16, 17, 20
 - *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at [62]–[63], [217] (**JBA Vol 3 Tab 14 p 152**)
 - ALRC Report at [88] (**JBA Vol 5 Tab 23 p 419**)
- (4) Assuming the purpose of s 14(3)(a) is to allow domestic courts to adjudicate on all conflicting claims to property in a bankruptcy, insolvency or winding up, including claims by foreign States, that purpose if fulfilled on the plain reading of s 14(3)(a). The respondent must show it was a purpose of the provision not to go any further.
- (5) The extrinsic material does not support that conclusion.
 - Explanatory memorandum (**JBA Vol 5 Tab 24 p 611**)
 - Second reading speech (**JBA Vol 5 Tab 26 p 652**)
 - ALRC Report at [41]–[44], [116]–[117] (**JBA Vol 5 Tab 23 p 419**)
 - ILC Report (**JBA Vol 5 Tab 25 p 635**)
 - *European Convention on State Immunity*, Art 14 (**JBA Vol 5 Tab 22 p 417**)
 - *Foreign States Immunities Act 1981* (South Africa), s 7 (**JBA Vol 2 Tab 8 p 86**)
 - *State Immunity Act 1978* (UK), s 6(3) (**JBA Vol 2 Tab 9 p 89**)
 - *State Immunity Ordinance 1981* (Pakistan), s 7(3) (**JBA Vol 2 Tab 12 p 98**)
- (6) If, as the respondent submits (**RS [31]**), s 14(3)(a) is not limited to proceedings in which a foreign State claims an interest in property the subject of a bankruptcy, insolvency or winding up, that undermines the respondent’s case.

3. Consequences of the competing constructions (AS [42]–[45]; Reply [8], [15]–[16])

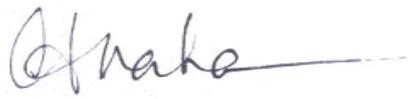
- (1) There is no difficulty with the appellants’ construction of s 14(3) presented by the fact that a foreign State is incapable of being wound up.
- (2) The appellants’ construction is highly unlikely to result in a foreign head of State being made amenable to bankruptcy proceedings from which they would otherwise be immune. It is an extreme and distorting possibility.
 - *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [94] (**JBA Vol 3 replacement Tab 13 p 111**)

4. The presumption against extraterritoriality and s 21 of the *Acts Interpretation Act 1901* (Cth) have no relevant role (AS [46]–[49])

Dated 7 March 2024



Perry Herzfeld



Christina Trahanas