HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

GREYLAG GOOSE LEASING 1410 DESIGNATED ACTIVITY COMPANY
First Appellant

GREYLAG GOOSE LEASING 1446 DESIGNATED ACTIVITY COMPANY
Second Appellant

and

P.T. GARUDA INDONESIA LTD
Respondent

APPELLANTS' REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

The respondent's reformulation

2. **RS [2], [5]–[6]** reformulate the issue in dispute, and assert that s 14(3)(a) of the FSIA should be read only as excluding proceedings where the body corporate being wound up is the same body corporate which claims the immunity. On this view, the additional words to be read into s 14(3) are as follows:

> (3) A foreign State is not immune in a proceeding in so far as the proceeding concerns:
>
> (a) bankruptcy, insolvency or the winding up of a body corporate <u>other than a separate entity of the foreign State</u> …

3. The submission remains contrary to the text of s 14(3), read in context. It requires words to be read in that are simply not there (see **AS [16]–[17], [27]**; cf **RS [30]**). It would, in reality (see [17] below), limit s 14(3) to cases involving claims by foreign States to an interest in property the subject of a bankruptcy, insolvency or winding up, which is the way subs (1) and (2), but not subs (3), are expressly limited (see **AS [18]–[20];** cf **RS [35]–[38]**). It requires reading in an exclusion to s 14(3)(a) of a kind used in other sections of the FSIA but not this one (see **AS [21]–[22]**; cf **RS [32]**). It cuts down the force of the perfectly general language "***a*** body corporate" (see **AS [24]–[26]**;

cf **RS [28]**). Throughout Pt II of the FSIA, "a" is used to refer to "any" of the noun before which it appears.[1] It rests on an assertion that the words in the chapeau to s 14(3) must refer to a different person than the words in paras (a) and (b) (see **AS [28]**).

Textual matters raised by the respondent

4. Turning to other textual matters raised by the respondent, the heading to s 14 does not assist the respondent (cf **RS [13], [36]**). The short description cannot be used to cut down the language of s 14(3), which is ***not*** limited to "ownership, possession and use of property". Indeed, that may explain the use of "etc" in the heading.

5. The respondent is not assisted by the other provisions referred to at **RS [32]**. They work against it, for the reason given at **AS [21]–[22]**. In s 14(3)(a), there was no need to make clear the intended relationship between the foreign State and the body corporate referred to because the language used was general: it refers to any body corporate whatever its relationship to a foreign State. That is likewise the answer to **RS [49]**: there was no need to include the words suggested because the way the section operates on its terms is clear.

6. The perfectly general operation of s 14(3)(a) is similarly the answer to **RS [33]**. Section 14(3)(a) could not have been expressed in the way suggested there, for it would then have been limited to granting an exception from immunity to where the bankruptcy, insolvency or winding up was of a foreign State or a separate entity of a foreign State. Section 14(3)(a) is broader.

7. Contrary to **RS [38]**, it is not the case that, on the appellant's construction, there is no connection between the subsections of s 14. Subsection (3) may apply where a foreign State claims an interest in property, which is what subss (1) and (2) concern. But that does not justify limiting subs (3) to that circumstance.

8. Contrary to **RS [44]**, on the appellants' construction s 14(3)(a) is capable of sensible application to both separate entities and foreign States. It is simply that it can operate in the case of entities capable of being made the subject of bankruptcy, insolvency or winding up differently from its operation in the case of entities not capable of being so.

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[1] See, eg, "a foreign State" in ss 9–22; "a proceeding" in s 9; "a trust" in s 14(3)(b); "a deceased person" or "a person of unsound mind" in s 14(3)(b); "a copyright", "a design", "a trademark", "a patent for an invention", "a registered trademark" or "a registered design" in s 15(1).

It is not the case on the appellants' construction that the exception "is largely incapable of application to foreign States". On both constructions, it would apply where a foreign State makes a claim in a bankruptcy, insolvency or winding up of any body corporate that is not a separate entity of the foreign State. But on the appellants' construction it would ***also*** apply where the body corporate is a separate entity of the foreign State.

Purpose of s 14(3)

9. **RS [19]** identifies the purpose of s 14(3) as being "to allow domestic courts to adjudicate on all conflicting claims to property, including any claims concerning an otherwise-immune foreign State". Even if that is correct, that purpose is ***fulfilled*** on the plain reading of s 14(3) for which the appellants contend. On its terms, the section applies where a foreign State makes claims to property in a bankruptcy, insolvency or winding up. This is not a case where one party's construction fulfils the purpose of a provision and the other party's does not. Both parties' constructions fulfil the purpose identified by the respondent to precisely the same degree (cf **RS [19]**, **[42]**).

10. To succeed, the respondent must go further and demonstrate that, for s 14(3) to be applied on its terms, would be contrary to its text, read in context including its objectively assessed purpose. That is not demonstrated by pointing merely to an absence from the extrinsic materials of a subjective appreciation on the part of law reform commissioners, drafters or parliamentarians that s 14(3) fulfilled but went beyond the purpose to which the respondents point (cf **RS [20]–[24], [42]**).

11. In neither *Firebird Global Master Fund II Ltd v Republic of Nauru*[2] nor *PT Garuda Indonesia Ltd v ACCC*[3] (**RS [42]**) did this Court say that a construction of the FSIA was unavailable because the ALRC Report was silent upon it. The lack of reference in the extrinsic material to proceedings concerning the insolvency or winding up of a body corporate that is a separate entity of a foreign State may be explained by the paucity of litigation in this area at the time the FSIA was enacted.[4] Be that as it may, the simplicity and generality of the words in s 14(3)(a) read in context say more than the absence of the circumstances of this case from the extrinsic materials.

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2 (2015) 258 CLR 31 at [95] (French CJ and Kiefel J).

3 (2012) 247 CLR 240 at [65] (Heydon J).

4 ALRC Report at [54].

12. Further, in focusing on the narrow purpose of s 14(3) referred to above, the respondent relegates the purpose of the FSIA as a whole to irrelevance. However, that purpose — to clarify the principles applicable in Australia to foreign State immunity by reference to enumerated exceptions — assists the Court in construing s 14(3)(a) according to its terms, read in context (see **AS [31]–[32]**; *contra* **RS [54]–[55]**). It is the FSIA, not the ALRC Report or general trends in foreign legislation in the late 1970s and 1980s, or "unstated pre-conceptions derived from the common law rules that it replaced",[5] that sets the metes and bounds of foreign State immunity in Australia.

13. The Respondent also relegates the key policy reason for restrictive immunity, related to the commercial or trading activities conducted on behalf of foreign States, to irrelevance (**RS [17], [56]–[57], [66], [70]**). This consideration is particularly apt for separate entities of foreign States, regardless of the exception that applies, as they do not usually perform the types of activities that attract immunity.[6] Legislation must be read a whole. Neither the commercial transactions exception in s 11 nor s 14(3) should be considered in a vacuum (see further **AS [33]–[35]**).

14. In determining the ambit of the exceptions in Pt II of the FSIA, it is unhelpful to refer to the "sovereign equality of foreign States" (**RS [71]**). The making of exceptions to the immunity justified by that equality is the precise purpose of Pt II.

Consequences

15. The circumstance in which a foreign head of State could be bankrupted in Australia but otherwise have an immunity of the kind conferred by the FSIA on the respondents' construction, but not the appellants', are extreme and unreal (cf **RS [45]–[47]**). As this Court has repeatedly observed, statutory construction is not assisted by reference to "extreme examples and distorting possibilities".[7]

16. Nor is this Court assisted by the absence of any case in which a court has found it has the power to wind up a separate entity of a foreign State (**RS [64]**). It has not been suggested that s 14(3) is formulated in the same way as a provision found elsewhere. That is the

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5 *PT Garuda Indonesia Ltd v ACCC* (2011) 192 FCR 393 at [107] (Rares J; Lander and Greenwood JJ agreeing).

6 (2011) 192 FCR 393 at [112]-[115], [120] (Rares J; Lander and Greenwood JJ agreeing).

7 See, eg, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [94] (Keane, Nettle and Gordon JJ).

answer to the respondents' reliance on the English cases referred to at **RS [62]** and **[65]**: the provisions in the United Kingdom legislation are tellingly different s 14(3).

Whether s 14(3) extends beyond cases where a foreign State claims an interest in property

17. The respondent suggests that, on its construction, s 14(3) would not be limited to proceedings in which a foreign State claims an interest in property the subject of a bankruptcy, insolvency or winding up (see **RS [31]**). The example provided to demonstrate this point is tortured: where the foreign State is a person with information concerning the examinable affairs of a body corporate being wound up but no other interest in its assets. In the other examples – where the foreign State is a creditor or debtor of a bankrupt or body corporate being wound up – the foreign State would, as a result, have some interest in that entity's assets (even if only contingent). That is why at **CA [40] (CAB 45)** the Court of Appeal regarded the primary judge's examples at **PJ [26] (CAB 12)** as being "examples as to how a foreign State's interest in property may need to be dealt with in a bankruptcy, winding up or other insolvency proceedings".

18. But even if, on the respondent's construction, s 14(3) is not limited to proceedings in which a foreign State claims an interest in property, that does not assist the respondent. There remains the need add words to s 14(3)(a): see [2] above. Indeed, the position is ***worse*** for the respondent. The respondent's case is that s 14(3) is directed to the same purpose as the foreign legislation the Court of Appeal considered. The Court of Appeal said that "a State's interest or claimed interest in property was the focal point of these provisions" (**CA [72] (CAB 55)**). If that is ***not*** so for s 14(3), as the respondent now contends, that destroys any basis to read it more narrowly than its terms suggest. It likewise destroys any support the respondent claims from subss (1) and (2) (cf **RS [35]**) and foreign provisions (cf **RS [53]**), which are each limited in this way.

Dated 1 February 2024

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