



HIGH COURT OF AUSTRALIA

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Details of Filing

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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

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I: CERTIFICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

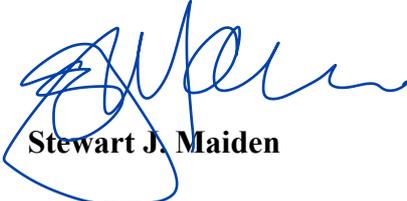
2. **The issue.** The parties join issue on this question: can the body corporate referred to in s 14(3)(a) of the FSIA be the same entity as the foreign State or separate entity seeking immunity? **RS [2], [5]-[6], AS [13], Rep [2]**. The primary judge and the Court of Appeal were correct to find that it cannot. That is the only interpretation of s 14(3)(a) consistent with its context, purpose and structure, and with the text itself. **RS [7]**.
3. **The section must be read in context.** This is trite: *Harvey v Minister for Primary Industry and Resources* [2024] HCA 1, [111] (Edelman J). Context is relevant “from beginning to end”: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [37] (Gageler J) **RS [14]-[15], [34]**.
4. **Legislative history.** The history informs the purpose and illuminates the structure of s 14. The FSIA was based upon the recommendations of the ALRC, which drew on foreign statutes and the work of the International Law Commission (**ILC**): *Kingdom of Spain*, [11] (Full Court). **RS [39], [40], [41]**.
5. State immunity is derived from and justified by “the sovereign equality of states. In the absence of special factors, one does not exercise jurisdiction over equals”: ALRC [37], **JBA 5/465**; 2nd Reading Speech **JBA 5/26/652**; *Firebird*, [133] (Gageler J) **JBA 3/14/191**; see *PT Garuda HCA*, [6] (plurality) **JBA 3/15/233**. **RS [7], [71]**.

6. At common law the immunity extended to a sovereign's property: ALRC [10] **JBA 5/449**; but that did not prevent a court winding up a company merely because a sovereign might make some claim in the liquidation: ALRC [10] **JBA 5/23/450**; *Russian Bank 768-770* (Maugham J), **JBA 4/21/406-408. RS [58]-[60]**.
7. The relevant foreign statutes considered by the ALRC contained an exception to immunity to allow local courts, in administering or supervising the administration of property (including in insolvency), to adjudicate all conflicting claims to such property: ALRC [116]-[117] **JBA 4/21/511**; UK s 6(3) **JBA 2/9/90**, Singapore s 8(3) **2/10/95**, Pakistan s 7(3) **2/12/101**; ILC Report [92], [95], art 15 **JBA 5/25/646, 649. RS [51]-[53]**.
8. The ALRC recommended that Australian legislation do likewise: [117] **JBA 5/23/511**.
9. The objective of the FSIA was to set out in clear, accessible form the law relating to sovereign immunity: Second Reading, **JBA 5/26/652**. Nowhere in the cases, the foreign statutory antecedents, the ALRC Report or the parliamentary material is there expressed an intention to create a new qualification to immunity to allow local insolvency proceedings to be brought against a foreign State. **RS [20]-[24],[42],[54]-[55],[64]-[65]**.
10. **Purpose**. It is common ground that the scheme of the FSIA is to provide for a broad immunity in s 9 and then to make specific provision for disjunctive classes of exception: *Firebird*, **JBA 3/14/176** [62] (French CJ, Kiefel J). AS [30]-[31]; RS [8], [12].
11. The specific rule for each class of exception accounts for the purpose for withholding immunity from that class: ALRC [52] **JBA 5/23/470**, [58] **473**, [65] **477**, [88] **492-493. RS [17]**. The 'commercial transactions' exception (FSIA s 11) exists because when a foreign State acts in a commercial matter within the ordinary jurisdiction of local courts it should be subject to that jurisdiction": ALRC [90] **JBA 5/23/493**. The common law accepted that that "does not involve a challenge to or inquiry into any act of sovereignty or governmental act [and is] neither a threat to the dignity of that state, nor any interference with its sovereign functions": *PT Garuda HCA*, [6] (Full Court) **JBA 3/15/233**, quoting Lord Wilberforce in *Playa Larga* 308.D-E **JBA 4/18/290**.
12. The property exception (FSIA s 14) has a different purpose: **RS [56], [66], [70]**. It reflects the need for local courts supervising the administration of local property to adjudicate on all conflicting claims to that property: ALRC [116]-[117] **JBA 5/23/511**. Section 14(3)(a) falls within that exception. **RS [17]-[19], [57]-[58], [61]-[63], [66]**.
13. That purpose does not confine the operation of s 14(3)(a) only to circumstances where the

foreign State has or may have a claim to property in the relevant insolvent administration; the ability to adjudicate on all claims may require a foreign State to be impleaded so that claims to the insolvent's property *by others* can be adjudicated completely and effectively. **RS [31]**. But to take the further step of exposing the foreign State itself to winding up is unnecessary to achieve the purpose and impinges on sovereignty.

14. **Structure.** The structure is consistent with that purpose. Section 14(3)(a) should be read *noscitur a sociis*: it is sandwiched between subs (1) and (2), each expressly dealing with property, and para (3)(b) which deals with trust property and estates. **RS [35]-[38]**.
15. **Text.** There is no 'plain meaning' of s 14(3)(a). The chapeau to s 14(3) refers to a foreign State, but no foreign State is referred to in para (a). None of a bankruptcy, an insolvency or a winding up can exist without a subject. Paragraph (a) does not identify the subject of the relevant bankruptcy or insolvency, and its use of the indefinite article before 'body corporate' merely begs the question. The subject must therefore take its meaning from the structure, purpose and context: it is a bankruptcy, insolvency or winding up of some entity other than the foreign State (or its separate entity), in which the participation of the foreign State or its separate entity might be necessary. If the Parliament had meant to bring the foreign State or its separate entities within the scope of para (a) it could easily have said so. **RS [25]-[30], [32]-[34], [44], [48]-[50]**.
16. Garuda does not press RS [43]. If CA [45] was incorrect, it was not determinative.
17. **Improbable consequence.** The appellants' construction of s 14(3) attributes to the legislature the unlikely intention to expose foreign States to being bankrupted or wound up by Australian courts, going far beyond what is necessary to satisfy the purpose of the exception and posing "a threat to the dignity of that state, [or] interference with its sovereign functions" (as to which see [11] above). **RS [45]-[47], [71]**.
18. In contrast, it is not surprising that creditors dealing with a foreign State or its separate entity in Australia might not be able to wind up that entity in an Australian court. Such a restriction is consistent with long-standing common law principle, and would not prevent the creditor commencing Australian civil proceedings (if the s 11 exception applied) or pursuing insolvency proceedings in the foreign jurisdiction. **RS [71]**.

7 March 2024



Stewart J. Maiden



E L Beechey