IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P14 of 2015

BETWEEN

PT BAYAN RESOURCES TBK

Appellant

and

BCBC SINGAPORE PTE LTD

First Respondent

KANGAROO RESOURCES LIMITED

Second Respondent

ATTORNEY-GENERAL OF WESTERN AUSTRALIA

Third Respondent

APPELLANT'S REPLY

Filed on behalf of the appellant
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13 May 2015
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PART I: Internet

1. The appellant certifies that these reply submissions are in a form suitable for publication on the Internet.

PART II: Reply

2. The courts have issued Practice Notes in relevantly uniform terms that explain the source of the power. At [7] of Practice Direction 9.6 in Western Australia, (PD 9.6), being Annexure 1 to the WA A-G Submissions, it is said of the (domestic) respondent that it is "...often the person said to be liable on a substantive cause of action of the applicant". PD 9.6.1 [7] goes on to say that the exception to that rule is when third parties are made respondents in accordance with the principles in *Cardile*.

3. A quite different basis for the power to make the present orders is given at PD 9.6.1 [15]. There it is said that "...the Court may make a *free-standing* freezing order *in aid of foreign proceedings* in prescribed circumstances" (emphasis added). This seems to be an assertion of inherent jurisdiction (or, in the case of the Federal Court, its implied statutory jurisdiction) to fashion "free-standing" relief in aid of foreign proceedings. "Free-standing" suggests that the power is not supported by a structural framework to be found in commenced or imminent proceedings. The question for this Court, at its heart, is whether such aid to the exercise of foreign judicial power is part of the inherent or implied jurisdiction of Australian superior courts.

4. BCBCS hopes to one day make a statutory claim under a Commonwealth statute to enforce a foreign judgment. This is not a putative cause of action at common law – they no longer exist for judgments from countries that are recognised by the legislation. The factum by which the relevant legislation, the *Foreign Judgments Act*, is to operate has not yet come into existence. The joint judgment of Hayne, Crennan, Kiefel and Bell JJ in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, made the point at 574 [105] that the enforcement of a foreign judgment by a local court depends on an anterior decision or determination which was not made in the exercise of federal judicial power. The enlistment of judicial power in enforcing a foreign judgment occurs at a point in time when the obligations sought to be enforced are those which are created by the foreign judgment: cf at 573 [104].

5. A simple response can be given to the arguments raised against Bayan concerning s 109 of the Constitution. The *Foreign Judgments Act* is a code for the countries it covers. There is no exercise of judicial power in aid of a foreign judgment until the foreign judgment exists. Thus, s 17 of the Act provides only for a post-judgment regime of enforcement. Instead of seeing the Parliament as not being taken "...to have intended such a stultification of the means of protecting federal rights" (cf Cth A-G [46]) the focus should be on the fact that *there is no federal right* until the statute is enlivened. The last edition of the leading textbook in the area published before the judgments in this case (but in 2010 so after *Davis*) refuted the existence of the contested jurisdiction in relation to the *Foreign Judgments Act* on the basis that "...the registering court should not make a *Mareva* order to avoid frustration of attempts to enforce the judgment, because such an order is intended to operate on a defendant who acts in a way calculated to defeat the enforcement of substantive rights pursued by the plaintiff in the court making the order".[1] Bayan has always conceded that federal jurisdiction is being exercised in the present proceedings: it is challenging the validity of the Rule on,

[1] *Nygh's Conflict of Laws in Australia*, (Davies, Bell, and Brereton eds), 8th edn (2010) at [41.26]. It can be seen that the statement in *Nygh* goes further than what Bayan needs to prove in this case to be successful. That text denied the existence of the jurisdiction even after judgment in the foreign court had been granted.

inter alia, constitutional grounds. The submissions of BCBCS and the Commonwealth A-G on the existence of a "matter" are circular. They do not advance the inquiry as to whether an actual controversy as to the existence of some immediate right, duty or liability is put in issue by the parties when O 52A is invoked in the ordinary case. The Commonwealth A-G's submissions on this issue boil down to no more than if there is a right to the freezing order, then that right is one that involves the interpretation of the Act and therefore falls within s 76(ii) of the Constitution.

6. In the context of private litigation, the question of jurisdiction may be addressed by asking whether relief is available. If there is no legal remedy for a "wrong", there can be no "matter": *Abebe v The Commonwealth* (1999) 197 CLR 510 at 527. In these proceedings there can be no relief in the absence of the anterior exercise of foreign judicial power. This Court was at pains in *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 to emphasise that a matter required the existence of some immediate right, duty or liability to be established by determination of the Court: see eg Hayne J at [243].

7. It may assist to unpack what is "necessary" to prevent prejudice to "the administration of justice". It should be more than voguish warnings *in terrorem* of the Court of the great capacity for defendants to deal with their assets in the modern era. "Necessary" is not a question of what is "convenient, reasonable or sensible", nor does it serve some generalized notion of public interest: see *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664 [31]. Further, the "administration of justice" being spoken of is the putative exercise by the Supreme Court of Western Australia of the judicial power of the Commonwealth under the *Foreign Judgments Act*, a more "...specific discipline than broader notions of the public interest": *Hogan* at 664 [30].

8. In *Cardile,* by reference to authority and academic commentary, the Court identified the prevention of the abuse of the integrity of the Court's processes once set in motion as the doctrinal basis of the order. That was by reference to the parties to the dispute against whom final orders were sought. The focus of the order against third parties was on the administration of justice, but only where that third party was "...answerable or liable in some way to a party...": at 401 [45]. There is no warrant for the Commonwealth A-G's submission that the endorsement of the comments of Emmett J at [7] somehow translated to an opening in the Court for prospective causes of action and a break from the substantive controversy of the primary litigation. The right to make an order against third parties only arises because there is a dispute being quelled by the Court between the parties to the action.

9. It is why, contrary to the submissions of BCBCS, the jurisdiction to order preliminary discovery is in fact inapposite. As the quote (at BCBCS [22]) from French J in *Carnegie Corporation* by reference to Finn J makes clear, that jurisdiction "...assists the administration of justice in relation to the making of the claim itself". It is one thing for a court to order that a prospective party is to disclose information in order for a prospective plaintiff to determine whether it has an accrued cause of action so that it can sue. It is an entirely different thing to impose a "...very tight 'negative pledge' species of security over property, to which the contempt sanction is attached" (*Cardile* at 403 [50]) in the hope that one day BCBCS may have the right to make a statutory claim in this country, knowing for a certainty that it does not presently have any right to invoke the jurisdiction of the court.

10. It is convenient to refer to the judgment of Dixon J in *Glover v Walters* (1950) 80 CLR 172 cited by the joint judgment in *Cardile* at 399 [39] as an example of courts developing doctrines and remedies "...outside the injunction as understood in courts of equity, to protect the integrity of its processes once set in motion": at 399 [40]. This is important in understanding the submissions of particularly the Attorneys of Western

Australia, Victoria, and Queensland that the removal of the equitable foundation of the remedy has left the Court at large.

11. In *Glover v Walters,* the plaintiffs in an action in the High Court applied for the issue against the defendant of a writ of *ne exeat colonia* . The defendant took out a summons to have the action stayed on the ground that it was an abuse of process inasmuch as the plaintiffs had already instituted in the Supreme Court of South Australia an action founded on the same cause of action. In disposing of the application, Dixon J said at 174-175:

> If I thought that otherwise a case was made for the issue of this writ I would have thought it necessary to impose a condition that the plaintiffs discontinue the action in the Supreme Court of South Australia. I do not think that this Court ought to grant the writ except for the purpose of ensuring that the plaintiffs' remedies in this Court are not defeated, endangered or prejudiced. The writ in this Court is a remedy incidental to the exercise of the jurisdiction to determine the suit and give relief. It is not a remedy to be granted here as auxiliary to the effective exercise of other jurisdictions.

12. The various parties point to the spectre of a potential judgment debtor eg "cock[ing] a snoop at the legal process of both countries": Cth A-G [20] or being able to move assets at a moment's notice with the press of a mobile phone button: WA A-G at [51]. The ability to move assets out of a jurisdiction quickly is perhaps not quite so novel as the arguments assume, and does not in any event present as a principled reason for a radical jurisprudential step.

13. A Singaporean order is equally, if not more, efficacious than an Australian one, particularly where foreign companies already subject to its jurisdiction are involved. For that reason, the assets are no better protected by an Australian order. Conversely, the Australian order denies the efficacy of one of the key features of interlocutory relief – "...a court remains in control of its interlocutory orders and a further order will be appropriate, for example, where new facts and circumstances appear or are discovered, which render unjust the enforcement of the existing order": *Hogan* at 663 [29]. How is that to work under this regime? A defendant is left in the position where it needs to convince the local Court that developments in the principal litigation overseas mean a change in the order is necessary. Is the local court to shadow the exercise of foreign judicial power? Is the defendant to be put to the expense and inconvenience of proving the case locally up to the same point it had reached overseas? Or is the local Court to read the transcripts of the proceedings thus far and form its own view? These are just some of the difficulties that ensue when the order is unhinged from its juridical basis with no discernible advantages.

14. In its submissions at [52], BCBCS says that it is irrelevant whether the Singaporean court is better placed to make this order. That is not so. It is an entirely relevant question to this Court, because this Court must decide whether such a jurisdiction exists, and if it is "free-standing", why the law in Australia should be developed to recognise such a jurisdiction. (cf submission of Qld A-G at [55] – there is a remedy prior to judgment, that which the Singaporean court can give).

15. Much is made of the view that the undertaking to commence proceedings is a discretionary limit, not a jurisdictional one, because this Court said that it was "...difficult to conceive of cases where such an undertaking would not be required": *Cardile* at 404 [53]. The response to this by some of the other parties proves too much. They embrace the impossibility of BCBCS giving an undertaking. No one could conscientiously give it and no court could sensibly receive it. As it cannot be done, BCBCS tells the Court it need not be done. This is no mere or ordinary discretionary consideration. The words used – "difficult to conceive of" and "required" are not only very strong but in any event are used to define the

secondary exercise of judicial power in respect of the third party proceedings. There is no resiling by this Court from the need to have an undertaking for processes to be set in motion in respect of the principal judicial controversy. This is an additional discretionary factor, expressed almost as a rule, for the proceedings in respect of which the third party is answerable to the *existing parties*, namely the substantive cause of action which the court is adjudicating. No Court in this country has ever said that the principal proceedings must not be "set in motion" either through origination or an undertaking to do so.

16. This exposes the error at the heart of the Commonwealth Attorney's submission that the reason that the requirement is not a condition of the exercise of the power is that "...the purposes of avoiding futility and injustice can be achieved by other means – relevantly the requirement for the court to be satisfied of a sufficient prospect that a judgment will be given in the foreign proceedings and registered in the Court": (Cth A-G [22]). First, it is a condition of the exercise of the jurisdiction because it is incidental to the determination of the substantive jurisdiction invoked. If a party cannot invoke the jurisdiction, or cannot warrant that it will be able to, how can that party be granted relief incidental to it? Secondly, the test proposed by the Commonwealth A-G, reflected in O 52A, places foreign litigants in a different position from domestic litigants because a domestic litigant is equally required to show that there is a sufficient prospect that the claim will be successful but also required to have either commenced substantive proceedings or to have given an undertaking to commence the substantive proceedings in that Court. At [40], the Victorian Attorney says that the risk in freezing order cases is always "prospective and contingent" – whatever one understands by the "risk to the administration of justice", it is never the chance that justice will not need to be administered. A prospective outcome, contingent on success, is fundamentally different from a prospective proceeding, the existence of which is contingent on events extraneous to an Australian jurisdiction.

17. There seems to be a concern from some of the parties that Australia would lag behind the English, and perhaps some other countries, in the development of the law if we do not recognise this jurisdiction. That is irrelevant to the inquiry – this Court has already found a different footing for the power to make freezing orders. In any event, in *Fourie v Le Roux* [2007] 1 WLR 320, the House of Lords said that the only reason a jurisdiction exists in England and Wales to make orders in aid of foreign proceedings is by virtue of "[t]he effect of section 25 of the Civil Jurisdiction and Judgments Act 1982, as extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997..." per Lord Scott of Foscote at 333 [31]. Further, in his speech, with which the other Law Lords agreed, Lord Scott said "I would agree that without the issue of substantive proceedings or an undertaking to do so, the propriety of the grant of an interlocutory injunction would be difficult to defend". In other words, the plaintiff must have an accrued cause of action – see eg *Cooke & Cooke v Venelum Property Investments Limited and Others* [2013] EWHC 4288 (Ch) at [12]. So, in England and Wales, the plaintiff must have an accrued cause of action and give an undertaking to commence proceedings, and statute says that can be there or in a foreign country. No such statute exists in Australia.

18. That is the law in the United Kingdom. Any attempt to rely on the dissenting opinion of Lord Nicholls in the advice of the Privy Council in *Mercedes-Benz AG v Leiduck* [1996] AC 284 is misplaced. Indeed, in his opinion, Lord Nicholls significantly misunderstands the law of Australia. At 312, he says that the law of Australia is that a cause of action may be prospective when the order is effected. He cites only the decision of Rogers A-JA in *Patterson v BTR Engineering (Australia) Ltd* (1989) 18 NSWLR 319 at 329-330. In doing so, he prefers the view of Rogers A-JA to that of both Gleeson CJ and Meagher JA who both determined that there must be an existing cause of action. Further, even Rogers A-JA says

(relying on a first instance judgment in England and Wales) that while the Mareva order may be made before the cause of action accrues, it may not come into effect until it does. As far as New Zealand is concerned, the position is as set out in Bayan's submissions in chief. All that the case cited by the WA A-G at [37] proves is that a freezing order can be obtained in the local court after a foreign judgment is granted – a proposition with which Bayan has never caviled.

19. The Commonwealth A-G is right at [25] to point out that the *Legislative Instruments Act* 2003 (Cth) needs to be considered. Order 52A cannot have been done pursuant to sec 17 of the *Foreign Judgments Act* for the reasons therein pointed out and for the additional reason that the Judges themselves describe the order as being free-standing, ie no mention is made of its juridical source in the *Foreign Judgments Act*. Rather the Judges expressly anticipated that they were using some inherent jurisdiction coterminous with the State grant of power. Pursuant to sec 9 of the *Legislative Instruments Act,* the Supreme Court of Western Australia is not a court that is excused from compliance with the Act. That is understandable on the basis that the Commonwealth Parliament wished to monitor actions of State Courts purportedly done in exercise of power under Commonwealth Statutes. The Commonwealth has more direct control over the courts it creates – and the Note to sec 9 makes that clear. The rule-makers not having complied with Part 5 of the *Legislative Instruments Act*, the Rule cannot be authorised by the *Foreign Judgments Act*.

Dated 13 May 2015

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