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High Court of Australia Confirms Power to Freeze Assets in Anticipation of Foreign Judgments

PT Bayan Resources TBK v BCBC Singapore Pte Ltd [2015] HCA 36

The High Court of Australia has confirmed that Australian Supreme Courts have the power to make orders freezing the Australian assets of a foreign company in anticipation of a possible judgment in a foreign court being obtained against that foreign company.

Background

BCBC Singapore Pte Ltd (**BCBC**) commenced proceedings against PT Bayan Resources TBK (**Bayan**) in the High Court of Singapore for damages for breach of a joint venture agreement. Bayan owned assets in Indonesia, and shares in an Australian company (**KRL**). Under Indonesian law any judgment in the Singapore proceeding would not be enforceable in Indonesia, but under Australian law such a judgment would be enforceable in Australia. As a result the shares in KRL were the only assets against which a Singapore judgment was likely to be able to be enforced. There was otherwise no connection with Australia (either with the parties, the relevant contract, or the dispute).

Before judgment was delivered in the Singapore proceedings, BCBC applied to the Supreme Court of Western Australia under Order 52A of the *Rules of the Supreme Court 1971* (WA) (**Rules**) for freezing orders preventing Bayan from dealing with its shares in KRL in a manner which would adversely affect the ownership or value of those shares without first giving written notice to BCBC.

The freezing order against Bayan was granted, and upheld on appeal to the Court of Appeal of Western Australia. Bayan appealed to the High Court, arguing that the freezing order should be discharged because Order 52A of the Rules was beyond the inherent jurisdiction of the Supreme Court, such an order was not authorised by the *Foreign Judgments Act 1991* (Cth) (**FJA**) (or the *Supreme Court Act 1935* (WA)), and was therefore invalid.

In summary, Order 52A of the Rules provides for such freezing orders to be made where:

- there is a good arguable case justiciable in a court outside Australia;
- there is a sufficient prospect that that court will give judgment in favor of the applicant;
- there is a sufficient prospect that the judgment will be registered in or enforced by the Supreme Court; and
- in the circumstances, there is a danger that a prospective judgment will be unsatisfied (in whole or in part) because of assets being removed from Australia, disposed of, dealt with or diminished in value.

Other Australian Courts have similar rules. It is clear that in respect of Australian proceedings a freezing order can be obtained before judgment is obtained. The case involving Bayan and BCBC was different in that it related to proceedings outside of Australia that would, if judgment were obtained, be enforceable in Australia.

High Court Decision

The High Court found the Supreme Court did have inherent jurisdiction to grant a freezing order in relation to proceedings in a foreign court that might be enforced in Australia. It considered the inherent power of a Supreme Court of a State to make such orders as that Court may determine to be appropriate "to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction", was not limited to cases where substantive proceedings in that Supreme Court had been commenced or were imminent. It found that this power applied equally to protect "a prospective enforcement process" under the FJA before a judgment was obtained.

Comments and Conclusions

As the High Court's reasons were based on the inherent jurisdiction of the Supreme Court of WA the same reasoning can be applied to other Supreme Courts in Australia, and the Federal Court of Australia which is conferred similar 'inherent' jurisdiction under the *Federal Court of Australia Act* 1976 (Cth).

This decision is important because it confirms that, in the right circumstances, Australian Courts can make orders to preserve assets in Australia pending the outcome of foreign proceedings. The High Court referred to the comments of Lord Nicholls in *Mercedes Benz AG v Leiduck* [1996] AC 284 that the "*alternative result would be regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community*".

While Australian Courts will not allow freezing orders to be used to provide a form of 'security' for a potential judgment creditor, a company involved in litigation in a foreign court ought to consider seeking a freezing order in Australia if it has a basis to be genuinely concerned that the opposing party may dispose of Australian assets to defeat the enforcement of any judgment.

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