

# High Court confirms power of Australian courts to grant freezing orders in aid of foreign litigation

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

The High Court of Australia has confirmed that Australian superior courts have the power to make freezing orders in respect of property in Australia that may be available to meet a foreign judgment which, when delivered, would be registrable under the *Foreign Judgments Act 1991* (Cth) (**FJA**).

In order to obtain a freezing order in these circumstances, it remains necessary to establish that the processes of the Court may be frustrated unless the freezing orders are made, which involves establishing a likelihood that the foreign judgment will be registrable under the FJA.

## Background

BCBC Singapore Pte Ltd (**BCBC**) and PT Bayan Resources TBK (**Bayan**), companies incorporated in Singapore and Indonesia, respectively, had entered into a joint venture agreement governed by Singapore law. Bayan holds shares in Kangaroo Resources Limited (**KRL**), a company incorporated in Australia.

BCBC commenced proceedings against Bayan in the High Court of Singapore claiming, amongst other things, damages for breach of the joint venture agreement. The proceedings have not yet proceeded to judgment and will be heard by the recently established Singapore International Commercial Court (**SICC**), being the first case which the SICC started hearing.

Under Indonesian law, any judgment made in Singapore would not be enforceable in Indonesia. However, in Australia such a judgment could be enforceable by registration under the FJA. As Bayan only held assets in Australia and Indonesia, BCBC's only recourse would be to have any judgment it obtained in Singapore enforced against the shares that Bayan owned in KRL.

BCBC applied ex parte to the Supreme Court of Western Australia (**WA**) for freezing orders against Bayan and KRL in respect of the shares in KRL.

The relevant rules of the Supreme Court of WA (**Rules**) set out the following criteria for obtaining a freezing order:

- a good arguable case that is justiciable in a court outside of Australia;
- a sufficient prospect that the other court will give judgment in favour of the applicant;
- 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 wholly or partly unsatisfied because the assets are removed from Australia, disposed of, dealt with, or diminished in value.

In respect of a freezing order against a person other than the prospective judgment debtor, the Supreme Court

must also be satisfied in the circumstances that the person is in possession of, or in a position of control of influence concerning, assets of the prospective judgment debtor.

The Supreme Court granted interim freezing orders against Bayan and KRL in respect of the shares held by Bayan on the ex parte application. Whilst the freezing orders against KRL were subsequently discharged because KRL had no control over the assets of Bayan, the freezing orders against Bayan were continued and then subsequently upheld by the Court of Appeal of the Supreme Court of WA.

### High Court judgment

The High Court dismissed the appeal by Bayan, finding that the Supreme Court of WA had the inherent jurisdiction to grant a freezing order in the circumstances. The Court noted that the basis of this inherent power was not confined to the protection of a pending action or an immediately justiciable cause of action in the Supreme Court. Furthermore, the Court emphasised that where it is demonstrated to a superior court that there is a likelihood that its processes will be abused or frustrated, it is within the Court's power to make orders considered to be appropriate to prevent that from occurring.

### Implications

The decision is significant in that it gives plaintiffs the assurance that if they are litigating in a foreign jurisdiction whose monetary judgments are enforceable in Australia under the FJA, the assets of the defendant located in Australia may be the subject of a freezing order before the foreign judgment has been obtained.

Furthermore, the decision may encourage foreign companies to bring

actions for freezing orders if a foreign defendant (or prospective foreign defendant) holds assets in Australia, including ownership interests in companies or joint ventures, particularly where enforcement action in other jurisdictions may be difficult.

The decision evidences an outward looking approach, which will be welcomed by parties who can identify assets in Australia against which to enforce a possible foreign judgment. The High Court recognised the importance of being able to make freezing orders in these circumstances, approving statements made in English authority nearly two decades ago that noted that 'the alternative result would be deeply 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 other assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community.'

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