TALACKO v. BENNETT & ORS (M154/2016)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2016] VSCA 179
Date of judgment:	28 July 2016
Date special leave granted:	10 November 2016

Before World War II, Anna and Alois Talacko owned several properties in the Czech Republic, Slovakia and Germany, which were expropriated by the communists. The couple came to Australia and lived here with their three children. In 1989, the collapse of communism opened the way to the restitution of the properties. Their parents having died, the three children agreed to apply for their restitution and to share them or the proceeds of them. One of the sons, Jan Talacko, managed to secure all the available properties in his own name, and denied any entitlement in his brother and sister. In 1998, the excluded children commenced proceedings in the Supreme Court of Victoria against him. The claim was compromised as a result of which all parties were to share in the fruits of the restitution.

When Jan Talacko failed to perform his part of the compromise, the respondents had the proceedings reinstated. They secured orders that Jan had breached the terms of the compromise and that he pay them equitable compensation, which was assessed at approximately €10 million. The respondents then commenced proceedings in the Czech Republic to enforce the judgment of the Supreme Court of Victoria. On 7 November 2011, the Federal Court of Australia declared Jan Talacko bankrupt. He died on 3 November 2014.

In order to facilitate their proceedings in the Czech Republic, the respondents successfully applied to the Prothonotary of the Supreme Court for the issue of certificates under s 15 of the *Foreign Judgments Act* 1991 (Cth) ('the *Foreign Judgments Act*'). The representative of Jan Talacko's estate (the appellant in this Court) brought proceedings in the Supreme Court of Victoria, seeking a declaration that the certificates were invalid and should be set aside by reason, inter alia, of s 58(3) of the *Bankruptcy Act* 1966 (Cth) ('the *Bankruptcy Act*'), which provides that, without the leave of the Court, '*it is not competent for a creditor to enforce any remedy against the person or the property of*' a bankrupt in respect of a provable debt. That application was successful.

The respondents appealed to the Court of Appeal (Ashley and Priest JJA, Santamaria JA dissenting). The first issue in the appeal was whether s 58(3) of the *Bankruptcy Act* operated as a stay of enforcement of a judgment debt for the purposes of s 15(2) of the *Foreign Judgments Act*, which states that '*an application for a certificate may not be made until the expiration of any stay of enforcement of the judgment in question*'. The majority of the Court held that s 15(2) referred only to a judicially ordered stay and not a stay by operation of a statute.

The second issue in the appeal was whether a judgment creditor can '*wish to enforce*' a judgment in a foreign country for the purposes of s 15(1) of the *Foreign Judgments Act* in circumstances where it is not competent for the creditor to enforce any remedy against the debtor by reason of s 58(3) of the *Bankruptcy Act*. Although

finding that the respondents had no entitlement to enforce the judgment by reason of s 58(3)(a) of the *Bankruptcy Act*, the majority found that it was clear that they did 'wish to enforce' the judgment in a foreign country. The fact that there were various steps which would have to be successfully undertaken, if and when a s 15(1) certificate issued, before there could be any enforcement in the Czech Republic did not mean that the relevant wish was not present.

Santamaria JA (dissenting) held that the expression '*any stay of enforcement of the judgment in question*' should be construed as applying to all stays howsoever imposed by law. In reaching that conclusion, his Honour noted that the phrase was unqualified; it did not refer expressly to the judicial stay of such proceedings, and there was nothing in the text of s 15(1) that required that limitation. On the contrary, the presence of the word '*any*' was itself inconsistent with the narrow meaning that the respondents sought to give to the expression.

The grounds of appeal include:

- The Court of Appeal erred in holding or finding that in the events that had occurred the first to third respondents were judgment creditors who 'wishe[d] to enforce' in a foreign country a judgment that had been given in an Australian court for the purposes of s 15(1) of the *Foreign Judgments Act* 1991 (Cth).