

PT BAYAN RESOURCES TBK v BCBC SINGAPORE PTE LTD & ORS (P44/2014)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia
[2014] WASCA 178

Dates of judgments: 25 September 2014

Special leave granted: 13 March 2015

The appellant (“Bayan”) is a company incorporated in Indonesia. The first respondent, BCBC Singapore Pte Ltd (“BCBC”), is a company incorporated in Singapore. The facts of the case concern a contractual dispute between the companies for a monetary judgment in the High Court of Singapore (“HCS”), whereby BCBC had commenced proceedings against Bayan alleging breach of contract. No judgment has been obtained from the High Court of Singapore. The cause of action being litigated by BCBC against Bayan in the High Court of Singapore could not be litigated in Western Australia.

Prior to commencing proceedings in the HCS, BCBC obtained interim freezing orders in the Supreme Court of Western Australia pursuant to Order 52A of the *Rules of the Supreme Court 1971 (WA)* (“the Rules”), restraining Bayan from transferring its Australian shares.

At trial, Le Miere J ordered the continuation of the freezing order over Bayan's Australian assets. His Honour held that Order 52A was supported by the Supreme Court's inherent jurisdiction under the *Supreme Court Act 1935 (WA)* and the Supreme Court's rule making powers conferred on it by the *Foreign Judgments Act 1991 (Cth)* (“the FJA”). The FJA provides a framework for the registration and enforcement in Australia of certain foreign judgments and empowers the Supreme Court of each State and Territory to make rules of court prescribing matters necessary or convenient for carrying out or giving effect to the FJA.

On appeal below, the critical issues were whether Order 52A was beyond the statutory powers granted to the Supreme Court under the FJA or its inherent jurisdiction under the *Supreme Court Act 1935 (WA)*. Bayan contended that the Supreme Court did not have inherent or statutory power under Order 52A to make a freezing order as no substantive proceedings had been or were to be commenced in the Supreme Court and no judgment had been made in the foreign proceedings. Furthermore, Bayan asserted that the existence of such power would be inconsistent with the FJA for the purposes of section 109 of the Commonwealth Constitution.

The Court of Appeal (McLure P, Buss and Murphy JJA) unanimously held that the Rules were valid insofar as they empower the Court to freeze local assets ahead of a possible foreign judgment. The Court held that Order 52A is not inconsistent with the FJA as the FJA did not prescribe the processes or requirements for the enforcement of foreign judgments.

Bayan has filed a Notice of a Constitutional Matter in this Court. The Attorneys-General of the Commonwealth, Victoria and Queensland are intervening in the appeal.

The grounds of appeal include:

- The Court below erred when it held that Order 52A of the Rules, to the extent it authorises the Supreme Court of Western Australia to make a freezing order in relation to a prospective foreign judgment to which Part 2 of the FJA extends, and where no substantive proceedings, apart from the application for the freezing order, have been or are to be commenced in the Supreme Court, and there is no judgment in the foreign proceedings:
 - a) is within the inherent jurisdiction of the Supreme Court; and
 - b) is not inconsistent with the FJA for the purposes of section 109 of the Commonwealth Constitution; and
 - c) further to (a) and (b) above, is not *ultra vires* section 17 of the FJA and section 167(1)(a) of the *Supreme Court Act 1935* (WA).