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

FIRST RESPONDENT'S SUBMISSIONS

Part I: Internet Publication

1. These submissions are certified to be in a form suitable for Internet publication.

Part II: Respondent's concise statement of issues

2. Order 52A of the *Supreme Court Rules 1971* (WA) authorised the grant of the freezing order in the current matter. So too did the Supreme Court of Western Australia's inherent jurisdiction or power to act in the administration of justice.

3. The four questions that arise are as follows:

   (i) Whether O 52A was itself authorised (by either s 17 of the *Foreign Judgments Act 1991* (Cth) (**FJA**) or ss 16(1)(d)(i) or 167 of the *Supreme Court Act 1935* (WA) (**Supreme Court Act**))?

   (ii) Even if it was not (which the First Respondent (**BCBC**) denies), whether the freezing order was supported by the inherent jurisdiction of the Supreme Court of Western Australia (not touched by O 52A: see O 52A, r 5(6))?

Date of Document: 29 April 2015
Filed on behalf of the **First Respondent** by
Herbert Smith Freehills
ANZ Tower
161 Castlereagh Street
SYDNEY NSW 2000

41110378.1

DX 361 Sydney
Tel +61 2 9225 5000
Fax +61 2 9322 4000
Ref Grant Marjoribanks
81979458

(iii) Whether O 52A is inconsistent with the FJA within the meaning of s 109 of the Commonwealth Constitution?[1]

(iv) Even if O 52A is inconsistent with the FJA within the meaning of s 109 (which BCBC denies), whether s 109 has any effect upon the Supreme Court's inherent jurisdiction, assuming that that jurisdiction exists and also sustains the freezing order granted (see (ii) above)?

4. BCBC's answers to these four questions are as follows:

(i) yes, O 52A was authorised by each of s 17(1) of the FJA, s 16(1)(d)(i) of the Supreme Court Act and s 167(1)(a) of the Supreme Court Act;

(ii) the freezing order was also supported by the inherent jurisdiction of the Supreme Court of Western Australia;

(iii) far from being inconsistent with the FJA, O 52A is in fact authorised by s 17(1) of that Act and, even if not authorised by that section but by the Supreme Court Act, it is not inconsistent with the FJA in any event;[2] and

(iv) if, as BCBC contends, the freezing order was also supported by the inherent power or jurisdiction of the Supreme Court of Western Australia, that jurisdiction is not affected by s 109 of the Constitution.[3] It is not otherwise inconsistent with the FJA.

Part III: *Judiciary Act 1903* (Cth) s 78B

5. It is certified that BCBC has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) in addition to the s 78B notices issued by the Appellant (**Bayan**) on 31 October 2014 and 26 March 2015 and considers that no further notice is required.

Part IV: Material Facts

6. BCBC, a Singaporean company and wholly owned subsidiary of an Australian company, is engaged in litigation in the High Court of Singapore seeking substantial damages against Bayan, an Indonesian company. Those parties were

---

1 This question is raised by Bayan and is the subject of its s 78B Notice. The question may more properly arise under s 79 of the Judiciary Act as federal jurisdiction was being exercised (but see *Agtrack (NT) P/L v Hatfield* (2005) 223 CLR 252, 271 [62]–[63]).

2 Further, if the true question is one that arises under s 79 of the Judiciary Act (albeit that this is not put by Bayan), then O 52A is neither repugnant to nor irreconcilable with the FJA which thus does not "otherwise provide" within the meaning of s 79: *Northern Territory v GPAO* (1999) 196 CLR 553.

3 *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101, 108 [13] (Gummow ACJ, Kirby, Hayne, Crennan and Kiefel JJ).

engaged in a joint venture in Indonesia.[4] Their joint venture agreement contained an exclusive jurisdiction clause for Singapore.

7. It was not disputed by Bayan, and in any event was held at first instance, that any decision of the High Court of Singapore would not be enforceable in Indonesia as Indonesia does not recognise or enforce foreign judgments.[5]

8. BCBC proposes to enforce any judgment obtained against Bayan in Australia where it has a valuable shareholding in the Second Respondent, Kangaroo Resources Limited (**KRL**).

9. There are only four factual findings of relevance to the disposition of the appeal, none of which is challenged by Bayan (CA [99]):

   a. BCBC has a good arguable cause on an accrued cause of action that is justiciable in the High Court of Singapore;

   b. there is a sufficient prospect that the High Court of Singapore will give judgment in favour of BCBC in the pending proceedings;

   c. if the High Court of Singapore enters judgment against Bayan, BCBC will register and enforce the judgment in the Supreme Court of Western Australia, pursuant to the FJA; and

   d. there is a danger that any prospective judgment will be wholly or partly unsatisfied because the assets of Bayan in Australia (being its shares in KRL), an Australian company, whose principal place of business is Perth, are transferred or otherwise dissipated.

10. Each of the matters referred to in the previous paragraph meant that BCBC satisfied the criteria for the grant of a freezing order in O 52A r 5. No challenge is made to that fact, nor is any challenge made to the primary judge's exercise of discretion.

Part V: Applicable constitutional / statutory provisions

11. Subject to the addition of a reference to s 16(1)(d)(i) of the Supreme Court Act and ss 79 and 80 of the Judiciary Act, Bayan's statement of applicable constitutional provisions, statutes and regulations is accepted.

---

[4] The statement at AS [56], fn 11 that "this litigation is being prosecuted in Singapore because the conduct is entirely concerned with alleged conduct relevant to the Singaporean jurisdiction" is incorrect.

[5] This is more than BCBC's "position" (cf AS [9]); it represents a finding by the primary judge: [101]–[102].

Part VI: Statement of argument

Introduction

12. Both Le Miere J (at first instance) and all members of the Western Australian Court of Appeal were correct to hold that:

    (i) O 52A was authorised by s 17(1) of the FJA;[6]

    (ii) O 52A was also supported by the Court's inherent jurisdiction to ensure the "effective administration of justice" and thus also supported by ss 16(1)(d)(i) and 167 of the WA Supreme Court Act;[7]

    (iii) O 52A is not inconsistent with the FJA within the meaning of s 109.[8]

13. The decisions below were:

    (i) consistent with this Court's decisions in *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 (***Jackson***) and *Cardile v LED Builders* (1999) 198 CLR 380 (***Cardile***);

    (ii) directly supported by a weight of Commonwealth authority on analogous cases[9] as well as the leading decision of Campbell J (as he then was) in *Davis v Turning Properties* (2005) 222 ALR 676 (***Davis***); and

    (iii) also entirely consistent with numerous decisions where freezing orders have been granted in support of the prospective enforcement (by registration) of domestic and international arbitral awards,[10] as well as the prospective judicial enforcement of taxation liabilities that have not yet fully accrued.[11]

14. Bayan, in broad terms, raises two issues:

    (i) the alleged inconsistency of O 52A rule 5 with the FJA; and

    (ii) the asserted absence of jurisdiction to grant the order in the first place.

Inconsistency and federal jurisdiction

15. On the assumption that the question is to be considered in terms of s 109 notwithstanding the exercise of federal jurisdiction, Bayan, with respect, gives no

---

6 Primary Judge [52]–[60]; CA [47]–[48] (McLure P), [197], [202]–[213] (Buss JA), [263] (Murphy JA, agreeing with Buss JA).

7 Primary Judge [44], [48], [49]–[51]; CA [45]–[49] (McLure P), [224] ff (Buss JA), [263] (Murphy JA).

8 Primary Judge [61]–[67]; CA [49] (McLure P), [251] (Buss JA), [263] (Murphy JA).

9 See paragraphs 47 ff below.

10 See paragraphs 49 ff below.

11 *Deputy Commissioner of Taxation v Sharp* (1988) 82 ACTR 1; *Commissioners for Her Majesty's Revenue & Customs v Mr Imtiaz Ali* [2011] EWHC 880; *Deputy Commissioner of Taxation v Seabrooke* [2012] FCA 1158; *Commissioner of Taxation v Regent Pacific Group Limited* [2013] FCA 36; *Commissioner of Taxation v Growth Investment Fund SA* [2014] FCA 780.

clear explanation of its assertion[12] that O 52A, rule 5 relevantly "impairs, negates or detracts from" the FJA. The basis for this assertion appears to be that the procedures of the FJA only apply *after* a foreign judgment is obtained: AS [68] and [87]. However, nothing in the FJA evidences an intention to exclude the power of the Supreme Courts of the States and Territories and the Federal Court to grant relief *prior* to the registration of a foreign judgment at least so long as that relief is incidental or ancillary in character to the primary jurisdiction (which, in the case of the FJA, is a jurisdiction to enforce a foreign judgment by registration, with the registered foreign judgment taking effect as a judgment of the local enforcing court).[13] Sir Gerard Brennan described the Mareva jurisdiction as having precisely that incidental character in *Jackson* (1987) 162 CLR 612, 621.

16. If, as BCBC contends, O 52A is in fact authorised by s 17 of the FJA, no question of inconsistency could possibly or logically arise under s 109. But even if O 52A is not authorised by s 17, it does not follow that there is any s 109 inconsistency (or that the FJA "otherwise provides" for Judiciary Act s 79 purposes). In this regard, the s 17 point is not simply the obverse of the s 109 argument: cf AS [18].

17. Before turning further to develop the argument in support of the unanimous concurrent findings below, it is important to identify the manner in which federal jurisdiction was engaged in the present case. As will be seen, by strong analogy with considered case law including in relation to the constitutionality of preliminary discovery orders, federal jurisdiction may be engaged notwithstanding that proceedings for substantive relief have not been commenced and may never be commenced. This is a fundamental doctrinal answer to much of Bayan's case.

Federal jurisdiction

18. Federal jurisdiction in respect of the enforcement by registration of foreign judgments is impliedly conferred on the Supreme Courts of the various states by s 6(2)(c) of the FJA: *Firebird Global Master Fund II Limited v Republic of Nauru* (2014) 289 FLR 398, 441 [244] (Basten JA); *Society of Lloyds v Marich* (2004) 139 FCR 560, [23] (Allsop J); and *SA Cryonic Medical* (2002) VSC 338, [6]–[10] (Nettle J).[14]

---

[12] AS [42].

[13] Section 6(7) of the FJA relevantly provides that, subject to ss 7 and 14,

(a) a registered judgment has, for the purposes of enforcement, the same force and effect; and
(b) proceedings may be taken on a registered judgment; and
(c) the amount for which a judgment is registered carries interest; and
(d) the registering court has the same control over the enforcement of a registered judgment;

as if the judgment had been originally given in the court in which it is registered and entered on the date of registration.

[14] Section 77(iii) of the Commonwealth Constitution empowers Parliament to confer federal jurisdiction on the Supreme Court of Western Australia with respect to any of the "matters" mentioned in ss 75 and 76.

19. Registration of a foreign judgment pursuant to the FJA involves the exercise of judicial power, and it is not to the point that the foreign judgment or prospective foreign judgment did not itself involve the exercise of the federal judicial power: *South Australia v Totani* (2010) 242 CLR 1, 64 [136] (Gummow J):

> "Under various laws of the Commonwealth there arise "matters" within the meaning of s 76(ii) of the *Constitution* in which the significant element is some anterior decision or determination not made in the exercise of the federal judicial power. Examples are the enforcement in the State and Territory courts of foreign arbitral awards, *the registration in the Federal Court and State and Territory Supreme Courts of foreign judgments,* and the curial effect given to determinations of the Superannuation Complaints Tribunal established by the legislation upheld in *Attorney-General (Cth) v Breckler*". (emphasis added, footnotes omitted).

As noted above, upon registration, the judgment takes effect as a judgment of the registering court.[15]

20. For constitutional purposes, "a matter" may exist, and judicial power may be exercised, prior to the commencement of proceedings in the relevant court for substantive relief, and even though proceedings for substantive relief may never be commenced. In this context, this Court has repeatedly emphasised that the concept of a "matter" is not synonymous with that of a legal proceeding. In *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, a majority of this Court pointed out, in a frequently cited passage, that the term "matter" did not mean a "legal proceeding, but rather the subject matter for determination in a legal proceeding". More recently, in *Abebe v Commonwealth* (1999) 197 CLR 510, 561 [140] (***Abebe***), Gummow and Hayne JJ observed that that "the concept of a 'matter' ... identifies a justiciable controversy ... [which] is identifiable independently of proceedings which are brought for its determination and encompasses all claims made *within the scope of that controversy*".

21. In this context, federal jurisdiction *was engaged* by the freezing order application in the present case in the very same way it is engaged in a preliminary discovery application. There was nothing hypothetical or prospective about the engagement of federal jurisdiction: cf AS [22], [24]. There was and is a matter in the constitutional sense even though no proceedings for substantive relief have been commenced.[16]

Section 76(ii) relevantly provides for jurisdiction in matters "arising under any laws by the Parliament". A matter "arises" under a law of the Parliament ... if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law": *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154.

[15] See fn 13.

[16] That substantive litigation had been commenced in Singapore and that any judgment would not be enforceable in Indonesia made it plain that the relief sought in Australia was not hypothetical. Further there was unchallenged evidence that BCBC's intention was to enforce any judgment in Australia:

22. The analogy with preliminary discovery is apposite[17] and it is no coincidence that the principles referred to in paragraph 20 above were applied by the Full Federal Court in *Hooper v Kirella Pty Ltd; Transfield Pty Ltd v Airservices Australia* (1999) 96 FCR 1, in which the Court upheld the validity of O 15A of the *Federal Court Rules 1979* (Cth) in relation to preliminary discovery. In separate proceedings at first instance, Tamberlin and Finn JJ had rejected challenges to the validity of rules, the latter having concluded that preliminary discovery was "an incident of the exercise of judicial power in relation to the matter": *Airservices Australia v Transfield Pty Ltd* (1999) 92 FCR 200, 208 [25]. In *Carnegie Corporation Limited v Pursuit Dynamics Plc* (2007) 162 FCR 375, 385–6 [42], French J (as the Chief Justice then was) cited with approval the following paragraphs from the decision of Finn J:

> Ordinarily a court's jurisdiction is enlivened by an initiating process seeking a determination of the substantive claim one party alleges it has against another. But ... such need not necessarily be the case. Necessity may require otherwise if a person's right is to be vindicated in a substantive claim. Preliminary discovery of the types provided in O 15A rr 3 and 6 have long been accepted as a proper and appropriate precursor to the making of a substantive claim – and appropriate because it assists in the administration of justice in relation to the making of the claim itself. There is no reason for present purposes to distinguish between the two types of discovery. Each reflects a different necessity.
>
> Though in form a discrete proceeding (as was the old bill of discovery: see the quotation from Story) preliminary discovery is, as a matter of substance, properly to be regarded as interlocutory in character in that it does not, nor is it intended to, determine finally the rights inter se of the parties to the substantive application: cf *Malouf v Malouf* [(1999) 86 FCR 134]. Its function rather is to assist in that determination when or if the substantive application is brought consequent upon what is revealed in the preliminary discovery itself.
>
> In consequence I consider an O 15A order for preliminary discovery to be an unexceptionable exercise of judicial power when made in relation to the matter necessitating the making of the order.

French J at 385–6 [42] in *Carnegie* referred to preliminary discovery as concerned with "*the prospective invocation of the jurisdiction of the Court in a claim for relief against an identified or yet to be identified respondent*".

Affidavit of Ivan Maras, sworn 2 April 2012, filed 3 April 2012 in Supreme Court of Western Australia matter CIV 1562 of 2012, 67–8 [215]–[218].

[17] As is the analogy with authorities considering the nature of the Court's inherent jurisdiction in the context of its power to make *Anton Piller* orders, which also demonstrate that the Court's inherent jurisdiction is not confined to circumstances where the processes of the Court have already been engaged. For example, as the NSW Court of Appeal observed in *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 (at 547G), the jurisprudential basis for such orders is the "inherent jurisdiction of the court to ensure that justice be done between the parties to *the proposed litigation*" (emphasis added). See also *Polygram Records Pty Ltd v Monash Records (Aust) Pty Ltd* (1985) 10 FCR 332.

23. After reviewing the distinction drawn in the authorities between a controversy and the proceedings in which that controversy might be resolved, the Full Court in *Hooper* observed (at 15, [53]):

> Of course, if a controversy is the subject of existing proceedings claiming substantive relief the scope of the controversy (or "matter") is likely to depend, in part, on what the parties allege in the pleadings and how they have conducted the litigation. But that does not mean that unless a party has instituted proceedings claiming substantive relief there can be no matter in respect of which jurisdiction can be conferred on the Federal Court [or in this case, the Supreme Court]. It is the justiciable controversy which constitutes the matter. That controversy may or may not be co-extensive with legal proceedings already instituted.

At [55], referring to the joint judgment of Gleeson CJ and McHugh J in *Abebe* at [32], the Full Court made the point that a right, duty or liability need not be established for there to be a matter.[18]

24. BCBC's application for a freezing order was intimately connected with the justiciable controversy constituting the matter here, namely a claimed right to be entitled to enforce the prospective judgment of the High Court of Singapore in the Supreme Court of Western Australia in circumstances where the primary judge was satisfied that there was a sufficient prospect *both* that the High Court of Singapore would give judgment in favour of BCBC (as plaintiff in Singapore) *and* that the Supreme Court of Western Australia would register or enforce that judgment.

O52A was authorised by s 17(1) of the Foreign Judgments Act

25. Section 17 (1) of the FJA (with emphasis added) provides:

> The power of an authority to make rules regulating the practice and procedure of a superior court extends to making any rules, not inconsistent with this Act or with any regulations made under this Act, prescribing all matters *necessary or convenient* to be prescribed for carrying out or giving effect to this Act, *including* the following:

[18] In dismissing the appeals against the decisions of Tamberlin J and Finn J, the Full Court held that the relevant matter in each case was the claim by the applicant to be entitled to relief under the *Trade Practices Act.* The Full Court concluded (at 20 [74]) that, "an application for preliminary discovery under O 15A, like the comparable procedure in equity, is intimately connected with the judiciable controversy constituting the matter". Transfield Australia's subsequent application for special leave on the basis that a "court cannot be exercising jurisdiction until a claim for the substantive remedy in respect of the relevant, right, duty, immunity, is before the court", was refused by Gleeson CJ and Callinan J because there were "insufficient reasons to doubt the correctness of the decision of the Full Court of the Federal Court": *Transfield Pty Ltd v Airservices Australia S231/1999* [2000] HCATrans 348 (16 June 2000). During the hearing of the special leave application, Callinan J referred to the Mareva injunction as another example of the Court exercising jurisdiction in a matter before the commencement of proceedings. That is of course the present case and a situation that is common whether or not the substantive proceedings to be commenced are domestic, transnational or arbitral.

(a) making provision with respect to the giving of security for costs by a person applying for registration of a judgment;

(b) prescribing the matters to be proved on an application for the registration of a judgment and for regulating the mode of proving those matters;

(c) providing for the service on the judgment debtor of notice of the registration of a judgment;

(d) making provision with respect to the extension of the period within which an application may be made to have the registration of a judgment set aside;

(e) relating to the method of determining a question arising under this Act as to:

(i) whether a judgment given in a country in relation to which this Part extends can be enforced in the country of the original court; or

(ii) what interest is payable under a judgment under the law of the original court.

Section 17(2) provides that section 17 does not affect any power to make rules under any other law.[19]

26. Both the primary judge and the Court of Appeal correctly held that O 52A is supported by the rule making power of the FJA.

27. A power expressed in the terms of s 17(1) "will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself *and will cover what is incidental to the execution of its specific provisions*": *Shanahan v Scott* (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb and Fullagar JJ) (emphasis added).

28. In *Quarter Enterprises Pty Ltd v Allardyce Lumber Co Ltd* (2014) 85 NSWLR 404, Bathurst CJ (Gleeson JA and Sackville AJA agreeing) described (at [138]) the purpose of the FJA in the following terms:

> [T]he object of the Act is to facilitate registration of foreign judgments of particular recognised courts. There is no reason in a period of increasing international trade with the corresponding likelihood of further cross-border disputes to treat registered judgments any differently to judgments of domestic courts. In this context it must be remembered that the Act was intended to facilitate the enforcement of foreign judgments.[20]

---

[19] In this context, BCBC contends that Order 52A was also authorised by s 16(1)(d)(i) of the Supreme Court Act and s 167(1)(a) of the Supreme Court Act.

[20] According to the Second Reading Speech for the Foreign Judgments Bill 1991, the FJA provides a "framework for the enforcement of foreign civil judgments by a simple registration process". In the

29. The FJA provides for the enforcement and registration of foreign judgments on a reciprocal basis. It applies with respect to judgments of courts in a particular country, by regulation, where the Governor-General is satisfied that substantial reciprocity will be given to the enforcement in that country of a corresponding Australian judgment. Pursuant to s 6 of the FJA, a judgment creditor under a foreign judgment may apply to have the judgment registered in the appropriate Australian court. Once registered, a judgment has, for the purpose of enforcement, the same force and effect, and the registering court has the same control over the enforcement of the registered judgment "as if the judgment had been originally given in the court in which it is registered on the date of registration": s 6(7). Item 24 of the Schedule to the FJA identifies that the FJA applies with respect to money judgments of the Supreme Court of Singapore (including the High Court).

30. By authorising the freezing of assets against which a registered judgment may be enforced, O 52A prescribes matters "necessary or convenient" for giving effect to this regime within the meaning of s 17(1). If the Australian assets of a prospective judgment debtor are removed from the jurisdiction or their value is materially diminished in the circumstances contemplated by O 52A and which were satisfied in the present case (see [9] above), the rights created by the FJA will have no practical utility. As Buss JA said: "The rules prevent the efficacy of the scheme for the registration and enforcement under the *Foreign Judgments Act* from being thwarted": CA [209]; [266]. Buss JA's conclusion that O 52A is "conducive to" and "complements" the provisions of the FJA (see CA [204], [209]) accords with authority, including the approach adopted by the Court in *Carbines v Powell* (1925) 36 CLR 88, 92, in which it was held that regulations made pursuant to a similarly-worded provision may "complement, but not supplement" the granted power.

31. In *Jackson* (1987) 162 CLR 612, Brennan J described a Mareva injunction as a "remedy which is *incidental* to the exercise by a court of its jurisdiction to enter judgment for a debt or damages and which is designed to prevent the defendant from divesting himself of his assets whereby enforcement of such judgment might be frustrated": at 621 (emphasis added); see also at 624 per Deane J (with whom Mason CJ, Wilson and Dawson JJ agreed). Similarly, by authorising freezing orders in respect of prospective judgments which will be entered following registration under the FJA, O 52A prescribes matters *incidental* to the registration and enforcement provisions of the Act: CA [210], [211]; see *Shanahan v Scott* at [27] above.

32. In determining that the impugned aspects of O 52A fell within the rule making power, the Court of Appeal appropriately had regard to the extent to which Federal Parliament disclosed an intention to deal with the subject matter with which the

Second Reading Speech it was noted that "[w]ith the increased mobility of persons and money across borders, the need for, and benefits of, an effective capacity to enable a judgment in one country to be enforced against assets in another country are obvious".

FJA is concerned: CA [196], citing *Morton v The Union Steamship Company of New Zealand Limited* (1951) 83 CLR 402. In this respect, it is significant that the FJA does not deal with the machinery for the enforcement of judgments by State and Territory courts, nor the mechanisms to protect frustration of their enforcement: CA [253]. It is also significant that the matters referred to in s 17(1)(a)–(e) are not said to be exhaustive; those matters are simply examples of what the broad power "*includes*". In these circumstances, the Court correctly concluded that "there is ample scope for the Supreme Court to make rules under s 17(1) in connection with the enforcement of judgments under the *Foreign Judgments Act,* including preventing the abuse or frustration of its enforcement processes and the protection of the administration of justice": CA [197].

33. O 52A was thus valid as a surrogate federal law authorised by s 17(1) of the FJA itself. No question of inconsistency under s 109 (nor repugnancy and irreconcilability under s 79 of the Judiciary Act) could therefore arise. But O 52A is also authorised by both s 16(1)(d)(i) or s 167 of the Supreme Court Act. It is in the context of s 16(1)(d)(i) that consideration as to whether the freezing orders made were also a valid exercise of the inherent jurisdiction of the Court arose.

O52A was authorised by s 16(1)(d)(i) of the* Supreme Court Act *and the inherent power of the Supreme Court of Western Australia

34. In *Christmas Island Resort Pty Ltd v Geraldton Building Co Pty Ltd (No 5)* (1997) 18 WAR 334, the Western Australian Court of Appeal confirmed that s 16(1)(d)(i) of the Supreme Court Act (WA) was substantively equivalent to s 23 of the *Supreme Court Act 1970* (NSW). The latter provision was considered by the New South Wales Court of Appeal in *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 (***Riley McKay***), a decision which, as Bayan recognises (AS [50]), was seminal in the development of Australian jurisprudence on Mareva freezing orders.

35. The statutory jurisdiction "*for the administration of justice*" and "*to administer justice*" conferred by s 23 of the *Supreme Court Act 1970* (NSW) and, s 16(1)(d)(i) of the WA Supreme Court Act respectively has been held to be co-extensive with the inherent jurisdiction or power of those two Supreme Courts. It is for this reason that, in considering whether or not s 16(1)(d)(i) of the WA Supreme Court Act authorised O 52A, both the primary judge[21] and the Court of Appeal[22] analysed the question of jurisdiction in the context of the Supreme Court's inherent power.

36. In *Riley McKay* [1982] 1 NSWLR 264, 276 it was said that "[t]he whole sense and purpose of the inherent powers ... are to ensure the effective administration of justice" and that the jurisdiction "is designed to prevent conduct inimical to the administration of justice". In the 30 years since that decision and these statements

[21] At [48].
[22] At [224] ff.

were first made, they have been regularly cited with approval.[23] It is uncontroversial that a superior court has an inherent jurisdiction to ensure the effective administration of justice and also to prevent the abuse or frustration of its own processes. The "processes" requiring protection have always included, critically, the processes for the enforcement and execution of judgments. Again in *Riley McKay* [1982] 1 NSWLR 264, 276:

> The basis of jurisdiction is founded on the risk that the defendant will so deal with his assets that he will stultify and render ineffective *any judgment given by the Court in the plaintiff's action*, and thus impair the jurisdiction of the Court and render it impotent properly and effectively to administer justice in New South Wales. (emphasis added)

A judgment which is given by the Supreme Court of Western Australia following registration of a foreign judgment, i.e., the orders of the Court which permit it to be enforced as though it were a domestic judgment, is equally capable of being undermined or frustrated as a domestic judgment. And like a domestic judgment, it may be frustrated before it is delivered or even before proceedings have been commenced.

37. On the question of inherent jurisdiction, Bayan's key proposition, namely that "[*t*]*he doctrinal basis of the inherent jurisdiction arises from the power to prevent the abuse or frustration of a court's process*", is simply too narrow. As has been said in a passage endorsed by many members of the Court, it is the "unlimited jurisdiction *for the administration of justice* which gives rise to [a superior court's] inherent power".[24] That is why the expressions "*for the administration of justice*" and "*to administer justice*" in s 23 of the *Supreme Court Act 1970* (NSW) and in s 16(1)(d)(i) of the Supreme Court Act respectively have been construed as being co-extensive with the inherent jurisdiction of the Supreme Courts of those two States: see *Riley McKay*.

38. *Riley McKay* [1982] 1 NSWLR 264 was endorsed by this Court in *Jackson* (1987) 162 CLR 612, 617, 637. It identified the source of the jurisdiction to grant freezing order relief as being in the Court's inherent jurisdiction to act *for the administration of justice*. Wilson and Dawson JJ held (at 619) that the Mareva doctrine (as the freezing order was then known) "exists not to create additional rights but to enable a court to protect its process from abuse in relation to the enforcement of its

---

[23] *Perth Mint v Mickelberg* (No 2) [1985] WAR 117, 118–9 (Burt CJ), 121 (Wallace J), 124 (Pidgeon J); *Jackson v Sterling Industries Limited* (1986) 12 FCR 267, 280–3, 288 (Woodward J), 292, 295 (Jackson J); *Jackson* (1987) 162 CLR 612, 617 (Wilson and Dawson JJ), 630 (Toohey J), 637, 642 (Gaudron J); *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319, 321 (Gleeson CJ), 327, 329–30 (Rogers AJA).

[24] *Grassby v The Queen* (1989) 168 CLR 1 (Dawson J, with Mason CJ, Brennan & Toohey JJ agreeing), a statement powerfully endorsed in *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 451–2 [50] (Gaudron, Gummow & Callinan JJ); *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268, 280 [36] (French CJ, with Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ agreeing). This decision was cited and quoted from by Buss JA at CA [220] in the instant case.

orders". Necessarily, that included prospective orders. Likewise, Brennan J held (at 621) that the remedy is one "which is incidental to the exercise by a court of its jurisdiction to enter judgment for a debt or damages and which is designed to prevent the defendant from divesting himself of his assets whereby enforcement of such judgment might be frustrated". Deane J (at 625) and Toohey J (at 634) made similar observations.

39. It was the same touchstone of acting in furtherance of the administration of justice that underpinned this Court's important decision in *Cardile* (1999) 198 CLR 380, making it clear that the jurisdiction could be exercised in respect of third persons against whom the applicant for the relief had no substantive claim. Thus, Bayan's very starting point in its analysis of the inherent jurisdiction at AS [44] (and quoted at the beginning of the paragraph [37] above) is too narrow. It ignores, moreover, the emphasis placed by members of this Court on the breadth and flexibility of that jurisdiction and its evolving nature: see, for example, the plurality in *Cardile* (1999) 198 CLR 380, 400 [41], quoting the earlier judgment of Brennan J in *Jackson* (1987) 162 CLR 612, a "judicial power to make an interlocutory order in the nature of a Mareva injunction may be exercised according to the exigencies of the case": see also *Cardile* (1999) 198 CLR 380, 403 [50] and *Jackson* (1987) 162 CLR 612, 632–633 (Toohey J).[25]

40. Further, what Bayan deprecates (at AS [98]) as a "siren song", namely that powers of superior courts to act in the interests of the administration of justice should be broadly construed "secure in the knowledge that injustice can be avoided by the judicial exercise of discretion" is in fact a well-established principle of law: see *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 185, 202–3, 205, cited with approval by the entire Court in *Owners of Shin Kobe Maru v Empire Shipping Co. Inc* (1994) 181 CLR 404, 421. That, as stated in AS [53] the Mareva order is "*a powerful remedy in which care must be exercised in its use*" may be readily accepted. But that is precisely where the absence of any attack on the discretionary aspects of the decision in question below is fatal to Bayan. Judicial statements as to the need for care in granting the remedy impliedly accept the *jurisdiction* to grant that remedy in an appropriate case but counsel caution in the discretionary exercise of that accepted jurisdiction.

41. The same underlying theme of acting to further, protect or prevent the frustration of the administration of justice is evident in this Court's later decision, *Cardile* (1999) 198 CLR 380, 393 [25], 401 [42]. The joint judgment of Gaudron, McHugh, Gummow and Callinan JJ observed (at 393 [25]) that the power to protect the integrity of its processes "extends to preserving the efficacy of the execution which *would lie* against the actual or *prospective* judgment debtor" (emphasis added). The

[25] "Courts must respond to the situations of the time, as is apparent from the way in which the scope of the Mareva injunctions has been extended."

emphasised words highlight the necessary prospectivity or proleptic nature of this jurisdiction.

42. Set against this doctrinal background, it is difficult to understand the basis for Bayan's insistence that the Court's inherent jurisdiction to protect its process is tied to the protection of the "process dealing with the substantive controversy that is to be tried by the court": AS [43]. Bayan's position that freezing order relief can only be granted by the Court dealing with the substantive controversy is further undermined by its concession that the Supreme Court *could* grant a freezing order if BCBC had already obtained a judgment in Singapore: AS [46].

43. It is true that in circumstances where no proceedings are on foot, it will be appropriate for the Court to consider the likelihood that such proceedings will be commenced. But as the Court of Appeal held, this is a discretionary consideration, not a "jurisdictional precondition": CA [50], [51] (McLure P), [238] (Buss JA), [264] (Murphy JA). The Court of Appeal's conclusion is consistent with the reasoning of this Court in *Cardile* (1999) 198 CLR 380, 404 [53].

44. If it be necessary to express the matter solely in terms of abuse of process (and it is submitted that it is not and to do so would be unduly to confine the inherent jurisdiction),[26] the relevant process that was being proleptically protected from abuse was the local court's enforcement process. This was recently accepted by the New South Wales Court of Appeal in a case involving factually indistinguishable circumstances, namely, a freezing order over local assets granted in anticipation of a prospective Indian judgment being enforced in New South Wales: see *Severstal Export GmH v Bhushan Steel Limited* (2013) 84 NSWLR 141, 155 [53] (***Bhushan Steel***) where Bathurst CJ referred to the Court's ability to "protect its registration and enforcement process by making a freezing order".

45. Once it is understood that a freezing order is designed to protect a Court's enforcement process, and to ensure that any judgment so given is not an empty one, then it can be seen that there is as strong a case for freezing order relief in respect of the domestic enforcement of an anticipated foreign judgment, as in respect of an anticipated judgment of the domestic court itself (as the Court of Appeal expressly recognised),[27] at least where, as was the case here, the Court is satisfied that there is a sufficient prospect that the applicant for relief will be successful and will register and enforce the judgment under the FJA.

---

[26] In truth, the doctrinal basis of the inherent jurisdiction, both generally and in the specific context, is as was articulated by Burt CJ in *Perth Mint v Mickelberg (No 2)* [1985] WAR 117, 118. There, citing *Riley McKay* [1982] 1 NSWLR 264, the Chief Justice stated that "[t]he true basis for the exercise for the jurisdiction, I think, is to render the administration of the law effective and to prevent abuse".

[27] CA [201]–[202].

46. In support of its arguments about the limits of the Court's inherent jurisdiction, Bayan places great weight on statements by this Court that refer to the availability of Mareva relief against "parties to the proceeding *against whom final relief might be granted*", and the need of the Court to protect "the integrity of its processes *once set in motion*": AS [53]–[59] (emphasis added).[28] But as the Court of Appeal concluded after carefully reviewing the authorities, such statements "must be understood by reference to the facts and circumstances that pertained in those cases": CA [232]–[235]. None of the relevant decisions concerned an application for a freezing order in the present circumstances, and the High Court was not attempting "exhaustively [to] state the ambit or limits applicable to the making of *Mareva* orders in any and all circumstances": CA [235].

47. Bayan's submissions also convey a false impression as to the novelty of a Mareva or freezing order being granted in the circumstances such as were presented in this case. The reality is that an inherent jurisdiction to grant a freezing order in the same circumstances has previously been recognised not only by Australian courts[29] but also by a range of courts in legal systems based on the English common law including Canada, the British Virgin Islands, the Isle of Man, the Cayman Islands and Jersey.[30] Recent cases in addition to those referred to in the courts below have also been identified, including from Canada and Singapore.[31] Many of these decisions have drawn on the powerful analysis of Lord Nicholls in *Mercedes Benz AG v Leiduck* [1996] AC 284 set out in the Court of Appeal's judgment at [141]–[144]. In his speech 306–7, his Lordship said:

> [U]nlike other interlocutory relief, Mareva relief is not connected with the subject matter of the cause of action in issue in the proceedings ... It is relief granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained ...

---

[28] Quoting from *Jackson* (1987) 162 CLR 612; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (No 3) (1998) 195 CLR 1; *Cardile v LED Builders* (1999) 198 CLR 380; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

[29] *Davis* (2005) 222 ALR 676; *Celtic Resources Holdings Plc v Arduina Holding BV* (2006) 32 WAR 276; *Bhushan Steel* (2013) 84 NSWLR 141.

[30] *United States v Levy* (1999) 45 OR (3d) 129; *Sun-Times Media Group Inc v Black* [2007] ONSC 6248; *Black Swan Investment ISA v Harvest View Ltd* (British Virgin Islands **(BVI)** High Court, BVI HCV 2009/399, 23 March 2010); *Secilpar SL v Burgundy Consultants Ltd* (High Court of the Isle of Man, CP 2003/128, 3 August 2004; *Gillies-Smith v Smith* (Grand Court of the Cayman Islands, Cause No 0173/2011, 12 May 2011); *Solvalub Ltd v Match Investments Ltd* [1996] JLR 361 (Court of Appeal, Jersey).

[31] *Osetinskaya v Usilett Properties Inc* (BVI High Court, Claim No 37 of 2013, 25 July 2013); *Petro-Diamond Inc v Verdeo Inc* [2014] ONSC 4538 (Ontario Superior Court of Justice); *Sociedade-de-Fomento Industrial Private Ltd v Pakistan Steel Mills Corporation (Private) Ltd* [2014] BCCA 205 (British Columbia Court of Appeal); *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2013] SGHC 217 (High Court of Singapore); *Tsoi Tin v Tan Haihong* (BVI Court of Appeal, BVIHCMAP 2013/0023, 5 February 2014); *VTB Capital Plc v Universal Telecom Management* (2013) 2 CILR 94 (Cayman Island Court of Appeal, 4 June 2013).

> Once it is borne in mind that a Mareva injunction is a protective measure in respect of a prospective enforcement process, then it can be seen there is a strong case for Mareva relief from the Hong Kong court being as much available in respect of an anticipated foreign judgment which would be recognised and enforceable in Hong Kong as it is in respect of an anticipated judgment of the Hong Kong court itself.

BCBC relies on that reasoning as well as the analysis of Campbell J (as his Honour then was) in *Davis* (2005) 222 ALR 676 whose decision has been widely cited with approval both judicially and by commentators.[32]

48. In *Davis* (2005) 222 ALR 676, 686–7 [35], Campbell J explained why the administration of justice, which underlies the Court's power to grant freezing orders, extends to foreign proceedings:

> The administration of justice in New South Wales is not confined to the orderly disposition of litigation which is begun here, tried here and ends here. In circumstances where international commerce and international monetary transactions are a daily reality, and where money can be transferred overseas with the click on a computer mouse, the administration of justice in this state includes the enforcement in this state of rights established elsewhere.

Bayan's complaint that "international commerce" is not a principled basis on which to extend the jurisdiction misses the point: the Court's concern in *Davis* was not international commerce *per se*, but the potential for the changing nature of international commerce to impact adversely the administration of justice in NSW. This concern has always been central to the rationale for freezing orders: see *Riley McKay* [1982] 1 NSWLR 264, 270; *Cardile* (1999) 198 CLR 380, 425 [115]–[116].

49. The grant of a freezing order in circumstances such as those in the present case is directly analogous to the grant of a freezing order where it is anticipated that an arbitral award (whether domestic or international) will be made in favour of the applicant for freezing order relief which will subsequently be enforced under the terms of the *International Arbitration Act 1974* (Cth) or one of the uniform state Commercial Arbitration Acts.[33] Such a jurisdiction has been recognised in Australia for more than 30 years, dating back to the decision of Clarke J (as his Honour then was) in *Construction Engineering (Aust) Pty Ltd v Tambel (Australasia) Pty Ltd* [1984] 1 NSWLR 274. See also further examples of Mareva freezing orders being granted where arbitral proceedings are pending and, *ex*

---

[32] See, eg, *Bhushan Steel Ltd v Severstal Export GmbH* [2012] NSWSC 583, [161], affd *Severstal Export GmbH v Bhushan Steel*; *Independent Trustee Services Ltd v Morris* (2010) 79 NSWLR 425, 431 [36]; M Davies, A Bell and Justice P Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 9th ed, 2014) 86–87 [4.6], 94 [4.18]–[4.19]; the Hon JJ Spigelman, 'Transaction Costs and International Litigation' (2006) 80 *ALJ* 438, 449; the Hon JJ Spigelman, 'Freezing Orders in International Litigation' (2010) 22 *Singapore Academy of Law Journal* 490, 500; J Tarrant, 'Mareva Orders: Assisting Foreign Litigants', (2006) 27 *Australian Bar Review* 314; Justice P Biscoe, *Freezing and Search Orders: Mareva and Anton Piller Orders* (LexisNexis Butterworths, 2nd ed, 2008) [5.71].

[33] See further para [47] above.

hypothesi, no substantive jurisdiction of any Australian court has been engaged: *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited* [2013] FCA 882; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; *ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"* (2011) 285 ALR 444; *J Hutchinson Pty Ltd v Sunnybank Plaza Pty Ltd* (Unreported, Supreme Court of Queensland, Mackenzie J, 1 July 1993).

50. Contrary to Bayan's Submissions (AS [22], [24], [44], [62], [66]), there was nothing hypothetical about the circumstances in which the freezing order in the instant case was granted: there was a real dispute between the parties which was the subject of litigation that had been commenced in Singapore, and the primary judge satisfied himself (in terms of O 52A r 5(3)) that there was a sufficient prospect *both* that the High Court of Singapore would give judgment in favour of BCBC (as plaintiff in Singapore) *and* that the Supreme Court of Western Australia would register or enforce that judgment. Neither of these findings of fact has been challenged. It needs to be emphasised that for the entire species of pre-judgment freezing orders, there is *always* the prospect that the applicant for the freezing order will not succeed. There was nothing unusual, or unusually hypothetical, about the freezing order in this case. The requirements of O 52A, r 5(3)(a) and (b) are designed to ensure that the Court is not dealing with hypothetical cases.

51. Insofar as Bayan submits that where proceedings have not been commenced, an undertaking to commence must be given (AS [45] and [66]), this is not correct and inconsistent with authority, including the Court's decision in *Cardile* (1999) 198 CLR 380, 404 [53] (Gaudron, McHugh, Gummow and Callinan JJ). Whether an undertaking to commence proceedings has been given is relevant to the exercise of the court's discretion; it does not go to jurisdiction. An undertaking was unnecessary in this case because proceedings between the parties for the substantive relief claimed were already on foot in Singapore. No undertaking was sought by Bayan that, in the event that BCBC was successful in Singapore, it would commence enforcement proceedings in Australia nor was any such undertaking required by the primary judge. The reason for that was obvious. BCBC had filed unchallenged affidavit evidence that its intention was to enforce any judgment in Australia in circumstances where it was held that any judgment would not be enforceable in Indonesia.[34]

52. As to Bayan's oft-repeated submission[35] that BCBC could and should have sought the freezing order in Singapore rather than Western Australia, there are multiple answers:

(i) Bayan's assets were relevantly in Australia and not Singapore;[36]

---

[34] Affidavit of Ivan Maras, sworn 2 April 2012, filed 3 April 2012 in Supreme Court of Western Australia matter CIV 1562 of 2012, 67–8 [215]–[218].

[35] See AS [30], [46], [61], [68], [75].

(ii) the WA Supreme Court had jurisdiction over Bayan in respect of the freezing order: O 10 r 1(1)(a)(ii) and O 52A r 5(7);

(iii) whether the High Court of Singapore was better placed to grant freezing order relief in respect of Bayan's assets in Australia (which was doubtful in light of (i)) is entirely irrelevant to the question of the *jurisdiction* of the Supreme Court of Western Australia to grant such relief;

(iv) the question of jurisdiction to grant the relief sought is not to be answered by the colloquial submission that the High Court of Singapore "has been totally left out of the loop";[37] the WA Supreme Court either had jurisdiction or it did not;

(v) Bayan's submission that relief should have been sought from the foreign court is akin to an argument that was roundly rejected in the context of anti-suit injunctions in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 396, namely that an Australian court should not grant an anti-suit injunction having the effect of restraining proceedings in a foreign court without first having sought a stay of those proceedings in that Court.

The Court of Appeal rightly dismissed this particular argument of Bayan: CA [242]. At most, considerations of suitability of forum for the making of an application for freezing order relief bear on the exercise of the discretion of the Court asked to make the order (here unchallenged).

53. Neither the enactment of the *Trans-Tasman Proceedings Act 2010* (Cth), which confers a statutory power on some Australian courts to grant interim relief in aid of New Zealand proceedings, nor the proceedings of the antecedent Trans-Tasman Working Group, supports a view that: (i) the Court otherwise lacks jurisdiction to grant freezing order relief in respect of foreign proceedings; and (ii) O 52A is inconsistent with the FJA: cf AS [26]–[27], [88]–[91]. Putting to one side the novelty of Bayan's approach (for which no authority is offered), the express terms of s 26(3) of the *Trans-Tasman Proceedings Act 2010* (Cth) (which expressly provide that the powers conferred by the Act do not affect any other power to grant relief in support of a New Zealand proceedings), are inconsistent with the conclusion Bayan asks the Court to draw. Further, even if this Court were inclined to have regard to the views of a Trans-Tasman Working group in determining the breadth of the Court's inherent jurisdiction, it would also need to have regard to the fact that the introduction of the impugned harmonised rules presumably reflected the view of the Supreme Courts of each of the Australian States and Territories, and the Federal Court of Australia, that Australian courts *did* have jurisdiction to grant freezing order in respect of the possible domestic enforcement of a foreign

[36] There was no evidence that Bayan had any assets in Singapore. Further, it was uncontroversial that any judgment from the High Court of Singapore would not be able to be enforced against Bayan's assets in Indonesia: Primary Judge [101]–[102].

[37] Cf AS [61].

judgment. The Appellant points (AS [92]) to the observation of Miller J in *Yos v Heng* [2009] NZHC 2282, [5] that no inherent jurisdiction existed in New Zealand to grant freezing order relief, but omits reference to his Honour's further observation (at [7]) that "even before the introduction of the new harmonised rules, Courts in Australia recognised an inherent jurisdiction to make freezing orders over domestic property in aid of substantive foreign proceedings".

O52A was also authorised by s 167(1)(a) of the Supreme Court Act

54. Order 52A was also authorised by s 167(1)(a) of the Supreme Court Act.

55. In this regard, BCBC is content to rely upon the elegant reasoning of Buss JA at [246]–[248] as follows:

> [246] Section 167(1)(a) of the Supreme Court Act provides that rules of court may be made "for regulating and prescribing the procedure ... and the practice to be followed in the Supreme Court in all causes and matters whatsoever in or with respect to which the court has for the time being jurisdiction ... and any matters incidental to or relating to any such procedure or practice".
>
> [247] Order 52A regulates and prescribes the procedure and practice (including matters incidental to or relating to such procedure or practice) to be followed in the Supreme Court where the Supreme Court's inherent jurisdiction to make a freezing order (including a freezing order in the circumstances in question) is sought to be invoked.
>
> [248] Section 167(1)(a) therefore authorised the making of O 52 A.

O52A is not inconsistent with the Foreign Judgments Act

56. As discussed above, Bayan's s 109 argument can only arise in the event that the Court concludes that O 52A is not supported by the rule making power in s 17 FJA but is supported by either s 16(1)(d)(i) or s 167 of the Supreme Court Act. In this event, the Court of Appeal and the primary judge were correct to conclude there was no such inconsistency between O 52A and the FJA.

57. *First,* the FJA does not evince any express intention to exclude the operation of State law (cf *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518, [20]–[21], where the Commonwealth statute provided that it was "intended to apply to the exclusion of any law of a State or Territory").

58. *Secondly,* contrary to Bayan's submissions, the FJA does not establish a complete legislative scheme: cf AS [81]–[83]. Although it is true that the Act created a national framework for the enforcement of foreign civil judgments in Australia (cf AS [83]), it plainly enough does not exclusively prescribe the measures that State and Territory courts and the Federal Court may take when exercising jurisdiction under it. On the contrary, as the Court of Appeal observed, the FJA "expressly contemplates that the registered foreign judgment will be enforced under the rules of the registering court or courts": CA [193], [253]. This is evident from the

provisions of s 17 of the FJA: as discussed, s 17(1) confers a rule making power on superior courts, while s 17(2) states that this power "does not affect any power to make rules under any other law". See also s 6(7) and s 20. The inclusion of such provisions is inconsistent with an intention to create a "general and complete federal legislative scheme": cf AS [81].

59. *Thirdly,* the power of the Supreme Court to make a freezing order in the present circumstances does not undermine (that is, "alter", "impair" or "detract from") the operation of the FJA: *Jemena Asset Management Pty Ltd v Coinvest Limited* (2011) 244 CLR 508, 525, [41] (***Jemena Asset v Coinvest***). On the contrary, O 52A supports the Supreme Court's capacity to prevent the abuse or frustration of its enforcement processes in the circumstances where the matters to be established in O 52A r 5 are made out, that is to say, where there is a sufficient prospect that the Court's enforcement jurisdiction will be engaged: see CA [256].

60. Bayan also submits that the Rule detracts from the operation of the FJA because the registration and enforcement protections in Part 2 of the Act do not apply to foreign non-money judgments (including foreign freezing orders): AS [82] and [85]–[87]. But the impugned aspect of the Rule is directed to the making of local freezing orders, not the recognition of foreign ones. As this Court observed in *Jemena Asset v Coinvest* (2011) 244 CLR 508, 525 [42], all tests of inconsistency are "tests for discerning whether a 'real conflict' exists between a Commonwealth law and a State law". Here there is no conflict.

PART VII: Notice of contention / cross appeal

Not applicable

PART VIII: Time estimate

BCBC estimates that it will require 3 hours for the presentation of its oral argument.

Dated 29 April 2015

Name: Andrew Bell
Telephone: (02) 9233 1370
Facsimile: (02) 9232 7626
Email: asbell@wentworthchambers.com.au

Name: Declan Roche
Telephone: (02) 9376 0662
Facsimile: (02) 9210 0521
Email: declan.roche@banco.net.au