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

APPELLANT'S SUBMISSIONS

Filed on behalf of the appellant
Ms Orfhlaith McCoy
Clayton Utz
Level 15, 1 Bligh Street
SYDNEY NSW 2000

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Tel: (02) 9353 4240
Fax: (02) 8220 6700
DX 370 SYDNEY
Ref: 156/12003/80129029

PART I: Internet

1. The appellant certifies that these submissions are in a form suitable for publication on the Internet.

PART II: Issues

2. Are Order 52A of the *Rules of Supreme Court 1971* (WA), (**WASC Rules**) and its companion Rules of Court throughout Australia, to the extent they authorise superior courts of record to make a *Mareva* or freezing order in relation to a prospective foreign judgment to which Part 2 of the *Foreign Judgments Act* 1991 (Cth) extends, and where no substantive proceedings, apart from the application for the freezing order, have been or are to be commenced in an Australian court, and there is no judgment in the foreign proceedings:

a. inconsistent with the *Foreign Judgments Act* for the purposes of section 109 of the Commonwealth Constitution and/or *ultra vires* section 17 of the *Foreign Judgments Act*; and

b. within the inherent or implied jurisdiction of Australian superior courts?

PART III: *Judiciary Act* 1903 (Cth)

3. The appellant certifies that it served notices on the Attorneys-General pursuant to sec 78B of the *Judiciary Act* and the High Court Rules on 30 March 2015.

PART IV: Citations

4. The judgments below are not as yet reported in the Western Australian Reports. The decision below is reported as *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2014) 288 FLR 299. The relevant decision at first instance before Le Miere J is reported as *BCBC Singapore Pte Ltd v PT Bayan Resources TBK (No 3)* (2013) 276 FLR 273.

PART V: Facts[1]

5. The appellant (**Bayan**) is a company incorporated in Indonesia. The first respondent (**BCBCS**) is a company incorporated in Singapore. It holds 51% of the issued share capital of an Indonesian company, PT Kaltim Supacoal (**KSC**). Bayan holds the other 49%. By a deed dated 7 June 2006 (**the JV Deed**), provision was made for the rights and obligations of the shareholders in KSC. Pursuant to a novation and the acquisition of shares, Bayan and BCBCS are now the relevant holders of the rights and bearers of the obligations under the JV Deed. The JV Deed is governed by the law of Singapore.

6. A dispute under the JV Deed arose between BCBCS and Bayan in November and December 2011. BCBCS alleges that, in breach of the JV Deed, Bayan instructed its associated companies to cease supplying coal to KSC and, further, that Bayan refused to provide funding to KSC. On 13 December 2011, Bayan served a default notice on BCBCS alleging that BCBCS had breached its obligations under the JV Deed. BCBCS alleges that the default notice was invalid and also denies the allegations in the notice.

7. On 27 December 2011, BCBCS commenced proceedings against Bayan in the High Court of Singapore. The relief claimed includes damages for breach of the JV Deed. On 21 February 2012, Bayan served a notice on BCBCS by which it terminated, or purported to terminate, the JV Deed. BCBCS treated the notice as a wrongful repudiation by Bayan of its obligations under the JV Deed. BCBCS purported to accept the repudiation and to terminate the JV Deed.

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[1] Unless otherwise indicated, the summary of facts is taken from [53]-[76] of the judgment below of Buss JA.

8. No judgment has been obtained from the High Court of Singapore in the pending proceedings. There are claims and cross-claims and the proceedings have not been set down for hearing. No proceedings, apart from the application for freezing orders, have been or will be commenced by BCBCS in Western Australia unless BCBCS obtains a judgment against Bayan in the High Court of Singapore. If that contingency occurs, BCBCS contends that it will register and enforce the judgment in the Supreme Court of Western Australia pursuant to the *Foreign Judgments Act*. The cause of action being litigated by BCBCS against Bayan in the High Court of Singapore could not be litigated in Western Australia (CA [99]).

9. BCBCS's position is that if it obtains a judgment against Bayan in the High Court of Singapore it will be unable to enforce the judgment against Bayan in Indonesia, where most of Bayan's assets are located. Bayan's sole asset in Australia is its 57% holding in the issued share capital in the second respondent (**KRL**), an Australian company.

10. On 5 April 2012, BCBCS applied *ex parte* to the Supreme Court of Western Australia, pursuant to O52A of the WASC Rules, for freezing orders against Bayan and KRL in respect of the shares held by Bayan in KRL. On that date Justice Pritchard made interim freezing orders.

11. On 17 May 2012, Bayan and KRL commenced proceedings in this Court in which they challenged the power of the Supreme Court to make the freezing orders, seeking declaratory relief relevantly akin to that presently sought in this Court, namely that O 52A is invalid insofar as it purported to authorise the Supreme Court of Western Australia to make the freezing orders and there is no inherent, implied or statutory jurisdiction capable of being exercised by the Supreme Court to authorise the making of the freezing orders. The collocation of words "inherent, implied or statutory" is taken from O 52A, r 6, which as part of harmonised Rules of Court throughout Australia, obviously employs a form of words that may be applicable to any superior court irrespective of its mode of creation.

12. On 26 June 2012, Gummow ACJ remitted those proceedings to the Supreme Court and the proceedings were heard together by Le Miere J. Consistent with its argument concerning the lack of power in the Supreme Court, Bayan did not put on any evidence, or challenge the evidence of BCBCS, concerning the "merits" of the dispute or the "prima facie" case of BCBCS in Singapore. Bayan denies the asserted strength of BCBCS's case, and defends the allegations, and prosecutes its own, in the High Court of Singapore. In other words, Bayan accepted for the purposes of argument that the language of O 52A extended to the relief granted in the present case, subject to the question of whether the relief was lawfully authorised by O 52A.

13. Justice Le Miere discharged the freezing orders against KRL as that company did not have any control over the assets of Bayan and therefore it was not a case where a Court may make a freezing order against a third party. His Honour held, for the purposes of O 52A, that there was a sufficient prospect that the High Court of Singapore would give judgment in favour of BCBCS in the Singaporean proceedings and that if the freezing orders were not continued, there was a real and sensible risk that a judgment obtained by BCBCS from the High Court of Singapore would remain unsatisfied. His Honour dismissed Bayan's proceedings for declaratory relief and, with security from BCBCS as a foreign company, continued the freezing orders against Bayan.

14. Bayan appealed to the Court of Appeal of the Supreme Court of Western Australia.[2] On 25 September 2014, that Court (McLure P, Buss and Murphy JJA) dismissed Bayan's appeal.

PART VI: Argument

Introduction

15. The decision below impermissibly and erroneously extends the understanding of the jurisdiction of superior courts of record to grant freezing orders considerably beyond that traditionally understood and supported by the doctrine enunciated in this Court. Moreover, it restructures the understanding of when it is permissible for a law of the State to operate over the subjects marked out by Commonwealth legislation. In this case, that subject represents a carefully worked out regime that provides for international reciprocity.

16. The view taken of O 52A below undermines the operation of the *Foreign Judgments Act*. That legislation requires an evaluative decision to be made about the existence of reciprocity between sovereign nations in the recognition of various forms of judicial acts and a political decision concerning whether the Governor-General will be advised by the Executive to so opine and to promulgate regulations. As will be established below, no action is permissible under that legislation, either in support of foreign proceedings or as some anticipatory enforcement, prior to the existence of a recognised order of a foreign judicial tribunal.

17. Order 52A represents the Western Australian part of uniform "harmonised" Rules of Court developed under the auspices of the Australian Council of Chief Justices. These Rules of Court were drafted and enacted as putative delegated legislation without any further provisions in empowering constitutive legislation for any of the relevant jurisdictions of the Courts. In this case, the authorising provision in State law is para 167(1)(a) of the *Supreme Court Act 1935* (WA). A majority below (McLure P and Buss JA) confirmed the view of Le Miere J that para 167(1)(a) does not go any further than the inherent jurisdiction. BCBCS did not challenge the trial judge below on that issue, so that there is no State law question separate from whether the inherent jurisdiction supports the judicial acts purportedly authorised by the Rule.

18. In practical terms the question of whether O 52A is inconsistent with the *Foreign Judgments Act* is no different from whether sec 17 of that legislation directly authorises O 52A. For Bayan's part, sec 17 is part of the regime that conclusively indicates that the legislation would be undermined by the existence of this judge-made rule.

19. The relevant Rules of Court throughout Australia are materially identical.[3] As made clear in its grounds of appeal, it is the limited extent to which the Rule attaches to a prospective foreign judgment that Bayan argues is invalid.

Error and elision

20. The conception the Court below had of its inherent jurisdiction and the power it exercised illustrates why the *Foreign Judgments Act* is inconsistent with O 52A. Two critical

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[2] KRL also appealed to the Court of Appeal so as to reverse the costs order made against it at first instance in the event of Bayan's success. KRL did not take an active role in the appeal hearings.

[3] *Federal Court Rules* 2011 (Cth), Ch 2, Pt 7, Div 7.4; *Uniform Civil Procedure Rules* 2005 (NSW), Pt 25, Div 2; *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), Order 37A; *Uniform Civil Procedure Rules* 1999 (Qld), Ch 8, Pt 2, Div 2; *Supreme Court Rules* 2006 (SA), Rule 247, when read with Practice Direction 4.5 of the Supreme Court; *Supreme Court Rules* 2000 (Tas), Part 36, Div 1A; *Supreme Court Rules* (NT), Order 37A; *Court Procedure Rules* 2006 (ACT), Sub-div 2.9.4.2

errors were made below in the judgment of Buss JA with whom McLure P and Murphy JA relevantly agreed:

a. First, in respect of the inherent jurisdiction, the Court below said that "*[t]here is no reason in principle why a freezing order should be available in respect of a prospective domestic judgment but should not be available in respect of a prospective foreign judgment if there is a sufficient prospect that the prospective judgment, if given, will be registered and enforced by the Supreme Court*" (CA [230]) and went on to say that "*...it is not a jurisdictional precondition to the Supreme Court granting* Mareva *relief that substantive proceedings will imminently be commenced in the court. The absence of substantive proceedings, apart from the application for a* Mareva *order, is relevant only to the exercise of the Supreme Court's discretion to make or refuse the order*": (CA [238])

b. Secondly, in respect of the operation of the *Foreign Judgments Act*, the Court below said "*...[t]he general purpose or object of the* Foreign Judgments Act *is to facilitate and simplify the enforcement in Australia of certain foreign judgments to which the Act extends*" (CA [198]) and "*O 52A (in particular O 52A r 5), to the extent it relates to a judgment or prospective judgment of foreign courts to which pt 2 of the* Foreign Judgments Act *extends, is conducive to, and does not detract from, the operation of the* Foreign Judgments Act. *More specifically, O 52A is conducive to, and does not detract from, the reciprocity of the scheme embodied in pt 2 which includes, when read with the* Foreign Judgment Regulations, *the registration of money judgments given by the High Court of Singapore and the enforcement of them as though they were Australian domestic judgments*: (CA [204]).

21. These statements are outside previously understood limits derived from the nature of the judicial power in question. The Court and BCBCS appear to be speaking of the eventual registration process under the federal statute but in truth are calling in aid concepts relevant only to the support of the Singaporean proceedings. BCBCS has repeatedly eschewed the notion that the *Mareva* order is in aid of the substantive proceedings on foot in Singapore. The key contention of BCBCS, and that adopted by their Honours below and by O 52A itself, is that the *Mareva* order is in aid of the prevention of the frustration of the putative statutory registration process under the *Foreign Judgments Act* of which BCBCS wishes to one day avail itself of – if various contingencies are satisfied.

22. How can that be? First, no jurisdiction to grant a *Mareva* order has ever been recognised when a contingency exists as to whether the putative plaintiff will *ever* have a cause of action to commence proceedings, including an arbitration, over which the Court has a supervisory role. If, as must be right, the jurisdiction is said to exist in support of the prospective registration proceedings in the Supreme Court of Western Australia, and not in support of the Singaporean proceedings, the relevant contingency is not whether the plaintiff will win (which is common to *Mareva* proceedings and which Bayan obviously does not gainsay) but whether any process of the Supreme Court will ever be put in motion. The contingency relates to whether the process will ever exist – whether BCBCS will ever have a cause of action, whether it will ever have an immediate occasion to approach the Court to quell a controversy in some hypothetical future exercise of federal jurisdiction. Put to one side the fact that proceedings may not be imminently commenced – in this case it has been *three years* since the plaintiff received freezing orders and it still cannot give an undertaking that it will ever commence substantive proceedings while Bayan's assets remain stultified. That is because BCBCS does not have a cause of action under the federal statute.

23. It cannot possibly be contradicted that in order to be eligible for a freezing order (or an *Anton Piller* order for completeness) in any Australian court, an applicant for such an order must demonstrate that there is an actual and imminent relationship with the substantive controversy. By actual it is submitted that the cause of action propounded must not be contingent. By imminent it is meant that all applications for a freezing order in this country are supported by an undertaking to commence substantive proceedings if such proceedings are not already on foot. The Court below could only find *three* examples since 1975 in this country where it claimed that was not the case (at [150]-[165]). They will be dealt with below, but suffice to say that one of those was an application of the NSW analogue of O52A where the validity of the Rule was not challenged, and one other was a first instance judgment which was the genesis of the harmonised Rules.

24. The putative jurisdiction cannot be squared with authority in this Court unless an unprincipled blend is made of the contingent Australian registration proceedings and the actual substantive proceedings in Singapore. Even if that is done – what then? Such a jurisdiction would cut away the policy of the *Foreign Judgments Act.* Rights only inure under the *Foreign Judgments Act* when there is a judicial order of a foreign nation. That is not surprising. In a focussed sense, the legislation recognises that an order must exist in order for a judgement about reciprocity to be made. Any plaintiff in the position of BCBCS which seeks some relief or redress under the legislation will be rightly turned away – at present that federal jurisdiction exists solely in *futuro.* The jurisdiction that BCBCS claims is hypothetical in that sense. BCBCS cannot approach a Court and say that it has a matter under the *Foreign Judgments Act* unless it bootstraps the *Mareva* order itself. It is only by circularity (addressed below) of saying that it somehow enhances the policy of the legislation for O52A to be directly authorised by it that BCBCS generates any shadow of a claim to have an immediate right, duty or liability that constitutes a controversy to be quelled by the exercise of (federal) judicial power. The present exercise of power at best concerns something that may come to exist as a matter, but may not. In truth, by appealing to notions of supposed good judicial policy in promoting the Rule, the public policy selected by the Legislature has been undermined.

25. This is where, with respect, the Court below departed so significantly from a proper understanding of the context in which the *Foreign Judgments Act* exists. At [251]-[261] below, Buss JA gave his reasons for why O 52A is not inconsistent with the *Foreign Judgments Act.* They can effectively be summarised by one proposition. That is that the *Foreign Judgments Act* is not a complete legislative scheme and nothing about it indicates an intention to exclude the ability of either the State Parliament or the courts to grant or exercise respectively a jurisdiction to prepare for and improve the enforcement prospects of a future registrable judgment, including by way of granting a *Mareva* order. Especially in relation to the power of the Court, the judgment below calls into aid the well understood notion that s 109 is not directed to displacement of the common law with which, of course, Bayan does not cavil.

26. All this however fails to appreciate that no-one possibly considered that a jurisdiction to grant *Mareva* orders in this context existed until a first instance judgment of the Supreme Court of New South Wales in 2005. Any notion that such a jurisdiction is "necessary and convenient" for the operation of the *Foreign Judgments Act* puts to one side the fact that the legislation was drafted on an understanding of the state of the law at the time that the common law of Australia did not provide for such a remedy. That is not a mere hypothesis presented by Bayan in this appeal – it has been the express and manifested opinion of the Legislative and Executive branches of this country. The Executive has taken the view that the reciprocity required under the legislation is achieved by careful nation by nation deliberations to extend the remedy. As is explained below, the Executive Governments of both Australia and New

Zealand, in negotiating the passage of the *Trans-Tasman Proceedings Act* 2010 (Cth) and (NZ), did not think such an inherent jurisdiction existed and *ex facie* the *Foreign Judgments Act* did not provide for it. This is important in the context of the *Foreign Judgments Act* relying on decisions of the Executive Government to provide the actuating reciprocity and that the Legislature's subsequent actions cast significant light on the understanding of the *Foreign Judgments Act*.

27. The Parliament of this country has consistently acted on the basis that a jurisdiction purportedly invented in 2005 does not exist and that interim relief will only be granted in the present circumstances by legislative and executive will within the confines of the *Foreign Judgments Act* or by special purpose legislation. That reveals everything that a Court needs to understand about the *Foreign Judgments Act*. The approach below, by treating silence in the legislation as implied assent, inverts the inquiry.

28. Further, recognition of an inherent jurisdiction results in a lack of coherence in all other aspects of domestic law to which *Mareva* orders could be relevant. Let it be assumed for present purposes that two parties are in an executory contractual relationship under which one is bound to perform in a substantial way at some time in the future. It could be something as common as a payment of a large sum of money on a certain date some months away. The party with a right to payment of the monies starts to be concerned with objectively good reason that the payment may not be made, however no anticipatory breach has been committed so that no cause of action has accrued. The prospective creditor sees that with complete propriety legally, but in a commercially hazardous way, the prospective debtor is conducting a fire sale, but there is no provisional liquidation or receivership in place. It may be thought by all reasonable persons that there is a looming insolvency or bankruptcy. In that all too common domestic case, the prospective creditor, regardless of the strength of his evidence that it is unlikely that the payment will be made and unlikely that there will be sufficient remaining assets to make good, cannot get a freezing order from an Australian court. *Mareva* orders cannot be employed simply to give a security right to a prospective creditor that would be able to be otherwise obtained - they are employed to prevent frustration of the Court's process. If a *Mareva* order may not operate as a security interest even when there is an accrued cause of action, how can it operate when there is no right to commence process? How is that to be differentiated from the position of less looming disaster that operates in the present case where it not just a question of effluxion of time which will bring about an obligation to pay money it is the outcome on a case where the parties are suing each other for loss of bargain damages. The relationship with the process in question is even more contingent here than a putative cause of action for a failure to repay a debt before the time has been reached for repayment, however solid the fears of looming insolvency.

29. If one considers the domestic position and tries to contemplate its comparison with the case here, the present case is a fortiori. The cause of action is enshrined in the contingency. This is summed up by the repeated argument of BCBCS that there is nothing flawed in a proleptic *Mareva* jurisdiction (see e.g. [2015] HCATrans 057 at lns 208-235). It is true that all freezing orders are proleptic or contingent in the sense that they look forward to an event that may not happen depending upon the outcome of the dispute of which the court exercising this interlocutory jurisdiction is seized. However, it is the Court in question which will bring about a result and remains the master of both the substantive and interlocutory regime. They are not proleptic in their assumption about the existence of their future jurisdiction.

30. Finally, for present purposes it is no surprise that this jurisdiction has never been recognised by an appellate court when it serves no purpose consistent with the proper administration of justice. Any freezing order operates only *in personam*. That is not in

dispute. Bayan is a foreign company enjoined from dealing in its property. There is not, and cannot be, any *in rem* order over the shares. The *in personam* order is an order which the Singaporean High Court is well able to make in the supervision of its own proceedings. There is no relevant lacuna in the law necessitating the recognition of an inherent jurisdiction and to fill supposed gaps in the federal statute. There is no potential for injustice in this case except to Bayan. BCBCS is no better off with an Australian freezing order than with a Singaporean freezing order. Indeed, the Singaporean order is superior in that it would be based on an understanding of the substantive proceedings and continually amenable to dismissal or variation based on the strength of those proceedings as evaluated by the Court dealing with them. Moreover, it would be thought that any failure by Bayan to comply with the terms of the Singaporean order would have immediate consequences in the substantive litigation. At present the Supreme Court of Western Australia has imposed an order over one foreign company at the request of another foreign company in circumstances where it may never be seized of a substantive controversy, and certainly where it *cannot* be seized with the principal substantive dispute.

31. One unfortunate outcome of recognising this novel jurisdiction is to potentially generate a result different from that which could have obtained in Singapore. If the High Court of Singapore had been approached for a *Mareva* order and had granted it, any further application to an Australian court would be futile.

32. The jurisdiction contended for is not only potentially abrasive to international comity, but in legal and practical operation is also destructive of the scheme set up by the *Foreign Judgments Act*. It is a judicial reading inconsistent with the regime and with the published practice of the Legislature and Executive in dealing with it.

33. President McLure's reasons reflect the error in approach. At [50], her Honour says "*The High Court's consideration of the existence, scope and purpose of the jurisdiction to grant a freezing order has been in cases in which the applicant has commenced proceedings (in the same court) for final relief to which the freezing order was ancillary. Some of its language reflects that fact. However, the High Court's identification of the jurisprudential basis and purpose of a freezing order is inconsistent with a conclusion that the prior commencement of proceedings in the same court for final relief is a necessary condition (jurisdictional fact) that enlivens the power to make a freezing order. If that was so, this court could not grant a freezing order after judgment in the Singapore proceedings but before the filing of an application to register the judgment*".

34. That is not what was argued. What is required, as the authorities demonstrate, is that an undertaking can be given to launch substantive proceedings. The urgent case of *Mareva* before substantive proceedings is a classic example of an exception that proves the rule. If judgment in Singapore is given for BCBCS, it will be able to give an undertaking to the Supreme Court that it will commence proceedings to register the judgment, thereby justifying the grant of a freezing order.

35. Secondly, it has never been the test for the purposes of s 109 of the Constitution that the State law is "conducive" to the Commonwealth law. It is well established that it is not open to State law to add to the efficacy of Commonwealth law or to "improve" it. The test for whether a State law impairs, negates or detracts from a Commonwealth law is not some test of whether the State law is "good" or "expedient" for the Commonwealth law. That is not what "necessary" or "convenient" means. The concepts of impairing, negating or detracting are not pejorative – they focus attention on whether the State law encroaches on an area where the

paramount legislature has intended its law to be the only law on a particular point.[4] As Isaacs J put it in his seminal judgment in *Carbines v Powell* (1925) 36 CLR 88 by quoting Barton J in *Stemp v Australian Glass Manufactures Co* (1917) 23 CLR 226 at 233-234 "*It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met*".

36. It is necessary at this point to deal with another finding of McLure P, as well as some reasoning which her Honour accepts was not the subject of submission by the parties. At [45] her Honour said "*The only reasonable conclusion is that this court's inherent jurisdiction to make freezing orders is picked up by s 79(1) of the* Judiciary Act *and applied to the* [*Foreign Judgments*] *Act*".

37. There are, with respect, at least three problems with that reasoning. First, in terms of the notion that s 79 "picks up" an inherent jurisdiction, her Honour has misunderstood the relationship between ss 79 and 80 of the *Judiciary Act* and the manner in which the common law of Australia applies to judicial proceedings in this country, albeit there was some recognition of this at [38].[5]

38. The common law of Australia is subject to statutory modification by the Commonwealth, the States and the Territories, each within their respective spheres of competence: *Lipohar v The Queen* (1999) 200 CLR 485 at 509-510 [57]. The result is that whilst there is but a single body of common law throughout Australia, at any given time, "the operation of the common law upon a particular subject may vary according to the circumstances of the litigation, including the identity of the forum and of the lex causae": *Lipohar v The Queen* (1999) 200 CLR 485 at 509-510 [57]. That is to say, the statute law of a State may modify the common law of Australia in its operation in that State whilst leaving unaffected the common law of Australia in its operation in the other States and Territories.

39. Section 80 of the Judiciary Act recognises this operation of the common law of Australia and directs its application to the resolution of disputes in federal jurisdiction. Thus, the "application of any rules of the common law will, in the terms of s80, be subjected to any modification" by the statute law in force in the state or territory in which the proceeding is heard: *Blunden v The Commonwealth* (2003) 218 CLR 330 at 339 [18]. The common law of Australia applies of its force as it does in all judicial proceedings. Also, no one argued that the inherent jurisdiction had been modified by statute in Western Australia.

40. Secondly, it is difficult in any event to see how the inherent jurisdiction can be "applied to" the *Foreign Judgments Act* as a surrogate federal law. The legislation operates according to its own terms and has primacy. Either there is some capacity for a complementary operation of the "inherent jurisdiction" of the Court (which always exists) consistent with the legislation or there is not.

41. Thirdly, her Honour at [36]ff considered a supposed failure of the parties to argue the consequences that flow from the exercise of federal jurisdiction. It is clear that in the present proceedings federal jurisdiction was and is being exercised. That is probably not the case in the majority of orders sought under O 52A. Federal jurisdiction was at the latest being exercised in these proceedings when a Summons was filed by Bayan in this Court alleging s

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[4] *Momcilovic v The Queen* (2011) 245 CLR 1 at [240] per Gummow J.

[5] To the extent that her Honour's reasoning may have been based on some view that the Western Australian Supreme Court, not being originally a creation of a Royal Charter of Justice and thus owing its existence and jurisdiction entirely to the provisions of State statute which need to be "picked up" that would seem to run counter a proper understanding of the role envisaged for State Courts by the Constitution.

109 inconsistency. What her Honour appears to have overlooked in her consideration of the differences between the test for s 109 consistency and "otherwise provides" pursuant to s 79 of the *Judiciary Act* is that the operation of s 79 of the Judiciary Act is sequential to, not concurrent with, the operation of s 109 of the Constitution. The operation of s 109 is anterior to any commencement of a proceeding in a court, which is when s 79 begins to do its work: *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 271 [62]-[63] Thus, it is necessary to ask first whether the state law in question is "invalid" by reason of inconsistency with federal law. A state law "which is invalid or inoperative by reason of "inconsistency" with a law of the Commonwealth is not restored to life through the medium of s 79 of the *Judiciary Act*": *Northern Territory v GPAO* (1999) 196 CLR 553 at 576 [38].

42. At least for Bayan's part, given the nature of its contention about the relationship between O 52A and the *Foreign Judgments Act,* it has been therefore unnecessary to consider the separate question of "otherwise provides". Section 109 has already done its work or not. In any event, Bayan's contention that the law of the State "impairs, negates or detracts" from the law of the Commonwealth would also apply to any consideration of the "otherwise provides" test.

Inherent Jurisdiction

43. The position of Bayan on the question of an inherent jurisdiction is simple. That is that this Court, on multiple occasions, has said that the jurisdiction to grant a *Mareva* order exists as an ancillary one to maintain the effectiveness of the process dealing with the substantive controversy that is to be tried by the court. No proceedings, apart from the claim for freezing orders, have been, or will be commenced in Western Australia to deal with the substantive controversy between the parties. The only proceedings that will ever be commenced are proceedings to register and enforce a foreign judgment, pursuant to the *Foreign Judgments Act*, in the event that BCBCS is successful in the High Court of Singapore. That cause of action is enshrined in the contingency unlike the case in respect of every other *Mareva* order.

44. The doctrinal basis of the inherent jurisdiction arises from the power to prevent the abuse or frustration of a court's process. An exposition of the relevant authorities leads to the conclusion that when this Court speaks of the protection of the integrity of the process once set in motion that it refers to the court's adjudication of the substantive controversy between the parties. The Court below accepted the erroneous elision of doctrine in the argument of BCBCS that "process" extends to the hypothetical future process in the Supreme Court of the application to enforce the as yet unobtained and potentially unobtainable judgment in Singapore. No jurisdiction exists unless and until and if judgment is given for BCBCS in Singapore.

45. These are not questions of discretion. It is not a question, as BCBS would frame it, as whether the proceedings are somehow *imminent* or on foot – the undertaking must be able to be given that substantive proceedings *will* be commenced. The only barrier to the commencement of the relevant proceedings must be the will and action of the plaintiff. That cannot be a merely discretionary consideration given that the whole jurisdiction is founded on that fact. This is not a question of clear words being needed to displace the common law, there being no common law for which BCBCS contends.

46. Until BCBCS obtains judgment in Singapore (at which time or soon thereafter it could get a freezing order in Australia), BCBCS has a perfectly good remedy available to it – it may seek *Mareva* relief from the High Court of Singapore if the *probanda* for such relief are shown. That is a court that has undoubted power to make the freezing orders. The substantive controversy is presently before that Court. That court has the power, as does any Australian superior court with substantive proceedings before it, to bind the litigants before it from

disposing of their overseas property pending the determination of the proceedings, and to make ancillary orders binding third parties. There cannot be any sensible dispute to the proposition that the High Court of Singapore could *in personam* bind Bayan from disposing of its shares in KRL.[6] Indeed, this Court to this day relies on that *in personam* power to support the anti-suit injunction, there being no other way to control the conduct of a party in foreign proceedings. BCBCS has chosen not to approach the court that is placed to determine the issues between the parties on an interlocutory basis, being that Court seized with the authority to finally determine the dispute between the parties in accordance with the laws of that jurisdiction.

10 **47.** When the *Mareva* "injunction" was fashioned by Lord Denning MR in the famous companion cases of 1975,[7] his Lordship founded the Court's jurisdiction to make the order on a statutory basis which gave a power to grant injunctions, namely section 45(1) of the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK). In the first opportunity to consider this new jurisdiction, the House of Lords in *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 determined that any interlocutory injunction may be granted only to protect or assert a legal or equitable right which was to be enforced by the Court that was to grant final relief on that cause of action.

48. Statutory amendments in the United Kingdom have shifted the jurisdictional debate there[8], largely as a result of changes made to domestic legislation to accommodate the United
20 Kingdom's position as a contracting state to the Brussels Convention and the Lugarno Convention[9] and to deal with foreign arbitrations, but in opining on the law of jurisdictions where the statutory framework remains similar to the original United Kingdom position, the Privy Council has largely maintained the presently relevant aspects of *Siskina*.[10]

49. Now the only relevant limitation in the United Kingdom is to consider, under the statute, whether it is "expedient" to grant the order: *Credit Suisse Trust SA v Cuoghi* [1998] QB 818. That is a far different jurisdiction from the one being exercised in Australia. Of course, it is available to Parliament to grant such a jurisdiction as the United Kingdom Parliament has done. However, in this country, not only has that not been done, but the existing legislation commands otherwise.

30 **50.** The foundation of the jurisdiction to grant *Mareva* "orders" is, as the nomenclatural differences imply, different in Australia. It is necessary to understand that jurisdiction in order to examine the validity of the *Rule*. In the first judgment of an intermediate appellate court in this country to fully examine the question of where the jurisdiction to grant *Mareva* relief lay, the Court of Appeal of the Supreme Court of New South Wales in *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 determined that the jurisdiction could be found in two places.

51. The first was not in the NSW equivalent of the UK provision relied on by Lord Denning but in section 23 of the *Supreme Court Act* 1970 (NSW) which gives the Court "...all jurisdiction which may be necessary for the administration of justice in New South Wales". The analogue in Western Australia is section 16 of the *Supreme Court Act*.

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[6] Which can safely said to be true from as far back as the decision in *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 [27 ER 1132]

[7] *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093 and *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509

[8] See eg *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

[9] Section 25 of the *Civil Jurisdiction and Judgments Act* 1982 (UK)

[10] *Mercedez-Benz AG v Leiduck* [1996] AC 284 – but see the comments of Lord Dyson JSC in *Al Rawi v Security Service* [2012] 1 AC 531 at [20].

52. The second basis for the jurisdiction given by the NSW Court of Appeal was as part of the inherent jurisdiction of the Court and "...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": at 276. This was seen as coterminous with the statutory grant, as his Honour found below at [48] with respect to section 16.

53. This Court has accepted the second basis given by the NSW Court of Appeal as representing the law of Australia. The doctrinal basis for the power residing in Australian courts to grant *Mareva* orders and the general principle which informs the exercise of the power to grant interlocutory relief is that the court may make such orders, at least against the parties to the proceeding against whom final relief might be granted, as are needed to ensure the effective exercise of the jurisdiction invoked. Where the relief is granted against parties to the proceedings and against whom final relief was sought the focus is on preventing the frustration of the court's process: see *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [41]-[42]. It is a powerful remedy in which great care must be exercised in its use.

54. In *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, the first decision of this Court to consider the nature of a *Mareva* order, the Court described the power as arising to prevent the abuse or frustration of a court's process. The Court saw no difference in theory between the statutory and incidental power given to the Federal Court and the inherent power that resides in State Supreme Courts. As the Court explained, the linchpin for extending the *Mareva* jurisdiction to both foreign and domestic defendants, and foreign and domestic assets, was that it was necessary to prevent the abuse of process of the substantive controversy that the court was determining that would lead to it making an order against the defendant: Wilson and Dawson JJ at 617-619. At 623, Deane J said that the power should "...now be accepted as an established part of the armoury of a court of law and equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction". At 641-642, Gaudron J described the power as one that can be made as appropriate for a court that has jurisdiction to determine "all matters in controversy between the parties".

55. That view of the matter was accepted in both *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 32 and in *Cardile v LED Builders*. In the passage of principle in *Patrick Stevedores* at 32 endorsed in *Cardile* at 400-401 [42] the Court reiterated that the power was one to prevent the abuse or frustration of a court's process and that orders may be made against "parties to the proceeding against whom final relief might be granted, as are *needed* to ensure the effective exercise of the jurisdiction invoked" (emphasis added). In support of that was cited the celebrated case of *Tait v The Queen* (1962) 108 CLR 620. Of course, the basis upon which the High Court granted a stay of execution in that case was as Dixon CJ explained at 624, so that the "authority of this Court may be maintained and we may have another opportunity of considering it".

56. The court with the authority to determine the substantive controversy between these parties is the High Court of Singapore and it is currently going about its task according to its own processes. BCBCS has not invoked, and will not and cannot invoke the jurisdiction of the Supreme Court of Western Australia to determine the controversy[11].

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[11] BCBCS made a scant attempt at [21] of its Defence in CIV 2139 of 2012 to try and plead some conduct occurring in Western Australia, but there is no legitimate dispute that this litigation is being prosecuted in Singapore because the conduct is entirely concerned with alleged conduct relevant to the Singaporean jurisdiction. Le Miere J accepted at [14] that proceedings will never be commenced in Western Australia.

57. There is no process below which is being frustrated or abused so that a *Mareva* order in the inherent jurisdiction would be available to the plaintiff. The Supreme Court was tasked with nothing other than the applications for interim orders. There are no other processes that are "set in motion". The jurisdiction, as will be further explained, does not exist to prevent the frustration of another court's process, particularly where that court is not an Australian court. The process spoken of is not one simply to potentially enforce a registered foreign judgment at some time in the future.

58. The joint judgment in *Cardile* at 401 [42] indicated that it is preferable that the relief be described as a *Mareva* order so as not to confuse the doctrinal basis. Justices Gummow and Hayne further explained this in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 243 [94] as follows:

> It was also emphasised in [*CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345] that the grant of what are somewhat loosely called "anti-suit injunctions" in some instances did not involve the exercise of the power deriving from the Court of Chancery. The order in question may be supported as an exercise of the power of the court to protect the integrity of its processes once set in motion. Likewise it was emphasised in the joint judgments in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* and in *Cardile v LED Builders Pty Ltd* that the doctrinal basis of the *Mareva* order is to be found in the power of the court to prevent the frustration of its process. In *Cardile*, the point was emphasised by the statement that to avoid confusion as to its doctrinal basis it is preferable to substitute "*Mareva* order" for the term "injunction". The Supreme Court of the United States, shortly after *Cardile* was decided, held that a *Mareva* order is not a preliminary injunction within the traditional principles of equity jurisdiction[12]

In that case Gaudron J again described the *Mareva* as an order the "...court makes to protect its own processes..." at 231 [60].

59. The reference to the decision of the Court in *CSR v Cigna* is instructive. That case concerned the questions of when, and on what basis, anti-suit injunctions should be granted to restrain foreign proceedings or local proceedings should be stayed in favour of the foreign proceedings. The joint judgment accepted at 395 that an anti-suit injunction could only operate on an *in personam* basis. In explaining one basis of the anti-suit jurisdiction by reference to the *Mareva* jurisdiction, the joint judgment explained at 391 that "[t]he counterpart of a court's power to *prevent* its processes being abused is its power to *protect* the integrity of those processes once set in motion" (emphasis in original). Similar statements were then made about the need for flexibility and the breadth of the notion of "administration of justice" and that categories were not closed (as BCBCS asserts) but this did not gainsay the basic proposition that when this Court speaks of the "protection of the integrity of processes once set in motion" it is contrasting the determination of the substantive controversy by the subject court with the activity of a foreign court. And if attention is paid to the putative litigation to register the foreign judgment, how can it be said that those processes will ever be set in motion?

60. To borrow an analogy from constitutional jurisprudence, BCBCS's submission accepted by his Honour below, with its entreaties towards "flexibility" elevates the stream above the source. The "flexibility" and the open "categories" must exist by reference to the basal pre-condition jurisdictional principle *viz* the Court is protecting its own extant or soon to be commenced proceedings. The gist of this was summarised by the Court in *CSR v Cigna* when it said at 398 that "[i]n cases where anti-suit injunctions are sought to protect the

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[12] *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc* 527 US 308 (1999).

proceedings or processes of a court, no question arises whether the court is an appropriate forum for the resolution of that issue: it is the only court with any interest in the matter".

61. The Supreme Court of Western Australia is in the opposite position – it has no interest in the controversy between Bayan and BCBCS. Meanwhile, the High Court of Singapore, the court with the most interest in the substantive controversy, has been left totally out of the loop.

62. It is an impermissible leap in reasoning to assume that this collocation of High Court authorities which so openly speak of tying the *Mareva* order to the *necessity* of the protection of the integrity of the substantive controversy leaves room for the support of a hypothetical future application premised on the successful completion of foreign proceedings in which the local court has no interest and in which the local court has no power to supervise the relief by reference to the controversy *and* in which the relevant foreign court has not been given the opportunity of being presented with the question when it has the power to do justice between the parties. Such a conclusion unhinges the guidelines for the drastic remedy from its mooring.

63. In *CSR v* Cigna, this Court expressly drew attention at 391 fns 108 and 109 to specific passages of its prior decisions to support its principled discussion of anti-suit injunctions and *Mareva* orders being employed to prevent an abuse of process.

64. With reference to *Hamilton v Oades* (1989) 166 CLR 486 at 502 it highlighted the necessity of a court to consider the purpose or motive for which relevant proceedings were instituted and the consequences for the litigants. By reference to *Witham v Holloway* (1995) 183 CLR 525 at 535 it described the purpose of a *Mareva* order as the prevention of abuse or frustration of a court's proves in relation to matters coming within its jurisdiction. And by reference to *Ridgeway v The Queen* (1995) 184 CLR 19 at 60 it referred to the concern of courts when confronted with an argument about abuse of process that there is a fair trial of the action and that the judicial process not be invoked for an improper purpose. It included a powerful citation from Lord Devlin in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1354 that courts have "...an inescapable duty to secure fair treatment for those who come or are brought before them".

65. None of these considerations governed the task before the Supreme Court of Western Australia because that court is not tasked with the substantive controversy. It was not even being asked to support a *Mareva* order that has been given in Singapore.

66. To take this Court's use of the word "process" and extend it to the hypothetical future process of registration and enforcement is to subvert the power. This court, concerned with a substantive domestic dispute, would absolutely require a plaintiff to undertake to commence proceedings expeditiously (if they had not had already been commenced) before granting *Mareva* relief.[13] This court would not grant such extraordinary relief, regardless of the small time involved, if the prospect of proceedings being commenced rested on a *contingency* other than honouring an undertaking, which should be assumed. BCBCS cannot give this Court an undertaking that there will ever be proceedings in Western Australia to enforce any judgment. Bayan's argument permits of the likelihood under both the inherent jurisdiction and the *Foreign Judgments Act* that a *Mareva* order may be sought *if* judgment in Singapore is obtained. That, however, would be unnecessary if a *Mareva* order were appropriately sought in Singapore.

67. Finally, in *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265 [9] the joint judgment affirmed the *Cardile* understanding of the jurisdiction and went into a

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[13] See *Cardile* at 404 [53] and *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452 [53].

detailed explanation of the abuse of court process generally. There was no mention of that historic doctrine having any room for a concern by a court of prevention of abuse to another court's process. Of course, the jurisdiction is "inherent" because it pertains to concerns about the exercise of the court's own process. As made clear in *Batistatos*, *Mareva* orders are concerned to "protect the integrity of [the court's] processes once set in motion" of the "principal litigation".

68. Some of the ways in which the *Mareva* jurisdiction has been enlarged over the years by the High Court show how important it is that it be tied to the resolution of a controversy, including the registration of a foreign judgment when judgment is obtained. As Toohey J remarked in *Jackson v Sterling* at 633, the power extends to freezing the domestic assets of a foreign-based defendant prior to judgment, in respect of foreign assets of a defendant in a local suit and against local and foreign residents and third parties both before and after judgment. All those extensions were predicated on the necessity to ensure the integrity of the substantive suit. Surely, by parallel reasoning, there is no potential for Bayan to deprive BCBCS of any assets it may need to satisfy a Singaporean judgment if BCBCS simply approached the Singaporean court for the relief it seeks. If Australian courts feel at liberty to freeze overseas assets in aid of domestic proceedings to protect the integrity of those substantive proceedings, surely the High Court of Singapore should be afforded equal respect in the ability to determine what is appropriate for the protection of its proceedings.

69. As mentioned above, the Court below was only able to identify three authorities where it said that a *Mareva* order had been previously granted in circumstances where there was no substantive litigation on foot or about to be commenced in the Court granting the order.

70. The first is the case that was heavily promoted by BCBCS at all stages of the litigation and was applied at [57] below. It is the first case to ever recognise something akin to this jurisdiction, and is the decision upon which the Council of Chief Justices recognised the inherent jurisdiction – a jurisdiction not recognised or spoken of until 2005.

71. The case is the decision of Campbell J in *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676. However, the judgment begins with the inauspicious phrase *"[t]his is an application for a Mareva order in support of a Mareva order issued in the Bahamas"*. At the first step, the decisions below and the order sought by BCBCS is distinguishable from the *only* authority in its favour.

72. The scant basis upon which Campbell J in *Davis* reasoned the availability of the jurisdiction is contained at 222 ALR 676 at [34]-[36]. His Honour's real rationale is a policy one expressed at [35] that "international commerce" requires the extension to the jurisdiction. That view appears to have been endorsed by Buss JA at [159] below by reference to an extra-curial article of the Hon JJ Spigelman AC which will be addressed below. However, that reasoning is, with respect, not a principled basis on which to extend the jurisdiction. His Honour then purports to give two analogous examples of when local courts give remedies to assist proceedings in other courts, none of which it might be noted was ever considered as relevant by this Court in its numerous discussions of the principles, almost certainly because they have no bearing on the present issue. That they have no bearing was endorsed by the Supreme Court of the United States in *Grupo Mexicano* (cited by Gummow and Hayne JJ in the *ABC v Lenah Game Meats* extract at [30] above) which said that old equitable bills were irrelevant to a consideration of *Mareva* relief as the relief does not derive from Chancery.

73. The first example given is the "old equitable remedies" of a bill of discovery, a bill to perpetuate testimony and a bill to take testimony *de bene esse*. These are all equitable doctrines that were created in the pre-Judicature Act period to remedy perceived defects in the common law system of trial. They are far removed from a doctrine which this Court has said

has no foundation in equitable doctrines or rights and which is grounded on an inherent jurisdiction to prevent abuse of process.

74. The second example his Honour gives is that of the recognition given by Australian courts to foreign-appointed administrators of an insolvent estate. However, as his Honour says, that recognition is given after the foreign court has heard and determined the foreign suit and then there is a consequent application of conflictual principles. It provides no excuse, or useful analogy, for the employment of an extraordinary power where there are no domestic proceedings and where, unlike the example given, the foreign court has not yet had its say in the matter.

75. Even though Bayan submits that the decision is wrong, it also submits that it is separately of no precedential value as its entire reasoning depends on the local remedy being granted to support the freezing order remedy already granted by the "principal" or foreign court. Presumably if that court then discharged the order, the local court would, on the reasoning of Campbell J, also be required to do so. The case does not present a useful analogy in the present context because BCBCS has not given the High Court of Singapore the opportunity of expressing its own opinion.

76. The second case cited by the Court below and by BCBCS is the decision of the NSW Court of Appeal in *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141, from which special leave was refused. That case if of no present assistance as it involved a straight application of the NSW analogue to O 52A. As Buss JA noted at [165], the jurisdiction (or power) of the Supreme Court of New South Wales was not in contest in the case. It is expected that courts will apply the prima facie valid rule until this Court determines its validity.

77. The third case, another first instance judgment, was that of Clarke J in *Construction Engineering (Aust) Pty Ltd v Tambel (Australasia) Pty Ltd* [1984] 1 NSWLR 274. In that case, his Honour held that the Supreme Court of NSW had jurisdiction to grant *Mareva* relief where the plaintiff was claiming moneys in an arbitration, notwithstanding that the plaintiff had not commenced the principal litigation in which the monies were claimed in the Supreme Court. That is unsurprising for a number of reasons. First, the Supreme Court of NSW maintained a supervisory jurisdiction over the arbitration proceedings. It had comprehensive powers under the *Arbitration Act* 1902 (NSW) in which to decide questions of law and order the attendance of witnesses and the production of documents in respect of the arbitration. Indeed, the arbitration resulted from a referral of the Court and the Court had the power to remove arbitrators for cause. Secondly, the plaintiff for the *Mareva* order was pursuing an accrued cause of action for the moneys. There was a present entitlement to pursue the right. That case is hardly comparable to the present proceedings.

78. These authorities hardly represent a rich vein of jurisprudence in support of the putative jurisdiction particularly where the ordinary order, worldwide orders freezing overseas assets in support of domestic proceedings, is relatively commonplace. It is no accident that one is prevalent and that there is no authority for the other.

79. One further case relied on by BCBCS below and in response to the special leave application, but not picked up by their Honours below was *Deputy Commissioner of Taxation v Sharp* (1998) 19 ATR 1515. In that case, the Deputy Commissioner of Taxation issued amended assessments against the defendants assessing them to additional taxation. Before the period allowed for the payment of the assessments had expired, the Deputy Commissioner moved *ex parte* in the Supreme Court of the ACT for a Mareva order even though he had no cause of action to sue. The Court (Kelly J) determined that a *Mareva* could be ordered as a debt arising out of an assessment had a peculiar quality in that the legislation provided that its

production was conclusive evidence, and he could commence proceedings for its enforcement in a short space of time for what would be an *inevitable* judgment. That authority also provides no support for BCBCS, a party whose whole cause of action is enshrined in a substantive contingency, not merely temporal or fleetingly so.

80. There are no other cases in this country to which BCBCS has pointed below, or on the special leave application in this Court, which purportedly authorise this jurisdiction. Given that the matter has reached this Court it is unnecessary for Bayan to presently point out the incorrect treatment by the Court below of earlier first instance authorities in Western Australia. Suffice to say that in dealing with decision of Hasluck J in *Celtic Resources Holdings Plc v Arduina Holding BV* (2006) 32 WAR 276 Buss JA overlooked that the very ratio of his Honour's judgment was that there would be no right to seek a *Mareva* order because the foreign judgment could not yet be registered. It is an inescapable reading of his Honour between [56]-[60] that when his Honour said that a jurisdiction exists when "...a foreign judgment has been or is to be obtained", then there must be certainty that the foreign court had determined the matter in favour of the plaintiff and no procedural rules prevented the judgment from being enforced. His Honour categorically rejected the idea that a jurisdiction could exist when the judgment was not presently capable of being enforced in Western Australia. Moreover, the reading of Hasluck J by Buss JA is inconsistent with another of Hasluck J's judgments, that in *Aspermont Ltd v Lechmere Financial Corporation* (2002) 27 WAR 1, where after discussing the High Court authorities in order to determine whether *Mareva* orders were available in support of an appeal Hasluck J said at [41] "...a *Mareva* order is essentially an ancillary remedy to prevent a party frustrating the substantial judicial process of the Court in relation to the pursuit of a cause of action before the Court".

Foreign Judgments Act

81. The *Foreign Judgments Act* is a general and complete federal legislative scheme for when foreign judgments are to be enforced by our courts. An essential element of that scheme is that foreign judgments are only to be enforced *when they are given.* Rights and duties only inure under the legislation when a money judgment is awarded – highlighted by section 17 of the *Foreign Judgments Act* which provides for a genus of Rules of Court all dependent on the existence of a foreign judgment. There is not one instance in the legislation where rights are given, or Court action is possible, before the existence of a foreign judgment. Not only is this a deliberate policy choice based on the need for reciprocity, but a recognition also that no such possibility for interim relief exists.

82. The decision below must therefore be wrong in accepting the argument of BCBCS that s 17 of the *Foreign Judgments Act* directly authorises O 52A. The point missed by the Court below is that the freezing order stands as a complete replacement for the issue of a foreign non-money judgment from the High Court of Singapore, a foreign judicial act in relation to which the Parliament has reserved to the Executive an important role in determining its enforcement. O 52A directly undermines the legislation: *Jemena Asset Management Pty Ltd v Coinvest Limited* (2011) 244 CLR 508.

83. The *Foreign Judgments Act* was enacted in place of previous separate State statutory regimes that have since been either repealed or rendered relevantly inoperative by Part 4 of the *Foreign Judgments Act.* The *Foreign Judgments Act* establishes a single, national and uniform scheme for the registration and enforcement of certain foreign judgments. It is intended to be a complete statement of the law governing matters concerning the right to register a foreign judgment: see *Momcilovic v The Queen* (2011) 245 CLR 1.

84. Section 5 of the *Foreign Judgments Act* makes it an essential element of the scheme that the Governor-General be satisfied that there is substantial reciprocity of treatment with the

relevant foreign country in respect of the type of judgment that a person desires to have registered in an Australian court. As the Explanatory Memorandum to the Foreign Judgments Bill 1991 emphasised at [3]: "*The basis of the scheme is reciprocity: the legislation will be applied with respect to judgments of courts of a particular country, by* regulations, *where the Governor-General is satisfied that substantial reciprocity of treatment will be given to the enforcement in that country of corresponding Australian judgments*".

85. Pursuant to the scheme, money judgments of the High Court of Singapore are capable of registration and enforcement in Australia, but non-money judgments including *Mareva* type relief given in the High Court of Singapore may not be registered or enforced in Australia pursuant to the *Foreign Judgments Act*. That is so because no regulations have been made under sub-section 5(6) recognising non-money judgments.

86. First, it is a detraction from the full operation of the *Foreign Judgments Act* for State delegated legislation to purport to authorise the Court to act in aid of foreign proceedings outside the cases in which there has been satisfaction established on the part of the Governor-General of substantial reciprocity that is a pre-condition to the operation of Part 2 of the Act.

87. Secondly, it impairs, negates or detracts from the operation of the *Foreign Judgments Act* for State delegated legislation to purport to give authority to a Court to freeze property in aid of a foreign judgment that has not yet been obtained and may never be obtained, which also explains why s 17 cannot authorise the *Rule* as it concerns procedures that apply once the foreign judgment is obtained and goes beyond the field of operations of the regime set up by the legislation. There are no rights or duties under the *Foreign Judgments Act* until a foreign judgment is obtained. The Explanatory Memorandum said about the then clause 17 at [40] that "*[t]his clause enables superior courts to make rules of court in order to carry out or give effect to the Bill*" (emphasis added).

88. Bayan's position is also consistent with the view of the Executive Government of both this country and New Zealand. In December 2006 (after *Davis v Turning Properties Ltd* (2005) 222 ALR 676 was handed down and after some States had adopted the harmonised Rules), the Commonwealth Attorney-General's Department and the Ministry of Justice in New Zealand published the *Trans-Tasman Court Proceedings and Regulatory Enforcement Report* of the Trans-Tasman Working Group, established by the Prime Ministers of both nations, the Terms of Reference of which required the Group to "*examine the effectiveness and appropriateness of current arrangements that relate to civil (including family) proceedings, civil penalty proceedings and criminal proceedings (where those proceedings relate to regulatory matters)*". The third recommendation made by the Group was that interim relief be given in support of foreign proceedings. This was because as the Group reported at 15:

> Currently an Australian or New Zealand court will only grant interim relief, such as a *Mareva* injunction preventing a party removing assets from the jurisdiction or disposing of them, pending final judgment in proceedings before that court. Interim relief cannot be obtained in one country in support of proceedings in the other. Instead proceedings seeking resolution of the main dispute need to be commenced in the court where interim relief is sought, even if it is not the appropriate court to decide the matter.

89. In order to effectuate this, the Governments of both countries entered into a Treaty done at Christchurch in 2008 named *The Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*. Article 7 of that Treaty, entitled "[i]nterim relief in support of proceedings in the territory of the other Party" provides:

> 1. Each Party shall nominate courts within its territory to grant interim relief in support of proceedings commenced in the courts within the territory of the other Party.

> 2. Courts nominated under paragraph 1 shall have the ability to grant the same types of interim relief in support of proceedings initiated in the courts within the territory of the other Party as they are able to grant in domestic proceedings.

90. Australia and New Zealand have both enacted legislation to give effect to the Treaty *viz* the *Trans-Tasman Proceedings Act* 2010 (Cth) and *Trans-Tasman Proceedings Act* 2010 (NZ). By proclamation dated 25 July 2013, the Governor-General of Australia fixed 11 October 2013 as the day on which sections 3 to 110 of the Commonwealth Act were to commence. Part 4 (sections 24 to 27) of that Act gives Australian superior courts, including this Court, the power to grant interim relief in aid of New Zealand proceedings. The *Trans-Tasman Proceedings Regulation* 2012 (Cth) also gives the power to some Australian inferior courts.

91. It would be an extraordinary (if theoretically possible) thing if the Executive Governments and Legislatures of two such close neighbours went to such expense and effort to confer a jurisdiction that already existed. Instead, what this process confirms is not only that the power to make those interim orders did not exist, but just as importantly for present purposes, it would be a detraction from the operation of the *Foreign Judgments Act* to allow any State delegated legislation to achieve this outcome and that the *Foreign Judgments Act* itself does not provide a basis for it. The scheme of the *Foreign Judgments Act* is based on reciprocity, and that reciprocity was achieved between Australia and New Zealand with the Treaty and complementary legislation. That reciprocity for interim relief has not been established between the courts of Australia and Singapore.

92. The position is also consistent with the understanding of the common law of New Zealand at the time. That country's judges also adopted the uniform Rules as a result of participation in the Council of Chief Justices. The common law of New Zealand is that there is no inherent jurisdiction to grant the relief in question. In *Yos v Heng* [2009] NZHC 2282 at [5], Miller J said *"[b]efore the new High Court Rules were introduced, it was generally accepted that a freezing order could not be brought independently of an underlying substantive proceeding within this Court's jurisdiction*".

93. It is not possible to suppose that the Supreme Court of Western Australia has the power to promulgate Rules conferring this power on itself with respect to *any* and *all* overseas courts, without reference to the careful country by country process necessary to establish reciprocity between foreign governments at the level of their Executive Governments, supported by the Commonwealth Parliament.

94. In the face of the uniform federal scheme – enacted under the external affairs power and carrying with it deliberate judgments of how far Australian courts should go in lending themselves to aid in the enforcement of the exercises of jurisdiction by foreign courts – no scope is left for rules of court or even State Parliaments to expand that scheme into the freezing of property within Australia merely for the purposes of ensuring that a court can, so it is contended, more effectively exercise a future jurisdiction that may never fall on it and depends on the defendant not satisfying the foreign judgment in the ordinary course.

95. The Courts have no power to enact Rules that trammel on the carefully considered Commonwealth scheme. In an extra-judicial article about freezing orders, Spigelman CJ[14] was quite candid about the fact that he had been unable to interest the Australian Government in pursuing relevant treaty arrangements and instead determined that some progress could be

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[14] The Hon JJ Spigelman, 'Singapore Academy of Law Distinguished Speakers Series Inaugural Lecture 6 May 2010 – Freezing Orders in International Commercial Litigation' (2010) 22 *Singapore Academy of Law Journal* 490 at 510-511 [81]-[83]

made with the Rule making powers. And so it occurred. The existence of the harmonised Rules cannot stand with the Commonwealth's decision through individual negotiation with relevant countries concerning the question when interim relief will be available in respect of that country's proceedings.

96. The better conclusion is, by the words and continuing conduct of the Commonwealth Parliament that the paramount legislature has intended its law to be the only law on a particular point. No State law could then purport to grant rights in respect of foreign judgments from Singapore. And when the Commonwealth Parliament has determined that rights will not exist until a Singaporean court gives judgment, there can be no room for a law that provides that interim relief can be given to support that potential judgment. Nor is that room made by the fact that the Commonwealth has not legislated with respect to such interim relief.

97. O 52A bespeaks its connection with enforcement proceedings which are here governed by federal statute. The inconsistency emerges because the *Foreign Judgments Act* bespeaks the universe of foreign judgments of the exhaustive (ie money and non-money varieties). A supposed jurisdiction to grant relief of a kind that serves as a complete substitute for the Singaporean *Mareva* (foreign non-money), bereft of the safeguards at the diplomatic and executive level undermines rather than complements the statute. The scheme of the Act has the starting point of a foreign judgment order – it has to exist so that its character can be understood. It is an act of government of a foreign nation, not a potential act.

98. It is important, with respect, in this circumstance for Courts to resist the strength of the siren song that "courts can do justice" and these are all questions of discretion not power. The argument goes that the words can be given the great breadth in relation to power, secure in the knowledge that injustice can be avoided by the judicial exercise of a discretion. However, the Parliament has determined how our judicial arm of government will or will not be enlisted in the endeavour of supporting foreign acts of government. In addition to foreign judgments only having status once given, the scheme provides for reciprocity of the enforcement of interlocutory relief amongst nations when the Governor-General so provides. Not only has no provision yet been legislated with respect to Singapore, a seven year process has recently concluded between Australia and its close neighbour in a geographic, economic, historical and legal sense, New Zealand, to finally provide for the enforceability of freezing orders with respect to assets in the other country. New Zealand is the first and only country which the Governor-General has recognised.

99. The significance of this cannot be overstated for the purposes of interpretation of the *Foreign Judgments Act*. Both the Legislative and Executive branches of our Commonwealth Government explicitly understood that no power existed in a court to grant *Mareva* type relief in aid of foreign proceedings. A multi-year process was undertaken to ensure that there was reciprocity with our closest neighbour New Zealand on such an issue so that *Mareva* orders could be made by each country's courts prior to the determination of the principal proceedings. For a court to find in the face of that the *Foreign Judgments Act* gives power to a court to promulgate a rule that gives the power in aid of foreign proceedings in *any* country markedly diverges from the scheme established by the *Foreign Judgments Act* and the authority that is given by the Parliament to the Executive to administer the scheme.

PART VII: Legislation (annexed)

Rules of Supreme Court 1971 (WA), O 52A (Reprint No 9 is suitable – no amendments since)

Supreme Court Act 1935 (WA), s 167 (Reprint No 9 is suitable – no amendments since)

Foreign Judgments Act 1991 (Cth), whole Act (as in force)

Trans-Tasman Proceedings Act 2010 (Cth), Part 4 (as in force)

PART VIII: Orders

1. Appeal allowed with costs;

2. Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia dated 25 September 2014 and in their place order:

    a. Appeals allowed with costs;

    b. Set aside the orders of Le Miere J dated 26 June 2013 in proceedings no CIV 2139 of 2012 and orders 1, 5, and 6 of Le Miere J dated 26 June 2013 in proceedings no CIV 1562 of 2012 and in their place order that:

        i. Orders 6 to 9 and 12 to 13 of the Freezing Orders "A" of Pritchard J dated 5 April 2012 in proceedings no. CIV 1562 of 2012 be discharged;

        ii. There be a declaration that Order 52A r 5(1)(b)(ii) of the *Rules of Supreme Court 1971* (WA) is invalid insofar as it purported to authorise the Supreme Court of Western Australia to make Freezing Orders "A" on 5 April 2012 and to continue those orders on 26 June 2013;

        iii. There be a declaration that there was no inherent, implied or statutory jurisdiction capable of being exercised by the Supreme Court of Western Australia to authorise the making of Freezing Orders "A" on 5 April 2012 and to continue those orders on 26 June 2013;

        iv. BCBC Singapore Pte Ltd pay the costs of PT Bayan Resources TBK and Kangaroo Resources Ltd in CIV 2139 of 2012 and CIV 1562 of 2012.

PART IX: Estimate

100. Bayan estimates that it will require two and a half hours for the presentation of its oral argument in chief.

Dated 8 April 2015

Bret Walker
Tel: (02) 8257 2527
Fax: (02) 9221 7974
Email: maggie.dalton@stjames.net.au

Peter Kulevski
Tel: (02) 9376 0611
Fax: (02) 9210 0636
Email: peter.kulevski@banco.net.au

Counsel for the appellant