HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

PT BAYAN RESOURCES TBK APPELLANT

AND

BCBC SINGAPORE PTE LTD & ORS RESPONDENTS

PT Bayan Resources TBK v BCBC Singapore Pte Ltd
[2015] HCA 36
14 October 2015
P14/2015

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation

B W Walker QC with P Kulevski for the appellant (instructed by Clayton Utz Lawyers)

A S Bell SC with D J Roche for the first respondent (instructed by Herbert Smith Freehills)

Submitting appearance for the second respondent

G R Donaldson SC, Solicitor-General for the State of Western Australia with M Georgiou for the third respondent (instructed by State Solicitor (WA))

Interveners

S B Lloyd SC with D P Hume for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

P J Dunning QC, Solicitor-General of the State of Queensland with G D Beacham and J A Kapeleris for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

R M Niall QC, Solicitor-General for the State of Victoria with C J Tran for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

CATCHWORDS

PT Bayan Resources TBK v BCBC Singapore Pte Ltd

Procedure – Freezing orders – Power of Supreme Court of Western Australia to make freezing order in relation to prospective judgment of foreign court which would be registrable under *Foreign Judgments Act* 1991 (Cth) – First respondent commenced proceeding against appellant in High Court of Singapore – Proceeding remains pending – First respondent applied to Supreme Court for freezing order under O 52A of Rules of the Supreme Court 1971 (WA) against appellant's assets – Freezing order made – Whether freezing order in relation to prospective foreign judgment within inherent power of Supreme Court.

Words and phrases – "federal jurisdiction", "freezing order", "inherent jurisdiction", "inherent power", "prospective enforcement".

Foreign Judgments Act 1991 (Cth), Pt 2, s 17.
Judiciary Act 1903 (Cth), ss 39(2), 79.
Supreme Court Act 1935 (WA), s 167(1)(a).
Rules of the Supreme Court 1971 (WA), O 52A.

1 FRENCH CJ, KIEFEL, BELL, GAGELER AND GORDON JJ. The question in this appeal is whether the Supreme Court of Western Australia has power to make a freezing order in relation to a prospective judgment of a foreign court which would be registrable by order of the Supreme Court under the *Foreign Judgments Act* 1991 (Cth).

2 The answer is that the Supreme Court has that inherent power within the authority to adjudicate conferred on the Supreme Court by s 39(2) of the *Judiciary Act* 1903 (Cth). The exercise of the power is regulated by O 52A r 5 of the Supreme Court Rules[1], which is validly made under s 167(1)(a) of the *Supreme Court Act* 1935 (WA) and relevantly applied by s 79 of the *Judiciary Act*. There is no inconsistency with the *Foreign Judgments Act*.

3 These reasons explain that answer, after explaining the context in which the question arises.

Background to the appeal

4 PT Bayan Resources TBK ("Bayan") is a company incorporated in Indonesia. Bayan owns shares in Kangaroo Resources Limited ("KRL"), a company incorporated in Australia. BCBC Singapore Pte Ltd ("BCBC") is a company incorporated in Singapore.

5 Between them, Bayan and BCBC own all of the shares in PT Kaltim Supacoal ("KSC"), a company incorporated in Indonesia. The rights and obligations of Bayan and BCBC as shareholders in KSC are the subject of a joint venture agreement which is governed by the law of Singapore.

6 BCBC commenced a proceeding against Bayan in the High Court of Singapore. That proceeding remains pending. In it, BCBC claims against Bayan, amongst other things, damages for breach of the joint venture agreement.

7 After commencing that proceeding in the High Court of Singapore, BCBC applied ex parte to the Supreme Court of Western Australia for freezing orders against Bayan and KRL in respect of Bayan's shares in KRL. The application was made pursuant to O 52A of the Supreme Court Rules.

8 Within the meaning of O 52A of the Supreme Court Rules, a freezing order is an order made, upon or without notice to the respondent, for the purpose

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1 Rules of the Supreme Court 1971 (WA).

of preventing the frustration or inhibition of the Supreme Court's process by seeking to meet a danger that a judgment or prospective judgment of the Supreme Court will be wholly or partly unsatisfied[2]. A freezing order may be an order which restrains a respondent from removing assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets[3].

9 Although expressed not to affect the power of the Supreme Court to make a freezing order if the Supreme Court considers it is in the interests of justice to do so[4], O 52A r 5 sets out criteria by reference to which the Supreme Court may make such an order. In substance, those criteria are relevantly that:

- the applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in a court outside Australia[5];
- there is a sufficient prospect that the other court will give judgment in favour of the applicant[6];
- there is a sufficient prospect that the judgment will be registered in or enforced by the Supreme Court[7]; and
- the Supreme Court is satisfied, having regard to all the circumstances, that there is a danger that a prospective judgment will be wholly or partly unsatisfied because the assets of the prospective judgment debtor or another person are removed from Australia or from a place inside or outside Australia or disposed of, dealt with or diminished in value[8].

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2 Order 52A rr 1 and 2(1).

3 Order 52A rr 1 and 2(2).

4 Order 52A r 5(6).

5 Order 52A r 5(1)(b)(ii).

6 Order 52A r 5(3)(a).

7 Order 52A r 5(3)(b).

8 Order 52A r 5(4).

10 In respect of a freezing order against a person other than the prospective judgment debtor, the Supreme Court is in addition relevantly to be satisfied, having regard to all the circumstances, that the person is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the prospective judgment debtor[9].

11 The immediate result of the ex parte application made to the Supreme Court by BCBC was the making by Pritchard J of interim freezing orders against both Bayan and KRL.

12 Bayan and KRL soon afterwards commenced a separate proceeding against BCBC in the original jurisdiction of this Court. That separate proceeding was for declaratory relief. In it, Bayan and KRL contended that the interim freezing orders made by Pritchard J were beyond power. The separate proceeding was remitted by this Court to the Supreme Court. There it was heard by Le Miere J concurrently with BCBC's application for continuation of the interim freezing orders.

13 Le Miere J dismissed the remitted proceeding, discharged the interim freezing order against KRL, and continued the freezing order against Bayan[10]. The freezing order as so continued by Le Miere J prohibited, and continues to prohibit, Bayan until further order from: transferring any of its shares in KRL to a related entity; further encumbering those shares; or in any way disposing of, dealing with or otherwise diminishing the value of those shares without first giving notification in writing to BCBC and its Australian solicitors.

14 Le Miere J made detailed findings of fact in relation to the continuation of the freezing order against Bayan[11]. He found that BCBC had a good arguable case on an accrued cause of action that was justiciable in the High Court of Singapore which gave rise to a sufficient prospect that the High Court of Singapore would give a money judgment in favour of BCBC for at least $US138 million. Noting the stated intention of BCBC to register in the Supreme Court any judgment it might obtain in the High Court of Singapore and to enforce the judgment as so registered against the assets of Bayan in Australia, he

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9 Order 52A r 5(5)(a)(ii).

10 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK (No 3)* (2013) 276 FLR 273.

11 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK (No 3)* (2013) 276 FLR 273 at 294-302 [73]-[102].

found that there was a sufficient prospect that the judgment of the High Court of Singapore would be registered in or enforced by the Supreme Court. Apart from its shareholding in KRL, all of Bayan's assets were located in Indonesia. Le Miere J found that, subject to irrelevant exceptions, the law of Indonesia precludes execution of a money judgment of the High Court of Singapore. Against that background there was a real and sensible risk that the judgment of the High Court of Singapore would remain unsatisfied.

15 Relevant to the discharge of the interim freezing order against KRL, Le Miere J found that KRL had no control over assets of Bayan[12].

16 The Court of Appeal of the Supreme Court of Western Australia (McLure P, Buss and Murphy JJA) unanimously dismissed an appeal by Bayan from the orders of Le Miere J[13].

The appeal

17 Bayan accepts, in its appeal by special leave to this Court, that the findings of Le Miere J establish a factual foundation for the continuation of the freezing order against it in accordance with the criteria set out in O 52A r 5 of the Supreme Court Rules.

18 Bayan's argument is that the Supreme Court lacks power to make a freezing order in accordance with those criteria. The making of such a freezing order, Bayan argues, is beyond the inherent jurisdiction of the Supreme Court, is authorised by neither the *Supreme Court Act* nor the *Foreign Judgments Act* and moreover is inconsistent with the scheme of the *Foreign Judgments Act*. In its application to a prospective judgment of a foreign court, Bayan argues, O 52A r 5 of the Supreme Court Rules is authorised by neither the *Supreme Court Act* nor the *Foreign Judgments Act* and is invalid.

19 The various strands of Bayan's argument are best addressed in the course of a systematic examination, first of the scheme of the *Foreign Judgments Act*, and then of the relevant scope of the inherent power of the Supreme Court.

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12 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK (No 3)* (2013) 276 FLR 273 at 305-307 [116]-[120].

13 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2014) 320 ALR 289.

The *Foreign Judgments Act*

20 Part 2 of the *Foreign Judgments Act* establishes a regime for the registration and enforcement of judgments of foreign courts. For the purpose of that regime, a "judgment" includes a final or interlocutory order made by a court in a civil proceeding[14].

21 The application of that regime of registration and enforcement to a particular judgment of a particular foreign court is conditional on the existence of regulations which give that judgment the status of a judgment to which Pt 2 applies. The relevant regulation-making power distinguishes for that purpose between regulations which apply Pt 2 to a "money judgment" (that is to say, a judgment under which money is payable) and regulations which apply Pt 2 to a "non-money judgment" (including a final or interlocutory order made by a court in a civil proceeding which is not a money judgment)[15]. It is a prerequisite to the making of such regulations that the Governor-General is satisfied that, "in the event of the benefits conferred by [Pt 2] being applied" to a money judgment or non-money judgment of a particular category of courts of a country, "substantial reciprocity of treatment will be assured in relation to the enforcement in that country" of equivalent judgments of equivalent Australian courts[16].

22 The regulations which have been made in the exercise of that regulation-making power have the effect of applying Pt 2 to a money judgment of the High Court of Singapore but not to a non-money judgment of the High Court of Singapore. The result, Bayan points out, is that any freezing order which might be made by the High Court of Singapore, as a non-money judgment, would lie outside the regime established by Pt 2. The freezing order could not be registered and enforced under that regime.

23 That result, interesting as it is, has no bearing on the power of the Supreme Court of a State to make a freezing order in relation to a prospective money judgment of the High Court of Singapore. What matters is that the money judgment, when given, would be a judgment to which Pt 2 would apply.

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14 Section 3(1).

15 Section 5(1), (3) and (6) read with s 3(1).

16 Section 5(1), (3) and (6).

24 The central provision within Pt 2 is s 6. Section 6(1) provides:

> "A judgment creditor under a judgment to which this Part applies may apply to the appropriate court at any time within 6 years after:
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> (a) the date of the judgment; or
>
> (b) where there have been proceedings by way of appeal against the judgment, the date of the last judgment in those proceedings;
>
> to have the judgment registered in the court."

The expression "appropriate court" is defined in s 6(2) relevantly to include the Supreme Court of a State.

25 Section 15C(a) of the *Acts Interpretation Act* 1901 (Cth) provides that, where a provision of a Commonwealth Act authorises a proceeding to be instituted in a particular court in relation to a matter, that provision is to be deemed to vest that court with jurisdiction in that matter. Interpreted in light of s 15C(a) of the *Acts Interpretation Act*, s 6(1) operates to invest the Supreme Court of a State with federal jurisdiction under s 77(iii) of the Constitution in the matter to which the application authorised by s 6(1) relates. The matter in respect of which federal jurisdiction is so vested in the Supreme Court encompasses the totality of the issues which arise for judicial determination in the curial processes which flow, directly or indirectly, from the making of the application.

26 The making of an application under s 6(1) is the immediate trigger for the operation of s 6(3), which relevantly provides:

> "Subject to this Act and to proof of the matters prescribed by the applicable Rules of Court, if an application is made under this section, the Supreme Court of a State ... is to order the judgment to be registered."

The reference to "Rules of Court" in s 6(3), as elsewhere in the *Foreign Judgments Act*, is relevantly to "rules duly made by the Supreme Court of a State"[17].

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17 Section 3(1).

27 Section 6(7) goes on to set out the consequences of registration of a judgment pursuant to an order made under s 6(3) on an application under s 6(1). Section 6(7) provides:

> "Subject to sections 7 and 14:
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> (a) a registered judgment has, for the purposes of enforcement, the same force and effect; and
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> (b) proceedings may be taken on a registered judgment; and
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> (c) the amount for which a judgment is registered carries interest; and
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> (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."

Section 7 makes provision for the setting aside of a registered judgment by order of the court in which it is registered. Section 14 makes provision for a registered judgment to cease to be enforceable in certain circumstances.

28 Obviously, no application can be made under s 6(1) until such time as a foreign judgment to which Pt 2 applies comes into existence. Bayan builds on that inherent temporal limitation to argue that the regime established by Pt 2 impliedly excludes any power of the Supreme Court of a State to make a freezing order in anticipation of a foreign judgment coming into existence.

29 The relevant general principle of statutory interpretation is that "a law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably"[18]. The registration and enforcement regime established by Pt 2 does affect the jurisdiction which the Supreme Court of a State would otherwise have to enforce a foreign money judgment to which Pt 2 applies. That flows from the express terms of s 10(1), which provides that:

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18 *Shergold v Tanner* (2002) 209 CLR 126 at 136 [34]; [2002] HCA 19. See also *Johnson v Director-General of Social Welfare (Vict)* (1976) 135 CLR 92 at 97; [1976] HCA 19.

> "No proceedings for the recovery of an amount payable under a judgment to which [Pt 2] applies, other than proceedings by way of registration of the judgment, are to be entertained by a court having jurisdiction in Australia."

It is not necessary to explore the full effect of that limitation, which must be read with the provisions of s 12 of the *Foreign Judgments Act* providing for recognition of (even unregistered) foreign judgments for certain purposes including defence and counter-claim in later proceedings between the parties. No further exclusion of any jurisdiction or power of a State Supreme Court is expressed in the *Foreign Judgments Act* and none should be implied.

30 The registration and enforcement regime established by Pt 2 is one that relies on the ordinary processes of the Supreme Court of a State having application to the enforcement of a judgment of a foreign court once that judgment has been registered. That regime would be self-defeating were it to be read as impliedly excluding such jurisdiction and power as the Supreme Court of a State otherwise has to safeguard the efficacy of those enforcement processes.

31 Bayan further argues that ss 17 and 20 of the *Foreign Judgments Act* operate to exclude the making by the Supreme Court of rules regulating its own practice and procedure in the nature of those set out in O 52A of the Supreme Court Rules. Those arguments, too, must be rejected.

32 Section 17 provides:

> "(1) 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 ...
>
> (2) This section does not affect any power to make rules under any other law."

33 Whether the power conferred by s 17(1) might authorise the making of O 52A r 5 of the Supreme Court Rules need not be considered. Bayan submitted, for the first time in this Court, that any rules which might be made in the exercise of that power would answer the description of a "legislative instrument" and would therefore be ineffective as an exercise of Commonwealth delegated legislative power unless and until registered under the *Legislative Instruments*

Act 2003 (Cth)[19]. The instrument by which O 52A was inserted into the Supreme Court Rules[20] has not been so registered.

34 Whatever the merits of that argument, s 17(2) makes plain that the power conferred by s 17(1) has no effect on the separate rule-making power of the Supreme Court independently conferred, relevantly by s 167(1)(a) of the *Supreme Court Act.* It is against the ambit of that independently conferred rule-making power that the validity of O 52A r 5 is to be tested.

35 Section 20 provides:

> "Rules of Court relating to the registration or enforcement, under the laws of a State or Territory, of judgments of the courts of a country apply, so far as they are capable of application and with necessary modifications and adaptations, to proceedings under this Act until:
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> (a) the day on which Rules of Court are made under section 17 of this Act; or
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> (b) the end of one year from the day on which this Act commences;
>
> whichever is the earlier."

36 Section 20 is a transitional provision. It is now only of historical interest. Its sole concern was with the modification and adaptation of Rules of Court which existed as at the commencement of the *Foreign Judgments Act*. It did not contradict s 17(2), and its operation is now spent.

The Supreme Court's inherent power to make a freezing order

37 The Supreme Court of Western Australia, in common with other State Supreme Courts, is continued in existence[21] as a superior court of record[22]

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19 Sections 5(1), 24 and 31.

20 Supreme Court Amendment Rules 2007 (WA).

21 Section 6(1) of the *Supreme Court Act*.

22 Section 6(2) of the *Supreme Court Act*.

administering law and equity[23]. That status alone implies that it has inherent jurisdiction[24].

38 "Jurisdiction" is a word of many meanings. The term "inherent jurisdiction" has been described as "elusive"[25], "uncertain"[26] and "slippery"[27]. The difficulty is minimised if the term is confined to its primary signification: to refer to the power inhering in a superior court of record administering law and equity to make orders of a particular description[28]. For present purposes, inherent jurisdiction can be used interchangeably with "inherent power"[29].

39 The question of the scope of the inherent power of the Supreme Court to make orders of a particular description is distinct from the question of whether or not the authority of the Supreme Court to adjudicate on a particular exercise of its inherent power is within the "federal jurisdiction" invested in the Supreme Court by s 39(2) of the *Judiciary Act* or by another Commonwealth law enacted under s 77(iii) of the Constitution. That distinct question is not suggested by any party or intervener to be decisive in this case, and consideration of it can therefore be deferred until the conclusion of these reasons.

40 The rule-making power of the Supreme Court conferred by s 167(1)(a) of the *Supreme Court Act* is relevantly confined to making rules "regulating and prescribing the procedure … and the practice to be followed in the Supreme

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23 Section 16(1)(a) and (d) of the *Supreme Court Act*.

24 *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 280 [36]; [2009] HCA 18; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 60 [40]; [2013] HCA 7.

25 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 60 [40], quoting *Grassby v The Queen* (1989) 168 CLR 1 at 16; [1989] HCA 45.

26 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 295 [122]; [2006] HCA 27, quoting *A J Bekhor & Co Ltd v Bilton* [1981] QB 923 at 953.

27 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 263 [5].

28 Cf *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78]; [1999] HCA 65; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 60 [40].

29 Cf *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264 [6].

Court" in matters in or with respect to which the Supreme Court has jurisdiction. That rule-making power is available to regulate the range of orders capable of being made by the Supreme Court in the exercise of its inherent jurisdiction, but it is not available to expand the range of those orders.

41 It follows that the Supreme Court can have power to make a freezing order in accordance with the criteria set out in O 52A r 5 of the Supreme Court Rules only if and to the extent that a freezing order made in accordance with those criteria is an order which the Supreme Court can make in the exercise of its inherent power.

42 What, then, is the relevant scope of the inherent power of the Supreme Court?

43 There is no need here to attempt any novel or exhaustive exposition. It is well established by decisions of this Court that the inherent power of the Supreme Court of a State includes the power to make such orders as that Court may determine to be appropriate "to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction"[30]. And it has been noted more than once in this Court that a freezing order is "the paradigm example of an order to prevent the frustration of a court's process"[31].

44 Relying on statements by this Court which have from time to time linked the making of a freezing order to the capacity of a superior court of record to protect the integrity of its processes "once set in motion"[32], Bayan argues that the inherent jurisdiction of the Supreme Court to make a freezing order is always limited to circumstances in which a substantive proceeding in that Court has commenced or is imminent. The criteria set out in O 52A r 5 of the Supreme Court Rules, Bayan argues, are for that reason too wide.

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30 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623; [1987] HCA 23.

31 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32 [35]; [1998] HCA 30, quoted in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 400 [41]; [1999] HCA 18.

32 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393 [25], 399 [40]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 243 [94]; [2001] HCA 63; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265 [9].

45 The proposed limitation does not flow from the statements and judgments of this Court relied upon by Bayan. Those statements were not exhaustive statements of the capacity of the Supreme Court of a State, or of any other superior court of record, to protect the integrity of its processes.

46 There is a critical point which Bayan's argument misses. Even where a court makes a freezing order in circumstances in which a substantive proceeding in that court has commenced or is imminent, the process which the order is designed to protect is "a prospective enforcement process". That description is drawn from the explanation of the nature of a freezing order given by Lord Nicholls of Birkenhead in *Mercedes Benz AG v Leiduck*[33]. That passage was cited with approval by five members of this Court in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[34] in a passage which (subject to presently immaterial qualifications) was itself adopted as a correct statement of principle by four members of this Court in *Cardile v LED Builders Pty Ltd*[35]. Lord Nicholls explained[36]:

> "Although normally granted in the proceedings in which the judgment is being sought, [a freezing order] is not granted in aid of the cause of action asserted in the proceedings, at any rate in any ordinary sense. It is not so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment. 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."

47 The actual holding in *Cardile v LED Builders Pty Ltd* illustrates that the prospective enforcement process that a court might protect by making a freezing order can be a process contingent on factors in addition to the outcome of a substantive proceeding in that court. The holding was that a freezing order can be made against a third party against whom no present cause of action exists and against whom no present proceeding has commenced. It is enough that some future legal process (which might be contingent, for example, on the appointment by another court of a liquidator or a trustee in bankruptcy) may be available

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33 [1996] AC 284 at 306.

34 (1998) 195 CLR 1 at 32 [35].

35 (1999) 198 CLR 380 at 400 [41].

36 [1996] AC 284 at 306.

pursuant to which the third party may be obliged to contribute to the funds of the judgment debtor to help satisfy the judgment against the judgment debtor[37].

48 The earlier holding of the Supreme Court of New South Wales in *Construction Engineering (Aust) Pty Ltd v Tambel (Australasia) Pty Ltd*[38], frequently applied[39], provides a further illustration. Clarke J there held the Supreme Court to have inherent power to make a freezing order against a party to arbitration "to ensure that an arbitral award, which may as the result of the grant of leave be enforced by court process, is not a 'brutum fulmen'"[40].

49 Against the background of a freezing order made in advance of judgment being characteristically protective of what at the time of making the order could only be a prospective enforcement, Lord Nicholls went on in *Mercedes Benz* to point out that there was "nothing exorbitant" about a Hong Kong court making a freezing order in aid of a prospective judgment of a foreign court "given the prerequisite that the anticipated judgment must be one which will be recognised and enforceable in Hong Kong"[41]. He fairly observed[42]:

> "The alternative result would be deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community."

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37 (1999) 198 CLR 380 at 405-406 [57].

38 [1984] 1 NSWLR 274.

39 Eg *ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"* (2011) 285 ALR 444; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535; *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882.

40 [1984] 1 NSWLR 274 at 278, quoting *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 276.

41 [1996] AC 284 at 313.

42 [1996] AC 284 at 313-314. See, to similar effect, *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676 at 686 [35].

50 The power to make a freezing order in relation to an anticipated judgment of a foreign court, which when made would be registrable by order of the Supreme Court under the *Foreign Judgments Act*, is within the inherent power of the Supreme Court. That is because the making of the order is to protect a process of registration and enforcement in the Supreme Court which is in prospect of being invoked[43]. The criteria set out in O 52A r 5 of the Supreme Court Rules are appropriately tailored to the exercise of that inherent power. Such issues of principle or degree as might arise in the working out of those criteria go to the exercise of that inherent power, not to its existence[44].

Federal jurisdiction

51 The parties agree that BCBC's application to the Supreme Court for freezing orders against Bayan and KRL was from its inception a proceeding in a matter within the federal jurisdiction of the Supreme Court, that is to say, within the authority to decide conferred on the Supreme Court by a Commonwealth law enacted under s 77(iii) of the Constitution[45]. They agree that, to the extent not inconsistent with the *Foreign Judgments Act*, O 52A of the Supreme Court Rules was picked up and applied within that federal jurisdiction by s 79 of the *Judiciary Act*[46].

52 Although no party or intervener argues that it makes any difference to the outcome, it is appropriate to record how that federal jurisdiction arises.

53 Section 39(2) of the *Judiciary Act* provides that "[t]he several Courts of the States shall within the limits of their several jurisdictions … be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it ...". The settled effect of that provision is that, where a matter which would otherwise be within the jurisdiction of a State court answers the description of a matter within

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43 Cf *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141 at 155 [53].

44 Cf *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 616.

45 Cf *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 570 [3]; [2001] HCA 1.

46 Cf *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 270-271 [55]-[63]; [2005] HCA 38.

s 75 or s 76 of the Constitution, the State court is invested with federal jurisdiction with respect to that matter to the exclusion of State jurisdiction under s 109 of the Constitution[47].

54 One matter in which original jurisdiction can be conferred on this Court under s 76(ii) of the Constitution, so as in turn to be a matter in which federal jurisdiction is invested in a State court under s 39(2) of the *Judiciary Act*, is a matter "arising under" a law of the Commonwealth. A justiciable controversy sufficiently answers that description where a claim in issue within the scope of that controversy depends for its existence on a Commonwealth law. It is not necessary that the form of relief claimed also depends on Commonwealth law[48].

55 An application for a freezing order in relation to a prospective judgment of a foreign court, which when made would be registrable by order of the Supreme Court under the *Foreign Judgments Act*, is sufficiently characterised as a matter arising under a law of the Commonwealth on the basis that the prospective enforcement process to be protected by the making of the freezing order depends on the present existence of the *Foreign Judgments Act*.

Order

56 The appeal is to be dismissed with costs.

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47 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 471, 479; [1980] HCA 32; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571 [7].

48 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; [1983] HCA 31; *Ruhani v Director of Police* (2005) 222 CLR 489 at 519-520 [74]-[75], 530 [116]; [2005] HCA 42.

57 KEANE AND NETTLE JJ. The relevant legislation and findings of the courts below and the issues agitated in this Court are set out in the reasons of French CJ, Kiefel, Bell, Gageler and Gordon JJ. We gratefully adopt their Honours' summary. Further, we agree with their Honours' conclusion that the appeal should be dismissed and with their Honours' reasons for that conclusion. We wish to address some additional observations to the principal argument advanced by Bayan in this Court.

58 Bayan contended that the Supreme Court of Western Australia's power to make a freezing order arises from its inherent power to prevent abuse or frustration of its processes. It was argued that this power cannot be enlivened until the High Court of Singapore gives judgment in BCBC's favour. Until then, it was said, it is uncertain whether the Supreme Court's processes will ever be engaged.

59 This view of the inherent power of the Supreme Court is too narrow. Quite apart from O 52A of the Supreme Court Rules, the freezing order would be sustainable as an exercise of the inherent power of the Supreme Court to ensure that its own processes of enforcement are not set at nought by a disposition of assets undertaken for that purpose.

60 Bayan's principal argument may be stated in the form of a syllogism, the major premise of which is that superior courts in Australia have an inherent power to make a freezing order but only for the purpose of protecting a cause of action pending in, or at least immediately justiciable in, an Australian court. To the extent that O 52A of the Supreme Court Rules provides otherwise, it is inconsistent with the *Foreign Judgments Act* 1991 (Cth) ("the FJA") and thus inoperative by reason of s 109 of the Constitution. The minor premise of Bayan's argument is that, in the present case, there is no cause of action pending or immediately justiciable in an Australian court. And the conclusion is that the Supreme Court of Western Australia lacks power to make a freezing order until the High Court of Singapore delivers judgment in BCBC's favour for only then will a right to enforce that judgment arise under the FJA.

61 The major premise of Bayan's argument is unsustainable for two reasons. First, it takes too broad a view of the scope of the FJA; and second, it takes too narrow a view of the inherent power of a superior court to grant a freezing order.

The FJA

62 Bayan contended that the FJA is a comprehensive scheme for the enforcement of foreign judgments in Australia. It was said that any power in the Supreme Court to make a freezing order before a foreign judgment is pronounced would be contrary to that scheme. Bayan's contention that the FJA establishes a comprehensive scheme with respect to the enforcement in Australia of the

judgments of countries specified in regulations made pursuant to the power in s 5 ("the Regulations") is correct so far as it goes; but the FJA does not address itself to establishing the limits of the inherent power of a superior court of record to ensure that its own processes are not frustrated. There is no inconsistency between the power to make rules of court for the purposes of regulating and prescribing the procedure and the practice to be followed in the Supreme Court in s 167(1)(a) of the *Supreme Court Act* 1935 (WA) (as applied by s 79 of the *Judiciary Act* 1903 (Cth)) and the FJA within the meaning of s 109 of the Constitution.

63 It may be accepted that, for civil judgments from countries specified in the Regulations, the only means by which they may be enforced in Australia is by registration under the FJA; but to accept that is distinctly not to accept that the FJA is in any way concerned to limit the inherent power of superior courts in Australia to ensure that their processes are not abused or rendered useless. Nothing in the FJA manifests an intention to exclude the power of the Supreme Court to grant a freezing order in anticipation of proceedings for the enforcement of a prospective foreign judgment. And s 6(7) of the FJA expressly provides that a judgment registered under it shall have, for the purposes of enforcement, the same force and effect as if the judgment had been given by the court in which it is registered. Section 6(7) thus provides a positive indication that the FJA proceeds on the assumption that the court in which the judgment is registered is expected to deploy the full range of powers which might be deployed to vindicate its own judgments.

The doctrinal basis of freezing orders

64 The doctrinal basis of the inherent power of superior courts in Australia to grant a freezing order is not confined to the protection of a pending action or an immediately justiciable cause of action. A superior court has an inherent power to grant a freezing order proleptically to ensure the efficacy of its exercise of judicial power in accordance with the exigencies of its exercise. When it is demonstrated to a superior court that there is a likelihood that its processes will be abused or frustrated, it is within the court's power to make orders considered to be appropriate to prevent that from occurring.

65 The doctrinal basis of freezing orders, previously known as *Mareva* orders and *Mareva* injunctions[49], was first considered by this Court in *Jackson v Sterling Industries Ltd*[50]. The issue in that case was whether the Federal Court of

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49 See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

50 (1987) 162 CLR 612; [1987] HCA 23.

Australia had power to order the appellant to pay $3 million as "security" for the satisfaction of a judgment that might be entered in favour of the respondent. The particular focus of this Court's decision was upon s 23 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"), which empowered the Federal Court "to make orders of such kinds, including interlocutory orders ... as [it] thinks appropriate." The content of that power is not different, for present purposes, from the inherent power of a superior court to protect its processes[51]. The Court held, by majority, that the Federal Court did not have power to order the payment of security for the recovery of the debt. Deane J, with whom Mason CJ, Wilson, Brennan and Dawson JJ agreed, explained[52] that the purpose of a freezing order is:

> "not to create security for the plaintiff or to require a defendant to provide security as a condition of being allowed to defend the action against him. ... It is to prevent a defendant from disposing of his actual assets (including claims and expectancies) so as to frustrate the process of the court by depriving the plaintiff of the fruits of any judgment obtained in the action."

66 Similarly, in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[53], a case also concerned with the general provisions of s 23 of the Federal Court Act, Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ said[54]:

> "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[55]."

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51 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 405 [56]; [1999] HCA 18.

52 (1987) 162 CLR 612 at 625.

53 (1998) 195 CLR 1; [1998] HCA 30.

54 (1998) 195 CLR 1 at 33 [35].

55 See *Tait v The Queen* (1962) 108 CLR 620; [1962] HCA 57.

67 Their Honours referred[56] to the reasons of Lord Nicholls of Birkenhead in *Mercedes Benz AG v Leiduck*[57], where his Lordship said that:

> "*Mareva* relief is not granted in aid of the cause of action asserted in the proceedings, at any rate in any ordinary sense. It is not so much relief appurtenant to a money claim as relief appurtenant to a prospective money judgment. 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. The court is looking ahead to that stage, and taking steps designed to ensure that the defendant cannot defeat the purpose of the judgment by thwarting in advance the efficacy of the process by which the court will enforce compliance."

68 In *CSR Ltd v Cigna Insurance Australia Ltd*[58], Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ said of the power to grant a *Mareva* injunction that it is the "power [of a court] to *protect* the integrity of [its] processes once set in motion" (emphasis in original). In *Cardile v LED Builders Pty Ltd*[59], Gaudron, McHugh, Gummow and Callinan JJ referred to this passage from *Cigna*, and went on to say:

> "The integrity of those processes extends to preserving the efficacy of the execution which would lie against the actual or prospective judgment debtor[60]. The protection of the administration of justice which this involves may, in a proper case, extend to asset preservation orders against third parties to the principal litigation."

69 In argument in this Court, Bayan fixed upon the phrase "once set in motion" used in *Cigna* and *Cardile* to support its contention that the protective power in question arises only in relation to proceedings which have been commenced, or at least proceedings which are imminent in respect of a complete cause of action.

70 In *Cardile*, this Court was concerned with whether the Federal Court had power to grant a freezing order against a non-party. In concluding that the

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56 (1998) 195 CLR 1 at 32 fn 81.

57 [1996] AC 284 at 306.

58 (1997) 189 CLR 345 at 391; [1997] HCA 33.

59 (1999) 198 CLR 380 at 393 [25].

60 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623, 638.

Federal Court had this power, Gaudron, McHugh, Gummow and Callinan JJ held that the doctrinal basis of making a freezing order against a non-party lay in the Federal Court's power in relation to "the administration of justice". Their Honours said[61]:

> "What then is the principle to guide the courts in determining whether to grant *Mareva* relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word 'may', be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which: (i) the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including 'claims and expectancies'[62], of the judgment debtor or potential judgment debtor; or (ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor."

71 Three aspects of this statement of principle may be noted here. First, their Honours expressed the principle as pertaining to the "general power of superior courts which is comprehended by the express grant in s 23 of the Federal Court Act", a power which their Honours described as "a broad one"[63].

72 Secondly, the statement in *Cardile* contemplates the making of a freezing order against a person against whom proceedings in the court are not pending. The principle is said to be protective of "some process, ultimately enforceable by the courts, [which] is or *may be available* to the judgment creditor as a consequence of a judgment"[64] (emphasis added).

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61 (1999) 198 CLR 380 at 405-406 [57].

62 The phrase used by Deane J in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

63 (1999) 198 CLR 380 at 405 [56].

64 (1999) 198 CLR 380 at 405 [57].

73 Thirdly, their Honours expressly recognised[65] that, although the "general power" was a broad one:

> "orders made pursuant to [s 23 of the Federal Court Act] (and under the general power) must be capable of properly being seen as appropriate to the case in hand."

74 The limit on the general power acknowledged in this passage is stated in terms which contemplate a judgment by a court as to what is "appropriate to the case in hand" rather than the mechanical application of a hard and fast rule.

75 Given the doctrinal basis of a freezing order as explained in the authorities culminating in *Cardile*, the use of the phrase "once set in motion" in *Cigna* and *Cardile* cannot fairly be regarded as a statement of a necessary condition of the exercise of the inherent power to freeze an asset of an alleged debtor who is shown on the evidence to be moving to defeat the anticipated processes of the court. The phrase can be understood as noting the presence, in those cases in which it was used, of a sufficient connection with the processes of enforcement of the court making the order to warrant that court taking steps to ensure that those processes are not frustrated. The pendency of proceedings engages the responsibility of the court to ensure that its processes of enforcement should not be thwarted in advance of their implementation. On this view, the pendency of proceedings in the court in which the freezing order is sought may be regarded as a positive indication that the exercise of the power is "capable of properly being seen as appropriate to the case in hand". But these passages cannot fairly be taken to mean that a sufficient connection to make the exercise of the power "appropriate to the case in hand" cannot be demonstrated in ways other than the pendency or imminent pendency of proceedings in that court.

76 Whether or not a sufficient connection is demonstrated by the evidence adduced in any given case depends on a judgment by the court. That this is so is not a consideration which should lead one to prefer the adoption of the hard and fast rule for which Bayan contended. It is a characteristic feature of superior courts of record that they may determine the issues on which the exercise of their jurisdiction depends[66]. Given that the power in question is the inherent power of a superior court, it is inevitable that the limits of its application are to be set by

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65 (1999) 198 CLR 380 at 405 [56].

66 *Cameron v Cole* (1944) 68 CLR 571 at 590, 598, 607; [1944] HCA 5; *DMW v CGW* (1982) 151 CLR 491 at 504-505, 507; [1982] HCA 73; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 638 [8]; [2000] HCA 33; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177-178 [20]-[23], 185-186 [51]-[53], 236-237 [218]-[220], 248 [255], 274-275 [328]-[329]; [2000] HCA 62.

judicial determination; and it is better that they should be set by a determination based upon a full appreciation of the circumstances of the case rather than by the application of a hard and fast rule apt to permit the likely evasion of the court's processes in some cases for no good reason.

77 The power to make a freezing order is one which is to be exercised judicially, having regard to the considerations which inform the exercise of the power[67]. It will always be necessary for the court to bear steadily in mind that a freezing order is not a mode of converting a would-be creditor into a secured creditor before a dispute is determined[68]. On the other hand, a person likely to become a debtor ought not be allowed to dispose of his or her assets so as to defeat the capacity of a court to enforce a just claim[69]. In this case, there was no suggestion that the freezing order did not reflect a sound balancing of the considerations material to the proper exercise of the power.

78 The unchallenged concurrent findings of the primary judge and the Court of Appeal as to the likelihood of the registration of a Singaporean judgment in favour of BCBC under the FJA establish a sufficient connection with the administration of justice by the Supreme Court of Western Australia to engage the power of the Court proleptically to ensure that its processes will not be frustrated by action on the part of Bayan directed to that end.

Previous Australian authority

79 In *Official Receiver of State of Israel v Raveh*[70], the plaintiff commenced proceedings in the District Court of Israel and obtained from that Court a worldwide *Mareva* order against the defendant's property. The plaintiff intended to have any final judgment obtained from the District Court of Israel registered in Australia as a foreign judgment and then enforced in the Supreme Court of Western Australia. It was anticipated that the defendant was about to receive a substantial financial benefit from the settlement of separate proceedings pending in the Supreme Court of Western Australia. The plaintiff sought a *Mareva* injunction in relation to that prospective financial benefit, relying upon the likelihood that the District Court of Israel would ultimately deliver judgment in

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67 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 404 [53].

68 *Mercedes Benz AG v Leiduck* [1996] AC 284 at 299-300; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 396-397 [34].

69 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 404-405 [54].

70 (2001) 24 WAR 53.

the plaintiff's favour. Murray J dismissed the plaintiff's application. His Honour observed[71]:

> "As I understand the applicable principles for the grant of a Mareva order, it is right to focus upon the making of an order in appropriate circumstances in aid of a party who is seeking final relief, the order being of an interlocutory character to operate against a party who would so behave as to seek to frustrate, or in a way calculated to have the tendency to frustrate, the final process of the court and the enforcement of its orders. ...
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> ...
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> In the [present] factual circumstances ... no ... substantive proceedings could be issued out of this court ... It is not to the point, in my view, to consider whether or not the world-wide Mareva order obtained in Israel would be efficacious against the Western Australian property of the defendant. In my opinion the order may not be replicated in this court as an exercise of the power to grant interlocutory relief because it has, and can have, no connection with the enforcement of a substantive right in proceedings taken by the plaintiff in this court."

80 The decision in *Raveh* is the only Australian decision which supports the distinction upon which Bayan insisted, namely, the distinction between proceedings which, it is found as a fact, are likely to be instituted and proceedings which have actually been commenced. The reasoning of Murray J proceeded on the understanding that a *Mareva* injunction is an adjunct to a cause of action pending in the court making the order rather than a protection of the efficacy of that court's processes of enforcement. That understanding reflected a narrower view of the inherent power to make a freezing order than is warranted by the principle which informs the power.

81 It may be noted that, in relation to arbitration proceedings, as long ago as 1984 in *Construction Engineering (Aust) Pty Ltd v Tambel (Australasia) Pty Ltd*[72], it was held that it was no objection to the making of a freezing order that the claimant in arbitration proceedings was precluded from commencing curial proceedings by a "Scott v Avery" clause. Clarke J held that the circumstance that the plaintiff had not commenced, and indeed could not commence, proceedings in a court to enforce any entitlement to payment from the defendant unless and until an award had been made in the arbitration did not deny the power of the

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71 (2001) 24 WAR 53 at 57 [18], 59-60 [27].

72 [1984] 1 NSWLR 274 at 277-278.

court to make orders to prevent the dissipation of assets to render ineffective the use of the court's processes to enforce the award. Once it is appreciated that the relevant focus of attention must be upon that court's processes of enforcement, it is difficult to discern any material distinction between the doctrinal foundation of the power exercised in *Construction Engineering* and the foundation of the power invoked by BCBC in this case.

Conclusion and orders

82 Bayan's challenge to the decision of the Court of Appeal fails.

83 The appeal should be dismissed with costs.