
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : BCBC SINGAPORE PTE LTD -v- PT BAYAN
RESOURCES TBK [No 5] [2023] WASC 116

CORAM : ARCHER J

HEARD : ON THE PAPERS

PUBLISHED : 12 APRIL 2023

FILE NO/S : CIV 1562 of 2012

BETWEEN : BCBC SINGAPORE PTE LTD
Plaintiff

AND

PT BAYAN RESOURCES TBK
First Defendant

KANGAROO RESOURCES LTD
Second Defendant

Catchwords:

Special costs application - Complexity and importance - Turns on its own facts

Legislation:

Nil

Result:

Special costs orders made

Representation:

Counsel:

Plaintiff : No appearance (on the papers)
First Defendant : No appearance (on the papers)
Second Defendant : No appearance (on the papers)

Solicitors:

Plaintiff : Herbert Smith Freehills
First Defendant : Clayton Utz
Second Defendant : Not applicable

Case(s) referred to in decision(s):

BCBC Singapore Pte Ltd v PT Bayan Resources TBK [2012] WASC 170
BCBC Singapore Pte Ltd v PT Bayan Resources TBK [2023] SGCA(I)
BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 3] [2013] WASC
239
BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 4] [2018] WASC
338 (S)
BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 4] [2018] WASC
338; (2018) 134 ACSR 1
Heartlink Ltd v Jones as Liquidator of HL Diagnostics Pty Ltd (in liq) [2007]
WASC 254 (S)
Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 2] [2017] WASCA 76 (S)

ARCHER J:

Introduction

1 The first defendant (**Bayan**) seeks special costs orders. Bayan seeks that its costs be taxed without regard to the limits imposed by the relevant costs determinations and without regard to the hourly rates and daily rates provided for legal representatives.

2 The plaintiff (**BCBCS**) opposes this.

3 Special costs orders may be made if a court or judicial officer is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter.

4 The primary dispute between the parties is whether the proceedings *were* unusually difficult, complex or important. In short, BCBCS contends that Bayan is relying on aspects of *other* proceedings, heard with these proceedings, to justify its claim that the proceedings were unusually difficult, complex or important. For this reason, it is necessary to detail the content and the history of both proceedings, as well as related proceedings in Singapore.

Relevant background

5 The history of the various proceedings between the parties are tortuous.¹

6 Bayan is a company incorporated in Indonesia. BCBCS is a company incorporated in Singapore. Bayan and BCBCS owned shares in another company incorporated in Indonesia, PT Kaltim Supacoal (**KSC**). The rights of Bayan and BCBCS as shareholders in KSC were the subject of a joint venture deed (**Joint Venture Deed**) governed by the laws of Singapore.²

7 On 27 December 2011, BCBCS commenced proceedings against Bayan in the Singapore High Court claiming, amongst other things,

¹ The relevant chronology up to March 2022 was helpfully set out in an affidavit filed by Bayan, affirmed by Oliver Kar Heng Khaw on 9 March 2022. Mr Khaw is the Head of Legal and Senior Foreign Counsel at Bayan. Further events were set out in an affidavit filed by BCBCS, of Mark Dunlea Smyth affirmed on 27 February 2023. Mr Smyth is a partner of the law firm acting for BCBCS. Much of what follows in this section reproduces or draws from those affidavits, and from decisions of Le Miere J.

² This is almost a direct quote from *BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 3]* [2013] WASC 239; (*BCBC [No 3]*) [10].

damages for breaches of the Joint Venture Deed. I will refer to these proceedings as the '**Singapore Proceedings**'.

8 On 3 April 2012, and while the Singapore Proceedings were pending, BCBCS instituted the proceedings the subject of the current dispute. BCBCS made an ex parte application, pursuant to O 52A of the *Rules of the Supreme Court 1971* (WA), for freezing orders against Bayan in respect of its only Australian asset, a 56.05% shareholding in the Second Defendant (**KRL**), and against KRL. I will refer to these proceedings as the '**Freezing Orders Proceedings**'.

9 On 5 April 2012, Pritchard J³ granted the application, making interim freezing orders against Bayan and KRL.⁴

10 On 17 May 2012, Bayan and KRL commenced separate proceedings in the original jurisdiction of the High Court of Australia, challenging the jurisdiction of this Court to make the freezing orders. Gummow ACJ remitted that proceeding to this Court (CIV 2139 of 2012), where it was heard together with BCBCS' application for a continuation of the freezing orders in the Freezing Orders Proceedings. I will refer to the proceedings in CIV 2139 of 2012 as the '**Jurisdiction Proceedings**'.

11 On 26 June 2013, Le Miere J dismissed the challenge to the Court's jurisdiction. Bayan's appeals from this aspect of the judgment to the Court of Appeal and to the High Court of Australia were subsequently dismissed. As to the Freezing Orders Proceedings, his Honour discharged the interim freezing orders against KRL and continued the freezing orders against Bayan with some amendments.⁵ His Honour gave the parties liberty to apply. His Honour ordered that, as between BCBCS and Bayan, the costs of BCBCS' application for freezing orders be costs in the cause of the Singapore Proceedings. This is the first of the two extant costs orders in the Freezing Orders Proceedings.

12 On 4 March 2015, the Singapore Proceedings were transferred to the Singapore International Commercial Court (**SICC**), a division of the Singapore High Court.

13 The SICC separately heard and determined the issues that arose in the Singapore Proceedings in three 'tranches'. In broad terms, the

³ As her Honour then was.

⁴ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2012] WASC 170.

⁵ *BCBC [No 3]*.

first tranche dealt with the scope and content of the parties' obligations under the Joint Venture Deed, the second tranche dealt with questions of repudiation and breach, and the third dealt with damages.

14 On 12 May 2016, the SICC delivered judgment in relation to the first tranche.

15 On 25 July 2017, the SICC delivered judgment in relation to the second tranche. The SICC found that Bayan had breached the Joint Venture Deed and had wrongfully purported to terminate it, and that these acts constituted repudiatory breaches. Bayan's appeal from the second tranche judgment was subsequently dismissed by the Court of Appeal of the Republic of Singapore (**Singaporean Court of Appeal**). In relation to the issue of whether Bayan's repudiation caused loss to BCBCS, the Singaporean Court of Appeal said that that issue turned on whether BCBCS was willing and able to fund KSC on its own. The Singaporean Court of Appeal remitted that issue to the SICC.

16 On 17 August 2018, KRL announced to the Australian Securities Exchange Ltd that it had entered into a Scheme Implementation Deed with Bayan to enable a scheme of arrangement (**Scheme**) to be effected pursuant to which Bayan would purchase all issued shares in KRL, other than the ones Bayan already owned.

17 On 19 September 2018, BCBCS, exercising the liberty to apply, sought variations to the freezing orders (**Variation Application**) in the Freezing Orders Proceedings. BCBCS alleged that the orders should be varied because the circumstances had changed. In essence, BCBCS alleged that there were two changes. First, the progress that had occurred in the Singapore Proceedings. Second, that Bayan intended to acquire the balance of the shares in KRL by a Scheme and, if the Scheme was approved, Bayan intended to delist KRL, appoint its own directors and integrate KRL with the Bayan Group which was based in Indonesia.⁶ BCBCS sought an order prohibiting Bayan from disposing of its shares in KRL or dealing with, or otherwise diminishing, the value of its shareholding. It also sought an order to prevent Bayan causing any of KRL's assets, its subsidiaries, or its subsidiaries' assets from being transferred to Bayan with the consequence of diminishing the value of Bayan's shareholding in KRL.⁷

⁶ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 4]* [2018] WASC 338; (2018) 134 ACSR 1 (*BCBC [No 4]*) [10].

⁷ See Outline of Submissions filed by the plaintiff on 21 September 2018 [5].

18 The Variation Application was heard on 12 October 2018. On
8 November 2018, Le Miere J delivered his judgment.⁸ Advance
reasons of the judgment were provided to the parties prior to the
delivery date.

19 In the judgment, his Honour said that he did not accept that the
progress that had occurred in the Singapore Proceedings was a material
change in circumstance.⁹ His Honour accepted that the proposed
Scheme was.¹⁰

20 However, his Honour considered that it was not appropriate to
make the orders sought by BCBCS. His Honour held, in effect, that the
proposed orders went beyond the minimum relief necessary to do
justice between the parties. His Honour said that Bayan should instead
be required to give notice of any relevant transactions, and that the
period of notice should be sufficient to enable BCBCS, if necessary, to
apply to the court and for the matter to be properly resolved before the
proposed transaction was implemented. His Honour said he would hear
from the parties as to the appropriate form of order and period of
notice. His Honour made it clear that he would not make an order
absolutely prohibiting Bayan and KRL entering into relevant
transactions as sought by BCBCS in its application.¹¹

21 On 8 November 2018, after delivering the judgment and hearing
from the parties orally, his Honour directed the parties to confer and
provide an agreed minute of proposed orders or, failing agreement,
competing minutes of proposed orders with brief written submissions.¹²

22 After conferring, the parties were unable to reach agreement on
the form of orders. Both sides filed written submissions.¹³ On
3 December 2018, his Honour made a decision on the papers.¹⁴ In
short, his Honour varied the freezing orders so as to require Bayan to
give notice of certain related party transactions proposed to be entered
into by KRL. His Honour also made directions for the filing of
submissions as to costs.

23 On 14 December 2018, by consent, his Honour ordered that the
costs of the Variation Application be costs in the cause of the Singapore

⁸ *BCBC [No 4]*.

⁹ *BCBC [No 4]* [13] - [17].

¹⁰ *BCBC [No 4]* [18] - [21].

¹¹ *BCBC [No 4]* [22] - [25].

¹² ts 491, 8 November 2018.

¹³ Both parties filed submissions on 19 November 2018.

¹⁴ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 4]* [2018] WASC 338 (S) (*BCBC No 4 (S)*).

Proceedings. This is the second of the two extant costs orders in the Freezing Orders Proceedings.

24 On 7 February 2022, the SICC delivered judgment in relation to the third tranche (the **Tranche 3 Judgment**), which dealt with the question of damages. In the Singapore Proceedings, BCBCS had claimed damages under two heads: wasted expenditure of US\$91.6 million and damages for the loss of a chance to increase the production of a plant. The SICC dismissed BCBCS' claims under both heads of damages.

25 On 7 March 2022, BCBCS filed a Notice of Appeal against certain parts of the Tranche 3 Judgment relating to BCBCS' claim for wasted expenditure.

26 On 9 March 2022, Bayan filed a chamber summons in the Freezing Orders Proceedings seeking orders that BCBCS pay its costs of the Freezing Orders Proceedings without regard to the applicable scale limits (**Special Costs Application**). In April 2022, the matter was allocated to me, due to the retirement of his Honour Le Miere J. I listed the matter for directions on 19 May 2022.

27 During the directions hearing, it became apparent that the parties were in dispute as to whether Bayan had established an entitlement to costs at all. The dispute turned on the proper construction of Le Miere J's orders as to costs. The parties disagreed as to what was meant by 'costs in the cause of the [Singapore Proceedings]' (**construction dispute**). Bayan submitted that the relevant event was whether BCBCS succeeded in its claim for damages. BCBCS submitted that it would turn on the orders for costs made in the Singapore Proceedings. BCBCS submitted that, therefore, Bayan's Special Costs Application was premature.

28 BCBCS noted that the construction dispute would fall away if it was ordered to pay costs in the Singapore Proceedings. At that time, the decision as to costs in the Singapore Proceedings was anticipated to be imminent.

29 It emerged during the hearing that the parties had not properly conferred in relation to the construction dispute.¹⁵ I ordered counsel for the parties to confer, and ordered each party to file a short note setting out its position and contentions. I listed the matter for further hearing

¹⁵ See, for example, ts 513.

on 27 May 2022, the following week. Each party duly filed a short note.

30 On 27 May 2022, I heard further from the parties. I gave brief extempore reasons explaining why I had decided that the determination of the construction dispute should be postponed until after the SICC had delivered its costs decision in the Singapore Proceedings (**SICC's Costs Decision**). I explained that I had made this decision purely on case management grounds. I noted that a short delay could mean that there would be no need for the construction dispute to be determined, saving costs to the parties and the resources of the court. I found that there was no evidence that a delay would cause any prejudice to Bayan. I further said that, if the estimated delivery of the SICC's Costs Decision proved inaccurate, Bayan could renew its application on an urgent basis. I made programming orders by reference to the then unknown date of delivery of the SICC's Costs Decision.¹⁶

31 The SICC's Costs Decision took longer than anticipated, and was not delivered until 19 December 2022. On that date, the SICC awarded costs in favour of Bayan.

32 BCBCS has appealed against the SICC's Costs Decision. However, it accepts that, unless the SICC's Costs Decision is overturned, Bayan is entitled to its costs, and there is no need to determine the construction dispute.

33 Following the delivery of the SICC's Costs Decision, the parties conferred as to the manner in which Bayan's application for special costs should be progressed. On 2 February 2023, I made orders by consent (**February Orders**). By order 1 of those orders, BCBCS was to pay Bayan's costs of the Freezing Orders Proceedings. However, by order 2, BCBCS had liberty to apply to reopen that order in light of any orders made by the Singaporean Court of Appeal. Further orders were made programming the filing of submissions and any further evidence in relation to the appropriate measure of costs. Finally, an order was made that the Court would advise the parties as to whether it would deal with the matter on the papers or whether a hearing would be required. Later, after receiving the parties' submissions, I was satisfied that a hearing was not required.

¹⁶ ts 527 - 529.

34 On 10 February 2023, the Singaporean Court of Appeal handed down its decision in relation to BCBCS' appeal against the SICC's Tranche 3 Judgment.¹⁷ The Court said:¹⁸

For these reasons, we dismiss the appeal. That said, we recognise that the appellants were successful, in the first and second tranches, in establishing that [Bayan] acted in breach of the coal supply obligations they owed under the [Joint Venture] Deed. Even though they were not able to prove that they suffered substantial damages as a consequence, that does not detract from their success in establishing [Bayan's] *liability* for breach of contract. We therefore award the appellants S\$1,000 in nominal damages.

As to the costs of the appeal, unless the parties are able to come to an agreement, we direct them to file written submissions, limited to ten pages each, setting out their positions on the appropriate costs orders we should make together with the supporting grounds. These are to be filed within three weeks of the date of this judgment. We note that the costs of the trial have been determined by the SICC: see *BCBCS Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2022] SGHC(I) 17 (the 'Costs Judgment'). As we have affirmed the Judgment, and as there is a pending application before us by which the appellants seek permission to appeal the SICC's Costs Judgment, we expressly make no order or observations in respect of trial costs. The usual consequential orders will apply.

35 On 13 February 2023, 27 February 2023, and 3 March 2023, the parties filed their submissions on the Special Costs Application in the Freezing Orders Proceedings, pursuant to my February Orders.

Further deferral?

36 Before turning to the merits of Bayan's Special Costs Application, I note that, in its submissions, BCBCS suggested that it may be more efficient to await the Singaporean Court of Appeal's decision on the appeal against the SICC's Costs Decision before making a determination on the measure of costs in the Freezing Orders Proceedings. It submitted, in effect, that, if the Singaporean Court of Appeal overturned the SICC's Costs Decision, BCBCS may exercise its liberty pursuant to order 2 of my February Orders to ask the Court to reopen the costs order.

37 I accept that that possibility exists. However, I do not consider it would be more efficient to await the outcome of the appeal. The matter

¹⁷ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2023] SGCA(I) 1.

¹⁸ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2023] SGCA(I) 1 [66] - [67].

has already been delayed longer than anticipated. More importantly, the SICC's Costs Decision put Bayan's entitlement to costs beyond doubt, subject only to the prospect of that decision being overturned on appeal. In my view, Bayan is entitled to the fruits that follow that decision.

Legal principles¹⁹

38 The legal principles to be applied are well settled and were not in dispute.

39 The power to make special costs orders is contained in s 141 of the *Legal Profession Uniform Law Application Act 2022* (WA). This section replaced s 280(1) of the *Legal Profession Act 2008* (WA), but is relevantly identical. Accordingly, authorities which dealt with s 280(1) of the *Legal Profession Act* remain applicable.

40 Special costs orders may be made if a court or judicial officer is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter.

41 Special costs orders are as their name suggests - special. Generally, costs are to be taxed according to the applicable costs determination(s). It is only if specified conditions are met that a special costs order can be made.

42 The essential requirements of special costs orders were set out in *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 2]*²⁰ (citations omitted):

Before such a power will be exercised, the court must form an opinion that has two components. First, the court must form the view that the maximum amount allowable under the relevant scale item is inadequate in the sense that there is a fairly arguable case that the bill to be presented to the taxing officer may properly tax at an amount which is greater than the limit which would be imposed by the relevant cost determination. Secondly, the court must also form the opinion that the inadequacy of the costs allowable under a costs determination arises because of the 'unusual difficulty, complexity or importance of the matter'. Issues of the kind which arise are addressed as matters of impression, rather than as matters of detailed evaluation, precision or science.

¹⁹ Much of this section reproduces or draws upon what I have written in other judgments.

²⁰ *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 2]* [2017] WASCA 76 (S) (*Sino Iron [No 2]*) [12] - [15].

For the purposes of exercising the powers conferred by s 280(2) of the [*Legal Profession Act*], it will not ordinarily be necessary for the court to determine what amount should be allowed on taxation, but only whether there is a fairly arguable case that a greater amount should be allowed than that which is allowable under the relevant determination

...

A fairly arguable case to that effect will not be established merely because a party incurred greater costs than those allowable under the relevant determination. However, depending on the particular case and all the circumstances, the fact that a party has applied significantly greater legal resources to each step in the litigation than those for which allowance is made under items of the relevant determinations, when viewed in the context of the difficulty, complexity or importance of the matter, may sustain the conclusion that there is a fairly arguable case that each of the items identified is inadequate (and thereby the amount of costs allowable in respect of the matter is inadequate) because of the unusual difficulty, complexity or importance of the matter.

The word 'unusual' in s 280(2) of the [*Legal Profession Act*] qualifies only the 'difficulty' of the matter, and not its 'complexity' or 'importance'. The word 'unusual' in this context means unusual having regard to what one might describe as the usual run of civil cases determined in the court. That essentially involves the making of a value judgment by the court, having regard to the court's experience of the particular case when compared with the usual run of cases.

The application

43

Bayan seeks the following orders:

1. Taxation of costs payable pursuant to order 1 of the orders made on 2 February 2023 be undertaken:
 - (a) without reference to the limits provided for in Table B at clause 13 of the *Legal Practitioners (Supreme and District Courts) (Contentious Business) Determination 2020 (2020 Scale)*, clause 14 of the *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2018 (2018 Scale)*, clause 13 of the *Legal Profession (Supreme Court) (Contentious Business) Determination 2016 (2016 Scale)*, clause 10 of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2014 (2014 Scale)*, clause 9 of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination (2012 Scale)* and clause 11 of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination (2010 Scale)*;

- (b) without reference to the hourly rates and the daily rates provided for Practitioners (senior, junior and restricted), Clerks and Paralegals, Junior Counsel and Senior Counsel in Table A at clause 11 of the 2020 Scale, clause 12 of the 2018 Scale, clause 11 of the 2016 Scale, clause 8 of the 2014 Scale, clause 8 of the 2012 Scale and clause 10 of the 2010 Scale; and
 - (c) including reasonable allowances for work undertaken by Senior Counsel and Junior Counsel.
2. The Plaintiff pay the First Defendant's costs of the Chamber Summons dated 9 March 2022, to be taxed if not agreed.

44 The reason why Bayan refers to multiple costs determinations is because the proceedings have been on foot since 2012.

Analysis

An amount greater

45 Bayan relied on two affidavits in support of its application. The first was an affidavit of Scott Philip Crabb sworn 27 April 2022. Mr Crabb is a partner of Clayton Utz, the solicitors for Bayan. The second was an affidavit of Oliver Kar Heng Khaw affirmed 9 March 2022. Mr Khaw is the Head of Legal and Senior Foreign Counsel at Bayan.

46 Mr Crabb set out in his affidavit the various matters which he said contributed to the complexity of the Freezing Orders Proceedings.²¹

47 Mr Crabb further deposed that the manner in which the Freezing Orders Proceedings was run required Bayan's lawyers to perform unusually large volumes of work at very short notice. He said that the urgency initially arose from the ex parte nature of the originating motion filed in April 2012. He noted that BCBCS' subsequent Variation Application was accompanied by a certificate of urgency.²²

48 Mr Crabb also said that the Freezing Orders Proceedings were 'of the utmost importance to Bayan, as it concerned orders which restrained Bayan from effectively dealing with its only Australian asset'.²³

²¹ Affidavit of Scott Philip Crabb sworn 27 April 2022 (**Crabb Affidavit**) [25].

²² Crabb Affidavit [26].

²³ Crabb Affidavit [27].

49 Mr Crabb deposed as to the hourly rates of the legal practitioners involved in the proceedings, including counsel. Most charged more than the relevant hourly rates in the applicable scales.²⁴

50 Mr Crabb also included a draft bill of costs in his affidavit. Mr Crabb explained that the draft bill applied certain deductions to costs that related to both the Freezing Orders Proceedings and the Jurisdiction Proceedings, such as submissions that dealt with both proceedings and attendances at hearings.²⁵

51 Mr Crabb deposed that he believed that, if the limits were lifted, Bayan would recover special costs in excess of \$833,527.27, and explained why he held that belief.²⁶

52 It would be undesirable to require a party to produce more evidence than was necessary to enable the court to address the issues. This would inevitably involve extra, and self-evidently unnecessary, costs. It should be remembered that the reasonableness of costs actually to be awarded will always remain within the discretion of the taxing officer.²⁷

53 In my view, on the facts in this case, no more evidence is required before I could conclude that there is a fairly arguable case that Bayan's bill would properly tax at an amount that is greater than the total amount allowable if the applicable limits were not lifted.

Unusual difficulty, complexity or importance

54 Bayan submits that the Freezing Orders Proceedings were unusually difficult, and complex, and important.

55 BCBCS submits it was none of those things. BCBCS submits that any difficulty or complexity arose in the Jurisdiction Proceedings, not in the Freezing Orders Proceedings. BCBCS further submits that it does not follow that, simply because the orders froze the sole Australian asset of Bayan against which BCBCS could enforce a judgment of the Singaporean proceedings, the matter was important in the required sense.

²⁴ Crabb Affidavit [11] - [12], [19] and SPC-1.

²⁵ Crabb Affidavit [30].

²⁶ Crabb Affidavit [29] - [37].

²⁷ *Sino [No 2]* [11].

Unusual difficulty or complexity

56 The word 'unusual' in s 141 of the *Legal Profession Uniform Law Application Act* qualifies only the 'difficulty' of the matter, and not its 'complexity' or 'importance'.²⁸

57 In *Blatchford v Laine*,²⁹ Vaughan J³⁰ noted that the assessment of whether there is 'unusual difficulty, complexity or importance' is essentially a value judgment taking into account the court's experience of the usual run of civil cases.

58 In support of its contention that the proceedings were unusually difficult and complex, Bayan refers to the long duration of the proceedings, the costs it has incurred, the large number of lawyers who worked on the matter, and the involvement of experienced senior counsel. BCBCS accepts that each of those matters can be relevant to an assessment of complexity. However, it submits that 'caution should be exercised in placing much reliance on them, particularly in the present case'.³¹

59 BCBCS points out that the duration of the proceedings reflects the length of time it has taken for the Singapore Proceedings to be resolved. It points out that, although the Freezing Orders Proceedings have been on foot for 11 years, it has involved only five hearing days in that time. I accept that the lengthy duration needs to be viewed in that context.

60 BCBCS further submits that the large number of lawyers who have worked on the matter for Bayan, and the costs which have been incurred, do not demonstrate that the matter has been unusually difficult or complex. It submits that this is much more likely to reflect the fact that the matter is long-running. BCBCS also referred to Mr Crabb's evidence as to the need to apply certain deductions to costs that related to both the Freezing Orders Proceedings and the Jurisdiction Proceedings. BCBCS submits that the fact that Bayan is, as a result, only able to estimate its costs suggests that little weight should be placed on the estimate as a measure of the difficulty or complexity of the matter.

²⁸ *Sino Iron [No 2]* [16] in relation to s 280(2) of the *Legal Profession Act*.

²⁹ *Blatchford* [43].

³⁰ As his Honour then was.

³¹ Plaintiff's Outline of Submissions filed 27 February 2023 (**BCBCS' Submissions**) [14].

61 I accept that the duration of the matter is likely to have been the main contributor to the large number of lawyers who have worked on the matter. I accept that the duration is also likely to have significantly contributed to the costs which have been incurred. In addition, I accept that the fact that Bayan is only able to estimate its costs reduces the degree to which the costs are probative of the difficulty or complexity. Nevertheless, I consider that the estimate of the costs remains relevant to, and is of some weight in, the assessment of whether the amount of costs allowable under the scale limits is inadequate because of the difficulty or complexity of the matter.

62 BCBCS submits that 'the involvement of senior counsel does not demonstrate the novelty or complexity of the matter, particularly in the present case where it is likely that PT Bayan's decision to brief Mr Gleeson SC initially and then Mr Walker SC had more to do with PT Bayan's jurisdictional challenge'.³² I accept that the involvement of senior counsel does not of itself demonstrate complexity. I further accept that the Jurisdiction Proceedings were significantly more complex than the Freezing Orders Proceedings.

63 Bayan points out that BCBCS instructed Dr Bell SC, as his Honour then was, to make the initial ex parte application for the freezing orders. This was, self-evidently, before the jurisdictional issue was raised by Bayan. I accept that this suggests, at the very least, that BCBCS did not view the Freezing Orders Proceedings as routine.

64 Bayan further points out that the Freezing Orders Proceedings involved five special appointments and one civil trial.³³ Further, Le Miere J wrote three judgments (and Pritchard J delivered an ex parte judgment before Bayan became aware of the proceedings).

65 Bayan also relies upon the complexity of the Singapore Proceedings in justifying its assertion that the Freezing Orders Proceedings were unusually difficult and complex. This is because, in the Freezing Orders Proceedings, Bayan needed to decide whether to contest the continuation of the freezing orders on the basis that BCBCS did not have a 'good arguable case' in the Singapore Proceedings.³⁴ If it did not, the freezing orders would not have been continued.³⁵

³² BCBCS' Submissions [17].

³³ Crabb Affidavit [36].

³⁴ First Defendant's Outline of Submissions on Costs filed 13 February 2023 [19(c)].

³⁵ See *BCBC [No 3]* [5].

66 I accept that Bayan needed to decide whether to contest the continuation of the freezing orders on the basis that BCBCS did not have a 'good arguable case' in the Singapore Proceedings. However, I doubt that the inadequacy of the scale limits in the Freezing Orders Proceedings could be said to have been caused by any complexity in evaluating BCBCS' case in the Singapore Proceedings. Bayan filed a defence and counterclaim in the Singapore Proceedings on 22 February 2012.³⁶ It appears that the pleadings were further amended later in 2012.³⁷ Nevertheless, it is reasonable to infer that, when filing its original defence and counterclaim in the Singapore Proceedings, Bayan would have assessed the strength of BCBCS' case, at least as it stood at that time. This was before BCBCS filed its *ex parte* application, commencing the Freezing Orders Proceedings. Therefore, I would infer that, before the Freezing Orders Proceedings had even begun, Bayan had already evaluated the strength of BCBCS' case in the Singapore Proceedings.

67 It is unnecessary to consider this further. This is because I am satisfied that at least some aspects of the Freezing Orders Proceedings were complex.

68 In the 2018 Variation Application, one of the two bases upon which BCBCS alleged there had been a change in circumstances was the announced Scheme. BCBCS submitted that this increased the risk that the shares in KRL would diminish in value, leaving any judgment registered in this Court unsatisfied.

69 BCBCS filed 10 pages of submissions in support of its Variation Application. Bayan filed 17 pages and four affidavits. BCBCS filed seven pages of submissions in reply. One of Bayan's contentions was that Indonesian law provided safeguards against Bayan causing KRL to diminish the value of KRL's shares by giving financial benefits to Bayan to the detriment of KRL. Bayan adduced expert evidence as to those requirements under Indonesian law.³⁸

70 The oral hearing took half a day. Although Le Miere J's reasons were admirably succinct, this was more a reflection of his Honour's

³⁶ See *BCBC [No 3]* [12].

³⁷ See *BCBC [No 3]* [13], [74] - [88]. See also the affidavit of Ivan Maras filed 9 November 2012 [6]. This affidavit was not relied upon by the parties in relation to the Special Costs Application. However, as it ultimately does not affect the outcome, I considered it unnecessary to give the parties an opportunity to be heard on this point.

³⁸ This submission was ultimately not successful. His Honour found that there was some uncertainty as to the content, application and enforceability of those laws. His Honour further said that, in any event, there remained a material change of circumstances - see *BCBC [No 4]* [20].

skill than a reflection of the level of complexity. His Honour's decision was reported in the Australian Corporations & Securities Reports.

71 Following his Honour's decision, the parties were unable to agree the appropriate orders. A further hearing was held and the parties were directed to further confer and file brief further submissions. BCBCS filed a further six pages of submissions and Bayan a further five pages. His Honour Le Miere J again produced admirably succinct reasons. Nevertheless, the content of those reasons indicate that at least one of the issues involved some complexity. Of the six issues in dispute, one was whether the requirement to give notice should be subject to the exceptions in ch 2E of the *Corporations Act 2001* (Cth).

72 The court in *Sino Iron [No 2]*³⁹ said (citations omitted):

[T]he question of unusual difficulty, complexity or importance arises in respect of the proceedings as a whole and not in respect of each individual item in the relevant costs determination.

73 Considered as a whole, I am satisfied that the Freezing Orders Proceedings were complex.

74 In my view, there is a fairly arguable case that the amount of costs allowable is inadequate because of the complexity.

Importance

75 Cases in which importance has been found include cases which involve the risk of significant professional damage, test cases, or cases which involve enormous sums of money.

76 ***Heartlink Ltd v Jones as Liquidator of HL Diagnostics Pty Ltd (in liq)***⁴⁰ was a case in the first category, involving serious allegations against liquidators. In *Heartlink*,⁴¹ Martin CJ said that:

[B]y reference to 'importance' in this context, the legislature is allowing the court to have regard to the question of whether the work done was appropriate to the significance of the issue that arose in the litigation. Significance can arise either because of the significance of the issues to the parties or because of the significance of the issues to other prospective parties or to the public or to the community generally. In this case, the issues raised were of considerable significance to the

³⁹ *Sino Iron [No 2]* [16].

⁴⁰ *Heartlink Ltd v Jones as Liquidator of HL Diagnostics Pty Ltd (in liq)* [2007] WASC 254 (S).

⁴¹ *Heartlink* [19].

liquidators in the practice of their profession, and in respect of whom serious allegations were made.

77 This passage was endorsed by the Court of Appeal in *Sino Iron [No 2]*.⁴²

78 In *Blatchford v Laine*,⁴³ Vaughan J⁴⁴ commented on the passage as follows:

His Honour's formulation involves a qualitative evaluation as to the significance of the matter. It requires an assessment of the weight, seriousness and gravity of the issues and controversy before the court. Often the question of importance will be answered as a matter of impression informed by experience. Outside of those relatively rare cases involving matters of public importance - where 'importance' may well be obvious - the importance of the matter may be evident in the amount of the claim or the nature of the allegations that are being litigated.

79 It is plain from these authorities, and the context of s 141 and the *Legal Profession Uniform Law Application Act* as a whole, that a matter will not be 'important' in the required sense simply because a party considers it to be so. If it were otherwise, the test of importance would probably be satisfied in every litigated dispute.

80 Further, I consider that a matter will not be 'important' in the required sense simply because the amount of money involved is large. It would depend on the circumstances.

81 Bayan submits that the Freezing Orders Proceedings were plainly important to BCBCS. However, this would not necessarily demonstrate that they were important to *Bayan* in the sense required to justify a special costs order. Nevertheless, it is consistent with Bayan's contention that the inadequacy of the costs allowable under the costs determinations arises because of the importance of the matter.

82 Bayan further submits that the Freezing Orders Proceedings were important because the effect of the freezing orders was to freeze Bayan's sole Australian asset. BCBCS submits that this submission 'risks elevating any successful application for a freezing order - which necessarily will need to have demonstrated a danger that a prospective

⁴² *Sino Iron [No 2]* [15].

⁴³ *Blatchford* [88].

⁴⁴ As his Honour then was.

judgment will be wholly or partly unsatisfied - into an important matter for the purposes of special costs'.⁴⁵

83 I accept that the simple fact that assets are frozen, or indeed that all of a party's assets are frozen, could not of itself demonstrate the importance of the proceedings.

84 I further note that Bayan did not adduce any evidence in this application as to its overall asset position, against which the significance of its Australian assets could be evaluated.

85 Nevertheless, the effect of the freezing orders was to freeze Bayan's sole Australian asset. The value of the frozen property was, it seems, estimated to be \$52 million.⁴⁶ Having regard to this, combined with the engagement of eminent counsel and the amount of work performed in the proceedings, I am satisfied that the Freezing Orders Proceedings were important in the required sense.

86 In my view, there is a fairly arguable case that the amount of costs allowable is inadequate because of the importance.

Engagement of practitioners who charge above the scale rates

87 I further consider that, given the nature and importance of the Freezing Orders Proceedings, Bayan was justified in engaging counsel with greater experience and expertise in commercial litigation than in the usual run of civil cases. I consider that Bayan was justified in engaging solicitors who charged more than the scale rates.

Conclusion on application for special costs orders

88 I am satisfied that the inadequacy of the costs allowable under the applicable costs determinations arises because the proceedings were complex and important.

89 Having regard to the matters I have outlined above, I consider that it is appropriate to exercise my discretion to make the special costs orders.

Costs of the Special Costs Application chamber summons

90 BCBCS submits that, even if I make a special costs order, I should make no orders as to costs of the Special Costs Application

⁴⁵ BCBCS' Submissions [18].

⁴⁶ *BCBC [No 3]* [111].

chamber summons. BCBCS submits that the application was premature and resulted in unnecessary legal costs.⁴⁷

91 As noted earlier, Bayan filed the Special Costs Application on 9 March 2022. It became apparent that the parties disputed the proper construction of Le Miere J's orders. That is, they disagreed as to what was meant by 'costs in the cause of the [Singapore Proceedings]'. Bayan submitted that the relevant event was whether BCBCS succeeded in its claim for damages. BCBCS submitted that it would turn on the orders for costs in the Singapore Proceedings.

92 If Bayan's construction was correct, its Special Costs Application was not premature. Further, if its construction was reasonably arguable, it could not be said that the application should not have been made at that time.

93 I adjourned the Special Costs Application on case management grounds. I did not make a decision on the merits of the construction dispute, nor would it be appropriate to do so now.

94 In my view, Bayan should have its costs of the Special Costs Application.

Conclusion

95 For these reasons, I would make orders in terms of the minute of proposed orders filed by Bayan on 13 February 2023.⁴⁸

⁴⁷ BCBCS' Submissions [19] - [25].

⁴⁸ Titled simply 'Order'.

ARCHER J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

KH
Associate to the Honourable Justice Archer

12 APRIL 2023