FEDERAL COURT OF AUSTRALIA

Infrastructure Services Luxembourg S.à.r.l. v Kingdom of Spain (security for costs) [2024] FCA 234

File number:	NSD 602 of 2019
Judgment of:	**STEWART J**
Date of judgment:	13 March 2024
Catchwords:	**PUBLIC INTERNATIONAL LAW** – privileges of consular officials – *Vienna Convention on Consular Relations* – whether ordering foreign state to provide security for costs in its application to assert consular immunity would infringe on consular immunity **PRACTICE AND PROCEDURE** – security for costs – where application made for foreign state to provide security for costs in application by that state for the court to reconsider ex parte examination orders naming consular officers – power of the court to order security for costs – whether a party has a right to challenge orders made against it ex parte unfettered by the imposition of conditions such as provision of security for costs – exercise of discretion
Legislation:	*Consular Privileges and Immunities Act 1972* (Cth) s 5 *Federal Court of Australia Act 1976* (Cth) ss 53, 54, 56, 59(1) *Federal Court Rules 2011* (Cth) rr 19.01, 39.05(a), 41.01, 41.10(1), Sch 1 *Civil Procedure Act 2005* (NSW) s 108 *Uniform Civil Procedure Rules 2005* (NSW) r 38.02(3) *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967), Arts 40, 44
Cases cited:	*A1 for Maintenance Pty Ltd v Lehal Pty Ltd* [2018] FCA 1476 *Australian Federation of Islamic Councils Inc v Westpac Banking Corp* (1988) 17 NSWLR 623 *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* [1987] FCA 102; 16 FCR 497

	Cameron v Cole [1944] HCA 5; 68 CLR 571 *Commissioner of Taxation v Vasiliades* [2016] FCAFC 170; 344 ALR 558 *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157; 142 ACSR 616 *Fiorentino v Irons* [1997] FCA 1425; 79 FCR 327 *Juan Ysmael & Co Inc v Government of the Republic of Indonesia* [1955] AC 72 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 2)* [2021] FCAFC 28; 388 ALR 315 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 112; 392 ALR 443 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3; 284 FCR 319 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11; 275 CLR 292 *Lal v Minister for Immigration and Border Protection (No 2)* [2014] FCA 892 *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1 *Otsuka Pharmaceutical Co Ltd v Generic Health Pty Ltd* [2019] FCA 230; 140 IPR 109 *Savcor Pty Ltd v Cathodic Protection International APS* [2005] VSCA 213; 12 VR 639 *Shearson Lehman Brothers Inc v MacLaine Watson & Co Ltd (No 2)* [1988] 1 WLR 16
	Davies, M et al *Nygh's Conflict of Laws in Australia* (10th ed., LexisNexis Butterworths, 2020)
Division:	General Division
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Sub-area:	Commercial Arbitration
Number of paragraphs:	57
Date of hearing:	23 February 2024
Counsel for the Applicants:	O Jones
Solicitor for the Applicants:	Norton Rose Fulbright
Counsel for the Respondent:	P F Santucci and S J Hoare

Solicitor for the Respondent: K&L Gates

ORDERS

NSD 602 of 2019

BETWEEN:	**INFRASTRUCTURE SERVICES LUXEMBOURG S.A.R.L** First Applicant
	ENERGIA TERMOSOLAR B.V. Second Applicant
AND:	**KINGDOM OF SPAIN** Respondent

ORDER MADE BY: **STEWART J**

DATE OF ORDER: **13 MARCH 2024**

THE COURT ORDERS THAT:

1. The respondent provide security for the applicants' costs in the respondent's interlocutory application filed on 11 September 2023 in relation to the examination orders addressed to Ana Raquel Garcia Rubio and to Belèn Figuerola Santos dated 29 June 2023 (**Reconsideration Application**) in the amount of AU$56,000.
2. The security be provided by payment of cleared funds into Court within 31 days.
3. The Reconsideration Application be stayed until the security is provided in accordance with Order 2.
4. If the security is not provided in accordance with Order 2, then pursuant to r 5.21(a) of the *Federal Court Rules 2011*, the Reconsideration Application be ipso facto dismissed.
5. The applicants have liberty to apply on at least two business days' notice for a declaration to the effect that the Reconsideration Application has been dismissed by operation of Order 4.
6. The applicants have liberty to apply for further or other security for their costs in the Reconsideration Application.
7. The costs of the applicants' security for costs application be the applicants' costs in the cause in the Reconsideration Application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

Introduction and background

1 This case raises the question whether a foreign state, namely the Kingdom of Spain, which is the respondent in the proceeding should be ordered to pay security for the costs of an interlocutory application brought by it to set aside ex parte orders on the basis that they infringe consular immunity. The relevant background is a little involved.

2 In February 2020, in recognising and enforcing an arbitration award made under the auspices of the International Centre for the Settlement of Investment Disputes, I ordered that Spain pay the applicants, Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar BV, the sums of €101,000,000, US$635,431.70 and £2,447,008.61 plus interest and costs: *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157; 142 ACSR 616. The central issue of contention was whether Spain enjoyed foreign state immunity in the proceeding. I held that it did not.

3 In February 2021, that holding was upheld on appeal by the Full Court which, in June 2021, varied the orders that I had made and entered judgment against Spain in the amounts already referred to plus interest and costs: *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3; 284 FCR 319, *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 2)* [2021] FCAFC 28; 388 ALR 315 and *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 112; 392 ALR 443.

4 The appeal by Spain to the High Court of Australia was dismissed with costs in April 2023: *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11; 275 CLR 292.

5 The result is that since June 2021, Spain has been a judgment debtor in this proceeding in a very substantial sum (currently about €125 million which amounts to more than $200 million), and since April 2023 it has had no further possibility of recourse against the judgment, all avenues having been exhausted. Spain, which doubtless has the resources to pay, has nevertheless failed to pay any part of the judgment or the successive costs orders at three levels of the court hierarchy. Its refusal, or failure, to pay the judgment arises from peculiarities of

the law of the European Union, but that does not detract in any way from its obligation to pay the judgment in Australia.

6 Frustrated by that state of affairs, the applicants filed a request for enforcement of the judgment in June 2023. The enforcement orders that were sought cover several avenues of enforcement including, relevantly, orders for the examination of named consular officers of Spain in Australia for the purpose of identifying what assets Spain has in Australia against which execution might be pursued for the purpose of satisfying the judgment.

7 On 28 June 2023, a Judicial Registrar of the Court made examination orders against Belèn Figuerola Santos and Ana Raquel Garcia Rubio requiring them to attend court and be examined on specified dates and to produce specified documents. Both Ms Santos and Ms Rubio are accredited consular officers at the Consulate-General of Spain in New South Wales.

8 By interlocutory application filed on 11 September 2023, Spain applied for reconsideration of the examination orders and for orders setting them aside or, in the alternative, excusing the examinees from attendance. Two bases for that relief are asserted.

9 First, it is contended that the Court has no power to issue the examination orders to the consular officers because they are not persons bound by the judgment. The foundation to that contention is that s 53 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) provides that a person in whose favour a judgment of the Court is given is entitled to the same remedies for enforcement of the judgment in a State or Territory, by execution or otherwise, as are allowed in like cases by the laws of that State or Territory. Relevantly, s 108 of the *Civil Procedure Act 2005* (NSW) provides that the court may make an order requiring "a person bound by a judgment or order" to be orally examined as to any material question or to produce any document that relates to a material question.

10 Secondly, it is contended that requiring the consular officers to answer any relevant question or to produce any relevant document would infringe on the privileges and immunities conferred by the *Consular Privileges and Immunities Act 1972* (Cth). Section 5 of that Act gives the force of Commonwealth law to relevant Articles of the *Vienna Convention on Consular Relations* (**VCCR**).

11 In response to Spain's reconsideration application, the applicants filed an interlocutory application seeking security for their costs in opposing the reconsideration application. The

security for costs application is what is immediately before the Court for decision. In the meanwhile, the date for the examinees to attend under the examination orders has been put off.

The central issues

12 Given that Spain is the applicants' judgment debtor, has refused to pay the judgment, disputes that it has any assets in Australia that may be susceptible to execution (or, at least, it has failed to identify any such assets), and has failed to give any undertaking that it would pay any costs order against it, it might be thought that the case for it to pay security for costs is particularly strong. That is on the basis that there is a well-grounded fear that Spain will not pay any costs order made against it in its reconsideration application to set aside the examination orders.

13 Against that case, Spain advances a number of arguments. Mr Santucci, with whom Mr Hoare appears for Spain, helpfully marshalled the arguments as follows:

(1) Whether the Court had the power to, and ought to have, issued the examination orders (ie Spain's reconsideration application) must be (in the sense of "has to be") addressed without imposing security for costs as a condition. That is because:

  (a) Being affected by orders made ex parte, Spain has an unconditional right to seek to set aside the orders; and, independently,

  (b) To require security for costs from Spain would be to impermissibly impose conditions on its ability to assert its consular privileges and immunities – the requirements imposed on the Court by both the Parliament and public international law to respect and uphold those privileges and immunities are unconditional and absolute.

(2) Even if the Court could impose the provision of security for costs as a condition of Spain challenging the examination orders, the Court should exercise its discretion against requiring security. The following are said to be the principal considerations that weigh against the exercise of the discretion against Spain:

  (a) Spain, in seeking to set aside ex parte orders made against its consular officers, is in substance in the position of a defendant.

  (b) To require security would be to impose conditions on Spain's unconditional entitlement to seek to set aside the ex parte orders and to assert its consular privileges and immunities (as argued in (1) above).

(c) Spain has a strong case in its interlocutory application to set aside the examination orders.

(d) Although consideration of Spain's case to set aside the ex parte orders and to assert its consular privileges and immunities does not require a final determination at this stage, it is a central feature of the factual circumstances relevant to the exercise of the Court's discretion.

(e) As a practical matter, the costs of the applicants marshalling the arguments and evidence to justify their application for the examination orders notwithstanding Spain's consular privileges and immunities are costs that they have (or ought to have) already incurred.

14 Spain's argument identified at (2)(e) above is also advanced as an argument against the amount of security sought by the applicants, in the event that I get to that point.

The power to order security for costs

15 The Court's power to order security for costs is found in s 56 of the FCA Act. Subsection (1) provides that the Court may order "an applicant in a proceeding in the Court, or an appellant in an appeal", to give security for the payment of costs that may be awarded against them. That power is given further expression in r 19.01 of the *Federal Court **Rules** 2011* (Cth). Subrule (1) provides that a "respondent" may apply to the Court for an order that "an applicant" give security for costs. Subrule (4) defines applicant to include a cross-claimant and respondent to include a cross-respondent.

16 "Proceeding" is defined in s 4 of the FCA Act as meaning a proceeding in a court, whether between parties or not, and including "an incidental proceeding in the course of, or in connexion with, a proceeding". That is "a very wide definition indeed": *Fiorentino v Irons* [1997] FCA 1425; 79 FCR 327 at 330 per Foster J. There can be little doubt that Spain's interlocutory application filed in the primary proceeding constitutes an "incidental proceeding" for the purposes of s 4 of the FCA Act: *Otsuka Pharmaceutical Co Ltd v Generic Health Pty Ltd* [2019] FCA 230; 140 IPR 109 at [29] per Yates J.

17 Spain is the applicant in its reconsideration application, and it claims relief in that application which is a proceeding within the definition. Spain is therefore a party within the meaning of "applicant" as used in s 56.

18 In the circumstances, I am satisfied that s 56 of the FCA Act provides the power to order Spain to provide security for costs in the reconsideration application. Although Mr Jones, who appears for the applicants, refers to the definition of "applicant" in the dictionary in Sch 1 to the Rules as including a party "claiming relief", I prefer not to rely on that definition because the Rules cannot enlarge the power with respect to security for costs beyond the power conferred by s 56 of the FCA Act. That is because s 59(1) of the FCA Act empowers the making of rules "not inconsistent with" the Act: *Commissioner of Taxation v* ***Vasiliades*** [2016] FCAFC 170; 344 ALR 558 at [64] per Kenny and Edelman JJ.

19 I note that it may be that, aside from s 56 of the FCA Act, the Court has the power to order security for costs arising from its inherent or implied power to ensure that proceedings before the Court are conducted justly and efficiently: *Vasiliades* at [65] and [69]-[70]. However, given my conclusion in relation to s 56 it is not necessary to consider that matter any further.

The exercise of the power to order security for costs

20 A number of relevant principles can be identified in the majority judgment in *Vasiliades*:

(1) The discretion conferred by s 56 is a broad one, subject only to the limitation that it must be exercised judicially; it has been described as an unfettered discretion the exercise of which depends on the particular circumstances of the case (at [71]).

(2) The discretion is not cut down or necessarily limited by the fact that the person bringing the proceeding is in substance a defendant; the justice of the case must be kept in mind in any exercise of the discretion (at [81]-[86]).

(3) There is no rule that a court will not order a person who is in substance a defendant to provide security for costs (at [88]).

(4) In the exercise of the discretion, a multifactorial approach should be adopted where the significance of any particular factor will depend not only upon its own intrinsic persuasiveness but on the other circumstances of the case (at [90]-[91]).

(5) Fairness lies at the heart of the exercise of the discretion, both as to whether security should be ordered and also in what amount (at [90] citing *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1 at [92] per Allsop CJ and Middleton J).

21 With that background, each of Spain's arguments can be considered.

No condition to the reconsideration of an ex parte order?

22 Mr Santucci refers to *Cameron v Cole* [1944] HCA 5; 68 CLR 571 at 589 where Rich J said that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting their case – the person affected is entitled, "ex debito justitiae", to have any determination which affects them set aside. It was held in *Savcor Pty Ltd v Cathodic Protection International APS* [2005] VSCA 213; 12 VR 639 at [20]-[21] by Gillard AJA, Ormiston and Buchanan JJA agreeing, that when an order is made ex parte without notice, the affected party has a right to approach the court and have the application reheard; it amounts to a rehearing of the application but with the benefit of submissions and any material the affected party wishes to place before the court.

23 The principle is reflected in r 39.05(a) of the Rules which provides that the Court may vary or set aside a judgment or order after it has been entered if it was made in the absence of the party.

24 Spain's submission, however, goes further than the authorities. It is that the right to have an ex parte order revisited cannot be made conditional, or in any event it cannot be made conditional on providing security for costs.

25 Courts regularly place conditions on parties applying for ex parte orders to be reconsidered, such as that any such application be made on minimum notice being given and on an address for service being filed. I accept, as submitted by Mr Santucci, that those types of conditions are merely facilitative of the rehearing, and they therefore stand to be regarded as different from a requirement to put up security. Another typical condition is that any reconsideration application be brought within a specified time period. Such a condition is not facilitative of the rehearing, but is rather in aid of finality.

26 Mr Jones refers to *Lal v Minister for Immigration and Border Protection (No 2)* [2014] FCA 892 at [9] per White J as authority for the proposition that parties seeking the exercise of the discretion to set aside orders made in their absence will usually have to provide a proper explanation for that absence, and show that they have a case which is reasonably arguable. On that basis he submits that it is not correct that a party against whom an order is made in their absence has an unconditional right to the reconsideration of the order.

27 I do not think that that line of authority assists in resolving the present issue. First, it deals with orders made in a party's absence in the sense of the orders being made in default of appearance, rather than in circumstances where, quite deliberately and with justification, no notice of the

hearing for the orders was given. Secondly, it can be accepted that once orders are reconsidered there will have to be some reason for a different conclusion to be reached before they are set aside, but that comes only at the stage of reconsideration not before that stage. Spain's argument is that there can be no condition to the exercise of reconsideration, not that once that exercise is embarked on there need be no reason to set orders aside.

28 It is relevant to the context that r 41.01 provides that a party or an interested person may, without notice, apply to the Court for directions about the enforcement or execution of an order. Also, by r 41.10(1) the *Uniform Civil Procedure Rules 2005* (NSW) (***UCPR***) apply to the enforcement of the judgment. UCPR r 38.02(3) provides that an application for an order for examination with respect to the enforcement of a judgment or order, which is the application that the applicants made to obtain the examination orders, need not be served on the person bound by the judgment or order. The point is that there was nothing irregular in the applicants applying for the examination orders ex parte; the procedure contemplated by the rules is that a judgment creditor can apply for orders ex parte. That reversal of the general position is no doubt in recognition that the judgment creditor has a judgment in its favour that should have been paid; it would have no need to make any applications in relation to the enforcement of the judgment if the judgment debtor had done what it should have done and paid the judgment.

29 In the circumstances, I do not consider that there is any rule against ordering that security for costs be provided before a party can exercise its right to have ex parte enforcement orders reconsidered. Once the court is satisfied that there is reason to believe that the judgment debtor will be unable to, or will not, pay a costs order against it if so ordered (which in the case of an unpaid judgment may be regarded as axiomatic), whether or not security should be required is a matter of discretion. I will return to the exercise of that discretion where the fact of the orders having been made ex parte, and Spain's right to have them reconsidered, will be important considerations. Also, if it were shown that the judgment debtor against whom ex parte orders were made would likely not be able to provide the security that might otherwise be ordered, and for that reason may be denied its right to have the ex parte orders reconsidered, that may weigh particularly heavily against requiring security. But that is not this case – there is no suggestion that Spain could not or even would not provide the modest security that is sought.

The role of consular immunities and privileges

30 Article 40 of the VCCR provides that "[t]he receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom

or dignity". As mentioned, the VCCR has the force of law in Australia. Spain submits that Australia's duty to prevent any attack on the dignity of Spain's consular officers imposes a positive duty on the Court to respect and apply the consular privileges and immunities that Spain asserts in its reconsideration application. It says that requiring Spain to provide security for costs in order for the reconsideration application to be heard would be contrary to the Court's positive duty to respect and apply those substantive consular privileges and immunities.

31 It is hard to see why that is correct. Spain is able to make its reconsideration application and assert reliance on consular immunities and privileges. The ability to do so is not meaningfully compromised in any way by requiring security for costs given that Spain is able to provide that security.

32 Spain relies on Davies, M et al *Nygh's Conflict of Laws in Australia* (10th ed., LexisNexis Butterworths, 2020) at [10.65] where it is said that the court must stay an action as soon as it perceives that a diplomat, consular official or other person entitled to immunity has been impleaded unless it is satisfied that the transaction concerned is excluded from immunity. *Australian Federation of* ***Islamic Councils*** *Inc v Westpac Banking Corp* (1988) 17 NSWLR 623 is cited as authority for that proposition.

33 In the *Islamic Councils* case, the plaintiff sought payment of deposited funds from Westpac, but Westpac contended that the Saudi Arabian ambassador to Australia was a necessary party because he was a necessary signatory to the relevant account. Justice Cole held that the ambassador was a necessary party, but he could not be made a party in the case, ie he could not be impleaded, because in conducting the transactions with Westpac and the Council he was acting in his official capacity and therefore enjoyed jurisdictional immunity under the *Diplomatic Privileges and Immunities Act 1967* (Cth) which gave the force of law in Australia to the V*ienna Convention on Diplomatic Relations* (**VCDR**). It was in that context that his Honour said (at 630), in obiter, that there was a triable issue as to whether immunity attaches, ie the Court was satisfied that conflicting rights had to be decided in relation to the foreign government's claim, and, that point having been reached, the court must decline to decide the rights and must stay the action.

34 His Honour cited ***Juan Ysmael*** *& Co Inc v Government of the Republic of Indonesia* [1955] AC 72 in support of that principle. Earl Jowitt, in giving the decision of the Privy Council in an appeal from Hong Kong, stated (at 86) that the rule according to a foreign sovereign government immunity against being sued is that it is beneath the dignity of a foreign sovereign

government to submit to the jurisdiction of an alien court, and that no government should be faced with the alternative of either submitting to such indignity or losing its property. His Lordship explained (at 89-90) that a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim, and when the court reaches that point it must decline to decide the rights and must stay the action. That statement of the principle was approved by the House of Lords in *Shearson Lehman Brothers Inc v MacLaine Watson & Co Ltd (No 2)* [1988] 1 WLR 16 at 29-30.

35 In my view, that principle is inapplicable in the present case.

36 First, the principle is applicable to jurisdictional immunity which does not arise in the present case. The privilege that is claimed is with reference to VCCR Art 44(3) which provides that members of a consular post are under no obligation to give evidence "concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto". However, VCCR Art 44(1) provides that members of a consular post may be called upon to attend as witnesses in the course of judicial proceedings. Thus, the consular officers can be compelled to attend to be asked questions, and once questions are asked they can, in relation to any particular question, claim Art 44(3) privilege. The same is true of any documents that they are compelled to produce – at the time of production they can claim the privilege. That privilege is materially different from jurisdictional immunity which operates at a prior stage; it protects against even being impleaded.

37 Secondly, the principle expressed in the authorities referred to is necessarily confined to cases where the determination of the claim to immunity will itself determine the issue in respect of which immunity is claimed. There is no triable issue in relation to immunity (or even privilege), the determination of which would decide the very issue in respect of which immunity (or privilege) is claimed. That point may arise when questions are asked, or documents are required to be produced, but that point has not yet been reached.

38 In short, any order requiring Spain to furnish security for the applicants' costs will not infringe against the privilege that is claimed. For that reason, there is no obligation to stay the security for costs application in order to avoid infringing against the privilege.

The exercise of the discretion

39 As identified above, fairness lies at the heart of the exercise of the discretion.

40 The strongest factor weighing in favour of requiring Spain to furnish security for costs is that it is a judgment debtor which has no possible further recourse against the judgment, it has firmly indicated its intention not to pay the judgment, it has not secured the judgment, it has not said that it will pay the costs previously awarded against it, and it has not said that it will pay any costs awarded against it in its reconsideration application. On any view, it is a recalcitrant judgment debtor in this proceeding. It deserves no sympathy.

41 As against that, there are the following considerations.

42 First, Spain is in a limited sense not the principal moving party in the proceeding – it is responding to the examination orders that were obtained against it ex parte. That carries some weight because, considered in isolation, there is some unfairness in requiring a party in that position to have to put up security. The authorities recognise as much.

43 Secondly, the examination orders were made ex parte with the result that to require security for costs from Spain would be to impose on Spain a condition on the exercise of Spain's right to have the orders reconsidered. That too can be seen to cause some unfairness.

44 Spain also contends that it has strong prospects of success in its reconsideration application. In my assessment, that is not a conclusion that can readily be reached at this stage. There are arguments of some complexity and nuance both ways. All that I am able to say at this stage is that the reconsideration application is both seriously brought and seriously resisted. It is not productive or efficient to have a dry run on the merits in order to form near-concluded views on the ultimate question in respect of the determination of which security for costs is sought. See *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* [1987] FCA 102; 16 FCR 497 at 514 per French J; *A1 for Maintenance Pty Ltd v Lehal Pty Ltd* [2018] FCA 1476 at [38] per Colvin J.

45 I do not accept Spain's submission that the applicants should have already incurred the relevant costs in their preparation for obtaining the ex parte orders. That submission is unrealistic; it has no proper regard to how things work in reality. Spain has made a substantial case against the examination orders. It is deserving of a substantial response that goes well beyond what the applicants could reasonably have been required to prepare in seeking the examination orders in the first place or in pressing the security for costs application.

46 When I weigh the various considerations, and in particular search for the fairest result, I inevitably reach the conclusion that Spain must furnish security for a possible costs award against it in due course. Where, as here, post-judgment enforcement procedures are pursued bona fide, the judgment debtor wishes to oppose them on at least an arguable basis, and requiring security from the judgment debtor will not stifle such opposition, the case for security for costs is overwhelming. One might ask rhetorically, why should the judgment creditor have to pursue enforcement procedures against the judgment debtor's opposition at risk of not being able to recover its costs in so doing even if it is successful in defeating that opposition? Has it not suffered enough by not being paid what successive courts have found is its due? Spain's status in this proceeding as a recalcitrant judgment debtor ultimately counts decisively against it.

47 In the circumstances, Spain must furnish security.

The amount of security

48 The amount of security sought by the applicants is $56,163.66 – an unnecessarily specific amount that I intend rounding-off at $56,000.

49 The applicants arrive at that amount through the testimony of their solicitor, Jack Pembroke-Birss, a partner at Norton Rose Fulbright Australia (**NRF**). Mr Pembroke-Birss was admitted as a solicitor in New South Wales in 2006. Since then, he has specialised in commercial litigation and, as one would expect, he has been extensively involved in conducting litigation on a day-to-day basis including in large and complex proceedings. In short, he has relevant experience that should enable him to fairly estimate the work required in the reconsideration application and the likely recoverable costs.

50 Mr Pembroke-Birss identifies that the work in the reconsideration application is likely to be conducted by four people, namely junior counsel, a partner at NRF, a senior associate at NRF and an associate at NRF. He identifies their respective charge out rates, and he then estimates how many hours each of them is likely to work on the matter with reference to what each is likely to do. NRF charges the applicants for the work done by it in United States dollars, whereas junior counsel charges in Australian dollars.

51 Next, Mr Pembroke-Birss calculates the total amounts likely to be charged by junior counsel and by NRF, and he then discounts the former by 10% and the latter by 30%. He explains that from his experience he considers that those discount rates reflect the proportion of those fees

that would be recoverable if the costs were taxed as between party and party. He then applies a third party, apparently reasonable, exchange-rate to convert the NRF fees from United States dollars to Australian dollars. The relevant calculation then arrives at the figure of $56,000 rounded off as explained.

52 Spain has not put on any evidence challenging Mr Pembroke-Birss's approach, and he was quite properly not required for cross-examination. Rather, Spain makes the following submissions in support of the ultimate conclusion that it impresses on the court, namely that the quantum of security should be nil:

(1) The applicants have already invested time considering the substance of the reconsideration application which means they are already prepared to meet it, inconsistently with the premise of their application for security being that they need to prepare.

(2) The applicants should have been prepared, at the ex parte stage, to make submissions as to the court's power to make the examination orders and on the operation of consular immunities and privileges. That is to say, the applicants should always have been expected to bear the costs and associated risk of adverse costs, and they ought already to have expended such costs.

(3) No amount of security for costs should be awarded where the applicants have had their opportunity to attempt to justify the examination orders and to respond to Spain's assertion of consular immunities as points of principle and without the need for any evidence or any further costs.

53 None of those submissions impresses me. The reconsideration application has not been substantively dealt with, either in evidence or submissions. It has been dealt with at a level appropriate to a security for costs application. Also, the proposition that a party's preparation for an ex parte application should put the party in a position to deal with a reconsideration application without any additional work and preparation is, as I have observed, untethered to any experience of the real world.

54 I am left with no telling challenge to Mr Pembroke-Birss's costs estimate. It seems to me to be reasonable, and even conservative given the nature of the issues at stake.

55 In the circumstances, Spain should furnish security for costs in the sum of $56,000.

56 Spain asked that, in that event, it be given 31 days rather than the applicants' proposed 21 days to furnish the security, which the applicants accepted. Spain did not cavil with the order sought by the applicants that the security be provided in the form of payment into court. I will accordingly make such an order.

57 Although the applicants have sought an order for the costs of their application for security for costs, it seems to me that the most appropriate order is that those costs be the applicants' costs in the cause in the reconsideration application. That would mean that the security furnished by Spain would also serve as security for those costs in the event that the applicants are awarded costs in the reconsideration application. Making the costs the applicants' costs in the cause of the reconsideration application rather than merely costs in the cause, means that even if Spain is successful in the reconsideration application it will not get the costs of the security for costs application, which fairly reflects the result in the security for costs application. Further, a costs order in the applicants' favour in the security for costs application would be essentially meaningless given the huge sum of money that Spain already owes the applicants which it is refusing to pay and which is unsecured.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 13 March 2024