FEDERAL COURT OF AUSTRALIA

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (Security for Costs) [2024] FCAFC 113

Appeal from:	*Infrastructure Services Luxembourg S.à.r.l. v Kingdom of Spain (security for costs)* [2024] FCA 234
File number:	NSD 367 of 2024
Judgment of:	**PERRAM, DERRINGTON AND FEUTRILL JJ**
Date of judgment:	29 August 2024
Date of publication of reasons:	2 September 2024
Catchwords:	**PRACTICE AND PROCEDURE** – application for security for costs against foreign state – where security sought in relation to application to set aside examination orders – whether set aside application made under s 35A(5) of *Federal Court of Australia Act 1976* (Cth) or r 39.05 of *Federal Court Rules 2011* (Cth)
Legislation:	*Consular Privileges and Immunities Act 1972* (Cth) s 5 *Federal Court of Australia Act 1976* (Cth) s 35A *Federal Court Rules 2011* (Cth) rr 1.34, 3.11, 39.05, 41.10 *Uniform Civil Procedure Rules 2005* (NSW) r 38.2 *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:	*Bechara v Bates* [2021] FCAFC 34; 286 FCR 166 *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157 *Harris v Calladine* (1991) 172 CLR 84 *House v The King* (1936) 55 CLR 499 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 112; 284 FCR 319 *Kingdom of Spain v Infrastructure Services Luxembourg sarl* [2023] HCA 11; 275 CLR 292
Division:	General Division
Registry:	New South Wales

National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Number of paragraphs:	30
Date of hearing:	29 August 2024
Counsel for the Applicant:	Mr S Robertson SC with Mr P Santucci
Solicitor for the Applicant:	K&L Gates
Counsel for the Respondents:	Mr O Jones with Mr M Taylor
Solicitor for the Respondents:	Norton Rose Fulbright

ORDERS

NSD 367 of 2024

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

ORDER MADE BY:	**PERRAM, DERRINGTON AND FEUTRILL JJ**
DATE OF ORDER:	**29 AUGUST 2024**

THE COURT ORDERS THAT:

1. The application for leave to appeal be dismissed.

2. The Applicant pay the Respondents' costs.

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

REASONS FOR JUDGMENT

PERRAM J:

1 The Court made orders dismissing this application for leave to appeal on 29 August 2024. These are my reasons for taking that course.

2 The question which arises is whether the Kingdom of Spain should be ordered to pay security for costs in relation to its application to set aside examination orders made by a Registrar of this Court. Those orders were issued to two accredited consular officials of Spain's Sydney consulate, Ms Ana Raquel Garcia Rubio and Ms Belèn Figuerola Santos.

3 The examination orders were made on the application of the present Respondents, Infrastructure Services Luxembourg S.à.r.l. and Energia Termosola B.V., whom it is convenient to refer to as 'the Investors'. The orders require the consular officials to present themselves to this Court at Queens Square in Sydney for the purposes of producing documents and of being examined. The documents sought relate to bank accounts held by Spain, the names of debtors owing money to Spain and other assets which Spain might have within the jurisdiction. The terms of the examination orders show that the questions which the Investors would seek to ask the consular officials also relate to these matters. Each of the examination orders is endorsed with a warning that if it is disobeyed then the examinee may be arrested.

4 The three proposed grounds of appeal as finally pursued were annexed to Spain's written submissions in chief.

Proposed Ground 1: s 35A(5) of the *Federal Court of Australia Act 1976* (Cth)

5 The examination orders were issued at the instance of the Investors as part of their efforts to enforce a judgment they have obtained against Spain in this Court. That judgment is for a sum now in excess of €125 million (i.e., more than AUD$200 million). Spain has refused to pay the judgment sum. It also did not accept, until 26 August 2024, that it was liable to pay three sets of costs orders made in favour of the Investors and against Spain in the course of securing the judgment by a judge of this Court (*Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157), by the Full Court (*Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 112; 284 FCR 319) and by the High Court (*Kingdom of Spain v Infrastructure Services Luxembourg sàrl* [2023] HCA 11; 275 CLR 292).

6 This posture of resistance led the learned primary judge to conclude that there was good reason to believe that Spain would not pay the costs of its application to set aside the Registrar's orders in the event that the application was unsuccessful ('On any view, it is a recalcitrant judgment debtor in this proceeding': [40]). In this Court Spain submitted that it was not permitted to pay the judgment sum as this would be unlawful under the law of the European Union. Assuming for the sake of argument that this contention is correct, it nevertheless leaves in place the basic point made by the learned primary judge that Spain is not going to pay the judgment debt. Moreover, it does not explain why Spain is not paying the costs orders, which it did not submit would be contrary to the law of the European Union. On the hearing of the application for leave to appeal, Mr Robertson of senior counsel who, with Mr Santucci of counsel, appeared for Spain, tendered a letter dated 26 August 2024 which became Exhibit 1. This letter shows that Spain does not regard itself as prohibited by European law from paying the costs orders. Until 26 August 2024 Spain has never before indicated that it intended to meet the costs orders. Whilst it is true that the costs orders have not yet been assessed or taxed, Spain has not until 26 August 2024 indicated that it had accepted any liability to pay the costs orders. This is because the Investors' letters inquiring about the costs orders went unanswered.

7 Whilst it is now apparent that Spain intends to pay the costs orders, the learned primary judge was correct to proceed on the basis that Spain would not meet any costs order made against it if its application to set aside the examination orders was unsuccessful. The material before his Honour justified no other conclusion.

8 Spain's refusal to pay the judgment debt has provoked the Investors into seeking to ascertain what assets Spain has within the territorial confines of the Commonwealth so that they may consider enforcing the judgment by execution. On 6 June 2023 they filed a Request for Enforcement which sought, inter alia, the issue of the examination orders to the two consular officials. By r 41.10(1) of the *Federal Court Rules 2011* (Cth) ('FCR'), the procedure governing the enforcement of judgments of this Court is provided by the procedure of the Supreme Court of the State in which the judgment was given (in this case, New South Wales). In New South Wales the enforcement of judgments of the Supreme Court is regulated by the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR'). By UCPR r 38.2 an application for an order for examination with respect to the enforcement of a judgment or order need not be served on the person bound by the judgment or order. Acting in conformity with r 38.2, the Investors did not serve Spain with the application for the examination orders. On 28 June 2023, the Registrar made the examination orders sought by the Investors.

9 Nearly two months later, on 11 September 2023, Spain filed an interlocutory application seeking to set aside the Registrar's orders of 28 June 2023 or to excuse compliance with them. The orders sought by that application were as follows:

> 1. The Examination Order addressed to Ana Raquel Garcia Rubio dated 29 June 2023 be set aside.
>
> 2. In the alternative to order 1, Ana Raquel Garcia Rubio be formally excused from compliance with the Examination Order addressed to her and dated 29 June 2023.
>
> 3. The Examination Order addressed to Belen Figuerola Santos dated 29 June 2023 be set aside.
>
> 4. In the alternative to order 3, Belen Figuerola Santos be formally excused from compliance with the Examination Order addressed to her and dated 29 June 2023.
>
> 5. Costs.
>
> 6. Such further or other orders as the Court deems fit.

10 The precise legal nature of this application is of central importance to the issues between the parties. In this Court, Spain submits that the application was an application made pursuant to s 35A(5) of the *Federal Court of Australia Act 1976* (Cth) to review the orders made by the Registrar. This provision permitted Spain to apply to the Court for a review of the Registrar's orders:

> A party to proceedings in which a Registrar has exercised any of the powers of the Court under subsection (1) may, within the time prescribed by the Rules of Court, or within any further time allowed in accordance with the Rules of Court, apply to the Court to review that exercise of power.

11 There is no dispute that the power exercised by the Registrar was one which had been authorised by subsection (1). The question is whether Spain applied under s 35A(5). In terms, its interlocutory application did not seek a review of the orders but rather sought to set them aside. An application for a review under s 35A(5) must be made within 21 days of the exercise of power, in this case, within 21 days of 28 June 2023: FCR r 3.11. Thus, the application was required to be made by 19 July 2023. The application made on 11 September 2023 to set aside the Registrar's orders was therefore significantly out of time if it was, in fact, an application for a review under s 35A(5). Before the learned primary judge, Spain did not submit that its application was, in fact, an application made under s 35A(5) and it did not apply under FCR r 1.34 to dispense with the 21 day time limit in r 3.11. Consequently, the learned primary judge neither considered the question of security for costs on the basis that Spain's application had

been made under s 35A(5) nor dispensed with the time limit in r 3.11 under r 1.34. This suggests that what Spain filed was not an application under s 35A(5).

12 The Investors submit that this is, in fact, so and that Spain's application was made pursuant to FCR r 39.05(a) or (c) ('The Court may … set aside a judgment … after it has been entered if: (a) it was made in the absence of a party; or … (c) it is interlocutory'). There is no time limit for the bringing of an application under r 39.05. The Investors' submission is consistent with the terms of Spain's interlocutory application; with the fact that an application under r 39.05 was within time (there being no time limit); with Spain's failure to seek an extension of the time specified in r 3.11; with Spain's failure to make any submissions to the primary judge about s 35A(5); and, with the fact that the primary judge nowhere deals with the argument now advanced in this Court.

13 Against this conclusion Mr Robertson, in his careful argument, submitted that it was enough that the interlocutory application could in its terms encompass an application for a review under s 35A(5). If a review was sought, no matter what form it took, the Court was bound to provide it. He drew the Court's attention to the Full Court's decision in *Bechara v Bates* [2021] FCAFC 34; 286 FCR 166 ('*Bechara*'). In that case a registrar of the Federal Circuit Court had made a sequestration order in respect of Ms Bechara's bankrupt estate. Ms Bechara sought orders that the sequestration order 'be set aside'. Her application did not use the correct form. Had it done so, it would have been clear that the application was an application to review the registrar's order. At 178 [40], the Full Court observed that 'There could be no doubt that this was *intended* as an application for review under s 104(2) of the registrar's sequestration order' (our emphasis). When the review application came before the Federal Circuit Court, Ms Bechara did not appear. The Federal Circuit Court dismissed her application for review on the basis of her non-appearance.

14 The Full Court's conclusion was that this involved a procedural misconception about what was taking place. Once the review was called on for hearing, the moving party was the creditor who sought the sequestration order and the situation was not one where Ms Bechara, as the moving party, had failed to attend her own application. Rather, it was a rehearing of the creditor's original application for sequestration orders. That Ms Bechara did not appear might perhaps affect the disposition of the creditor's application but, once the review application had been sought and called on for hearing, Ms Bechara was not the moving party. In that context, dismissing her application for non-appearance was conceptually misconceived. The correct

course was to determine whether, even in the absence of Ms Bechara, the creditor had proved that the sequestration order should be made.

15 In this Court, Mr Robertson placed particular emphasis on the fact that the Full Court treated Ms Bechara's application to set aside the orders as being, in substance, an application for a review. On that basis, he submitted that this Court was obliged to treat Spain's application to set aside the orders as being an application for a review under s 35A(5).

16 As already observed, the Full Court in *Bechara* (at 178 [40]) found that the application was *intended* to be a review application. I do not accept the submission that *Bechara* stands for the proposition that in every case an application to set aside a registrar's order is necessarily a review application under s 35A(5). What it establishes is that whether an application is a review application or not is a question of fact and that this question of fact is informed by the intention of the applicant.

17 In this case, the surrounding facts show that Spain did not intend to make a review application but, rather, an application to set aside the orders under r 39.05(a) or (c). Unlike Ms Bechara, Spain was not without representation before the primary judge and the fact that its own advisers conducted the case without mentioning s 35A(5), still less any of the matters it sought to ventilate in this Court, shows that it intended its application to be exactly what it appeared to be, *viz*, an application to set aside orders made in the absence of a party rather than an application for a review under s 35A(5). Had it intended to bring an application under s 35A(5) it is reasonable to think that it would also have sought to extend the time for the bringing of that application. That it did not do so is a powerful indication that it did not intend to bring an application under s 35A(5).

18 I conclude, as a matter of fact, that Spain did not apply under s 35A(5) and there can be no occasion for this Court to proceed on the basis that it did.

19 By proposed Ground 1, Spain submits that the primary judge failed to give any weight to the constitutional nature of a review under s 35A(5). Here there are at least two points: (a) on a review application under s 35A(5) the moving party is the party who made the application for the original orders, so that Spain was not the moving party and should not have been ordered to put up security; and (b) the possibility of a review before a judge was a constitutional imperative flowing from the High Court's decision in *Harris v Calladine* (1991) 172 CLR 84.

20 This submission should be rejected. Spain's application for leave to appeal is premised on the necessity to establish that the primary judge exercised his discretion in awarding security in a way which involved error of the kind in *House v The King* (1936) 55 CLR 499. Even if Spain is correct in all that it now wishes to say about the constitutional theory underpinning s 35A(5), this cannot assist it. There can have been no error by the primary judge in failing to deal with an application which had not been brought.

21 Ground 1 of Spain's proposed notice of appeal is premised on the assumption that its application was made under s 35A(5). Leave to appeal in relation to this ground should not be granted since it has no prospects of succeeding.

Proposed Ground 2: the *Vienna Convention on Consular Relations*

22 Articles 40 and 44 of the *Vienna Convention on Consular Relations* ('the Convention') provide:

> *Article 40*
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> *Protection of consular officials*
>
> The receiving State shall treat consular officials with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.
>
> …
>
> *Article 44*
>
> *Liability to give evidence*
>
> 1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.
>
> 2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.
>
> 3. 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. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

23 The Convention has the force of law by virtue of s 5 of the *Consular Privileges and Immunities Act 1972* (Cth). Spain argues that it is an infringement of its consular immunities under Article 40 to require it to put up security for costs to challenge the issue of the examination orders. It says that the primary judge failed to take this into account in the exercise of his Honour's

discretion. At [30] the primary judge recited a submission made by Spain at first instance: '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.' At [31] his Honour rejected the argument: 'It is hard to see why that is correct'. This was because Spain was 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.

24 Mr Robertson submitted that this demonstrated that the primary judge had not understood the submission Spain had made. It was an affront to the immunities themselves to require Spain to put up security for costs as the price for vindicating those immunities. Whilst the immunities were not literally Spain's, it was Spain which was asserting them.

25 But Spain is not asserting the immunities in this proceeding, because the time for such an assertion has not yet arrived. Only once the examination orders are called upon will they become directly relevant. Whilst I would accept that it is obvious from the spirited manner in which this litigation has been conducted on all sides that the consular officials will in due course assert their immunity, that has not in point of fact yet happened. What Spain seeks to do is to prevent the occasion ever arising at which it would be necessary for its consular officials to assert their immunities. This it is undoubtedly entitled to do but it is not correct to conflate such a pre-emptive application with the assertion of the consular immunities themselves.

26 In my view, this is what the primary judge said albeit somewhat more crisply. Spain's submission that the primary judge did not take this matter into account is therefore incorrect. His Honour took it into account by rejecting it. Leave to appeal should not be granted to pursue proposed Ground 2 because the primary judge's decision is not attended with sufficient doubt to warrant its reconsideration by the Full Court.

Proposed Ground 3: re-exercise of the discretion by this Court

27 Since leave to pursue Grounds 1 and 2 should not be granted, there can be no occasion to reconsider the primary judge's exercise of discretion. Leave to pursue proposed Ground 3 should not be granted.

Result

28 Spain's application for leave to appeal should be dismissed with costs.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perram.

Associate:

Dated: 2 September 2024

REASONS FOR JUDGMENT

DERRINGTON J:

29 I have had the advantage of reading the draft reasons and orders proposed by Perram J. I agree with his Honour's orders for the reasons which he has articulated.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate:

Dated: 2 September 2024

REASONS FOR JUDGMENT

FEUTRILL J:

30 I agree with the reasons of Perram J and there is nothing I can usefully add to them.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Feutrill.

Associate:

Dated: 2 September 2024