HFW LITIGATION

JULY 2022

KARIS V DIGITAL CC MANAGEMENT PTY LTD

[2022] FCA 685

The Federal Court of Australia recently granted an anti-suit to restrain the taking of steps in proceedings in the United States District Court in Massachusetts. The application was made by Mr Karis, who had separately commenced proceedings in the Federal Court against two Australian incorporated companies for misleading and deceptive conduct.

The dispute arose out of a business venture to buy hardware to mine bitcoin and engage in arbitrage by trading between different bitcoin exchanges. The defendant companies, Digital CC Management Pty Ltd (**DCC Management**) and Digital CC Holdings Pty Ltd (**DCC Holdings**) were incorporated for this purpose and a listed Australian company, DigitalX Limited (**DigitalX**) acquired for the purpose of capital raising.

The representations pleaded by Mr Karis were said to have been made in breach of the Australian Consumer Law (**ACL**). Mr Karis also prosecuted claims for breach of his employment contract.

The Federal Court proceedings were commenced in April 2022; a short time earlier, DCC Management commenced proceedings in the US seeking, amongst other things, declarations as to the ownership of two bitcoin trading accounts. As the judgment notes, *[t]he US proceeding also raises issues such as the basis upon which Mr Karis received equity in DigitalX and the circumstances of his employment, including with respect to the identity of his employer and the termination of his employment* (at [20]).

Mr Karis' employment contract was stated to be governed by Western Australian law and contained an exclusive jurisdiction clause in favour of the Western Australian courts. The choice of court clause provided further that:

> *The Employer may elect to initiate injunctive proceedings in any jurisdiction in the world, which, but for 3.3.1 would have jurisdiction, against the Employee to enforce the terms of this Agreement or to seek a determination of any matter in relation to this Agreement as it sees fit.*

A second agreement (referred to in the judgment as the **Purported Agreement**) was also governed by Western Australian law and contained a Western Australian court choice of court clause.

The court turned first to the established principles in the High Court decision of *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

Those principles relevant to the grant of anti-suit relief were adopted and summarised in *Herold v Seally (No 2*) [2017] FCA 543:

a) In some cases, the question of whether a dispute as to legal rights should be litigated in Australia and not overseas may be resolved by one court staying its proceedings in favour of the other, or by it granting an anti-suit injunction restraining a person amenable to its jurisdiction from commencing or continuing the overseas proceedings;
b) Sometimes, steps short of an injunction may be appropriate [...];
c) The remedies of a domestic stay and of an injunction in relation to the overseas proceedings are not governed by the same principles. However, in some cases the power to grant an injunction may be an aspect of the power to stay proceedings. In other cases, the Court should not exercise the power to grant the injunction without first considering whether instead the Australian proceedings should be stayed;
d) The test for a stay of the Australian proceedings [...] of a 'clearly inappropriate forum' [...] also applies as a threshold test for the grant of an anti-suit injunction [...];
e) The power to stay proceedings upon the ground of being an inappropriate forum is to be exercised [...] 'in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious, or an abuse of process and the rationale for the exercise of the power is the avoidance of injustice';
f) The counterpart of a court's power to prevent its process being abused is its power to protect the integrity of those processes. [...] In some cases, protection of the Australian court's own processes will authorise the grant of an anti-suit injunction;

g) Independent of protection of its own proceedings or processes, the court may make orders in the exercise of its equitable jurisdiction to restrain unconscionable conduct or the unconscientious exercise of a legal right. [...];
h) The power may extend to protecting legal rights in Australia, such as a contract not to sue, or to sue in a particular way or forum [..];
i) A well-established category of case in which an injunction may be granted is when foreign proceedings are, according to principles of equity, 'vexatious or oppressive' [...];
j) A long history of cases arising from competing foreign proceedings establish that the 'mere co-existence of proceedings in different countries does not constitute vexation or oppression', especially if the other proceedings give 'other or additional remedies beyond those attainable' in Australia. Foreign proceedings are to be viewed as vexatious or oppressive 'only if there is nothing to be gained by them over and above what may be gained in local proceedings'. However, they will be regarded as vexatious or oppressive if there is a 'complete correspondence between the proceedings' or if 'complete relief' is available in the local proceedings;
k) The exercise of the anti-suit injunction power does not involve any determination that the foreign proceedings are vexatious or oppressive in the sense that they are an abuse of that court's processes or even that they should be stayed on forum non conveniens grounds.

There was evidence before the court that the Massachusetts court would apply the law of Western Australia in determining the claims before it. However, the US expert was unable to say whether that same court would consider the claims made under the ACL. As the court noted, *on the assumption that the US proceeding continues, there is currently a question whether and how Mr Karis' claims made under and with respect to misleading and deceptive conduct under the ACL will be pursued and determined by the [US court]* (at [27]).

Banks-Smith J cited an earlier case in the Victorian Supreme Court where the court refused to stay proceedings in Victoria (in the face of parallel proceedings in the United States), because *there is a risk that the plaintiffs' statutory claims based on misleading and deceptive conduct may not be available to them in New York.* The court held, in *Babcock & Brown DIF III Global Co-Investment Fund LP v Babcock & Brown International Pty Ltd* [2016] VSC 623, that *these were important parts of the plaintiffs' case, and the plaintiffs will be prejudiced if they cannot pursue them*.

On the question of whether the Western Australian court was a clearly inappropriate forum, her Honour, having regard to the factual matrix, the contracts in question, the claims made, the submission that *there is a juridical advantage to Mr Karis of litigating in the Federal Court of Australia due to the risk that his claims pursuant to the ACL may not be available in the US proceeding* and the exclusive jurisdiction of the Federal Court in any matter arising under the ACL, concluded that *it is unlikely that it would be found that this Court is a clearly inappropriate forum* (at [30] – [31]).

Her Honour then considered the elements required for the grant of injunctive relief – whether there was a serious issue to be tried and whether the balance of convenience fell in favour of the grant of the anti-suit injunction.

Mr Karis made a number of submissions, which can be summarised as follows:

a) There is nothing to be gained by the defendants from the US proceeding over and above the proceeding in the Federal Court;
b) The fact that the US proceeding was commenced a short time prior to the Federal Court proceeding is not determinative;
c) The US proceeding and this proceeding are in relation to the same controversy;
d) There is a risk that even if the US Court were to apply Western Australian law, the claims brought under the ACL may not be available (so that Mr Karis would suffer a prejudice); and
e) The US proceeding covers only part of the dispute.

The court accepted that *there is sufficient relevance, substance and weight in these submissions to justify the grant of interim relief, noting that the ACL claims are (on their face) of considerable relevance to the overarching relief, particularly as Mr Karis seeks an order under s 237 of the ACL that the Purported Agreement is void* (at [40]). Banks-Smith J found therefore that *it is sufficiently arguable that the US proceeding is vexatious and oppressive as those terms are to be understood in this context* (at [41]).

Her Honour further concluded, in considering the balance of convenience, that although risks were relatively remote *[a]t present, I am concerned only with an interim interlocutory injunction, and this risk can be re-visited once the interlocutory application is listed for further hearing* (at [44]).

Orders were made restraining DCC Management until further order from taking any step in the US proceeding, other than steps to have that proceeding dismissed or stayed until further order.[1]

Conclusion

This decision highlights the significance of a pleading of a breach of the ACL where a contest lies between parallel litigation in different jurisdictions. The Australian courts recognise that a party who has commenced a proceeding in the courts in Australia pleading a breach of the ACL provisions and seeking relief in respect of that breach may well be at risk of losing the right to prosecute the claim if the defendant is permitted to continue a proceeding in a domestic court of another country.

---

[1] The judgement records that Mr Karis gave the usual undertaking as to damages arising from the relief granted.

For more information, please contact the authors of this alert

BRONWYN LINCOLN
Partner, Melbourne
T +61 (0)3 8601 4511
E bronwyn.lincoln@hfw.com

GERALDINE VALENZUELA
Associate, Melbourne
T +61 (0)3 8601 4513
E geraldine.valenzuela@hfw.com

hfw.com

Americas | Europe | Middle East | Asia Pacific