Denial of Natural Justice as a Defence to Enforcement of a Chinese Judgment in Australia

In *Yin v Wu* [2023] VSCA 130, the Court of Appeal of the Supreme Court of Victoria set aside a judgment[1] which had affirmed the enforcement a Chinese judgment by an Associate Justice of the Supreme Court.[2] This was a rare instance of an Australian court considering the defence to enforcement of a foreign judgment on the basis that the judgment debtor was denied natural justice—or procedural fairness—before the foreign court.

Background

The dispute concerned a payment made by a Chinese national living in China, Di Wu, to a Chinese national living in Australia, Ke Yin. The payment was made pursuant to a foreign exchange agreement: Yin had promised to pay Wu a sum of US Dollars in exchange for Wu's Chinese RMB.

The arrangement was made unusually through a series of Telegram and WhatsApp messages, from accounts with different numbers and aliases. (In Australia, we would say that the arrangement sounded 'suss'.) The agreement was seemingly contrary to Chinese law, which may have contributed to the clandestine character of communications underlying the agreement; see [30].

After Wu transferred the funds—RMB ¥3,966,000—Yin denied that the full sum was received and did not transfer any sum of US Dollars to Wu. Yin eventually returned RMB ¥496,005 but not the balance of what Wu had paid. Wu went to the police on the basis he had been 'defrauded'; they refused to act. Meanwhile, while broadcasting video under a pseudonym on Twitter, Yin suggested that his accounts had been frozen at the instigation of Wu's cousin and with the participation of 'communists'.

On 13 October 2017, Wu commenced a proceeding against Yin in the Ningbo People's Court. The Court characterised the foreign exchange agreement as

‘invalidated and unenforceable’, but nonetheless provided judgment and costs to Wu for RMB ¥3,510,015 (‘Chinese Judgment’).

The Chinese Judgment recorded that: *‘[t]he defendant [Yin] failed to attend despite having been legally summoned to attend. As such, the court shall enter default judgment according to the law. … Any party dissatisfied with this judgment may, within 15 days from the date of service of the written judgment, file an appeal …’*: [27].

Wu commenced enforcement proceedings in China. An affidavit in those proceedings recounted that Yin’s whereabouts were then unknown, but Yin had been served according to relevant procedure of the Chinese forum, which allowed service ‘by way of public announcement’: [31]. The ‘Public Notice’ provided as follows (see [32]):

> *‘In relation to the private loan dispute between the plaintiff Wu Di and defendant Yin Ke, you are now, by way of public notice, served with the Complaint and a copy of the evidence, notice to attend, notice to adduce evidence, risk reminder, summons to attend court, notice of change of procedure, civil ruling and the letter of notice. You are deemed to have been served with the said documents after sixty days from the date of this public notice.’*

Recognition and enforcement sought in Australia

Wu filed an originating motion in the Supreme Court of Victoria, seeking an order for enforcement of the Chinese Judgment, or alternatively, reimbursement of the sum paid to Yin.

The latter and alternative order may be understood in terms of an order seeking the *recognition* of the obligation created by the Chinese Judgment, to be given effect through the remedial powers of the Australian forum: see *Kingdom of Spain v Infrasructure Services Luxembourg S.À.R.L.* (2023) 97 ALJR 276; [2023] HCA 11, [43]–[46]; *Schibsby v Westenholz* (1870) LR 6 QB 155, 159.

Australia has a fragmented regime for recognition and enforcement of foreign judgments; see generally Michael Douglas, Mary Keyes, Sarah McKibbin and Reid Mortensen, 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) *Federal Law Review* 420. New Zealand judgments are treated with deference under the *Trans-Tasman Proceedings Act 2010* (Cth); judgments of various other jurisdictions are easily registered under the *Foreign Judgments Act 1991* (Cth), where the relevant court is identified in the *Foreign Judgments Regulations 1992* (Cth) on the basis of reciprocal treatment of Australian judgments in the relevant foreign jurisdiction. For other *in personam* money judgments, recognition and enforcement may occur pursuant to common law principles.

At common law, a foreign judgment may be recognised and enforced if four conditions are satisfied—subject to defences:

'(a) the foreign court must have exercised jurisdiction that Australian courts will recognise;

(b) the foreign judgment must be final and conclusive;

(c) there must be an identity of the parties; and

(d) the judgment must be for a fixed sum or debt': *Doe v Howard* [2015] VSC 75, [56].

Here, the Chinese Judgment was assessed according to the common law principles.

In his defence, Yin pleaded (among other things) that he was not served with the documents commencing the foreign proceeding which produced the Chinese Judgment, or any other documents relevant to the foreign proceeding while it was on foot. He also pleaded that he was unaware of the existence of the Chinese Judgment until the Australian proceeding was commenced. As an extension of that plea, Yin said that enforcement of the Chinese Judgment should be refused on the basis of public policy, or because there was a failure by the Chinese court to accord Yin natural justice: [6].

Wu sought summary judgment on the basis that Yin's defence had no prospects of success. On 22 October 2021, summary judgment was entered in favour of Wu by an Associate Justice of the Supreme Court: *Wu v Yin* (Supreme Court of Victoria,

Efthrim AsJ, 22 October 2021); see *Wu v Yin* [2022] VSC 729, [5].

The Associate Justice referred (at [33]) to *Boele v Norsemeter Holding AS* [2002] NSWCA 363, [28], where Giles JA of the New South Wales Court of Appeal held as follows:

> *'In determining whether due notice has been given regard will be had to the notice provisions of the foreign court: for example, notification not by personal service but in accordance with the rules of the foreign court may be held to be consistent with affording natural justice even if not in accord with notice provisions of the forum (see Jeannot v Fuerst (1909) 25 TLR 424; Igra v Igra (1951) P 404; Terrell v Terrell (1971) VR 155).'*

Efthrim AsJ considered that the statement in the Chinese Judgment that Yin had 'been legally summoned to attend' was enough to defeat the natural justice defence: [2022] VSC 729, [74]–[79]. Although the 'public notice' service underlying the Chinese Judgment would generally be insufficient for service within Australia under Australian law, it was considered sufficient for the purposes of overcoming the defence.

Yin appealed to the Supreme Court's trial division on the ground (among others) that Efthrim AsJ erred in holding that Yin's defence that he was not accorded natural justice in the Chinese proceeding had no prospect of success. Tsalamandris J rejected this ground, and Yin's appeal: [2022] VSC 729, [124], [133]. Yin applied for leave to appeal the decision of Tsalamandris J to the Court of Appeal.

Before the Court of Appeal

The Court of Appeal overturned the decision of Tsalamandris J, granting leave to appeal and allowing the appeal on the following ground (see [79]):

> *Ground 1: the judge erred in upholding the associate justice's conclusion that the defence to the enforcement claim had no real prospect of success, and in doing so erred by imposing an onus on Yin to adduce evidence about applicable Chinese law relating to service by public announcement and why that method of service had not been properly invoked in this case. Further, the judge erred*

> *by relying on the Wang affidavit [the affidavit in the Chinese enforcement proceeding, mentioned above] which was not in evidence, or not relied on by Wu, on the hearings before either the associate justice or the judge.*

The Court of Appeal's decision turned on the available evidence. Yin deposed that he was not served with any documents in connection with the Chinese proceedings. That evidence was uncontradicted: [90]. In these circumstances, 'the associate justice and the judge erred in placing the onus on Yin to establish that there was no valid service on him by alternative means permitted by Chinese law': [84]. Yin's evidence raised a prima facie case that he had been denied natural justice in the Chinese proceedings: [91].

In *obiter*, the Court of Appeal also considered that even if it were assumed 'that the evidence was sufficient to establish that Yin had been "legally summoned", the evidence as a whole [did] not establish that the public notice procedure apparently adopted complied with the requirements of natural justice in the circumstances of the case': [84]; [95].

The Court of Appeal cited (at [96]–[99])) *Terrell v Terrell* [1971] VR 155, which was also cited in *Boele*, [28]. *Terrell* was about a petition for divorce by an American husband who had left his wife in Australia and returned to the US. The husband obtained a decree of divorce in the US. The Australian court considered a forum statute that would give effect to foreign decrees if they would be recognised under the law of the domicile. But the statute provided that a foreign decree would not be recognised 'where, under the common law rules of private international law, recognition of it[s] validity would be refused on the ground that a party to the marriage had been denied natural justice'; see [96].

Barber J considered that 'natural justice' was 'not a term of great exactitude, but in this context probably refers to the need for the defending party to have notice of the proceedings and the opportunity to be heard': *Terrell*, 157. A foreign judgment produced in circumstances where the respondent to the foreign proceedings had no notice of them or an opportunity to be heard would be amenable to a natural justice defence. Barber J considered an exception to that position, which was inapplicable in the circumstances as the husband had withheld the wife's address from the foreign court (see *Terrell*, 157):

> *'To this basic rule there is an exception, that where the foreign court has power*

> *to order substituted service or to dispense with service, and that power has been properly exercised upon proper material, even where the respondent was not in fact made aware of the proceedings, such proceedings cannot be held to be unjust, as similar powers are available to our courts. However, there must have been some attempt to effect personal service: Grissom v Grissom, [1949] QWN 52. Moreover, if the order for substituted service is based on a false statement that the petitioner did not know the respondent's whereabouts, or where a false statement is made as to the respondent's address for service, the decree will not be recognized as valid: Norman v Norman (No2) (1968) 12 FLR 39; Grissom v Grissom, supra; Macalpine v Macalpine, [1958] P35; [1957] 3 All ER 134; Brown v Brown (1963) 4 FLR 94; [1963] ALR 817;Middleton v Middleton, [1967] P 62; [1966] 1 All ER 168.*

After considering *Terrell* and other authorities, the Court of Appeal concluded as follows (at [107]):

> *… even if Wu had established by admissible evidence that service of the Chinese proceeding was legally effected on Yin by some form of public notice — albeit one which did not come to Yin's attention — the Court should not have recognised the Chinese judgment on a summary basis. This is because at the time Wu commenced the Chinese proceeding he well knew of a number of alternate means of giving notice of the proceeding to Yin, namely, by Twitter, WhatsApp and Telegram. Indeed, Wu's case in the Chinese proceeding and in this Court was based on money paid under an alleged contract made by these means. In these circumstances, there is a case to be investigated at trial as to whether Wu informed the Chinese court of these alternative means of giving notice of the Chinese proceeding to Yin.*

The Court then provided (at [108]) some helpful dicta on the future application of the natural justice defence to enforcement of foreign judgments, considering the following proposition in *Nygh's Conflict of Laws* (LexisNexis, 10th ed, 2020) at 990 [40.84]:

> *It matters not that the forum would not have dispensed with notice in the same situation, although a line would have to be drawn somewhere as in the case where the rules of a foreign court dispensed with the need of giving a foreign*

> *defendant any form of personal notification even in peacetime.*

The Court opined (at [109]):

> *In our view, in considering whether natural justice has been provided, modern courts should move with the times in their assessment of the sufficiency of foreign modes of service which do not aim to give defendants personal notification by the many electronic means now commonly available. Courts should draw the line and look unfavourably on modes of service by foreign courts which do not attempt to give notice by such means where a defendant's physical whereabouts are unknown but electronic notice in some form is possible.*

Yin failed on his other grounds of appeal. As the underlying decision also provided summary judgment for Wu's restitution claim, the Court of Appeal characterised the restitution claim as separate to the enforcement claim: [111]. The Court of Appeal affirmed the decision that Yin's defence that he did not know Wu went 'nowhere': [118]. Wu ultimately succeeded: he obtained summary judgment for the restitution claim, together with interest: [158].

Some takeaways

Yin v Wu provides a few insights for the natural justice defence to recognition and enforcement of foreign judgments in common law courts.

The first concerns the onus of proof. The onus of making out a defence to recognition of a foreign judgment would ordinarily fall on a defendant: *Stern v National Australia Bank* [1999] FCA 1421, [133]. The Court of Appeal's decision demonstrates how burdens may shift in the practical operation of private international law in the context of litigation. (On the difference between legal and evidentiary burdens, and how they may shift, see *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151; [2020] HCA 27.) Once Yin had produced evidence he was not served, it was up to Wu to contradict that evidence. The omission may be understood on the basis that the underlying decision was one for summary judgment.

Second, the decision is notable for framing enforceability in terms of a natural

justice defence rather than in terms of the first criterion for recognition or enforcement: 'the foreign court must have exercised jurisdiction that Australian courts will recognise'. This element is often framed as a requirement of 'international jurisdiction'. Yin was not within the territorial jurisdiction of the Chinese court at any relevant time, and nor did he submit to the foreign court. International jurisdiction was seemingly predicated on Yin's nationality. Arguably, this is insufficient for recognition and enforcement at common law in Australia (but see *Independent Trustee Services Ltd v Morris* (2010) 79 NSWLR 425, cf *Liu v Ma* (2017) 55 VR 104, [7]). The focus on natural justice defence rather than international jurisdiction would be a product of how the parties ran their cases.

Third, although the Court of Appeal allowed the appeal as regards the natural justice defence, the judgment supports the orthodox view that this defence should have a narrow scope of operation. As Kirby P opined in *Bouton v Labiche* (1994) 33 NSWLR 225, 234 (quoted at [73]), courts should not be 'too eager to criticise the standards of the courts and tribunals of another jurisdiction or too reluctant to recognise their orders which are, and remain, valid by the law of the domicile'. Australian courts provide for substituted service in a variety of circumstances; it would be odd if a foreign court's equivalent procedure was held to engage the natural justice defence.

Finally, the case serves as a warning for litigants seeking to enforce a judgment of a Chinese court in Australia: relying purely on the 'public notice' mechanism of the Chinese forum, without taking further steps to bring the proceeding to the attention of the defendant, may present problems for enforcement. The same can be said for transnational litigation in any jurisdiction that does not require 'personal service' in the sense understood by common law courts.

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[1] *Wu v Yin* [2022] VSC 729 (Tsalamandris J).

[2] *Wu v Yin* (Supreme Court of Victoria, Efthrim AsJ, 22 October 2021).