SUPREME COURT OF QUEENSLAND

CITATION:	*Bank Polska v Opara & Anor* [2007] QSC 001
PARTIES:	**BANK POLSKA KASA OPIEKI SPÓŁKA AKCYJNA (known as BANK PEKAO S.A.)** (applicant) **v** **RICHARD ZBIGNIEW OPARA (also known as RYSZARD ZBIGNIEW OPARA, RYSAZRD OPARA and RYSZARD OPARA)** (first respondent) and **EVA DOROTA OPARA (also known as DOROTA GORECKA-OPARA, DOROTA EWA GORECKA-OPARA, DOROTA EVA OPARA and EVA DOROTHY OPARA)** (second respondent)
FILE NO/S:	BS5198 of 2006 BS5199 of 2006 BS5200 of 2006
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	11 January 2007
DELIVERED AT:	Brisbane
HEARING DATE:	20 December 2006
JUDGE:	Chesterman J
ORDER:	**The applicant's application dated 19 December 2006 to strike-out paragraph 4(a) of the respondents' amended points of claim is dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – respondents applied to set aside registration of foreign judgments obtained by the applicant – respondents allege judgments are contrary to public policy, relying on, *inter alia*, *Garcia v National Australia Bank* – strike-out application in respect of that part of respondents' points of claim – whether pleading should be struck out *Foreign Judgments Act* 1991 (Cth), s 7(2) *Uniform Civil Procedure Rules* 1999 (Qld), r 293(2)

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1974] QB 660, cited
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, cited
De Santis v Russo (2001) 27 Fam LR 414, cited
De Santis v Russo [2002] 2 Qd R 230, cited
Garcia v National Australia Bank Ltd (1998) 194 CLR 395, cited
Israel Discount Bank of New York v Hadjipateras [1983] 3 All ER 129, considered
Stern v National Australia Bank [1999] FCA 1421, discussed
Stern v National Australia Bank [2000] FCA 294, considered

COUNSEL: Mr P Mills (sol) for the applicant
Dr A S Bell SC, with him Mr N H Ferrett, for the respondents

SOLICITORS: Jones King for the applicant
Cooper Grace Ward for the respondents

[1] The applicant ('the bank') applied for the registration of three judgments which it obtained from the District Court of Warsaw, the Republic of Poland, in October 2003 against the respondents who are husband and wife. On 7 July 2006 Wilson J made orders that each judgment be registered as a judgment in accordance with Part 2 of the *Foreign Judgments Act* 1991 (Cth) ('the Act') and ordered that the reasonable costs of obtaining registration in the judgments be payable by the respondents.

[2] The aggregate amount of the Polish judgment debts which were registered pursuant to her Honour's order is about $30,000,000.

[3] On 17 August 2006 the respondents filed three applications seeking orders that each judgment registered pursuant to the orders of Wilson J be set aside pursuant to s 7(2) of the Act on the grounds that:

(a) neither of the respondents received notice of the Polish court proceedings, or not within enough time to enable them to defend the proceedings;

(b) the District Court of Warsaw did not have jurisdiction to hear the proceedings;

(c) the District Court of Warsaw is not a court for the purposes of the Act or regulations made pursuant to it;

(d) the judgments registered in this Court were not 'final and conclusive' judgments of the District Court of Warsaw; and

(e) the enforcement of the judgments would be contrary to public policy.

[4] The applications to have the registration of the judgments set aside have been placed on the commercial list and directions made to bring about a speedy hearing of the matter which apparently has some aspects of urgency; involves a very substantial

amount of money; and arises out of a commercial transaction. Despite what I regard as the best endeavours of the Court to facilitate the preparation of the applications for a speedy determination the directions which have been made have been singularly ineffective.

[5] In order to clarify the respondents' complaints about the registration of the judgments the respondents were ordered to deliver points of claim which they duly did on 1 December 2006. That pleading raises substantial points of fact which will have to be resolved before the Court can adjudicate upon the applications to set aside the registration. The solicitors for the bank who have chosen to appear without the assistance of counsel have adamantly insisted that the applications can be determined as questions of law without recourse to questions of fact which may be in dispute and would have to be resolved. The bank's solicitors have expressed a desire to save their client the cost of bringing witnesses from Poland and having to translate numerous documents from Polish into English.

[6] After much indecision it was apparently thought by both the bank and the respondents that one of the grounds on which the latter rely could be determined as a point of law which, if the bank succeeded, would obviate the need for much evidence.

[7] Accordingly on 19 December 2006 the bank applied to the Court:

> '… pursuant to rule 293(2) … that para 4(a) of the amended points of claim … be struck out.'

[8] Paragraph 4(a) of the amended points of claim is in these terms:

> 'To the extent that each of the Polish orders derives from a document … executed by the second respondent purporting to consent to bank enforced collection orders, the enforcement of any judgment or order … would be contrary to public policy within the meaning of s 7(2)(a)(xi) of the … Act … in circumstances where … that document was procured as a result of unconscionable or unconscientious dealing on the part of the … bank, or on the basis of undue influence insofar as:
>
> (i) the second respondent was a volunteer;
>
> (ii) the second respondent was not aware of the purport or effect of the transaction;
>
> (iii) the applicant took no steps to explain the purport or effect of the transaction;
>
> (iv) the second respondent received no independent advice in respect of the transaction;
>
> (v) the applicant understood that the second respondent reposed full trust and confidence in the first respondent.'

[9] The second respondent, Mrs Opara, is the wife of the first respondent, Dr Opara. The defence raised is that approved by the High Court in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

[10] Section 6 of the Act provides that a judgment creditor under a judgment to which Part 2 of the Act applies may apply to the appropriate court (here the Supreme Court of Queensland) at any time within six years after the date of the judgment to have the judgment registered in the court. By s 6(7) a judgment registered under s 6 may be enforced and has the same effect as if the registered judgment had been originally given in the court in which it is registered. Section 7 provides that a party against whom a registered judgment is enforceable may apply to have the registration set aside and the court must set it aside if satisfied of any of the eleven circumstances specified in the subsection. The eleventh is:

> 'that the enforcement of the judgment … would be contrary to public policy'.

[11] Both the bank and the respondents have taken advice from Polish lawyers and are agreed that the *Garcia* defence is not recognised under Polish law.

[12] The bank's application, being one to strike out a defence, necessarily proceeded on the basis that the respondents will prove the facts alleged in para 4(a) but even so could not have the registration of the judgments set aside as being contrary to public policy. The bank's argument is that it could not be contrary to public policy to register the judgment against the second respondent, notwithstanding that she was the dupe of her husband, and the bank; and that she obtained no benefit from the transaction which resulted in the debt; and Polish law does not recognise such a defence. The bank submits that the authorities show that a registering court is not concerned to go into the comparative merits of domestic and foreign law, but will accept as just the judgment of a foreign court.

[13] The bank's solicitors referred to and relied upon the decision of the Court of Appeal, *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1974] QB 660 without noticing that the decision was reversed by the House of Lords: [1975] AC 591.

[14] The respondents' position is that the High Court has recently and solemnly declared that wives in the position in which Mrs Opara describes herself are not liable on guarantees they give to support their husbands' borrowings, and that conduct of a bank seeking to enforce a guarantee obtained in the described circumstances is unconscionable, and unconscientious, and inequitable. Much emphasis was placed upon these adjectives in the respondents' submissions. It is submitted that it is not at all unlikely that a court, perhaps on appeal, would find it contrary to public policy to register a judgment obtained in a jurisdiction which did not protect the naïve wife's right in equity not to be liable for her husband's debts.

[15] The respondents rely upon another decision of the Court of Appeal, *Israel Discount Bank of New York v Hadjipateras* [1983] 3 All ER 129 in which the court held that:

> 'The fact that an agreement was obtained by undue influence, duress or coercion was a reason for an English court to treat a foreign judgment based on that agreement as being invalid or to refuse to

> enforce the foreign judgment as being contrary to English public policy.'

The judgment was in fact enforceable because the law of the foreign jurisdiction would have allowed the defendant to raise those matters as a defence, as did English law. It was not contrary to public policy to enforce a foreign judgment which could have been resisted on the alleged grounds. The respondents submit that the principle of that case is applicable, but the exception is not, because Polish law does not recognise the *Garcia* defence.

[16] The scope of the ground afforded by s 7(2)(a)(xi) of the Act to set aside the registration of a foreign judgment is unclear. There is little authority to offer guidance as to the content of the public policy which might be offended by the registration. The point has been considered in two cases, neither of which, for their own peculiar reasons, is authoritative. The first is *Stern v National Australia Bank* [1999] FCA 1421, particularly at paras 133 to 147. The discussion is instructive but probably *obiter* because on appeal the Full Court (dismissing the appeal) held that the factual basis which might have given rise to the argument that it would be contrary to public policy to register the judgment was not made out: [2000] FCA 294. Similarly the discussion in *De Santis v Russo* (2001) 27 Fam LR 414 is of limited assistance because the decision was reversed on other grounds: [2002] 2 Qd R 230.

[17] The point is interesting but there is no profit in pursuing it. The respondents are right in their submission that it is not appropriate to determine it on a strike-out application. There are a number of reasons why this is so.

[18] The first is that the defence is applicable to only the second respondent and with respect to only one of the registered judgments. The bank's solicitors informed me that the second respondent was herself a borrower and principal debtor for two of the loans and a guarantor only for one. The defence is not therefore going to loom large on the hearing of the application to set aside the registrations.

[19] More significantly it is highly likely that should I accede to the bank's application to strike out the defence in the one application to which it is relevant there will be an appeal which will delay the hearing of the application for months, if not a year. It is in the interests of an expedited hearing that the matter proceed early in the new year when it will be ready. An examination of the evidence may show that the defence has no substance in fact.

[20] This leads to the third point which is that the ground afforded by s 7(2)(a)(xi) of the Act is unclear in its scope. The circumstances which might lead to the conclusion that the registration of a foreign judgment would be contrary to public policy have not been established or delineated by the courts. In those circumstances it is preferable to ascertain what the facts were: what the second respondent knew and did and was told about the loan she guaranteed, before deciding whether it is, or is not, against public policy to register the judgment.

[21] The final point is that Mrs Opara's evidence adduced to make out her defence in para 4(a) is not likely to add measurably towards the length or cost of the trial.

[22] All in all, little is to be gained by determining the question raised by the bank's application and much time and money might be lost if it were.

[23] Accordingly I dismiss the bank's application. There should be no order as to costs. Both parties wasted the Court's time and their clients' money. The application was given a special hearing date because both parties told the Court the application could achieve something substantial. The respondents then contested the application on the ground that it was inappropriate to deal with the point in advance of the trial. If that attitude had been expressed earlier the application would not have been listed.