SUPREME COURT OF QUEENSLAND

CITATION:	*Marks v ANZ Banking Group Limited* [2014] QCA 102
PARTIES:	**CLARE ELIZABETH MARKS** (appellant) **v** **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED** ACN 005 357 522 (respondent)
FILE NO/S:	Appeal No 7806 of 2013 SC No 2252 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2014
JUDGES:	Muir and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	PRIVATE INTERNATIONAL LAW – RECOGNITION, EFFECT AND ENFORCEMENT OF FOREIGN JUDGMENTS – UNDER LEGISLATION – ENFORCEMENT OF FOREIGN JUDGMENTS – REGISTRATION – SETTING ASIDE – where the appellant was a guarantor to a Facility Agreement issued by the respondent in Singapore – where the Facility Agreement contained a non-exclusive jurisdiction clause – where default occurred and the respondent commenced proceedings against the appellant in Singapore – where judgment entered on 27 December 2012 ordered the appellant to pay A$11,102,788.56 – where the respondent applied to the Queensland Supreme Court to register the judgment and was granted registration pursuant to Part 2 of the *Foreign Judgments Act* 1991 (Cth) – where the appellant sought to set aside the registration but the application was dismissed – whether the Singapore judgment was an abuse of process given that the respondent had commenced another action in Queensland for the recovery of possession of land – whether

the High Court of Singapore had jurisdiction – whether the appellant submitted to the jurisdiction of Singapore – whether the Singapore judgment was for an ascertained amount of money – whether the registration of the foreign judgment should be set aside

Foreign Judgments Act 1991 (Cth), s 3, s 6, s 7(2), s 7(3), s 7(5)

ASIC v Lindberg (2009) 76 ACSR 181; [2009] VSC 566, cited
Branir Pty Ltd v Wallco Pastoral Co Pty Ltd (2006) 18 NTLR 127; (2006) 203 FLR 115; [2006] NTSC 70, distinguished
British South Africa Co v Companhia de Moçambique [1893] AC 602, distinguished
de Santis v Russo [2002] 2 Qd R 230 ; [2001] QCA 457, applied
Dresser (UK) Ltd v Falcongate Freight Management Ltd [1992] QB 502, distinguished
Duke v Andler [1932] SCR 734; [1932] 4 DLR 529, distinguished
Ex parte Jackson; Re Australasian Catholic Assurance Co Ltd (1941) 41 SR(NSW) 285; [1941] NSWStRp 41, cited
Malaysia-Singapore Airlines Ltd v Parker (1972) 3 SASR 300, distinguished
Moore v Inglis (1976) 50 ALJR 589, distinguished
Re Forrest Trust [1953] VLR 246; [1953] VicLawRp 37, cited
Steadmark Pty Ltd v Bogart Lingerie Ltd [2013] VSC 402, distinguished
Thirteenth Corporation Pty Ltd v State (2006) 322 ALR 491; [2006] FCA 979, distinguished

COUNSEL: The appellant appeared on her own behalf
J W Peden with D C Whitehouse for the respondent

SOLICITORS: The appellant appeared on her own behalf
Gadens Lawyers for the respondent

[1] **MUIR JA:** I agree that the appeal should be dismissed with costs for the reasons given by Gotterson JA.

[2] **GOTTERSON JA:** On 22 March 2013, a judge of the trial division of the Supreme Court of Queensland ordered[1] that a judgment of the High Court of the Republic of Singapore given in suit No S627/2011/N ("the Singaporean proceedings")[2] on 27 December 2012 in an amount of A$11,102,788.56, be registered under Part 2 of the *Foreign Judgments Act* 1991 (Cth) ("the FJ Act"). The Singaporean proceedings were between the Australia and New Zealand Banking Group Ltd ("ANZ Bank") as plaintiff and Scott Francis Tyne, Clare Elizabeth Marks and a company in which they were interested, Telesto Investments Ltd, ("Telesto") as defendants. Ms Marks was named as the Third Defendant. Telesto was the First Defendant and Mr Tyne the Second Defendant.

[3] Notice of registration of the judgment[3] was duly served on Ms Marks on 18 April 2013. The notice advised her that she might apply to have the registration set aside

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1 Indexed Paginated Bundle of Documents ("IPBD") 33.
2 AB10-11.
3 IPBD 36.

within 28 days. On 16 May 2013, Ms Marks filed an application in the Supreme Court of Queensland[4] seeking an order that the registration be set aside pursuant to s 7(2)(iv) of the FJ Act. This application initiated proceeding No 2252 of 2013. The application was heard on 16 July 2013. On 24 July 2013, the learned primary judge made orders dismissing the application and requiring Ms Marks to pay the ANZ Bank's costs of the application to be assessed.[5]

[4] By a notice of appeal[6] filed on 21 August 2013, Ms Marks appealed to this Court against the orders made on 24 July 2013. She seeks orders that would set aside the registration of the foreign judgment and require the ANZ Bank to pay her costs "of and incidental to this matter on an indemnity basis".

[5] In order to put the grounds of appeal in context, it is necessary that I first summarise relevant aspects of both the Singaporean proceedings and separate proceedings in the Supreme Court of Queensland, No 8313 of 2011. In those proceedings, the ANZ Bank was the plaintiff and Ms Marks the defendant. It is convenient to refer to them as "the recovery of possession proceedings".

The Singaporean proceedings

[6] The Singaporean proceedings were commenced by a writ of summons filed in the High Court of the Republic of Singapore ("the Singapore High Court") on 8 September 2011.[7] The originating process also included a statement of claim dated that date.[8] The claim against Telesto was for debt arising under a Facility Letter Agreement ("the Facility Agreement") entered into between the ANZ Bank, through its Singapore Branch, and Telesto on or about 15 November 2007. The claim against each of the other defendants was upon a guarantee given by them individually of punctual payment by Telesto of its indebtedness to the ANZ Bank arising under the Facility Agreement. In Ms Marks' case, her guarantee[9] was executed on or about 4 July 2007 in consideration of the ANZ Bank's undertaking to make the Facility available.

[7] An order for service out of the jurisdiction of the originating process was made on 15 November 2011. Ms Marks has sworn that on 25 January 2012, she was served with certain material at the Gold Coast.[10] The material consisted of a letter to her from the ANZ Bank's Singapore solicitors dated 29 September 2011 which notified her of the originating process and the order, and that she had 21 days within which to enter an appearance. Copies of the writ of summons, the statement of claim and the order were attached to the letter.[11] Ms Marks also swore that on the advice of her lawyer partner, Mr Tyne, she ignored the materials.[12]

[8] The claim against Ms Marks was a liquidated demand. A judgment in default of appearance was entered against her on 29 February 2012 pursuant to Order 13 of the Rules of Court of the Singapore High Court.[13] Thereafter, Ms Marks filed a summons in

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4 AB3-4.
5 AB204.
6 AB211-212.
7 AB12-14.
8 AB15-31.
9 AB141-145.
10 Affidavit sworn in the recovery of possession proceedings on 8 May 2012, para 5; AB76.
11 Exhibit B thereto; AB90-115.
12 *Supra* n10 paras 6, 7.
13 A copy of this judgment does not appear in the record for this appeal. Evidently, the judgment required payment of monetary amounts, including principal, interest and assessed costs.

that court pursuant to which orders were made by an assistant registrar in Chambers on 30 October 2012. Those orders were that the default judgment against Ms Marks be set aside "conditional on [her] entering an appearance to these proceedings within 3 days and filing a Defence within 4 weeks". Ms Marks was ordered to pay the ANZ Bank's costs and disbursements fixed at S$4,200.[14]

[9] Ms Marks duly filed an unconditional Memorandum of Appearance on 30 October 2012.[15] She informed Brisbane solicitors acting for her that she intended to file a Defence in the Singapore High Court no later than 26 November 2012.[16]

[10] On 12 November 2012, the ANZ Bank filed a notice of appeal against the orders made by the assistant registrar.[17] The appeal was heard as an application by a judicial commissioner of the Singapore High Court on 5 and 27 December 2012. The formal court order and official Notes of Argument[18] indicates that, at the later hearing, the judicial commissioner read written submissions filed on behalf of Ms Marks dated 23 December 2012 and heard oral submissions made by counsel for the ANZ Bank. Orders were made on the application on 27 December 2012. Those orders were that the order of the assistant registrar made on 30 October 2012 be set aside and that the judgment entered on 29 February 2012 against Ms Marks be varied to the following terms:

"

IT IS THIS DAY ADJUDGED that the 3rd Defendant do pay the Plaintiff:	
1.	The sum of AUD 11,102,778.56.
2.	Interest on the sum of AUD 11,102,778.56 in the following manner:-
(a)	contractual interest in respect of each interest period from 8 October 2010 to 22 August 2011 at 1.00% per annum over the Bank's Cost of Funds as quoted by the Bank in respect of the 3 months interest period on the second business day before the commencement of the relevant interest period;
(b)	default interest on the unpaid contractual interest (in paragraph 2(a) above) at the default interest rate of four per cent. per annum above the Prime Lending Rate of the Plaintiff or the Plaintiff's Costs of Funds for overnight borrowings in the currency in which the sum which the 1st Defendant has failed to pay is denominated, whichever is higher, and shall be calculated on the same basis daily and thereafter, compounded monthly, from 7 January 2011 until the 22 August 2011; and

14 AB60-61.
15 AB56.
16 Affidavit of J B Loel sworn in proceedings No 3872 of 2012 in the Supreme Court of Queensland on 6 November 2012, para 11; AB43. It is not clear from the record for this appeal whether the Defence was filed or not.
17 AB33-34.
18 AB150-160.

(c)	default interest on the aggregate of: (i) AUD 11,102,778.56; (ii) unpaid contractual interest (at paragraph 2(a) above); and (iii) unpaid default interest (at paragraph 2(b) above) at the default interest rate of four per cent. per annum above the Prime Lending Rate of the Plaintiff or the Plaintiff's Costs of Funds for overnight borrowings in the currency in which the sum which the 1st Defendant has failed to pay is denominated, whichever is higher, and shall be calculated on the same basis daily and thereafter, compounded monthly, from 22 August 2011 until the date of full payment.
3.	Costs of S$3,906.00 and AUD$2,949.50…

„[19]

[11] Orders were also made striking out Ms Mark's Memorandum of Appearance and requiring her to pay the ANZ Bank's costs of the appeal proceeding including disbursements of S$7,500.

The recovery of possession proceedings

[12] On 16 September 2011, the ANZ Bank commenced the recovery of possession proceedings against Ms Marks by filing a Claim and Statement of Claim in the Supreme Court of Queensland that day. The relief sought by the Claim[20] was recovery of possession of property described as Lot 572 on Survey Plan 211891 in the County of Ward Parish of Barrow being land adjacent to Knightsbridge Parade East, Sovereign Islands at the Gold Coast ("the land"), and costs. As the Statement of Claim[21] pleaded, the ANZ Bank's claim was based upon a mortgage of the land executed by Ms Marks in favour of the ANZ Bank on or about 5 September 2006 which was duly registered.[22] In summary, the ANZ Bank claimed an entitlement to enter possession of the land under the express terms of the mortgage upon a default by Ms Marks in failing to pay moneys owing to it by her under her guarantee of Telesto's indebtedness under the Facility Agreement. Possession was sought by the ANZ Bank in order to facilitate the exercise by it of its power of sale under the mortgage.

[13] Upon the application of the ANZ Bank, an order for substituted service of the originating process was made on 14 November 2011.[23] The originating process was served and Ms Marks entered an appearance to it and filed a defence and counterclaim on 19 December 2011.[24] This pleading was amended on several occasions during the course of 2012.[25]

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19 AB10-11.
20 AB81-82.
21 AB83-89.
22 AB123. It is common ground that a substantial amount of funds were made available under the Facility Agreement to finance construction of a dwelling on the Knightsbridge Parade East land.
23 AB80.
24 Affidavit sworn in the recovery of possession proceedings 8 May 2012 para 4; AB76.
25 Affidavit of C E Marks sworn in this appeal 17 February 2014, Exhibits CEM-2, CEM-3 and CEM-5.

[14] The ANZ Bank applied for summary judgment pursuant to r 292(2) of the *UCPR*. The application was decided by the Honourable Justice Dalton on 12 October 2012. Her Honour's reasons[26] disclose that she was of the view that the default judgment in the Singaporean proceedings precluded Ms Mark's from relying on defences which had "as their aim, supporting a case to the effect that moneys claimed by the Bank under the guarantee are not owing". However, having been informed of the then pending application to set aside the default judgment, her Honour went on to consider the two pleaded defences based respectively on alleged misleading and deceptive conduct in relation to a novation of Mr Tyne's indebtedness to the ANZ Bank to Telesto and on an alleged absence of authority on the part of Mr Tyne to execute the Facility Agreement on behalf of Telesto. She found each defence to be without foundation. Accordingly, her Honour granted the ANZ Bank summary judgment on both its claim and the counterclaim.

[15] On 9 November 2012, Ms Marks filed a Notice of Appeal to this Court against the summary judgment orders.[27] The appeal did not proceed to a hearing and on 22 April 2013 a Memorandum of Agreement to Dismissal of Appeal signed by the solicitors for the ANZ Bank and for Ms Marks was filed.[28] The summary judgment for recovery of possession of the land has remained enforceable ever since the order for it was made.

The decision at first instance

[16] The learned primary judge rejected an argument advanced for Ms Marks that upon the proper constructions and application of clause 22 of her guarantee, the Singapore High Court had no jurisdiction with respect to the claim made against her in the proceedings in that court. Another argument to the effect that the proceedings in the Singapore High Court were an abuse of process was also rejected. A further argument based on a non-voluntary submission by Ms Marks to the jurisdiction of the Singapore High Court for the purposes of s 7(3)(a)(i) of the FJ Act and then s 7(2)(a)(iv) thereof, too, was rejected. Having ruled against each of these arguments, her Honour dismissed the application to set aside registration of the judgment.

The arguments on appeal

[17] The grounds of appeal as set out in the Notice of Appeal are as follows:

> "1. Her Honour erred in denying the appellant's application to set aside registration of a judgment of the High Court of Singapore entered against the appellant by Daubney J on 22 March 2013.
>
> 2. Her Honour erred in finding that the appellant had contractually submitted to the jurisdiction of the High Court of Singapore.
>
> 3. Her Honour erred in finding that the appellant had voluntarily submitted to the jurisdiction of the High Court of Singapore."[29]

[18] These grounds were elaborated in an Outline of Argument and a Supplementary Outline of Argument filed on 17 and 29 September 2013 respectively. At the

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26 IPBD20-28.

27 Affidavit of G M Couper sworn in this appeal 21 February 2014, Exhibit GMC-1.

28 IPBD29.

29 AB211-212.

commencement of the hearing of the appeal, the court was informed by Ms Marks that these documents had been written by Mr Tyne. At her request, leave was given to him to present oral submissions on her behalf on the appeal.

[19] It is convenient to deal with the grounds of appeal under the headings and in the sequence in which they are developed in the written outlines.

The abuse of process ground of appeal

[20] In support of this ground of appeal, it was argued that it was an abuse of process for the ANZ Bank, having commenced the recovery of possession proceedings in Queensland which it knew were being defended, thereafter to have commenced the Singaporean proceedings "seeking recovery of the same debt", to have continued those proceedings through to judgment, and then to have had the judgment registered in Queensland. To enforce the registered judgment, it was said, would be contrary to public policy. That would give legitimacy to an abuse of process. Accordingly, it was submitted, s 7(2)(a)(xi) of the FJ Act requires that registration of the judgment be set aside.

[21] Embedded in this argument was the proposition that the recovery of possession proceedings were commenced first because service of them was effected on Ms Marks before service of the Singaporean proceedings was effected on her. This was so notwithstanding that the originating process for the recovery of possession proceedings was filed some eight days after the originating process for the Singaporean proceedings was filed.

[22] Support for this proposition was said to be given by the decision of the Court of Appeal of the United Kingdom in *Dresser UK Ltd v Falcongate Freight Management Ltd*.[30] That case concerned construction of Article 22 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which had application in the United Kingdom. That article applies to the circumstance where proceedings involving the same cause of action between parties are brought in the courts of different contracting states. The article obliges any court other than the court first **seised** of the proceedings, on its own motion, to decline jurisdiction in favour of that court. In a passage on which reliance was placed for support of the proposition, Bingham LJ[31] expressed the opinion that a court was not seised of proceedings on the mere issue of them.[32]

[23] This opinion was evidently directed at the meaning that the concept of being seised of proceedings has within the context of Article 22. His Lordship was not expressing an opinion as to when proceedings are commenced in ordinary legal concepts. So much is clear from this statement earlier in his reasons:

> "An action in England is commenced, whether in the High Court or the County Court, by and upon the issue of proceedings".[33]

[24] The decision in *Dresser* does not support the proposition on which this ground of appeal depends. To the contrary, it confirms that the proposition is wrong. In the eyes of the common law, the Singaporean proceedings were commenced first.

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30 [1992] 1 QB 502.

31 Ralph Gibson LJ and Brown P concurring.

32 At p 523 A-D.

33 At p 517 G.

[25] Beyond this erroneous proposition, the argument advanced by Mr Tyne on this ground of appeal sought to draw upon the judgment of Robson J in *Australian Securities and Investments Commission v Lindberg*[34] and a number of cases to which his Honour referred including *Moore v Inglis*,[35] *Thirteenth Corporation Pty Ltd v State*[36] and *Branir Pty Ltd v Wallco Pastoral Co Pty Ltd*,[37] and also to his Honour's summary of principles relevant to abuse of process set out in his reasons.[38] Particular emphasis was placed upon the following principle stated in the judgment of Jessup J in *Thirteenth Corporation* to which Robson J referred with apparent approval:[39]

> "The important, perhaps critical, point was that the court in which the earlier proceeding was commenced had jurisdiction to deal with everything raised in the later proceeding and there was no reasonable justification, based on legitimate considerations of convenience, cost or the like, for commencing the second proceeding rather than seeking to amend the earlier."[40]

[26] In my view, this statement of principle is unexceptionable. However, it cannot assist Ms Marks here for two significant reasons. First, it was legitimate for the ANZ Bank to have commenced the Singaporean proceedings in order to recover moneys payable by Ms Marks under her guarantee. The advance was made by its Singapore branch. The guarantee was executed by it in Singapore. Further, the guarantee expressly provided that it was governed by and shall be construed in accordance with the laws of Singapore.[41] Under its express terms, Ms Marks submitted to the non-exclusive jurisdiction of the courts of Singapore.[42]

[27] Secondly, the Singaporean proceedings did not include a claim for recovery of possession of the land. In all likelihood, according to the laws of Singapore and to its own Rules of Court, the Singapore High Court had no jurisdiction to grant a judgment in *rem* for recovery of possession of land situate in Queensland.[43] Had such a claim been included in those proceedings, it would most likely have been liable to be struck out for want of jurisdiction. More directly to point, it is the principles of private international law applicable in Australia which determine whether the Singapore High Court has jurisdiction for the purposes of s 7(2)(a)(iv).[44] Under these principles, such a judgment were it given, would not be recognised here as having been made within jurisdiction and having effectuated a recovery of possession of the land in favour of the ANZ Bank.[45]

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34 [2009] VSC 566.
35 (1976) 50 ALJR 589.
36 [2006] FCA 979; (2006) 232 ALR 491.
37 [2006] NTSC 70.
38 At [264].
39 At [250].
40 At [41].
41 Clause 22.
42 *Ibid*.
43 No evidence was tendered as to the relevant law of Singapore. Such would be the case if that law accords with the law in other English-based legal systems: Cf: *British South Africa Co v Companhia de Moçambique* [1893] AC 602.
44 *de Santis v Russo* [2001] QCA 457, per McPherson JA at [9].
45 Cf: *Duke v Andler* [1932] 4 DLR 529. That that outcome would be so is reinforced by s 7(4)(a) of the FJ Act which provides that the courts of the country of the original court are not taken to have had jurisdiction if the subject matter of the proceedings was immovable property situated outside the country of the original court.

[28] An attempt was made by Mr Tyne in submissions to classify the recovery of possession proceedings as debt proceedings on the footing that in order to establish a right to recovery of possession under the mortgage, the ANZ Bank would have to prove that Ms Marks had defaulted on her guarantee.[46] It was said that the only "substantive difference" between the recovery of possession proceedings and the Singaporean proceedings "was the mode of relief sought". This difference is truly a substantive one. Relevantly, it is also a highly significant difference because the relief sought in the recovery of possession proceedings was not available to the ANZ Bank in the Singaporean proceedings.

[29] For these reasons, this ground of appeal cannot proceed. For completeness I note that in his submissions, Mr Tyne did not separately address s 7(2)(a)(xi) or develop an argument for its application beyond the alleged abuse of process.

The submission by contract ground of appeal

[30] This ground of appeal seeks to invoke s 7(2)(a)(iv) of the FJ Act. That provision requires a court to set aside registration of a judgment on the application of the judgment debtor, where it is satisfied that the courts of the country of the original court (in this case, Singapore) had no jurisdiction in the circumstances of the case.

[31] To engage this provision, Mr Tyne advanced an argument based upon clause 22 of the guarantee which provides:

> "22. This Guarantee is governed by, and shall be construed in accordance with, the laws of Singapore. The Guarantor irrevocably submits to the non-exclusive jurisdiction of the courts of Singapore or of any other court as the Bank may elect, waives any objections on the ground of venue or forum non conveniens or any similar grounds and consents to service of process by mail or in any other manner permitted by the relevant law."[47]

[32] The argument depends upon the proposition that the recovery of possession proceedings were commenced first. The commencement of the proceedings, it is further argued, constituted an election by the ANZ Bank under clause 22 for the jurisdiction of the courts of Queensland which, upon the proper construction of clause 22, had the consequential effect of depriving the courts of Singapore of jurisdiction in relation to enforcement of the guarantee.

[33] This chain of argument is deficient at every link in it. As explained, the recovery of possession proceedings were not commenced first.

[34] Secondly, the submission to jurisdiction provision in clause 22 consists of two limbs. The first limb is a submission by the Guarantor to the non-exclusive jurisdiction of the courts of Singapore and the second limb is a submission by the Guarantor to the non-exclusive jurisdiction of any other court as the ANZ Bank may elect. That is to say, on the natural reading of the clause, the expression "as the Bank elects" is a composite part of the second limb, and not an expression which qualifies the whole of the submission to jurisdiction provision. In context, the word

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46 Reference was made in this context to the decisions in *Ex parte Jackson* (1941) 41 SR(NSW) 285 and *Re Forrest Trust* [1953] VLR 246.

47 AB144.

"or" at the commencement of the second limb has a conjunctive rather than disjunctive connotation. Thus, even if the ANZ Bank had made an election by commencing the recovery of possession proceedings first, that step would have had no impact upon the submission to the non-exclusive jurisdiction of the courts of Singapore effected by the first limb.

[35] Thirdly, and in any event, clause 22 does not, of itself, operate in a way to deprive of jurisdiction every other court which might have jurisdiction to entertain proceedings on the guarantee when the ANZ Bank makes an election by commencing proceedings on it in a specific court. Under the clause, the submission is to the non-exclusive jurisdiction of the courts under both limbs, not to the exclusive jurisdiction of one court or of the courts of one country. Had the latter been the case, it would have been arguable that an election under the clause by commencing proceedings in the court of one country impliedly precluded the ANZ Bank from commencing proceedings in the courts of other countries by reason of the guarantor's submission to the exclusive jurisdiction of the originating court. However, such an argument is simply not open given the language and structure of clause 22. It follows that even if the expression "as the Bank elects" did qualify the whole of the submission to jurisdiction provision, an election by the ANZ Bank by commencing the recovery of possession proceedings in Queensland first would not have contractually precluded the ANZ Bank from commencing proceedings to enforce the guarantee in Singapore (and thereby deprived the Singapore High Court of the jurisdiction it otherwise had to entertain proceedings to enforce the guarantee) or negated the irrevocable submission by Ms Marks *per force* of the clause to the non-exclusive jurisdiction of the Singapore High court in such proceedings. Accordingly, this ground of appeal must fail.

[36] In advancing this argument, Mr Tyne referred to a number of cases concerning the enforceability of exclusive jurisdiction clauses. One of them, *Steadmark Pty Ltd v Bogart Lingerie Ltd*[48] concerned proceedings commenced in Victoria notwithstanding an exclusive jurisdiction clause in favour of a French court, in which the overseas-supplier defendant had participated to a point of defending, counterclaiming and taking other steps. Its application for a stay of the Victorian proceedings was refused. The other cases involved concurrent court and arbitral proceedings. To my mind, none of these cases provided assistance with respect to the interpretation or application of clause 22. It is a submission to non-exclusive jurisdiction clause, and not a conferral of exclusive jurisdiction clause.

The submission by appearance ground of appeal

[37] This ground of appeal also seeks to invoke s 7(2)(a)(iv) of the FJ Act. It is centred upon what, it is argued, was a non-voluntary submission by Ms Marks to the jurisdiction of the Singapore High Court. Section 7(3)(a)(i) of the FJ Act deems the courts of the country of the original court to have had jurisdiction if the judgment debtor voluntarily submitted to the jurisdiction of the original court. Section 7(3)(a)(i) is qualified by s 7(5) which provides that a person does not voluntarily submit to the jurisdiction of a court by entering an appearance or participating in the proceedings for the purpose only of, *inter alia*, protecting or obtaining the release of property seized or threatened with seizure, in the proceedings: (c)(i).

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48 [2013] VSC 402.

[38] Outwardly, Ms Marks' conduct has the appearance of a voluntary submission to the jurisdiction of the Singapore High Court. Upon succeeding in having the default judgment against her set aside, she filed an unconditional and valid Memorandum of Appearance and was taking steps to defend the proceedings. She actively resisted the ANZ Bank's appeal against the order of the assistant registrar. The submissions made on her behalf were considered by the judicial commissioner. She did not challenge the jurisdiction of the court to entertain the proceedings.

[39] The two cases to which Mr Tyne referred in advancing this argument are clearly distinguishable at a factual level. In *Malaysia-Singapore Airlines Ltd v Parker*[49] where registration of a Singapore judgment was directed by the Supreme Court of South Australia, the solicitors for the defendant who had entered an appearance to the proceeding for him were granted leave by the Singapore High Court to withdraw it. Bray CJ was of the view that the defendant had never appeared and submitted to the jurisdiction of that court.[50] Here, however, Ms Marks' notice of appearance was struck out by an order made consequent upon the hearing of the appeal by the judicial commissioner. In the *de Santis v Russo*,[51] this Court concluded that there had not been a voluntary submission to the jurisdiction of an Italian court by Mrs de Santis. The relevantly different factual circumstances of that case are apparent from the conclusion expressed by McPherson JA as follows:

> "The present case in my opinion falls on the New Zealand side of the line. Mrs de Santis tried but failed to participate in the proceedings, by invoking the assistance of the Court of Appeals in Rome, or of Ms Rossi's attorney to act for her. The court rejected that informal method of seeking to appear before it, and found her guilty of default. The court did not in the course of giving judgment, as the Bavarian court did in *Re Overseas Food Importers & Distributors Ltd* (1981) 126 DLR (3d) 422, consider the informally presented submissions that were made by the defendant. In my view, the unsuccessful attempt by Mrs de Santis did not amount to participation in the proceedings before the Court of Appeals in Rome or constitute a voluntary submission on her part to the jurisdiction of that Court."[52]

[40] Insofar as reliance was sought to be placed on s 7(5)(c)(i), it must be said at once that the proceedings in the Singapore High Court did not directly relate to the land. No relief was sought in respect of it. Even if, for the purposes of discussion, those proceedings were apt to be characterized as proceedings for seizure of the land, it is not credible that Ms Marks submitted to the jurisdiction of that court **only** to protect the land as property threatened with seizure. Those proceedings were for an amount which exceeded A$11m. Her evident primary purpose in submitting to the jurisdiction was to resist that claim and to avoid the entry of a money judgment against her for the principal, interest and costs in Singapore which might then have been executed there and registered and executed elsewhere. The ANZ Bank's rights to pursue recovery of such a judgment were, of course, not limited to the rights that it had under the registered mortgage that Ms Marks had given.

[41] This ground of appeal, too, must fail.

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49 (1972) 3 SASR 300.

50 At 303.

51 *Supra* n 44.

52 At [22], Thomas JA and Cullinane J concurring.

The enforceable money judgment ground of appeal

[42] This ground of appeal draws attention to the three interest components in Item 2 of the judgment entered under the order of the judicial commissioner. The point is made, and it is a valid one, that the judgment for each component was not for an ascertained amount of money. In order to calculate the amount of money payable for each component, it was necessary to undertake arithmetic calculations after having ascertained an interest rate or interests rates which are described, but not specified by amount, for each component in the judgment. It follows that the judgment entered against Ms Marks "*in toto*, is not for a definite and actually ascertained sum".

[43] It is further argued that the judgment, in its totality, therefore was not an enforceable money judgment within the meaning of the definition of that term in s 3 of the FJ Act because it was not a money judgment under which was payable "an amount of money". Hence it was not registrable under s 6 in Part 2 of the FJ Act.

[44] It will be recalled that the judgment registered in Queensland was for the principal of A$11,102,788.56, precisely the same amount stated in Item 1 of the judgment entered under the orders of the judicial commissioner. Thus the judgment registered in Queensland did not include any interest component.

[45] Whilst I would regard it as open to argument whether an amount of money was payable in respect of each of the interest components in the judgment for the purposes of the definition in s 3, it is not necessary to decide the point. It is clear that even if those components were not amounts of money payable, s 6(13) of the FJ Act would have permitted registration of the judgment in the amount payable for which it was in fact registered. This ground of appeal therefore lacks merit on that account.

Disposition

[46] None of the grounds of appeal relied upon by Ms Marks has succeeded. It follows that her appeal must be dismissed and that she must pay the ANZ Bank's costs of the appeal.

Order

[47] I would propose the following orders:

1. Appeal dismissed.
2. Appellant to pay the respondent's costs of the appeal on the standard basis.

[48] **DAUBNEY J:** I respectfully agree with Gotterson JA.