SUPREME COURT OF QUEENSLAND

CITATION:	*Bank Polska Kasa Opieki Spolka Akcyjan v Opara & Anor (No 2)* [2010] QSC 358
PARTIES:	**BANK POLSKA KASA OPIEKI SPOLKA AKCYJAN** (Applicant) **v** **RICHARD ZBIGNIEW OPARA** (First Respondent) **and** **EVAN DOROTA OPARA** (Second Respondent)
FILE NOS:	BS 5198/06, BS 5199/06, BS 5200/06
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions on 14 and 15 April 2010
JUDGE:	McMurdo J
ORDER:	**In each case the order will be that the applicant bank pay to the respondents their costs of the proceedings, to be assessed upon the indemnity basis from 27 November 2006.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where, upon the application of the respondents, orders were made to set aside three foreign judgments registered in favour of the applicant bank – where the bank rejected the respondents' offer to compromise the proceedings – where the bank, through its former lawyers, had the foreign judgments registered in terms which did not reflect the terms of the original judgments – whether the respondents' costs should be assessed upon the indemnity basis. *Bank Polska Kasa Opieki Spolka Akcyjan v Opara & Anor* [2010] QSC 93

COUNSEL: K A Barlow with D E F Chesterman for the applicant
N Ferrett for the respondents

SOLICITORS: HopgoodGanim Lawyers as town agents for Baker & McKenzie for the applicant
Cooper Grace Ward Lawyers for the respondents

[1] This judgment deals with the costs of the proceedings in which, upon the application of Dr and Mrs Opara, orders were made to set aside the foreign judgments registered in favour of the Applicant bank.[1]

[2] It is common ground that the bank should pay the Oparas' costs, but they argue that there should be an assessment upon the indemnity basis.

[3] The principal basis for this argument is that the bank rejected an offer to compromise the proceedings. The offer was made relatively early in the proceedings, on 27 November 2006. The Oparas' offer was for the bank to consent to the setting aside of the registration of the judgments with no orders as to costs. The bank now submits that that involved no element of compromise. That cannot be accepted because by then the Oparas must have incurred some costs which they were offering to forego. The Oparas concede that rules 360 and 361 of the *Uniform Civil Procedure Rules* do not apply. Rule 360 applies to an offer to settle made by a plaintiff and r 361 applies where a defendant has made an offer to settle and the plaintiff obtains a judgment that is not more favourable to the plaintiff than the offer. But the Oparas argue that their position was relevantly equivalent to that of successful plaintiffs and that r 360 indicates the proper approach to the exercise of court's discretion.

[4] In my view the Oparas should not be regarded as litigants who were, in substance plaintiffs. It is true that they applied for the orders which were granted by my judgment, which were final orders disposing of the proceedings. However the distinction between plaintiffs and defendants, which appears from a comparison of rules 360 and 361, reflects a policy that a party which has a good cause of action should be allowed a more generous assessment of its costs where it has offered to compromise but has had to litigate. As I see the present cases, the Oparas' position was not analogous to that of plaintiffs. The cause of action (if any) prior to these proceedings was that of the bank and the Oparas have successfully resisted the bank's attempt to pursue it by the registration of its foreign judgments. If indemnity costs are to be awarded, it is appropriate that they be awarded only from the date of service of the offer to settle.

[5] The bank submits that it would be wrong for the Oparas to be awarded indemnity costs in the circumstances where, it is said, they owe the bank about $16 million. It is said that the Oparas have never disputed their indebtedness to the bank, they left Poland knowing what they owed to the bank and having decided not to repay any of

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1 *Bank Polska Kasa Opieki Spolka Akcyjan v Opara & Anor* [2010] QSC 93.

it and that their conduct "had no commercial or moral basis and led to the bank commencing these proceedings". I accept that the Oparas have not given evidence which disputes their indebtedness (prior to the foreign judgments). However the existence of such a dispute would not have provided a ground to set aside registration of the judgments. At present I could not determine whether they were liable to the bank in the amounts the subject of the judgments or otherwise. However the fact that there is at least a strong possibility that they are liable for debts of that order might indicate in one way the potential unfairness of an award of indemnity costs. The present context is unusual because although the proceedings have been finally determined, there has been no adjudication here of the merits of the bank's claims for repayment. What has been determined is that the bank's attempts to recover what it says is owed to it were without the necessary legal basis according to the *Foreign Judgments Act 1991* (Cth).

[6] The submissions for the Oparas are critical of the bank's conduct of the present proceedings. However with one qualification, I do not accept that the bank's conduct was so susceptible to criticism that indemnity costs would be warranted for that reason. That qualification is that, as explained in the principal judgment, the bank through its former lawyers had the foreign judgments registered in terms which did not reflect the terms of the original judgments. I could not fairly conclude that the court was deliberately misled when it registered the judgments upon the bank's application. But greater attention should have been paid by the bank's then lawyers to the precise terms of the foreign judgments, in the circumstance where the bank's application for registration was made ex parte.

[7] Having regard to that matter and to the offer to compromise which ought to have been accepted by the bank, I am persuaded that the Oparas' costs should be assessed upon an indemnity basis from the date of that offer. In each case the order will be that the applicant bank pay to the respondents their costs of the proceedings, to be assessed upon the indemnity basis from 27 November 2006.