

International Law

Enforcement of Foreign Judgments by Claire Harris and Albert Dinelli



In two recent cases, Australian courts have considered the scope of the common law and statutory exceptions to the enforcement of foreign judgments. In particular, readers will note the recent Victorian Supreme Court judgment of Whelan J which considered the scope of the “public policy” exception to enforcement in s 7(2) of the *Foreign Judgments Act 1991* (Cth).

Xplore Technologies Corporation of America v Tough Corporation Pty Ltd [2008] NSWSC 1267

Beginning first across the border, the New South Wales Supreme Court (Rothman J) recently considered the common law principles relating to enforcement of foreign judgments in *Xplore Technologies Corporation of America v Tough Corporation Pty Ltd* [2008] NSWSC 1267.

The plaintiff, a US corporation (“Xplore”), sought to enforce a default judgment issued by the District Court of Texas, Travis County. The defendant, an Australian company (“Tough Corp”), contended that the enforcement proceedings should be stayed on the basis that the judgment was obtained in a manner inconsistent with the rules of natural justice and/or was obtained by fraud.

Xplore had a claim in breach of contract against Tough Corp and served a petition on Tough Corp by service on the Texas Secretary of State, which is the manner of service on a foreign defendant provided for by the *Texas Civil Practice and Remedies Code* (“the Code”). The Secretary of State in turn served the petition on Tough Corp by registered mail. The time allowed under the Code for the filing of a “written answer” in defence to the claim had already expired by the time that Tough Corp received the petition. Xplore filed for default judgment without notice to Tough Corp, and default judgment was entered by the Texas District Court. Tough Corp filed an appeal against the default judgment to the Texas Third Court of Appeals, but no resolution of the appeal was expected until early 2009.

Xplore applied to the NSW Supreme Court to enforce the judgment of the District Court. In seeking the application for a stay of the enforcement proceeding, Tough Corp did not challenge the jurisdictional competence of the Texas Court, but argued that the proceeding should be stayed by reference to common law principles. Tough Corp relied on the two exceptions to the enforceability of foreign judgments at common law: judgments obtained in breach of natural justice and fraud.

Rothman J found (at [25]) that “it was at least arguable that Tough Corp ha[s] not had a sufficient opportunity to prepare or present a case” in the time prior to default judgment being entered. His Honour also found that the trial judge in Texas had been

misled by Xplore as to its efforts to contact Tough Corp (at [11]-[12]; [26]-[27]). In the circumstances, Tough Corp would have an arguable defence and it was appropriate that the enforcement proceedings be stayed pending the resolution of the appeal. Rothman J therefore ordered a stay until the earlier of March 2009 or the resolution of the appeal.

***Jenton Overseas Investment Pte Ltd v Townsing* [2008] VSC 470**

Closer to home, the Victorian Supreme Court proceedings of *Jenton Overseas Investment Pte Ltd v Townsing* [2008] VSC 470 involved the application of the enforcement provisions of the *Foreign Judgments Act* 1991(Cth). The foreign corporate plaintiff (“Jenton”) had obtained judgment against Townsing in the High Court of the Republic of Singapore. Townsing had appealed unsuccessfully to the Court of Appeal of the Republic of Singapore.

Jenton applied to the Supreme Court of Victoria to register the judgments pursuant to the *Foreign Judgments Act*, Singapore being a country to which Part 2 of that Act applies: see the *Foreign Judgments Regulations* 1992 (Cth). An order registering the judgments of both Singapore courts was made by the Victorian Supreme Court in August 2007.

Townsing then applied to the Supreme Court, under s 7 of the *Foreign Judgments Act*, to have the registration of the judgments set aside, on the ground that enforcement of the judgment would be contrary to public policy.

Whelan J undertook a review of a number of cases which had considered the public policy exception, both under s 7, and at common law, from which the statutory exception was drawn. Clear from this case law was the principle that the interests of comity and respect and recognition of other sovereign states’ institutions is important. This was especially so under the *Foreign Judgments Act* where there is substantial reciprocity of treatment for Australian judgments in the foreign forum: see s 5(1). Nevertheless, in appropriate cases, substantial injustice, either because of a repugnant law or because of a repugnant application of the law in a particular case, may invoke the public policy ground. Whelan J suggested, however, that “[f]or the public policy ground to be invoked in this context enforcement must offend some principle of Australian public policy so sacrosanct as to require its maintenance at all costs” (at [22]).

In this case, it was argued by Townsing that the public policy exception applied because there had been a substantial injustice in that the Court of Appeal had failed to address a critical issue in dispute in such a way that it amounted to a failure to accord Townsing a hearing at all. Townsing had been a director of Jenton. When it went into liquidation, the liquidators commenced the proceeding in Singapore against him for breach of duty on the basis that the payment away of certain amounts was in dereliction of his duties as a director. As the payment away had been in discharge of debts owing, Townsing had argued that he could not have been in breach of duty for paying a secured creditor what that secured creditor was legally entitled to. His argument relied on the notional rectification of a charge that had been in place between the companies. Before Whelan J, Townsing submitted that the Court of Appeal should have considered the common intentions of the parties, which he said were undisputed, when considering whether he had breached his directors’ duties. By not doing so, it was argued that Townsing had not received a hearing at all.

This argument was rejected by Whelan J. His Honour did not accept the criticism made of the judgment, adding that, in any case, it would not be sufficient to warrant the setting aside of the judgment. The Court of Appeal had dealt with the matter in the way in which it was argued on Townsing's behalf. Essentially, Whelan J's conclusion foreclosed Townsing's attempt to avoid the judgment of a foreign court which had been fully litigated to the highest court in that jurisdiction. It is clear from his judgment that the interests of comity, particularly in the context of the *Foreign Judgments Act*, will be a difficult hurdle to overcome when one relies on public policy as a defence to enforcement of foreign judgments in Victoria, and elsewhere.