REFORMING FORUM DISPUTES

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About the author

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Matthew O'Grady was admitted to the Victorian Bar in 2021. He was called to the Bar in England & Wales in 2010 and has practised in Family Law for over a decade. He continues to practice across both jurisdictions.

When he is in England, Matthew sits part-time as a Judge of the Family Court. He is ranked as a "Leading Junior" in both property and children proceedings by the Legal 500 (UK Bar).

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In *Henry & Henry*[1] the High Court of Australia settled the test to be applied in forum disputes between Australia and jurisdictions other than New Zealand by applying the "clearly inappropriate forum" standard decided in *Voth v Vanildra Flower Mills Pty Ltd*.[2]

This article contends that it is time to review the High Court's holding in Henry by replacing the "clearly inappropriate forum" test with the principles of *forum non conveniens*, which is to say that Australia should give up its claim to jurisdiction where an alternative forum is more appropriate and suitable for achieving the ends of justice.

This article's conclusions will identify a case for review of the 'clearly inappropriate forum' test in light of:

1. the unnecessary lack of alignment in the tests applied to disputes with New Zealand and other countries; and
2. the scope for an irreconcilable clash of forums because of the different tests applied in sister common law countries.

The article will make good practice recommendations for running an international case with forum issues.

1 (1996) 185 CLR 571.
2 (1990) 171 CLR 538.

The current landscape

Forums other than New Zealand

The Australian court will decline its jurisdiction in property proceedings only if the party resisting its jurisdiction persuades it that Australia is a "clearly inappropriate forum" for entertaining the dispute. In deciding whether it is a clearly inappropriate forum, the Australian court's (non-exhaustive) considerations include:[3]

- Factors of convenience and expense (such as witness location).
- Whether, having regard to their resources and understanding of language, the parties are able to participate in the proceedings on an equal footing.
- The connection of the parties and their marriage with each of the potential jurisdictions and the issues on which relief may depend in those jurisdictions.
- Whether the other potential forum will recognise Australian orders and vice versa and the ease of enforcement in each country.
- Which forum may provide more effectively for a complete resolution of the matters involved in the parties' controversy.
- The order in which each of the proceedings were instituted, the stage which they have reached and the costs incurred in each jurisdiction.
- The governing law of the dispute.
- The place of residence of the parties.
- The availability of an alternative forum.
- Any legitimate juridical advantage to litigating in either jurisdiction.

New Zealand forum disputes

The *Trans-Tasman Proceedings Act 2010* (Cth) ('the Act') codifies the "more appropriate forum" test. It specifies an exhaustive list of factors to be considered in deciding whether to stay the proceedings on the basis the New Zealand court has jurisdiction and would be the more appropriate forum:[4]

- The residence of the parties.
- The residence of witnesses likely to be called.
- The place where the subject matter of the proceedings is situated.
- Any agreement between the parties about the court before which the issues should be determined.
- The law that would be most appropriate to apply to the proceedings.
- Whether related or similar proceedings have been commenced in New Zealand.
- The financial circumstances of the parties.
- Any matter prescribed by regulations.
- Any other matter the Australian court considers relevant.

> The Australian court is expressly prohibited from taking into account the fact that proceedings were commenced in its jurisdiction.

The alternative

England, along with other common law jurisdictions, determines forum disputes not by asking whether it is a clearly inappropriate forum, but whether the alternative forum is more appropriate.[5] The English court asks where the balance of fairness and convenience lies as between it and the competing forum (*forum (non) conveniens*).

The English court must identify '...where the case may be tried suitably for the interests of all the parties and for the ends of justice'.[6] The 'cardinal' principles are:[7]

- The court must first identify the 'natural forum' for the dispute (the place with which the case has the most real and substantial connection).
- Connecting factors will include not only matters of convenience and expense but also factors such as

3 *Deslandes & Deslandes* [2015] FamCA 913, *per* Kent J at [22].
4 *Trans-Tasman Proceedings Act 2010* (Cth), s 19(2).
5 This article does not intend to address the legal position of 'legacy' cases which commenced during the UK's membership of the European Union or those which commenced during the UK-EU Transition Period. Distinct legal arrangements exist for those cases.
6 *Spiliada Maritime Corp v Cansulex Ltd The Spiliada* [1987] AC 460, per Lord Goff.
7 *W v L (Forum Conveniens)* [2019] EWHC 1995 (Fam), *per* MacDonald J at [30], applying *Spiliada*.

the relevant law governing the proceedings and the places where the parties reside.

- The party wishing to stay the English proceedings must show not only that England is not the natural and appropriate forum but that there is another available forum that is clearly and distinctly more appropriate.
- The court retains a discretion to refuse to grant a stay where, in the circumstances, justice requires it should be refused – these circumstances should be all the circumstances of the case and not just 'connecting factors'.

The list of considerations that weigh in favour of a forum being more suitable is not exhaustive. Factors considered include:[8]

- Where assets are located.
- The convenience of the parties and any witnesses.
- Where the relationship subsisted.
- The rights of the parties in each jurisdiction (including procedural rules of disclosure).
- The delay and expense that would arise from the proceedings being stayed.

Why change?

It is suggested that the 'more appropriate forum' test is preferable to that adopted by the High Court in *Voth* and *Henry*. There are three advantages to adopting the 'more appropriate forum' test.

First, it better suits the ends of justice to have a test that endeavours to identify where proceedings are better suited, rather than one which will 'cling on' and only give itself up (even to an objectively more suitable forum), if it believes itself to be 'clearly inappropriate'.

Secondly, it would harmonise Australian law by bringing the treatment of non-New Zealand forum disputes in line with the treatment of disputes in the *Trans-Tasman Proceedings Act 2010* (Cth). In doing so the law would be simplified, thereby making it more accessible.

Thirdly, it would align Australian law with that of its closest common law relations. The 'more appropriate forum; test is not only utilised by England and New Zealand in its non-Australian disputes, but also by Canada, Singapore and Hong Kong.

The existence of this difference between jurisdictions creates the possibility of an irreconcilable conflict: a conflict in which the foreign court is recognised by even the Australian court to be the natural or appropriate forum, but in which it cannot be said the Australian court is *clearly inappropriate*. The likelihood of this irreconcilable conflict was described by the High Court in *Voth* in 1990 as being 'rare'.[9] However, it must be doubted whether that conclusion continues with the force it did three decades later in a society in which global connectivity and ease of international movement of families have evolved to unprecedented levels.

> Furthermore, even if the likelihood is remote, why entertain such a possibility when there is a preferable test which has been adopted by leading common law jurisdictions in the time since *Voth* was decided?

Good practice guidance

Acting in international disputes requires a firm grasp of the client's circumstances, alongside a comprehensive understanding of the foreign law issues. The following are likely to be highly advantageous in assembling a defence of the client's preferred forum:

Instruct a foreign lawyer as early as possible – or, ideally, a dual qualified lawyer. Ask:

- Are there procedural advantages/disadvantages of the two jurisdictions (for example, in the rules of disclosure and service)?
- What are the probable costs of proceeding in the foreign jurisdiction?
- Are there merits for the client under the substantive law of the foreign jurisdiction?
- Can an interim restriction be entered against property in the foreign jurisdiction to prevent its sale?
- How suitable is the relief available to the parties?

8 *Butler v Butler* (No 2) [1997] 2 FLR 321, *per* Sir Stephen Brown P.

9 *Voth* at [36].

- Will the foreign forum be able to determine all the issues between the parties? (For example, are there pension or superannuation issues that can only be determined in one jurisdiction, which will make litigation in the other jurisdiction just a partial solution).
- Will a judgment of the foreign jurisdiction be enforceable?

Gather the facts from the client that are necessary to deal with a forum dispute:

- Will there be witnesses besides the spouses (for example, expert witnesses or third parties)? Where do they reside?
- Where are the parties' assets located?
- Where are relevant business interests based?
- Did the parties execute an agreement on forum?
- Where will the children reside (which jurisdiction is best suited to assess their long-term needs and make orders)?

It is hoped this analysis stimulates discussion and is useful to practitioners dealing with international Family Law disputes.