Which country? The "clearly inappropriate forum" test in Australian family law

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In deciding whether Australia should exercise jurisdiction in proceedings under the *Family Law Act 1975* ("the Act") , the usual test is whether or not Australia is a "clearly inappropriate forum".

The application of the "clearly inappropriate forum" test was recently considered in *Deslandes & Deslandes* [1]. In that case, the parties lived in France for 5 years, sailed around the world for 4½ years and later lived in Australia for about 4 years.

The parties had entered into a prenuptial agreement - a marriage contract in France pursuant to French civil law, importing the regime for property settlement prescribed in Articles 1536 to 1543 of the French Civil Code. The husband contended that the wife's Australian proceedings for a property settlement were "an abuse of process" and/or that the proceedings ought be stayed on forum grounds.

What is the "clearly inappropriate forum" test?

Where proceedings are on foot in the Family Court, notwithstanding that the Court might have jurisdiction, applying the test of *forum non conveniens* might require those proceedings to be stayed. The test is whether the Family Court is a clearly inappropriate forum and to maintain the Australian proceedings would be vexatious or oppressive[2].

There is a heavy onus on the party seeking that an Australian Court decline to exercise jurisdiction. This was explained by Deane J in *Oceanic Sun Line Special Shipping Co Inc. v Fay* [3] in a statement of principle that was adopted by the High Court in *Voth v Manildra Flour Mills Pty Ltd* [4]. Deane J said that the power of a court in Australia to order the dismissal or a stay of proceedings properly within jurisdiction on forum grounds was:

> "a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgment and, to a significant extent, matters of impression. The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose jurisdiction the defendant is

[1] [2015] FamCA 913
[2] *Henry & Henry* [1996] HCA 51; (1996) 185 CLR 571 at 586-7
[3] [1988] HCA 32; (1988) 165 CLR 197
[4] [1990] HCA 55; (1990) 171 CLR 538

> amenable and which would entertain the particular proceedings at the suit of the plaintiff. Otherwise, that onus will ordinarily be discharged by a defendant who applies promptly for a stay or dismissal if he persuades the local court that, having regard to the circumstances of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties …"

Kent J noted that even if he found that a French court was the "more appropriate" forum, that did not result in the conclusion that Australia was a "clearly inappropriate" one. He had to determine whether the Australian proceedings were "vexatious or oppressive" in the sense identified by the High Court in *Voth* before staying the Australian proceedings. He quoted Deane J in *Oceanic*, which statement was adopted by the majority of the High Court in *Voth*:

> "… once it is accepted that the adjectives "oppressive" and "vexatious" are not to be narrowly or rigidly construed and are to be applied in relation to the effect of the continuation of the proceedings rather than the conduct of the plaintiff in continuing them, the continuation of proceedings in a tribunal which is a clearly inappropriate forum would, in the absence of exceptional circumstances being established by the plaintiff … be oppressive or vexatious to such a defendant if there is some available and appropriate tribunal in another country … [the test] cannot, however, properly be seen as a "more appropriate forum" test since the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceeding does not necessarily mean that the local court is a clearly inappropriate one".[5]

In *Navarro & Jurado,*[6] the Full Court of the Family Court considered these principles in the context of competing divorce proceedings in Australia and Costa Rica. In *Deslandes*, Kent J considered that the separate judgments of Thackray and O'Ryan JJ in *Navarro*, taken together, provided a comprehensive review of the authorities on the issue of forum in a family law context. Thackray J said in *Navarro* that:

> "… the focus must be "upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum."[7]

O'Ryan J helpfully explained the distinction between the "clearly inappropriate forum" test applied in Australia, and the "more appropriate forum" test which applied elsewhere, as follows:

> "The two tests are not identical and the difference lies in the emphasis placed on the appropriateness of the local forum rather than the appropriateness of any available foreign forum. The clearly inappropriate test avoids a mere comparison between the competing forums and focuses on the extent to which the continuation of the proceedings in the Australian court should be regarded as inappropriate. The question of whether an Australian court is a clearly inappropriate forum requires attention to be directed to the inappropriateness of that court and not to the appropriateness or comparative appropriateness of the foreign forum." [8]

Applying the "clearly inappropriate forum" test to the facts in *Deslandes*

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[5] at 248
[6] [2010] FamCAFC 201
[7] at 29
[8] at 127

When applying the "clearly inappropriate forum" test to the facts in *Deslandes*, Kent J said (at para 22) that whether or not Australia was a "clearly inappropriate forum" depended on an assessment of the following (non-exhaustive) factors (derived from Lord Goff's factors in *Spiliada,* approved in *Voth* and added to in *Henry*:

"(a) Factors of convenience and expense, such as the location of witnesses;
(b) Whether, having regard to their resources and understanding of language, the parties are able to participate in the respective proceedings on an equal footing;
(c) The connection of the parties and their marriage with each of the potential jurisdictions and the issues on which relief may depend on those jurisdictions;
(d) Whether the other potential forum will recognise Australian Orders and vice-a-versa and the ease of enforcement in each country;
(e) Which forum may provide more effectively for a complete resolution of the matters involved in the parties' controversy;
(f) The order in which each of the proceedings were instituted, the stage which they have reached and the costs incurred in each jurisdiction;
(g) The governing law of the dispute;
(h) The place of residence of the parties;
(i) The availability of an alternative forum; and
(j) Any legitimate juridical advantage to litigating in either jurisdiction".[9]

In *Deslandes*, the parties' assets were located in Australia. The assets included:

1. A yacht, which the husband valued at $300,000;

2. A Queensland Treasury bond of $750,000; and

3. The business interests of each of the parties via their respective businesses or corporations.

Kent J, referring to some of the connecting factors in Australia, said[10]:

> "Plainly enough, in circumstances where both parties are resident in Australia and have been now for some years; and both parties plan to remain living in Australia; it cannot be said that matters of convenience or expense, including the location of any necessary witnesses, renders Australia a clearly inappropriate forum".

He noted that significant additional cost and expense would be involved in the parties participating in proceedings in France (where they did not live) in comparison to participating in proceedings in Australia (where they lived).

A matter of central importance was that the husband sought parenting orders under the Act. In *Kemeny & Kemeny,* [11] the Full Court held that although the Family Court may be a "clearly inappropriate forum" to litigate one matrimonial cause (such as where property orders had been made by an overseas court) it may nonetheless properly exercise its jurisdiction with respect to others (such as parenting matters, or with respect to property located in Australia). However, it was important to recognise (e.g. *Henry*), that the matters in dispute between the husband and the

[9] at 592-593
[10] at para 330
[11] [1998] FamCA 34; (1998) FLC 92-806

wife arising out of the matrimonial relationship, and consequent upon its breakdown, were part of a single controversy.

In *Deslandes*, Kent J considered that it was contradictory for the husband to contend that the Australian Court was "a clearly inappropriate forum" for property matters, when he had invoked the Family Court of Australia's jurisdiction by applying for parenting orders. The husband's application for parenting orders brought into focus the important principle that resolving issues between the parties after marriage breakdown was a single controversy arising out of the same substratum of facts. To determine parenting issues in Australia, whilst there were proceedings in France to determine financial issues, was plainly vexatious and oppressive to the wife.

Relevance of the French pre-nuptial agreement

The husband pointed to the parties' pre-nuptial agreement made pursuant to the French Civil Code and his consequent juridical advantage in having financial issues determined in France. Importantly, Kent J noted that the pre-nuptial agreement did **not** include any clause or term to the effect that the parties submitted exclusively to the courts of France to determine any financial issues; or any agreement that the parties could not bring proceedings other than in France. In other words, the parties did not include in their agreement any promise not to sue in a foreign jurisdiction. Such a clause might have supported an injunction in aid of such a promise.

Kent J said the fact that the parties had an overseas pre-nuptial agreement was not necessarily ignored in property proceedings under the Act. It might, for example, provide an important source of evidence as to the initial contributions by each party.

Kent J concluded that juridical advantage was not the major factor, saying:

> "Put another way, the factor of any legitimate juridical advantage to the husband of litigation in France is overwhelmed by the other factors referred to. In particular, Australia provides more effectively for a complete resolution of the matters involved in the parties' controversy and the connection of the parties and their marriage with Australia, as referred to, results in the conclusion that Australia cannot be said to be a clearly inappropriate forum."[12]

Conclusion

The decision of *Deslandes* provides a useful summary of the law applied in determining forum disputes and how the "clearly inappropriate forum" test is applied in matters under the Act.In *Deslandes* the factors which were particularly important were:

1. The costs involved if the property proceedings were dealt with in France as opposed to Australia;

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[12] at para 45

2. The fact that the husband, although seeking that the property proceedings be determined in France, also sought parenting orders in Australia; and

3. The French pre-nuptial agreement was not relevant to the question of forum because the agreement did not include any provisions about that issue.

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