Which country? New Zealand vs Australia - a special case

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The "forum non conveniens" test does not apply when determining which forum should determine a family law dispute when the contest is between Australia and New Zealand. An example of the application of the test which applies to these forum disputes occurred in *Nevill & Nevill*.[1] In that case, the wife issued property proceedings in Australia. The husband issued property proceedings in New Zealand and sought a stay of the wife's Australian proceedings.

The husband and wife were New Zealand citizens. They met in New Zealand and commenced cohabitation in New Zealand in 2003, later marrying. They had one child, who was born in New Zealand in 2006. They separated in June 2013 in Australia, about six months after they had relocated to Australia from New Zealand. There was a dispute as to whether or not the relocation was permanent.

The wife had a trust in New Zealand and it was not in dispute that the proper law of the trust was the law of New Zealand. One of the assets of the trust included the parties' former matrimonial home with an estimated value of NZD $1,200,000. The husband also had a trust, which held most of his entitlement to shares in a business. The wife contended that the husband's interest in the business was valued at over NZD $12 million. There was also no dispute that the proper law of the husband's trust was the law of New Zealand.

Kent J drew the parties' attention to the existence of the *Trusts (Hague Convention) Act 1991* (Cth) and said that the parties stated positions appeared to be consistent with that statute.

The wife's proceedings were under the *Family Law Act 1975* (Cth). The husband's proceedings were pursuant to the *Property (Relationships) Act 1976* (NZ) in the Family Court of New Zealand. He sought to have his proceedings transferred to the High Court in New Zealand, as he had initiated separate proceedings there with respect to his trust.

The parties made submissions to the Family Court of Australia on the basis that the applicable law was the "clearly inappropriate forum" test. However, Kent J noted that the forum issue was to be determined by reference to the question of whether the New Zealand

[1] [2015] FamCA 876

Court "is the more appropriate court to determine those matters" within the meaning of s 19(2) of the *Trans-Tasman Proceedings Act 2010* (Cth) ("the Trans-Tasman Act").

The Trans-Tasman Act forum test

The test for an application to stay an Australian proceeding on forum grounds is set out in s 17(1) of the Trans-Tasman Act which provides:

> "A defendant in a civil proceeding in an Australian court may apply to the court for an order staying the proceeding on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue".

A stay of the Australian proceeding can be ordered by an Australian court on an application under s 17(1) if it is satisfied that a New Zealand court, in accordance with s 19(1):

> "(a) has jurisdiction to determine the matters in issue between the parties to the proceeding; and
> (b) is the more appropriate court to determine those matters".

Both parties conceded the s 19(1)(a) issue.

The matters to be considered by the Australian court in determining whether a New Zealand court is the more appropriate court under s 19(1)(b) are listed in s 19(2):

> "(a) the places of residence of the parties or, if a party is not an individual, its principal place of business;
> (b) the places of residence of the witnesses likely to be called in the proceeding;
> (c) the place where the subject matter of the proceeding is situated;
> (d) any agreement between the parties about the court or place in which those matters should be determined or the proceeding should be commenced (other than an exclusive choice of court agreement to which s 20(1) applies);
> (e) the law that it would be most appropriate to apply in the proceeding;
> (f) whether a related or similar proceeding has been commenced against the defendant or another person in a court in New Zealand;
> (g) the financial circumstances of the parties, so far as the Australian court is aware of them;
> (h) any matter that is prescribed by the regulations;
> (i) any other matter that the Australian court considers relevant;
> and must not take into account the fact that the proceeding was commenced in Australia".

Kent J referred to the decision of Brereton J in *Re Featherston Resources Limited, Tetley v Weston*,[2] where he considered the relevant provisions of the Trans-Tasman Act in the context of the *Corporations Act 2001* (Cth). Brereton J noted (at para 51) that, whilst the power conferred by s 17 is discretionary, "… it would be an exceptional case, if there is one at all, in which being satisfied that the New Zealand court had jurisdiction and was the more

[2] [2014] NSWSC 1139

appropriate one, the Court would not stay the Australian proceedings". Kent J agreed with this statement. Brereton J pointed out that the test directed attention to the more "appropriate", not the more "convenient", court. Whilst convenience was an important consideration, it was not determinative.

Consideration of the s 19(2) factors

Kent J considered the mandatory considerations in s 19(2) in the context of Brereton J's observations.

In relation to s 19(2)(a) - the places of residence of the parties - Kent J observed that whilst both parties were resident in Australia, the possibility of joining, or the potential need to join, the New Zealand based trustees of the husband's trust could not be excluded. Their joinder might be required to ensure effective interim or final relief or enforcement.

In relation to s 19(2)(b) - the places of residence of the witnesses likely to be called in the proceeding - both the husband and the wife, being the most obvious witnesses, were resident in Australia. New Zealand was where the other possibly relevant witnesses lived, so there was some prospect of necessary witnesses based in New Zealand being required,

In relation to s 19(2)(c) - the place where the subject matter of the proceeding was situated - the subject matter of the proceeding was situated essentially in New Zealand.

There was no suggestion of any agreement between the parties about the Court or place where proceedings consequent upon the breakdown of their marriage were to be determined in accordance with s 19(2)(d).

Regarding s 19(2)(e) - the law it was most appropriate to apply in the proceeding - Kent J considered that there were two possible interpretations of this provision. On a narrow view, all that was required was to compare the extent to which an Australian court, in the Australian proceeding, would consider it appropriate to apply Australian law or foreign law in the proceeding. Essentially this involved looking at the extent to which it might be appropriate to apply foreign law, rather than the law of the forum to the proceedings if they proceeded in the local forum. This narrow interpretation was inapplicable to this case, as a court exercising jurisdiction under the *Family Law Act* applied Australian law to the determination of the dispute and could adjust the property rights of the parties regardless of any rights acquired or vested in them under foreign law. See, for example, *In the Marriage of Hannema,*;[3] *Cain & Cain,*[4] and *Gilmore & Gilmore*.[5]

[3] (1981) 7 Fam LR 542

A wider interpretation of the provision focuses on the law that it would be most appropriate to apply to the particular dispute in issue, having regard to the circumstances in which that dispute arose. Kent J said:

> "That is, having regard to connecting factors with each country, whether it would be more appropriate for the law of New Zealand than that of Australia to apply to determination of issues consequent upon the breakdown of the marriage".[6]

Kent J considered that the wider interpretation commended itself, having regard to the express reference in s 17(1) of the Trans-Tasman Act to the more appropriate court **to determine the matters in issue**. His Honour considered all the connecting factors to New Zealand, as against the connecting factors with Australia.

The wife emphasised the juridical advantage to her of her property settlement claim being determined in Australia as distinct from a determination of the husband's proceedings in New Zealand. There were two aspects to her argument. Both parties submitted that in New Zealand there would, or may be, issues as to the extent to which the husband's trust formed part of the parties' "relationship property". That trust held the most valuable assets owned or controlled by either or both of the parties. If the trust was part of the "relationship property", the trust would be subject to division on the basis that each party had *prima facie* an equal entitlement. The second aspect of her argument was that New Zealand's family law was currently "in disarray" in terms of conflicting approaches as to how discretionary trusts and the interests in discretionary trusts were to be considered. She compared this to what was submitted to be the now clear and established approach under Australian family law, following in particular, cases such as the High Court's determination in *Kennon v Spry*.[7]

Kent J was not satisfied that New Zealand's law was unclear, much less that it met the description of being "in disarray", as contended by the wife's counsel. He was also not persuaded that any perceived juridical advantage to any party in one forum, even if one existed, rendered the law of that forum "most appropriate to apply in the proceeding" within the meaning of s 19(2)(e), or was even relevant to that consideration. Kent J saw no merit

> "… in the contention that an Australian court is more appropriate than a New Zealand court because the party invoking the jurisdiction of the Australian court has some juridical advantage, procedural or substantive, by so doing. That necessarily means disadvantage to the other party".[8]

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[4] (1987) FLC 91-808
[5] (1993) FLC 92-353; [1993] FamCA 3
[6] at para 45
[7] (2008) FLC 91-777; [2008] HCA 56
[8] at para 57

Kent J observed "… the need to treat issues between husband and wife arising out of the matrimonial relationship and its breakdown as a single controversy, is a principle of central importance".[9]

Any parenting, child support or spousal maintenance issues would have been part of the same single controversy as the property settlement proceedings. The principle to treat the matters as a single controversy might lead to a conclusion that, irrespective of where the parties had lived for the greater part of their married lives and the location of their assets, the proper law to apply was Australian law. However, in *Nevill,* no issues were raised other than the property settlement proceedings. The parties had apparently resolved their other issues in the three year period between final separation and the institution of the *Family Law Act* proceedings.

The facts which Kent J said "loomed large" in his judgment were:

> "(i) The parties are both New Zealand nationals and they lived for the greater part of their married life in New Zealand, having commenced cohabitation there in January 2003 and marrying there in January 2005. Conversely, the marriage relationship (prior to final separation) only subsisted for some six months after the parties came to Australia in January 2013;
> (ii) The parties accumulated their existing property or the property interests of either of them predominately [sic] whilst they pursued their married life together in New Zealand;
> (iii) The property of the parties or either of them is substantially situated in New Zealand. There are obviously substantial property interests involved;
> (iv) The wife's trust, which predominately [sic][owns or controls the vast majority of what may be conveniently described as the wife's assets (including the real property that was the parties' former matrimonial home in City F) is a New Zealand trust with a corporate trustee which is New Zealand based;
> (v) The husband's trust, which overwhelmingly in terms of value owns or controls the vast majority of property interests which are the focus of these proceedings, is a New Zealand trust with New Zealand trustees including both an individual resident in New Zealand and a corporate trustee;
> (vi) Neither party has acquired any asset of any significance in Australia beyond personal items;
> (vii) All, or predominately [sic] all, events referred to by either party in their respective evidence to date (accepting that to be preliminary) as to the acquisition or improvement of property or property interests (and historical real property transactions during the course of the marriage) occurred in New Zealand, and some of these are seemingly in dispute".[10]

Overwhelmingly, Kent J found that the connecting factors to be considered under s 19(2)(e) tended to favour the conclusion that the law of New Zealand was the most appropriate law to

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[9] at para 59. See *Henry v Henry* [1996] HCA 51; (1996) 185 CLR 571 and *Dobson & Van Londen* [2005] FamCA 479; (2005) FLC 93-225.
[10] at para 62

apply to the determination of property issues consequent upon the breakdown of the parties' marriage.

In relation to s 19(2)(f), a related or similar proceeding had been commenced against the defendant or another person in a court in New Zealand. Kent J noted that the wife had acceded to the jurisdiction in New Zealand by filing an unconditional defence in the proceedings the husband instituted pursuant to the *Property Relationships Act 1976* (NZ).

The financial circumstances of the parties so far as the Australian court was aware of them, were relevant by virtue of s 19(2)(g). Each party had filed a financial statement and affidavit setting out the substantial property interests they each held. In summary, Kent J found that both parties appeared to have substantial financial means available to them to pursue proceedings in either jurisdiction.

There did not appear to have been any matters prescribed by regulations pursuant to s 19(2)(h).

In relation to "any other matter" that the Australian court considered relevant under s 19(2)(i), there was no evidence that matters of convenience, delay or expense had any role in considering the outcome of the application, beyond those to which reference had already been made.

His Honour concluded:

> "The subject matter of these proceedings is property overwhelmingly situated in New Zealand. There are potential aspects relating to the trust law of New Zealand, in particular as regards the husband's trust and his pursuit of proceedings for the declaratory relief in relation to the husband's trust that potentially have a connection with property settlement proceedings. The parties' marriage subsisted for most of its duration in New Zealand and overwhelmingly in New Zealand as compared with Australia. In my judgment the nature and subject matter of the issues in dispute between the parties and the inter-relationship between those issues and New Zealand, render the Family Court in New Zealand (or the High Court if the proceedings are transferred there) the more appropriate court within the meaning of the Act. The discretion under s 17(1) of the Act thus enlivened, there is no reason not to conclude, in circumstances where a New Zealand court has jurisdiction and appears to be the more appropriate court to determine the matters in issue between the parties, that these proceedings ought be stayed".[11]

His Honour made an order permanently staying the Australian proceedings.

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[11] at paras 73-76

Conclusion

Lawyers need to be aware that the usual "forum non conveniens" test does not apply in forum disputes between Australia and New Zealand.

Nevill is a good illustration of the application of the relevant legislation including how the factors to be considered under that legislation are applied.

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