

THE CLEARLY INAPPROPRIATE FORUM TEST IN RELATION TO MATRIMONIAL PROPERTY PROCEEDINGS IN AUSTRALIA

Introduction

The purpose of this paper is to examine the development of law in Australia (and in particular as it relates to Family Court property settlements) as to the choice of the appropriate forum. This paper will firstly examine the development of the law from the “*Spiliada*” test through to the landmark High Court decision in *Voth and Manildra Flour Mills Pty Ltd*.

We will then examine the Family Court’s treatment of the “*clearly inappropriate forum*” test up to the current date. We will also look at some other decisions pertaining to the “*clearly inappropriate forum*” test and consider whether the test laid down in *Voth and Manildra Flour Mills* in 1990 is in all respects the same today as it was 14 years ago.

As always, the practical implications of these cases and how they impact decisions taken by practitioners in relation to the stay of proceedings for property settlement or otherwise will be considered together with relevant factors that must be given appropriate weight in such cases.

In this paper it is assumed that practitioners have a good understanding of the general requirements for the institution of property settlement proceedings under the *Family Law Act*. To recap quickly, the jurisdictional requirements for the institution of applications for property settlement is covered under Section 39(4)(a) of the *Family Law Act*. That is, proceedings with respect to property settlement are a matrimonial cause and can be instituted under the Act if at the relevant date (usually the date of the filing of the Application), either party to the marriage is:

1. An Australia citizen; or
2. Ordinarily resident in Australia; or
3. Present in Australia.

If a party in matrimonial property proceedings is able to institute proceedings in Australia and regularly invokes the jurisdiction of the Australian Family Court then it is not always the case that the Court will choose to exercise such jurisdiction.

These cases relate to instances where there is a foreign Respondent and/or proceedings instituted in a foreign Court or alternatively an Application for a Stay of the Australian proceedings brought by the Respondent.

The purpose of this paper is to look at the development of the law and practical implications as to various factors set out in those cases so as to assist practitioners.

A Review of the Law up to *Voth -v- Manildra Flour Mills Pty Ltd (1990) 171 CLR 538*

Up until 1988, in general terms, there were two (2) situations in both Australia and England which gave rise to different decisions on the staying of International matters.

The first situation was where service of an originating Application took place within the jurisdiction of the local country under the Common Law Rules of service. The other situation was where the Defendant or Respondent was served out of the jurisdiction.

In situations where the Respondent was served within the jurisdiction then the position both in England and Australia was that the jurisdiction of the Local Court had been established as a matter of right and should not be lightly declined by that Court.

However, if service took place outside of the jurisdiction it was accepted that the Local Court generally had a discretion to stay the proceedings if there was a more “*appropriate forum*” elsewhere.

The House of Lords in a number of decisions commenced eroding the distinction between the service within the jurisdiction and service out of jurisdiction cases. This culminated in the 1986 House of Lords decision of *Spiliada Maritime Corporation -v- Consulex Ltd (1987) 1AC460*.

This is a landmark House of Lords decision which accepted that the general doctrine of forum non-conveniens applied to both service within the jurisdiction and out of the jurisdiction. In summary, the test was that if a Respondent to proceedings in the Local Court could show that a foreign Court was a more appropriate forum as the proceedings had the most real and substantial connection with the foreign jurisdiction then a presumption would arise in favour of a stay of the proceedings in the Local Court.

The House of Lords made reference to a number of facts which would be considered in deciding which forum was more appropriate such as:

1. The location and accessibility of witnesses;
2. The applicable law governing the transaction in dispute;
3. The places of business and residence of all parties.

Common exceptions to the rule were that if the Plaintiff was able to show that they’d be denied a legitimate juridical advantage by a stay being ordered then in the interests of justice a stay may be refused. For example, a Plaintiff may show that they had better prospects for recovery of damages or there are more appropriate assets within the local forum to recover against and satisfy any judgment etc.

The High Court of Australia had the opportunity to adopt the House of Lords reasoning in 1998 in the decision of *Oceanic Sunline Special Shipping Company -v- Fay (1988) 165CLR197*. In this case however, the High Court, by a majority, refused to adopt the forum non conveniens test. The majority however in this case did not agree upon a uniform principal to be applied which then lead to the later majority decision by the High Court in *Voth’s* case.

In *Voth’s* case, the majority of the High Court adopted the “*clearly inappropriate forum*” test which was proposed by Dean J in the *Oceanic Sunline* case.

Simply, in *Voth’s* the facts involved companies in Australia suing a US Accountant who had been engaged to provide taxation advice for one of the subsidiary companies (wholly owned) which operated under the US laws. Specific tax advice was sought and it was alleged by the Plaintiffs that the advice was negligent and that the Plaintiff companies in NSW had suffered loss.

In a majority decision of 5-1 the High Court stayed the proceedings in the NSW Court as they found that NSW was a “*clearly inappropriate forum*”.

The majority in that case held that NSW was a clearly inappropriate forum for the proceedings due to the following matters:

1. The whole of the action was overwhelmingly connected to Missouri;
2. It was the Plaintiff's claim that negligent advice which they had received had actually occurred in the State of Missouri and therefore the local rules in Missouri are likely to apply to any claim;
3. Missouri is the place of residence for the Defendants and also Missouri was where professional Accounting standards applied and would be relevant;
4. The substantial evidence in the case would be in Missouri and the substantial laws that would be applied would be in relation to any tax laws in the US.

In the Plaintiffs' favour it was really only the fact that they resided here and that they had commenced proceedings here in Australia. It was accepted however, in the proceedings here that the Plaintiffs had greater prospects for recovery of legal costs and also greater prospects for award for interest on damages as compared to proceedings in Missouri.

The majority considered however these factors were not as important because of the overwhelming connection of the proceedings to the foreign Court.

Whilst *Voth's* case was a landmark decision in that the majority of the High Court stated beyond doubt that the "*clearly inappropriate forum*" test was now to be used the case was not all that helpful (in the writer's opinion) as far as distinguishing a discrete set of factors which needed to be looked at in every matter.

It is perhaps this lack of precision in the majority decision that led to the High Court's later criticism of the Full Court of the Family Court in *Henry's* case.

Henry -v- Henry (1996) FLC92-685

After the decision in *Voth's* case there were two (2) important decisions in the Family Court. The first decision was a decision by the Full Court in *Gilmore and Gilmore (1993) FLC92-353* and the subsequent Full Court decision in *Henry's* case which was then overturned by the High Court.

In *Gilmore's* case, the Husband had filed divorce proceedings in New Zealand in September 1991. The Wife filed divorce proceedings in Australia in November 1991. The Wife began proceedings against her Husband in December 1991 for property settlement in the Family Court in Australia. Subsequent to this in March 1992 the Husband began similar proceedings for property settlement against the Wife in the Family Court in New Zealand. At the time of institution of each party's respective Applications they were domiciled and resident in Australia and New Zealand respectively. Each party filed documents in the other one's proceedings protesting the jurisdiction.

The Family Court of Australia granted the Husband an order to stay of the Australian proceedings and the Wife then appealed against that Order.

The Wife's appeal was successful and the stay Order was set aside with the result that current proceedings ran in the both the Australian and New Zealand Court for property settlement. In *Gilmore's* case, the Full Court of the Family Court (Justices Fogarty, Finn and Lindermeyer), in a Judgment written by Fogarty J stated:

“The substance of the Australian test involves five (5) elements:

- 1. A party who has regularly invoked of the jurisdiction of a Court has a prima facie right to insist upon its exercise;*
- 2. The power to stay proceedings regularly commenced is to be exercised in accordance with the general principal empowering a Court to dismiss or stay proceedings which are "oppressive", "vexatious" or "an abuse of process";*
- 3. The fact that the balance of convenience favours another jurisdiction or that some other jurisdiction is a more appropriate forum will not justify a stay of the action;*
- 4. In the Application of the above principal the discussion by Lord Guffin Spiliada of relevant "connecting factors" and legitimate "personal or juridical advantage" provides valuable assistance;*
- 5. In deciding whether the chosen forum is clearly inappropriate, the extent to which the law of that forum is applicable in resolving the rights and liabilities of the parties is a material consideration. The selected forum will not been seen as inappropriate "if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities of the parties".*

The High Court had reason to revisit the Family Court's Application of the "*clearly inappropriate forum*" test in *Henry's* case when the High Court considered both the Full Court's judgment in *Henry's* case and also made reference to the Full Court judgment in *Gilmore's* case and the laying down of the abovementioned five (5) principles.

The relevant facts in *Henry's* case are as follows:

1. The Appellant Wife was a Germany National resident in Monaco. The Respondent Husband was a Australian citizen and had been a resident of Monaco until 1993. The parties married in Germany in 1977 and moved to Monaco about ten (10) years later. The Husband returned to Australia in 1993 and later commenced Divorce and property proceedings against the Wife in the Family Court. The Wife applied in the Australian Family Court for the proceedings to be stayed or dismissed in favour of proceedings which were already on foot (having been instituted by her) in Monaco. The Wife submitted that the Family Court of Australia was clearly an inappropriate forum.
2. The Respondent Husband bought proceedings for Divorce and also property settlement proceedings in Australia. The stay and subsequent appeals related only to the Divorce proceedings. The Full Court of the Family Court had granted a Decree Nisi of Dissolution of Marriage but had stayed the Decree Nisi pending the outcome of the appeal to the High Court. No consideration had been given to the question of whether the property proceedings should also go ahead in Australia. However, the facts and reasoning in this judgment are crucial and important to the ongoing consideration by the Family Court of such matters.
3. After the parties were married in Germany they set up home in Germany and lived there for the next ten (10) years. They then moved back to Switzerland. The parties then both eventually took up residence in Monaco in or around 1988/89 and lived there together until about late 1992/early 1993. The Appellant Wife continues to live in Monaco. The Respondent Husband returned to Australia and immediately instituted proceedings.

4. The Respondent Husband had money in bank accounts in Monaco, New York and Switzerland and has or has had business interests in Europe, the United States and Asia. The Appellant Wife believes he's also had substantial property interests in the United States and in the Cayman Islands. In Australia, the Respondent has a rented apartment, a car and bank account but few other assets.
5. The parties spent none of their married life in Australia. The Appellant Wife visited Australia as a tourist before her marriage and once during the marriage. The Respondent visited Australia also once during the marriage but not with the Appellant.
6. Significantly, the Respondent Husband had commenced proceedings in Monaco on 14 December 1992 by filing a Petition for Divorce. It appears that the Respondent failed to attend Court and the Petition was struck out or withdrawn in or around February 1993. The Respondent then left Monaco to visit Japan. After the Respondent had left Monaco Orders were made in the Monaco proceedings forbidding the Respondent from entering the former matrimonial home and preventing him from drawing on his Monaco bank accounts and requiring him to pay maintenance to the Appellant Wife.
7. On 11 August 1993, the Appellant Wife applied for Orders with respect to property and maintenance in the Monaco Court. It was not in issue that the Respondent Husband was represented and resisted various parts and aspects of the proceedings in Monaco and perhaps also other proceedings in Switzerland.
8. After the Respondent Husband came back to Australia in late 1993 and instituted proceedings the Judicial Registrar held that the Husband had acquired a domicile by choice based on his evidence that he had re-established his residence here and is intending to live here long term. There was no challenge to that finding.

The High Court was critical of the Full Court's "5 step" pronouncement in *Gilmore's* case and approval of that in the Full Court decision in *Henry's* case.

The High Court indicated there were three (3) areas that were misleading in such a test if those guidelines were to be adopted and further raised the issue of the relevance of proceedings in another jurisdiction and how they were to be taken into account when looking at the "*clearly inappropriate forum*" test.

It is suggested that the following represents a summary of the "*clearly inappropriate forum*" test after the decision of the High Court in *Henry's* case:

1. The substance of the law is simply whether the chosen forum is a clearly inappropriate forum. That is to be determined by considering whether the continuation of the proceedings would be "*oppressive*" or "*vexatious*" in the extended sense in which those words were used by Dean J in the *Oceanic Sunline* case, i.e. oppressive in the sense of "*seriously and unfairly burdensome, prejudicial or damaging*" or vexatious in the sense of "*production of serious and unjustified trouble and harassment*".
2. There is no strict rule that a party who has regularly invoked the jurisdiction of the Court has a prima facie right to insist upon its exercise. The High Court stated that there may be some cases in which the notion of a prima facie right has some role in determining whether or not a stay should be granted. But there are also cases in which the notion can do little more than indicate that the onus lies on the party seeking a stay to establish the chosen forum is clearly inappropriate. The High Court commented that in fact there may be cases where the forum is so clearly inappropriate that the notion of prima facie right can have no real bearing on the matter as for example if the cause of action arose in a

country in which the parties reside or carry a business and the controversy could be conveniently be litigated in that country.

3. The fact that the balance of convenience favours another jurisdiction or that some other jurisdiction is a more appropriate forum will not justify a stay of the action.
4. The discussion by Lord Goff in the *Spiliada* case of the relevant “*connecting factors*” and “*legitimate personal or juridical advantage*” provides assistance to the Court and such factors are to be considered.
5. The substantive law of the forum is a very significant factor in the exercise of the Court’s discretion as to whether or not it is a clearly inappropriate forum however the Court should not focus upon that factor to the exclusion of all others. This statement by the High Court in *Henry* waters down considerably the statement by the Full Court in *Gilmore*.
6. There are more compelling considerations in favour of a stay of local proceedings if there are proceedings already on foot in another country which has jurisdiction to entertain those proceedings and the proceedings are between the same parties and with respect to the same issue or controversy.

It is prima facie, vexatious and oppressive in the strict sense of those terms to commence a second or subsequent action in Courts of this country if an action is already pending with respect to the matter in issue.

It does not follow that because one or other of the proceedings is prima facie, vexatious or oppressive within the *Voth* sense of those words, that the local proceedings should be stayed. However, it does follow that the fact that where there are or even that there may be simultaneous proceedings in different countries with respect to the same controversy is highly relevant to the question whether the local proceedings are oppressive in the sense of “*seriously and unfairly burdensome, prejudicial or damaging*” or vexatious in the sense of “*productive of serious and unjustified trouble and harassment*”. It also follows that the Court should strive to the extent that *Voth* permits, to avoid that situation.

7. No question arises unless the Courts of the respective countries have jurisdiction with respect to the parties and their marriage. If there is a question as to the jurisdiction of a foreign Court it may be necessary to adjourn a local proceedings to enable the foreign Court to determine that question.

However, if both have jurisdiction it will be relevant to consider whether each Court will recognise the other’s orders and agreements. If the Orders of the foreign Court will not be recognised in Australia that will ordinarily dispose of any suggestion that the local proceedings should not continue. However, if the Orders of the foreign Court will be recognised in Australia it will be relevant to consider whether any Orders may need to be enforced in other countries and if so the relative ease with which that can be done.

8. It may also be relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties controversy.
9. It is also necessary to consider the Order in which the proceedings were instituted, the stage which they have reached and the costs which have been incurred.
10. It is also relevant to consider the connection of the parties and their marriage with each of the jurisdictions and to have regard to the issues on which relief might depend in those jurisdictions.

11. It will be relevant consider whether having regard to each party's resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing.

The High Court noted that the above list is not exhaustive but rather the question whether Australia is a clearly inappropriate forum is one that depends on the general circumstances of the case taking into account the true nature and the full extent of the issues involved.

The High Court also offered a valuable insight into the nature of the proceedings for matrimonial relief in different jurisdictions. At 83124 the High Court stated:

“If separate proceedings are commenced between the Husband and Wife in different countries, differences in procedure, in available remedies and in the substantive law with respect to marriage and divorce will ordinarily ensure that the proceedings are different in significant respects. However, the proceedings will ordinarily be concerned with the same controversy and that will be so even if the initiating party is not the same and even if the proceedings seek inconsistent remedies or outcomes. The martial relationship lies at the heart of all proceedings between Husband and Wife with respect to their martial status especially proceedings for the dissolution of marriage. In such cases it is the martial relationship itself which is the subject of controversy. If the marriage is still subsisting, disputes with respect to property, maintenance and the custody of children will ordinarily be aspects of an underlining controversy with respect to the martial relationship.

In this case (Henry's case) even though the Appellant first brought proceedings against the Respondent in Monaco for judicial separation and only later commenced proceedings for divorce, both proceedings were in essence proceedings with respect to the martial relationship. Clearly, it was the same martial relationship which was the subject of the divorce proceedings brought in Australia by the Respondent. Although it may not be quite so clear, the property proceedings instituted by the Respondent in the Family Court are but an aspect of his controversy with the Appellant as to their martial relationship. It may have been otherwise if they were no longer married but so long as their marriage subsists their dispute with respect to property is a dispute as to the rights and obligations arising out of the martial relationship and those which should attend its dissolution. As such, it is proper to be seen as part of the controversy with respect to that relationship.”

The Current Status of the “Clearly Inappropriate Forum” Test and Practical Considerations

It is the writer opinion that subsequent decisions in the Family Court have failed to fully appreciate and to apply the guidance and principals of the High Court's pronouncements in Henry's case.

There have been a number of decisions by the Family Court including the following cases:

1. *Kemeny -v- Kemeny (1998) FLC92-806;*
2. *Ferrer-Watson -v- McElrath (2000) FLC93-022;*
3. *Kahdemollah and Kahdemollah (2000) FLC93-050;*
4. *Steen -v- Black (2000) FLC93-005.*

It is the writer's opinion that the High Court decision in *Henry* and subsequent High Court and other Supreme Court decisions have emphasised the importance of concurrent or pending proceedings in the other jurisdiction and the effect this has on the clearly inappropriate forum test.

The High Court decision in *Henry* has not been the only High Court decision to focus upon the relevance of the existence or not of concurrent proceedings in a foreign jurisdiction and as to what are relevant factors to be applied in such case.

In *CSR Ltd –v- Cigna Insurance Australia Limited (1996) 189CLR345* the High Court again considered this issue. The relevant facts of this case were as follows:

- CSR, a company incorporated in Australia had been engaged in the sale and production of asbestos to companies in Australia and the US. A number of personal injury claims were commenced against CSR in both countries and CSR sought indemnity from Cigna Australia, its insurer, who denied liability.
- CSR then sued Cigna and its parent company, Cigna Corporation (which was incorporated in the US), in the US. In the American action CSR sought declarations against both Cigna Australia and Cigna Corporation that it was entitled to indemnity in respect of the US asbestos claim and damages from Cigna Corporation in tort and under US anti-trust legislation. About three (3) weeks after the commencement of CSR proceedings in the US, Cigna Australia brought suit in NSW against CSR seeking negative declarations to the effect that they were not liable to indemnify CSR in respect of the Australian and US asbestos claims.
- CSR then applied to stay the proceedings with Cigna and the High Court, by a majority of 6-1 granted the Order. The judgment of the majority commenced by noting that the case was similar to the *Henry's* case in that it involved an Application for Stay based on the existence of pending proceedings in another jurisdiction. However, unlike *Henry* where both local and foreign proceedings were in respect of the same subject matter, in *CSR –v- Cigna* there was no “*correspondence*” between the proceedings for two (2) reasons, firstly because the NSW proceedings in contrast to the US proceedings extended to the Australian as well as the US asbestos claims and secondly and most importantly correspondence was lacking because the US proceedings unlike the NSW action involved a claim against Cigna Corporation (which both parties agreed) could not be pursued in Australia, that is for damages under US anti-trust legislation.
- The majority of the High Court commented that had the question of whether NSW was a clearly inappropriate forum been answered solely by reference to the issues pleaded in the NSW proceedings, a strong argument would have existed for saying that it was not. Most of the connections with the indemnity claim lay in Australia. Since it was the place of issue of the insurance policies, Australian law was likely to determine liability and the main parties in the litigation were two (2) Australian companies which carried on business here. However, when the US proceedings were focused upon, the suitability of the Australian forum for resolution of the dispute became more doubtful. As the US action involved the further issue of the liability of the Cigna Corporation under US anti-trust law and this matter could not be tried in Australia it followed that Australia was then a clearly inappropriate forum for the litigation of issues raised in the US proceedings. The majority of the High Court then laid down the following proposition:

“Where different issues are involved in the local and foreign proceedings, albeit that the different proceedings arise out of the same substratum of fact, the question is not whether the Australian Court is a clearly inappropriate forum for the litigation of issues involved in the Australian proceedings. Rather the question must be whether having regard to the

controversy as a whole, the Australian proceedings are vexatious or oppressive in the Voth sense of those terms.”

- Other cases where the clearly inappropriate forum test have been further considered include:
 - *Regie Nationale des Usines Renault SA -v- Zhag (2002) HCA10*;
 - *Gutnick -v- Dow Jones and Co Inc. (2001) VSC 305*;
 - *Jamieson -v- Madden (2003) NSWSC 639*.

Summary and Practical Consideration

From the High Court decisions and the Family Court decisions it is confusing to abstract a clear set of principles to guide practitioners as to relevant factors and considerations to look at when dealing with considerations concerning forum disputes. The following is an attempt to set out a summary of the relevant issues that you need to look at and consider in such cases:

1. Ask yourself, is the Australian Court a clearly inappropriate forum;
2. Primarily, when looking at whether the Australian Court is a clearly inappropriate forum, you need to consider whether continuation of the proceedings would be “*oppressive*” or “*vexatious*”. In this context, oppressive means seriously and unfairly burdensome, prejudicial or damaging and vexatious means productive of serious and unjustified trouble and harassment.
3. Whether a party has regularly invoked the jurisdiction of the local Court is one of the factors to be considered. It may be more important in certain cases rather than others. It is not a decisive factor nor does it give rise to any strict prima facie right to proceed in the local forum.
4. Relevant connecting factors with the local forum together with legitimate personal or juridical advantages should also be considered and weighted.

Relevant connecting factors include looking at the connection between the forum and the subject matter of the action, the place of business and residence of the parties and the relevant laws governing the transactions.

Personal or judicial advantage factors include the availability and extent of relief available in the forum, the existence of more favourable relief in the forum and the existence of assets within the forum for the satisfaction of any judgment obtained. In a matrimonial sense it may also include factors such as

- Where the parties were married;
- Where the parties have lived during the marriage;
- Where the parties have engaged in business or accumulated assets during the marriage;
- Where the children have grown up or gone to school.

5. The fact that the balance of convenience favours another jurisdiction or that some other jurisdiction is more appropriate will not on itself satisfy a stay of the action. The focus must be on whether the local forum is clearly inappropriate.
6. The substantive law of the local forum and its availability in resolving the rights and liabilities of the parties is a very significant factor in the exercise of discretion but the Court should not focus upon that factor to the exclusion of all others.
7. The Court will give weight to the existence of pending proceedings in another Court in the exercise of the discretion to grant a stay. There are compelling considerations in favour of a stay of proceedings in a local Court where proceedings have previously been instituted in another country which has jurisdiction to entertain those proceedings and the proceedings are between the same parties with respect to the same issue or controversy.
8. Where there are concurrent pending proceedings, no question of a stay can arise unless the Courts of the respective countries both have jurisdiction with respect to the parties and the action. If there is a question as to the jurisdiction of a foreign Court it may be necessary to adjourn the local proceedings to enable the foreign Court to determine the question.
9. Where both Courts have jurisdiction in the concurrent pending proceedings then the following factors may be relevant in determining whether a stay should be ordered:
 - Will each Court recognise each other's Orders and judgments. If the Orders of a foreign Court will not be recognised in Australia then that may ordinarily dispose of any suggestion that the local proceedings should not continue;
 - If however the Orders of a foreign Court would be recognised in Australia, it will then be relevant to consider the extent to which any Orders need to be enforced in other countries and the relative ease with which this can be done;
 - It may also be necessary to consider which forum can provide more effectively for the complete resolution of the matters involved in the parties controversy;
 - Focus should be placed upon the Order in which proceedings were instituted, the stage which they have reached and the costs which have been incurred;
 - It will also be relevant to examine the connection of the parties and the action with each of the jurisdictions and whether having regard to the resources and understanding of the language, the parties are able to participate in the respective proceedings on an equal footing.

It is suggested that as a practitioner confronted with an urgent jurisdictional problem involving property settlement then the following should be considered:

1. Immediately determine the jurisdiction of instituting any proceedings in the Australian Court on behalf of your client;
2. Immediately gather detailed facts from your client concerning both parties connections to Australia, history of their marriage and location and value of all assets;
3. Consider urgently (if possible) the jurisdiction of any claim that may be made in the foreign Court (depending upon where the other party resides). If necessary make enquiries of a Family Law Specialist in that jurisdiction;

4. In a sense, make a determination as to which is the more appropriate forum for your client. However, still focus on the test as to whether Australia is clearly inappropriate or not;
5. Ascertain urgently whether proceedings have been already commenced in a foreign jurisdiction. If so, obtain full details as to the nature of those proceedings and any action taken by your client in such proceedings and the stage of such proceedings. Once again obtain advice urgently from a Family Law Specialist in that jurisdiction as to the effect and impact of those proceedings and what matters have been part of the controversy dealt with in those proceedings;
6. Obviously, look at the assets available in the Australian jurisdiction to satisfy any potential judgment of your client. If assets are elsewhere then urgently consider obtaining advice as to the enforceability of any Australian Orders in that foreign jurisdiction and vice a versa;
7. It may be crucial factor later to have instituted proceedings first in time. Urgently consider that option and don't delay. If appropriate, file proceedings for all forms of relevant relief which your client is entitled to in the Family Court of Australia.
8. If you consider a jurisdiction is not appropriate then do not consent to nor take any active part other than to object to such jurisdiction and apply for a stay (if appropriate).

WORKSHOP PROBLEM

Q. Mary was born in Australia and is currently 50 years of age and is an Australian citizen. John was born in the Foreign Country A and has dual citizenship, he is currently 56 years of age. Mary and John were married in Australia in 1980. They have two (2) adult children who attend University in Brisbane, Australia. After being married for about two (2) years Mary and John travelled to Foreign Country A where they purchased a home together and resided in Foreign Country A for about six (6) years. Both children were born in Foreign Country A and also have dual citizenship. In 1988 Mary and John returned to Australia and lived in Australia until the children completed High School in 1999. John was then transferred to Foreign Country B and the parties lived and worked in Foreign Country B for a period of four (4) years before separating in Foreign Country B. After separation Mary returned to Australia and John returned to Foreign Country A to reside. The children recommenced their Tertiary studies in Australia.

The matrimonial assets consist of the matrimonial home in Foreign Country B worth \$200,000.00. There are two (2) properties in Brisbane worth net \$500,000.00 together with Shares owned in Australia worth \$100,000.00. John also owns a property in his own name in Foreign Country B worth £200,000.00. In the following scenarios, consider whether the Court would conclude that Australia is a clearly inappropriate forum for Mary's property settlement:

- (a) Assume all of the above facts and nothing else;**
- (b) Assume that John had filed proceedings for divorce only in Foreign Country A and served these upon Mary;**
- (c) Assume that John had already commenced proceedings in the Foreign Country A for divorce and property settlement and these have been filed and served upon Mary about three (3) months earlier. Mary has not yet taken any action in the Courts in Foreign Country A;**
- (d) Assume the above facts except Mary has filed a Response seeking different property Orders in the Foreign Country A's jurisdiction and the proceedings have been on foot there for about nine (9) months;**
- (e) Assume that Mary and John when separating in Foreign Country B had entered into a marital agreement (similar to a Binding Financial Agreement) which was a proper agreement under the law of that country but not an agreement that is filed in Court or an Order of the Court. That agreement provides for the division of property. Mary is unhappy with it and on your advice she would be entitled to more if proceedings were instituted in Australia. Is Australia clearly an inappropriate forum?**
- (f) Assume the above facts except also assume that the agreement has a specific and detailed exclusion clause detailing that Foreign Country B is the only jurisdiction for any disputes between the parties and that Foreign Country B is the appropriate forum for any future disputes and that the jurisdiction of Foreign Country A and Australia is specifically excluded;**
- (g) Assume that Mary has instituted proceedings in Australia for spousal maintenance only. These are then served upon John but he takes no action. John then files property proceedings in Foreign Country A. Mary seeks your advice about filing property proceedings in Australia.**