How to Run a Case Involving Multiple Jurisdictions

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"I don't ever want to call a court biased, so I won't call it biased and we haven't had a decision yet, but courts seem to be so political," he said. "It would be so great for our justice system if they were able to read a statement and do what's right." President Donald Trump, (January 2017)

In our increasingly complex and specialised society, litigation in multiple jurisdictions about the same subject matter and involving the same or some of the same litigants is becoming more common.

Handling this situation requires analysing the advantages and disadvantages of one Court over another and devising an argument for transfer and/or for consolidation of proceedings if appropriate. If the application for transfer fails then a strategy has to be devised to deal with that. Having regard to this the topics covered in this paper are:

- How does one superior Court exercise the jurisdiction of another?
- What is left of the Jurisdiction of Courts (Cross-Vesting) Act 1987?
- Accrued jurisdiction
- Transfer of proceedings
- Choosing the right forum: the lines of demarcation
- Dealing with judicial officers in different Courts
- When to apply to transfer proceedings to another Court
- What to do if the transfer fails

How does one superior Court exercise the jurisdiction of another?

There are two categories. The first is under the vestiges of the scheme established by the Jurisdiction of Courts (Cross-Vesting) Act 1987. The second relates to the principle of accrued jurisdiction.

Jurisdiction of Courts (Cross-Vesting) Act 1987

As originally devised the Cross Vesting scheme provided a simple and ingenious solution to the problem of superior Courts being invested with jurisdiction to determine all aspects of a judicial controversy between various parties. Essentially, any superior Court, State or Federal could exercise the jurisdiction of another Court provided certain criteria were met. Additionally there was provision for transfer of proceedings between Courts to consolidate

causes of action and provide for the most efficient disposal of the proceedings if it was in the interests of justice to do so.

However most or it came crashing down in the landmark decision of *Re Wakim, Ex parte McNally (1999) 198 CLR 511,* where the High Court held that, in so far as the State legislation purported to confer jurisdiction in State matters on the Federal or Family Courts, they were invalid, but left untouched the provisions in the Commonwealth Act relating to conferral of Federal jurisdiction on State Courts and Territories (as it was held to be authorised by Ch III of the Constitution); and the provisions for transfer of proceedings between such Courts. After the decision the Act was amended accordingly.

Sec 4 (1) of that Act provides that if:

a. the Federal Court or the Family Court has jurisdiction with respect to a civil matter, whether that jurisdiction was or is conferred before or after the commencement of this Act; and
b. the Supreme Court of a State or Territory would not, apart from this section, have jurisdiction with respect to that matter;

then:

c. in the case of the Supreme Court of a State (other than the Supreme Court of the Australian Capital Territory and the Supreme Court of the Northern Territory)--that Court is invested with federal jurisdiction with respect to that matter; or
d. in the case of the Supreme Court of a Territory (including the Australian Capital Territory and the Northern Territory)--jurisdiction is conferred on that Court with respect to that matter.

As a result a State Supreme Court may exercise all of the powers in the Family Law Act under what remains of the Cross Vesting legislation, but <u>not</u> via versa.

<u>Accrued jurisdiction in the Family Court</u>

Independently of the Cross Vesting scheme *accrued jurisdiction* permits the accrual of non-federal jurisdiction to a Court exercising federal jurisdiction so that a Court may determine the entire matter before it and not simply the Federal aspects of this matter. It has been recognised as an aspect of the High Court's jurisdiction for many years. It was not until 2002 that it was definitively held that the Family Court could exercise accrued jurisdiction.

In *Warby and Warby (2002) FLC ¶ 93-091* the Full Court identified (at p 88,792) matters to be taken into account in determining whether the Court should exercise such jurisdiction as including:

- what the parties have done;

- the relationships between or among them
- the laws which attach rights or liabilities to their conduct and relationships;
- whether the claims are part of a single justiciable controversy and in determining that question whether the claims are ``attached" and not "severable" or "disparate";
- whether the claims are non-severable from a matrimonial cause and arise out of a common sub-stratum of facts; and
- whether the Court has the power to grant appropriate remedies in respect of the "attached" claims.

The Full Court considered (at p 88,792) that "a rigid filter is difficult to define without close inspection of the particular facts and we would not wish to create an exhaustive definition which must be applied beyond the circumstances posited in this case".

Three examples of the use of accrued jurisdiction by the Family Court are:

a. In *Warby and Warby* where there was a dispute to the entitlement of property owned by the wife and her father to which property the husband made financial contributions after marriage.

b. In *C and C and C: Accrued jurisdiction* (2001) FLC ¶ 93-076 , the husband and wife lived on a property situated at Springwood which was registered in the names of the husband and the third party, as joint tenants. The wife claimed a beneficial interest in the property. At issue was whether the judge could make binding orders against the third party which Jerrard J. found that he could.

c. In *RUANE & BACHMANN-RUANE AND ORS (ACCRUED JURISDICTION)* [2012] FamCA 369 a financial agreement entered into by the husband and wife was found to be not binding within the meaning of s 90G. The wife sought as part of the proceedings damages for negligence and/or breach of contract and/or breach of fiduciary duty against the second respondent solicitors and third respondent counsel who advised her with respect to the agreement.

<u>Accrued jurisdiction in the Federal Circuit Court</u>

Sec 14 of the Federal Circuit Court Act provides that:

In every matter before the Federal Circuit Court of Australia, the Federal Circuit Court of Australia must grant, either:

(a) absolutely; or

(b) on such terms and conditions as the Federal Circuit Court of Australia thinks just;

all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible:

(c) all matters in controversy between the parties may be completely and finally determined; and

(d) all multiplicity of proceedings concerning any of those matters may be avoided.

According to the learned authors of the CCH Family Law Service this simply provides a power to determine matters that are within the jurisdiction of the Court. Where a "matter" involves issues or claims associated with a matter within the jurisdiction of the Court, consideration must be given to sec 18 in order to determine whether the Court will have accrued or associated jurisdiction with respect to the matter.

Sec 18 of the Federal Circuit Court Act provides that:

> To the extent that the Constitution permits, jurisdiction is conferred on the Federal Circuit Court of Australia in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Federal Circuit Court of Australia is invoked.

They go on to say that however, it is clear that the intention of Parliament is to provide the Court with sufficient power to completely deal with a matter so as to avoid multiple proceedings. They cite the Explanatory Memorandum which states as follows:

> 25. Clause 14 gives the Court the power to conclusively determine all the claims that are before the Court and to grant whatever remedies are necessary to do so. This provision is designed to avoid multiple proceedings arising from the same dispute between the parties.

Consistent with this the Federal Circuit Court has exercised accrued jurisdiction both in Family Law and non-Family Law proceedings; see *WATERS & DURRANT [2015] FCCA 2419 per Judge Harman.*

<u>Limitations of Accrued Jurisdiction</u>

Whilst the use of accrued jurisdiction is a versatile solution there is one significant caveat however which must be borne in mind at all times. The availability and exercise of accrued jurisdiction is not as of right, it is at the discretion of the trial judge. This makes the initial choice of forum highly

important as discussed below. The risks are magnified as an order for transfer or the refusal to transfer is not subject to appeal.

Transfer of proceedings

Section 5 (4) Jurisdiction of Courts (Cross-vesting) Act 1987 Act is the relevant section concerning transfer of proceedings from the Family Court to a State Superior Court. Reduced to its essence the question is whether a transfer is in the interests of justice once the prerequisites in the section are met.

Those criteria are set out in section 5(1)(b)(ii); viz:

(A) whether, in the opinion of the first Court, apart from this Act and any law of a State relating to cross-vesting of jurisdiction and apart from any accrued jurisdiction of the Federal Court or the Family Court, the relevant proceeding or a substantial part of the elevant proceeding would have been incapable of being instituted in the first Court and capable of being instituted in the Federal Court or the Family Court;

(B) the extent to which, in the opinion of the first Court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the Commonwealth and not within the jurisdiction of the first Court apart from this Act and any law of a State relating to cross-vesting of jurisdiction; and

(C) the interests of justice;

In *Dawson v Baker (1994) 120* ACTR 11, Miles CJ of the ACT Supreme Court held that:

> The decision about whether a transfer is or is not in the interests of justice is in the nature of a value judgment. Once the value judgment is made there is no discretion as to whether or not an order should be made. The Court must order the transfer or refuse to order the transfer in accordance with the decision whether to do so is in the interests of justice. The order for transfer or the refusal to transfer is not subject to appeal.

Quoting from Street CJ: from *Bankinvest AG v. Seabrook and Others* (1988) 14 NSWLR 711 at 714,

> A decision about cross vesting "calls for what I might describe as a "nuts and bolts" management decision as to which Court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute. Consideration of textured principle and deep learning - in particular principles of international law such as forum non conveniens - have no place in a cross vesting adjudication. There is, in substance, no principle to be enunciated other than the necessity of applying the specific considerations stated in the cross-vesting legislation, primary amongst which is the pursuit of the interests of justice. Internal administrative decisions within a

> Court as to where particular proceedings should best go forward in the interests of justice are in many ways akin to the making or refusing of transfer orders under the cross-vesting legislation.

A recent case where Family Court proceedings where consolidated with Supreme Court proceedings involving various equitable, trust and corporate matters and parties was *LL Pty Limited & Dawson* & Ors [2015] FamCA 709. In that case, Loughnan J considered whether he should transfer property proceedings to the Supreme Court of NSW. The parties were engaged in several pieces of litigation in the NSW Supreme Court and Family Court. The Supreme Court (Darke J.) had refused an application to have the related proceedings transferred to the Family Court. His Honour in that case, on the facts of that case, decided that it was in the interests of justice to transfer the proceedings to the Supreme Court.

In another recent case of *Vega and Riggs* [2015] FamCA 797 Watts J. was asked to transfer proceedings in the Family Court brought under sec 44(3) to the NSW Supreme Court where there were concurrent proceedings underway for the sale of a jointly owned property under sec 66G of the Conveyancing Act (NSW). His Honour refused to do so, stating inter alia, that the sec 66G proceedings were overridden by sec 109 of the Constitution and that the Family Law proceedings should prevail.

<u>Choosing the right forum: the lines of demarcation</u>

Taking this all into account how do you decide where to commence proceedings? Although this list is not exhaustive, the considerations include:

- Who goes first? Sometimes bringing the first application offers the advantage in keeping the proceedings in the forum of choice. Where a respondent brings a claim in a second Court apparently in response to the original proceedings brought in the first the litigant is open to the charge of being deliberately obstructive and unnecessarily duplicating litigation.

- Which Court is the most "natural" forum for the dispute? By this I mean which Court has the resources, procedures and jurisdiction most suited to the resolution of the dispute. For example, in *LL Pty Limited & Dawson* & Ors the majority of the parties were not spouses and their causes of action were only peripherally related to property Family Law proceedings.

- Which Court can dispose of the matter most quickly and efficiently? In this regard, generally speaking, any transferred proceedings or those

relying on accrued jurisdiction are subject to the rules and procedures of the Court hearing them. To give some simple examples, a Family Law property claim transferred to the Supreme Court is unlikely to be allocated a conciliation conference and the rules of Supreme Court will govern matters such as disclosure, discovery and appointment of experts. The matter will travel the same procedural path as the Supreme Court cause of action being heard with it. By way of another example, if it is primarily an Equity cause it will be subject to *SUPREME COURT PRACTICE NOTE SC Eq 1* which sets out in detail the procedure to ready a matter for trial including the filing of affidavits and expert evidence.

Dealing with judicial officers in different Courts

It goes without saying that when appearing before a judicial officer unfamiliar with the cause of action and/or legislation in your case an effort must be made to properly encapsulate your claim and to contrast and explain its relationship with the other causes of action traveling with it. This involves making no presumptions about how your case appears at face value.

If you are seeking to have it transferred to another forum be mindful of putting evidence before the Court about why it is in the interests of justice to do so (having regard to the issues that I am discussing).

If you wish the case to remain where it is, be ready to explain exactly what evidence is required and the procedural steps necessary to ready the matter for trial. Remember that this has to be presented and framed within the rules and case management guidelines of the Court you are in. You might seek assistance from a practitioner familiar with the jurisdiction. Ideally, you would brief Counsel familiar with practice in that Court as well.

Further if you are also seeking interlocutory relief, make sure you abide by the Court's rules and practices.

When to apply to transfer proceedings to another Court

There are many considerations about applying for a transfer, but the essential considerations are:

Can a strong a case be made out that it is in the interests of justice to transfer the proceedings?

- How do the costs of running a case in the current Court and the proposed Court of transfer differ.

- Compare the delay before the matter might be heard in each Court.

- Consider the effect on any appeal of your claim in the current Court. For example an appeal concerning proceedings heard at first instance in the NSW Supreme Court would be entertained by the NSW Court of Appeal. This would include the Family Law cause of action included in the proceedings.

What to do if your transfer fails

Note that the order for transfer or the refusal to transfer under the Cross Vesting legislation is not subject to appeal.

Parallel proceedings

There are numerous practical and legal problems where proceedings run in parallel. Inevitably along the way decisions made in one Court will "tread on the toes" of the other proceedings. For example, if there are contrary findings of fact and/or interlocutory orders interfere with the progress of the other proceedings. A simple example might be a finding in the Supreme Court that a debt between a spouse and a third party family member is enforceable applying the law of contract strictly whilst in the Family Court applying principles in cases such as *Biltoft and Biltoft (1995) FLC ¶ 92-614* the loan to or from a family member might be discounted or even disregarded.

Another difficulty is the possible effect of restrictions imposed about the use of subpoenaed material obtained in one set of proceedings in proceedings in another Court. Generally speaking sec 121 of the Family Law Act prohibits the publication of information in Family Law proceedings that would identify a party, related person or witness. Beaching the section is an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

There is however an exception in the section as follows:

The preceding provisions of this section do not apply to or in relation to:

> (a) the communication, to persons concerned in proceedings in any court, of any pleading, transcript of evidence or other document for use in connection with those proceedings; or

(aa) the communication of any pleading, transcript of evidence or other document to authorities of States and Territories that have responsibilities relating to the welfare of children and are prescribed by the regulations for the purposes of this paragraph;

Nevertheless one can well imagine an argument being raised to restrict the use elsewhere of subpoenaed documents obtained in Family Law proceedings with the potential that they are excluded.

One thing is certain; a decision must be made about the order for determination of the two sets of proceedings. Continuing with the previous example one would expect an application might be made in the Family Court under sec 79(5) of the Act for the Family Law proceedings to be adjourned until the Supreme Court proceedings are concluded so that the liabilities of the spouses owing to or from third parties to be crystallized before hearing the property claim.

Anti-suit injunction - proceedings in Foreign Courts

In the area of conflict of laws, an anti-suit injunction is an order issued by a court or arbitral tribunal that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum. Typically they are sought to prevent a party seeking an advantage by continuing proceedings in a foreign jurisdiction where the relevant legal principles are more favourable for them.

The general principles applicable in Australia to applications for injunctions to restrain a person from foreign proceedings may be summarised as follows:

(i) the basis of the exercise of the jurisdiction lies in the principle of equity preventing unconscionable behaviour, and general concepts of justice, and the exercise of the jurisdiction should not be limited to specific categories of cases;

(ii) the Court's power to restrain parties from commencing or continuing proceedings in a foreign jurisdiction should be exercised cautiously, having regard to international comity and the fact that such restraining orders interfere indirectly with the operation of the foreign court;

(iii) the Court should have regard to the principles in *Voth v. Manildra Flour Mills Pty Ltd (1990) 171 CLR 538* which apply to decisions as to the exercise of jurisdiction by Australian courts, and thus in general should not restrain a

party from pursuing proceedings in a foreign court where that foreign court cannot be characterised as a clearly inappropriate forum;

(iv) relevant factors include whether granting the injunction will deprive the respondent (the party against whom the injunction is sought) of a significant advantage or otherwise cause the respondent hardship; and whether refusing it will deprive the applicant (the party seeking the injunction) of a significant advantage or otherwise cause the applicant hardship;

(v) the Court should consider whether there is anything in the relevant legislation indicating that a particular approach or emphasis is appropriate.

A recent case where an anti-suit injunction was granted was a Federal Circuit Court decision by Judge Harland in *Page and Page [2016] FCCA 3126.*

Postscript

Whether or not proceedings in different Courts are transferred and consolidated or simply remain running in parallel, always remember that they are distinct causes of action and must me treated that way. Trying to merge them into a single cause may result in serious problems and lead to general confusion.

Richard Maurice
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Important Authorities referred to in this paper

Re Wakim, Ex parte McNally (1999) 198 CLR 511

Warby and Warby (2002) FLC ¶ 93-091

WATERS & DURRANT [2015] FCCA 241

RUANE & BACHMANN-RUANE AND ORS (ACCRUED JURISDICTION) [2012] FamCA 369

Bankinvest AG v. Seabrook and Others (1988) 14 NSWLR 711 at 714,

LL Pty Limited & Dawson & Ors [2015] FamCA 70

Vega and Riggs [2015] FamCA 797

Voth v. Manildra Flour Mills Pty Ltd (1990) 171 CLR 538

Page and Page [2016] FCCA 3126.

About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he has practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate. He also works as a Mediator in Family Law financial and parenting matters.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like Pierce and Pierce (1999) FLC 92-844 and Black v. Black (1991) DFC ¶ 95-113 and Jonah & White [2011] FamCA 221 and more recently Sand & Sand [2012] FamCAFC 179 and *Vega and Riggs* [2015] FamCA 797

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