Reflections on my recent trip to Australia

I was fortunate enough to spend a couple of weeks in Australia last month with David Hodson visiting some of our family lawyer friends in Brisbane, Sydney, Melbourne, and Perth along with Singapore. Within our practice we work on many Anglo/Australian cases, so I already had a good understanding of many of the similarities and differences in our systems. There is however no substitute for seeing and speaking with people in person and it was fascinating to experience and discuss many of the pros and cons of our respective countries. We were also able to give a presentation to several law firms on English family law.

First, and most important, hospitability. Australia is undoubtedly home to some of the best wine in the world. We were spoilt on many occasions in sharing with our family lawyer friends some wonderful bottles produced locally which, even despite our recent heat wave, just doesn't exist in the UK. Australia also probably has the best snack in the world: the Tim Tam! As soon as I mentioned to friends back home that I was visiting to Australia I was inundated with requests to bring them home, so my expectations were high. One particularly hospitable law firm in Sydney ransacked their snack cupboard for us one evening and another friend whom I visited in Melbourne turned up with a carrier bag full of them. The only problem was the luggage allowance on the return flight!

Australians also love the early morning. In an effort to mitigate the effects of the aforementioned food and drink I set myself a target of doing some exercise in each city. The first warning sign was that Park Run, which in the UK starts at what I consider to be a socially acceptable time of 9.00am each Saturday, was now at 7.00am. F45 classes during the week started even earlier! I started to realise why Australia based clients often suggest conference calls at what appear to the English to be unreasonable hours!

Turning to family law and the reason for visiting Australia, it was refreshing to at long last be able to tell our international friends that we finally have no fault divorce. This is one of many examples of where England has been playing catch up with Australia for some time, they have had no fault

divorce since as early as 1975. But it is at least better late than never. Australia do however still have a 12-month separation requirement before divorce proceedings can be commenced and shock was expressed on a number of occasions when we explained that we have no requirement for any period of separation before divorce proceedings can be commenced. Some acknowledged that if no fault divorce were being introduced in Australia now that it might be scrapped – it was a sop to the previous fault-based system.

Perhaps one of the reasons for the contrast is that in Australia financial claims are completely free standing of divorce. It is therefore possible, indeed common, for financial proceedings to be commenced in Australia before the divorce starts i.e. before the 12-month separation period has ended. This can include interim applications which means the financially weaker spouse is not prejudiced by being unable to make financial claims until the divorce process has started. By contrast in England financial claims can only be brought on the back of a divorce application which is in part why we have no period of separation, as it would prevent financially weaker spouses from being able to bring interim claims.

Whilst divorce and financial proceedings are separate in Australia, they deal with children and finance within the same set of proceedings. It means most Australian family lawyers cover both money and children whereas in some parts of England, perhaps particularly London, many family lawyers specialise in one area or the other. I am sure there were at least one or two who briefly considered cross qualifying in England after this comment! On a more serious note, although it probably wouldn’t happen openly, the Australian approach does perhaps give rise to greater risk of bargaining money against time with children and vice versa which is one reason these claims are dealt with completely separately in England.

Perhaps one of the biggest differences is the approach to forum on divorce. England applies a balanced test of most appropriate forum. If the strength of connection is very similar but slightly in favour of Australia, England will stand back and allow the proceedings to take place in Australia. By contrast Australia applies a much less balanced *“clearly inappropriate”* test and will (as the name suggests) only to give up jurisdiction if it would be clearly inappropriate for them to take place in Australia. This means that if e.g., England decides that in percentage terms the connections are 51/49 in favour of Australia it will transfer the proceedings, whereas in the opposite direction Australia requires a much higher percentage. This difference in approach gives rise to a risk of competing proceedings and irreconcilably judgments between our countries.

Of course, the primarily reason for disputing jurisdiction and/or arguing forum is to achieve a better

financial outcome. Although we have different approaches (Australia focuses to a large extent on contributions whereas the dominant feature in most English proceedings is the parties' needs), the end result in terms of capital i.e., a departure in favour of the financially weaker party, is often not too dissimilar. The bigger difference is spousal maintenance. In Australia this is often only payable pending a financial settlement as the departure from equality in the property split is in part to account for disparities in earning capacities, whereas in England it is not uncommon to have a non-equal division of the assets in favour of the financially weaker party to meet housing needs in addition to ongoing maintenance to meet future income needs.

One big difference in terms of procedure is the frequent use of subpoenas in Australia and the absence of them in English practice. It is possible to obtain third party disclosure orders in England although they are relatively rare in practice. We often rely much more on adverse inferences if full disclosure has not been provided. This is one area where perhaps a mid-way approach would be beneficial in both countries; in Australia they are sometimes overused at great cost with very little reward, whilst in England there are some cases where they would be invaluable. Perhaps a limited/targeted use would strike the right balance.

Another area where Australia has long been ahead of England is the treatment of marital agreements. For many years they were seen as contrary to public policy in England. They started to gain greater traction in the 1990s and 2000s leading up to the landmark decision of *Radmacher* in 2010. Although they still aren't legally binding, they are persuasive documents and can be determinative if there has been legal advice, financial disclosure, no undue pressure, and they are fair/meet needs. By contrast Australia has Binding Financial Agreements (BFAs) provided fairly rigorous and tight requirements are met. Although we have different starting points, we both have lots of litigation over marital agreements in Australia as to why a BFA should not be binding and in England over whether a marital agreement should be upheld.

Perhaps the biggest difference which was met with audible gasps and visible shakes of the head on my explaining it is our provision in law (or lack of) for what England would call cohabitants and Australia would treat as de-factos. Most English family lawyers agree our system needs to change (albeit there is not yet agreement as to what that change should look like) and now we finally have no fault divorce I suspect this will become the next collective push for reform. But hearing and seeing the reaction to our treatment of cohabitants really did drive home to me just how unfair our current law is in this area. Australia has spent years navigating how to treat de-factos upon separation and I hope when the time does come to reform this area of law in England we look toour Australian friends for guidance as there is much help they can offer.

On the issue of reform, it was noticeable just how infrequently we legislate for family law matters in England. By contrast Australia have very layered statutes which are regularly updated.

One area where England was however ahead of Australia was the treatment of same sex couples. England introduced civil partnerships for same sex couples in 2004 followed by same sex marriage in 2014. Civil partnerships were also opened up to heterosexual couples in 2019. Australia does not have the equivalent of civil partnerships although same sex marriage has been permitted since 2017.

Both countries place a strong emphasis on ADR. In London a very large number of cases now settle at a private early neutral evaluation. In Australia there is a strong emphasis on mediation which is somewhere between our meditations and early neutral evaluations. Unlike England there are no part-time judges in Australia which is perhaps one of the reasons their courts have been more stretched. There have however been big changes in the Eastern States recently with a series of judicial and registrar appointments which has much increased the speed of proceedings.

Both countries have a child support agency although Australia's has been much more successful. Such was the poor performance of the English system it was rebranded several years ago from the Child Support Agency to the Child Maintenance Service. The Australian Agency is notoriously strong in enforcing arrears including overseas. They also have the power to prevent debtors from leaving the country which always makes me suspicious when footballers are conspicuously absent from pre-seasons tours of Australia!

Our laws in relation to the arrangement for children are similar and indeed Australia moved to 'lives with/spends time with' orders before England. Both countries have a strong adherence to the 1980 Hague Convention and there is good use of the 1996 Hague Convention for the recognition of

children orders. England will also recognise Australian adoption orders. Enforcement of financial orders is more complicated as Australia has not yet signed up to the 2007 Hague Convention and David and I urged everyone to encourage their Government to do so.

The treatment of pensions, superannuation's, is one of the most common areas where we are instructed by Australian lawyers. There is a huge amount of international movement between England and Australia and since the UK's departure from the EU it has become much harder to obtain pension sharing orders in England after an overseas divorce if there is little ongoing connection with England apart from the pension. The problem doesn't usually apply in reverse as an Australian superannuation can be shared by way of agreement. On that note Western Australia has recently announced it will be introducing superannuation sharing for de facto couples to bring them in line with the Eastern States which is a very positive development.

The approach to privacy/publicity was another interesting contrast. In Australia many hearings are held in public but there are strict restrictions on reporting. Judgments are also anonymised but helpfully by being given a different name rather than the abbreviated system of usually *A v B* or *W v H* which makes remembering case names much easier! In England most hearings would be heard in private although there is a controversial move towards publishing financial remedy judgments without anonymisation.

So much else came out of our many meetings which has improved my thinking and awareness as I reflect on our respective systems which in some ways are very similar but in others quite different. David and I are very grateful to the many lawyers, law firms and judges we spent time with on our trip in both Australia and Singapore.

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