FOLEY'S LIST

Overseas Property – a quick gallop around some oft-raised scenarios

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**FLA = Family Law Act 1975 (Cth)*

Summary	
Can the FCFCoA (Div 1) make orders with respect to overseas property?	Yes, although they will be in personam rather than in rem
Can the Court make orders concerning a child's property situated overseas?	Yes, if the child is habitually resident in Australia
Does the Court have a discretion to treat the overseas property (including superannuation or pension interests) as property or resource?	Yes, depending on all the facts of the case
What types of factors will lead to the overseas property being treated as a resource rather than property?	A lack of clarity of what its value is; that legal or beneficial interest a party has in the property and whether there are third parties with such interests; a lack of admissible evidence about monies spent on improving or maintaining the property; a lack of expert evidence as to the enforceability of any order.
Can overseas superannuation or pension entitlements be split using the usual Part VIIIB splitting and flagging order methods?	No
Can UK pensions be split?	In some circumstances but not all - it may turn on issues such as certainty of value; expert evidence from a UK lawyer; and the habitual domicile of at least one of the parties
Ought you contemplate injunctive proceedings, even against a third party, if it means that you can keep some of the asset pool (and thus the litigation) in Australia?	Yes
If you can't find out the value or extent of overseas assets can they still taken into account?	Yes (as long as the Court is satisfied they exist) as a 75(2)(o) factor
Can parties living overseas give evidence?	Yes, most conveniently by attending an Australian consular office. A party proposing to adduce evidence by audio-visual link (Teams, etc.) must first satisfy r15.16 or 15.17 of the *Rules*
How and when can you apply for freezing orders?	See s114(1) of the FLA and r5.23 of the *Rules* on formal requirements. The applicant must provide evidence of a prima facie case to be tried and that the balance of convenience favours the making of the order (i.e. absent the order, there is a real risk of dissipation of assets).
Can you serve subpoenas overseas?	Yes – however, the Court is reluctant to impinge on the sovereignty of foreign countries.

The jurisdiction of the Federal Circuit and Family Court of Australia (Division 1) may be exercised in relation to persons or things outside Australia.[1] As Carew J uncontroversially noted in *Attar & Melidis (No 2)* [2023] FedCFamC1F 444 at 137:

> There is no doubt that this Court has the jurisdiction to determine this application in its entirety. The jurisdiction of this Court may be exercised in relation to persons or things outside Australia (s 25(2) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth)). Any order made by this Court pursuant to s 79 will be *in personam* order i.e. against the person, not *in rem* i.e. against the property.[16]

Put simply, the Court can make orders obliging a party to do (or not do) certain things, even if it cannot make orders about property in an overseas jurisdiction – for example, split a pension, or transfer an interest in real property. The *Moçambique* rule, as it is known, is regarded as authority for the proposition that a court will not exercise jurisdiction in respect of the title to, or possession of, land situated abroad.[2] The relevant power is the injunction power at s144(3) of the *FLA* which states:[3]

> (3) A court exercising jurisdiction under this Act in proceedings other than proceedings to which subsection (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court considers appropriate

An exception to this is found in what is known as the 1996 Child Protection Convention, or to give it is proper title, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, which came into force in Australia on 1 August 2003. Its incorporation into Australian law is found at Division 4 of Part VIIIA of the *Family Law Act* and the *Family Law (Child Protection) Regulations* 2003. Amongst

[1] Section 25(2)(c) of the *Federal Circuit & Family Court of Australia Act* 2021
[2] Strum J discusses this Rule at paragraph 7 onwards in *Oldham & Krantz* [2024] FedCFamC1F 293. See also *Ye & Cai (No 7)* [2022] FedCFamC1F 949 and *Bestari & Henley* [2022] FedCFamC1F 970, both recent decisions of Justice Gill.
[3] See discussion of the *in personam* power by Altobelli J in *Gresham & Gresham (No 2*) [2023] FedCFamC1F 51 (10 February 2023) at 108

other things, it empowers the Court to make a property protection order dealing with the administration, conservation or disposal of a child's property, as long as that child is habitually resident in Australia. In *Flemming* [2012] FamCA 985, the Hon. Robert Benjamin AM SC (Benjamin J as he then was) used this power to ensure that a mother of three children, all of whom had received some life insurance monies from their late father's overseas estate, could take control of the monies as their guardian and administer it for them, despite the fact that the monies existed in a non-convention country.[4]

In *Carrick* [2013] FamCA 1118, Bennett J dealt with the case of a little girl, habitually resident in Australia, who was entitled to receive her late father's estate after he died in France. Pursuant to the provisions of the Convention, the relevant French Tribunal had invited the mother to apply to the Family Court of Australia for permission or agreeance for the French Tribunal to assume jurisdiction to take measures as it considers necessary for the protection of the property of the child. In a short ex tempore decision, Bennett J made the orders sought, saying

> I am satisfied that the Tribunal de Grande Instance de Paris is better placed than this court and any other court of competent jurisdiction in Australia, to assess the child's best interests in relation to her interest in the estate of her late father and to take measures appointing, or deciding the powers of, a guardian of her property.

Some factors concerning valuations, joinders, timing and delay which you may face when dealing with overseas property are evident in the recent case of *Oldham & Krantz (No 2)* [2024] FedCFamC1F 347, a decision by Strum J. It is a Melbourne matter where His Honour was dealing with two litigants in person and should be read as much for its pithy turn of phrase as the law it traverses. The judge had previously made orders that two properties in Country H owned by the de facto wife be valued. The Court noted that the wife asserted that her sister was in fact the owner of one of the properties, but pledged to make her best endeavours to have her sister cooperate

[4] A decision followed by Hannam J in *Wright* [2021] FamCA 409, but note the qualifying remarks of Altobelli J in *Ishak & Koroma* [2023] FedCFamC1F 272 and by Harper J in *Yaling & Tsen* [2022] FedCFamC1F 347

with the valuations. She asserted that she and her sister had inherited the house, in which her mother still lived.

The valuations were never prepared. At the eleventh hour, the de facto husband filed an application to join the wife's sister and husband, and for the properties to be sold and the sale proceeds repatriated so as to fall into the balance sheet at trial. That application was dismissed. At trial, the husband asked the Court to add back a sum of over $600,000 which he asserted was spent on the properties. The judge declined, noting there was no satisfactory evidence of how the monies were applied. Given the lack of admissible evidence as to the legal status of the home and the nature and extent of the wife's interest in it, the judge decided to treat it as a financial resource.

In *Chan & Lee* [2022] FedCFamC1A 85 a Full Court of Tree, Gill and Wilson JJ found that the primary judge was entitled to exclude overseas property from the balance sheet. The primary judge had found that the husband owned two properties in China with his parents. Whilst she correctly identified them, she went on to find that as to the first property, there was no admissible evidence as to its sale price; and as to the second, there was no evidence as to the nature and extent of the husband's interest in the second property. She left them out of the pool for consideration. The Full Court said [at 79]

> The conclusion of the primary judge reflects the lack of evidence to establish the capacity of the husband to realise the assets in the face of the interests held by his father.

Overseas Pension funds

The sorts of difficulties you may encounter with overseas pension is evident in a series of decisions published in 2022 and 2023 as *Thukral & Trishna*, by Altobelli J. Ultimately he made orders as sought by both parties splitting the husband's UK pension - see the form of order in *Thukral & Trishna (No 4)* [2023] FedCFamC1F 276 . It is clear from that decision and the earlier one from December 2022 that His Honour was not confident that the pension could indeed be split, given that the relevant legislation required at least one of the parties to be domiciled or habitually resident in England and Wales; or a beneficial interest in a home which had been the matrimonial home; at the relevant time. Altobelli J gave the parties time to consider these issues. The

parties persisted in seeking the pension split and whilst reiterating his concern, His Honour made the orders sought.

In another series of decisions published as *Gresham* in 2023 and 2024, Altobelli considered arguments made by the wife that the husband's "Country Q" pension was merely a financial resource, not property, and further that orders could not be made *in personam* about them.[5]

Altobelli J firstly uncontroversially noted that the Country Q pension was not covered by Part VIIIB of the *FLA,* and therefore could not be subject to a splitting or flagging order made by His Honour. His Honour rejected the wife's argument and noted that an order could be made *in personam* if it was just and convenient to do so. In finding that the Country Q pension was property after

1. examining the relevant trust documents establishing the pension funds; and
2. Noting that there was expert affidavit evidence about the capacity to share, or split, the pension in Country Q, the parties could be ordered to make application to a Country Q Court to effect this.

Altobelli J then turned to a UK pension of the husband's. The Court had expert evidence which stated that unless one of the parties was domiciled in the UK at the relevant time, it could not be split. His Honour determined it was not property but a "valuable financial resource."

In *Kornfeld & Wehinger* [2023] FedCFamC1F 817 Williams J was faced with the differing opinions of three experts who each gave their views as to the capacity to share, or split, a UK pension; and the enforceability of any orders. Williams J undertook a lengthy examination of the process which would need to be undertaken in order to split the UK Pension – noting that unlike the Altobelli J cases, the husband could rely on his domicile in the UK. This was a forum case, and noting that majority of the assets of the marriage are located in the UK, Williams J found that Australia was a clearly inappropriate forum and dismissed the husband's anti-suit injunction.

Chinese property

[5] *Gresham & Gresham (No 2)* [2023] FedCFamC1F 51 (10 February 2023) per Altobelli J at 102 onwards

In *Mah & San* [2022] FedCFamC1F 316 Howard J dealt with an interlocutory skirmish about whether concurrent proceedings in the Supreme Court brought by a bank against the wife, ought be the subject of injunctions made by the FCFCoA. His Honour noted he had the power to do so despite the fact that the bank was not a party to the proceedings. The Supreme Court proceedings concerned the only property the parties really had in Australia. The rest of it was in China, where the parties jointly owned a house worth about A$3M and a business, of indeterminate value, owned 80% by the husband. In making the orders sought His Honour (inter alia) relied upon the possibility of the property proceedings being "thwarted" and said [at 44]:

> I have reached the conclusion that without issuing the injunction to restrain B Bank from continuing its proceedings in the Equity Division of the Supreme Court of New South Wales – these property proceedings in this Court are likely to be "thwarted".

Failure to disclose overseas assets

This is not uncommon. *Haines & Rader (no. 4)* [2022] FedCFamC1F 1008 was the final determination of property litigation between a husband and wife, with the trial judge (Brasch J) noting the litigation's "long and protracted history"[6] and dealing with the matter on an undefended basis. The balance sheet disclosed that the husband owned real property overseas. The wife had been unable to extract any disclosure from the husband about those properties. He had similarly not responded to requests for any information about his interests in the UK or other countries where he would be required to file tax returns.

In deciding to treat the unidentified items as 75(2)(o) factors rather than line items in the Balance Sheet, Her Honour said [at 86 ff]:

> 86. I cannot divine values for inclusion in the balance sheet. Indeed, the wife did not propose I come up with figures for any of her "NKs" for inclusion in the pool, rather, that I consider the alleged non-disclosure as a s 75(2)(o) factor.
>
> 87. I agree with this approach. The husband left the wife and the Court in the dark about any value which might be ascribed to either of his two business entities, whether he has overseas interests, various bank balances and the HH Pty Ltd share account.

[6] Her Honour's decision was taken on appeal but that appeal was dismissed.

> 88. Considering alleged non-disclosure under s75(2)(o) is an entirely orthodox approach, recently confirmed by the Appeal Division in *Mayhew & Fairweather* [2022] FedCFamC1A 53; (2022) 64 Fam LR 633 at [14]:
>
> The usual way in which defective disclosure is taken into account is either by adding a sum to the pool, reflective of an estimate of the value of undisclosed property ..., or under s 75(2)(o) of the Act.

Her Honour described the husband's non-disclosure as "woeful" and made an overall adjustment for 75(2) factors (which traversed more than the overseas non-disclosure) at 10 percent.

Taking evidence from overseas parties

Evidence given by a person who is *physically* located overseas, whether by affidavit and/or by the person themselves by electronic communications (audio-visual link), regard must be had to the laws of that country as to whether such evidence may be given. An affidavit sworn or affirmed for the purposes of an Australian proceeding may be an offence. In Switzerland, it is a criminal offence to swear an oath for a foreign court.[7] In China, it is a criminal offence to give evidence in a foreign proceeding.

The issue of the swearing or affirming of an affidavit is more easily addressed; the deponent may attend an Australian consular office and have their affidavit witnessed there.

The issue of evidence being given by a foreign person by electronic communication is more difficult. A party who proposes to adduce evidence by electronic means from a witness in a foreign country must comply with rule 15.16[8] and must satisfy the court that:

(a) The party has made appropriate inquiries to determine the attitude of the foreign country's government to the taking of evidence by electronic communication; and
(b) Whether permission is needed from the foreign country's government to adduce evidence from a witness in that country by electronic communication; and

[7] There is a general prohibition under Swiss law whereby "acts falling within the prerogative of the State" such as gathering of evidence (including taking of Affidavits) on Swiss soil for a foreign State or authority are punishable pursuant to Article 271 of the Swiss Criminal Code if done without authorisation.
[8] https://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_reg/fcafcoalr2021543/s15.17.html

(c) If permission is needed, whether permission is granted or refused (and if refused, the reason for refusal); and

(d) Whether there are any special requirements for adducing evidence in this manner including the administration of an oath and form of the oath.

The issue of ultimate legality in the foreign country is not what a party proposing to adduce the evidence must prove. His Honour Wilson J [at 40] of the decision in *Moy & Pao (No. 3)* [2021] FamCA 310 stated

> it may not be necessary to finally decide whether it is or is not unlawful for a Chinese citizen to give evidence in China for use in an Australian court" but noted that there was no evidence as to the Chinese authorities on that point.[9]

The issue of the operation of the foreign country's law and the attitude of the foreign government must be fully argued. The question of the operation of the foreign law governing the giving of evidence overseas must be presented in full so as to constitute proper enquiries for the purposes of rules 15.16 or 15.17.[10]

An application for the taking of evidence from an overseas person my be made pursuant to section 7 of the *Foreign Evidence Act 1994* (Cth). To appreciate the complexities that might arise see the Full Court of the Federal Court decision of *Rawson Finances Pty Ltd v Commissioner of Taxation* [2016] FCAFC 95.

Freezing orders

The source of power for freezing orders are the injunctive provisions at s114(1) of the *FLA.* The process as to how one is sought is governed by r5.23 of the *Rules.*

An applicant may seek to restrain another person from removing property from Australia or dealing with property both in and outside of Australia (subject to the thresholds at r 5.23(1)(a) and (b)), without notice to the respondent. The application

[9] *Moy and Pao (No 3)* [2021] FamCA 310
[10] *Fing & Ma* [2023] FedCFamC1F 938

must be accompanied by an affidavit which sets out the required evidence relied upon by the applicant pursuant to rule 5.23(3).

A freezing order is not, however, an anticipatory action to obtain security for a judgment which the applicant hopes to obtain at final hearing. In addition to satisfying the evidentiary requirements at r 5.23(3), the applicant's evidence must also address the well-established principles in *Australian Broadcasting Corporation v O'Neill*[11] in relation to the grant of interlocutory injunctive orders the Court will apply, being:

1. There must be a serious question to be tried as to the applicant's entitlement to relief, which is a sufficient likelihood of success to justify the maintenance of the status quo;
2. The balance of convenience favours the granting of the order. In particular, that there is a danger or a risk that absent the orders, a judgment in the applicant's favour will be unable to be satisfied if the respondent is not restrained from dealing with the property.

Notwithstanding the above, the applicant does not need to establish a positive intention by the respondent, but merely the possibility of the dissipation or dealing of the property occurring.[12] It may be an inference drawn from the facts and circumstances established by the applicant's evidence.[13]

Filing and serving overseas subpoenas

The method of service of a subpoena on an overseas person or entity will depend on the country in which the person or entity is situate. If the country is a contracting "State" to the Hague Service and Evidence Conventions, then the framework within which service is effected is governed by the *Family Law Regulations 1984* (Cth) at Part IIAB.[14]

Be aware of the requirement (at 21AF(3)) for the legal practitioner to undertake to be personally liable for the costs of service.

[11] *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46
[12] *Kachmar & Madero (No 2)* [2023] FedCFamC1F 121
[13] *Skyworks v 32 Drummoyne Road* [2017] NSWSC 343
[14] https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_reg/flr1984223/

Complexities with service aside, in issuing a subpoena to an overseas person or entity, the court is generally reluctant to do so where the Court is unable to force compliance and no ready means of enforcement.

Facts and circumstances to be considered, as identified by Wigney J in *Ceramic Fuel Cells Ltd (in liq) v McGraw-Hill Financial Inc*[15] most likely include:

- the nature of the subpoena;
- the nature of the particular proceedings and (in the case of a subpoena to produce documents) the importance of the documents to the issues in those proceedings;
- the attitude of the subpoenaed party (if known or ascertainable);
- the foreign country involved; and
- the law in, and attitude of, the foreign country regarding foreign subpoenas and whether they impinge upon the country's sovereignty.[16]

The reluctance to give permission to serve a subpoena overseas where there is difficulty in enforcement is based upon the premise that:

> "service of an order upon such an entity demanding that it do something in Australia on pain of punishment in proceedings to which it has not submitted is such an invasion of another country's sovereignty as not to be contemplated except in the most exceptional circumstances." [17]

Although not pertinent to the issue of service of a subpoena itself, a similar consideration as to the issue regarding impingement of another country's sovereignty was raised in *Gao v Zhu*[18] where Habersberg J set aside a subpoena that was served on a branch of the Bank of China located in Victoria. *Gao* demonstrates the caution with which the Court approaches the issue and service of a subpoena of overseas entities.

[15] [2016] FCA 401
[16] Ibid at [59]
[17] *Stemcor (Australasia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391
[18] [2002] VSC 64