

Whose law is it anyway?

Applicable law post Moore

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The Court of Appeal judgment in the case of Moore (2007) EWCA Civ 361, handed down on 20th April 2007, potentially creates seismic reverberations around European family law. In summary, in a Spanish/English finance forum case (Part III MFPA 1984) after a Spanish divorce, the court said one primary consideration was that as Spain would have applied English law to the financial outcome, it was more appropriate that the English courts should deal with the case. This is a stark riposte to the Europe wide concept of applicable law in which the courts of the country where the family law proceedings are taking place deals with the matter according to the law of the country with which the couple have the closest connection, and not necessarily local law. Yet Moore is merely a further extension of the policy over recent years of the English family courts transferring English cases to the courts of the country whose laws, procedures or agreements are the subject of the dispute, on the basis that local courts are much better placed to deal with local law matters.

The United Kingdom government opted out of Rome III, the EU draft regulation to introduce applicable law across Europe, in November 2006. The SFLA/resolution has made positive and well supported counter proposals to applicable law. At the same time the higher family courts of England and Wales have been developing a jurisprudence which sits very happily alongside the government opt out and the SFLA proposals. It is one with which the vast number of English family law specialists and a very substantial number of the public would heartily agree. Which court is better able to deal with issues of law, practice and procedure? The courts of the country whose laws are being considered or the courts of another country whose laws are altogether different? Of course. The English answer is always the former.

Nevertheless, the expression of this jurisprudence in Moore takes the policy one stage further. In so doing, it is starkly against applicable law and Brussels II yet stunningly in accordance with Brussels I and international comity.

This article sets out a background to the case, a brief background to Part III, applicable law and Brussels I, the decision of the court and considers possible longer term implications.

Background to the case

The parties are in their mid-40s, described as seemingly very rich (para 2) although a figure does not appear in the judgement. It was a long relationship with three children aged 7, 10 and 16. They emigrated to Spain to avoid UK tax. Within three months the relationship was at an end and the wife returned to England. The husband applied for a divorce in Spain in June 2004, issuing first under Brussels II. There was then subsequently a myriad of proceedings in England and in Spain about whether the Spanish court or the English court should exercise jurisdiction to deal with the financial consequences. A feature of the case which has gained much publicity is that the parties had spent about £1.5 million in legal fees about this issue. Yet it was accepted that if the Spanish court had jurisdiction to deal with financial matters, it would apply English law. The Court of Appeal called this a “lamentable and grotesque waste of family resources” (para 6). Leading counsel for the husband was specifically unable to state what advantage the husband might gain by having proceedings in Spain - the whole purpose of the litigation!

Nevertheless, despite these massive costs, the Court of Appeal complained that no one involved in the case was able to give “an up-to-date assessment of the likely progress in the foreign proceedings” (para 7) and no one seemed to be coordinating the two sets of proceedings. Such coordination is fundamental

in all international family law work - even with 1% of these costs. It is yet further illustration that colossal legal costs do not necessarily equate with immaculate preparation. There have several recent cases in which higher court judges have condemned aspects of litigation preparation notwithstanding huge costs incurred by the parties. So much for active case management under FPR 2.51D.

After the wife's later divorce petition in London was stayed because of the prior divorce proceedings in Spain, there were defended proceedings in Spain including on financial claims. It is at this point that the detailed pleadings before the Spanish court become more complex and more surprising. What many international family lawyers and the Court of Appeal would have expected to have occurred in the progress of the proceedings did not. It was April 2006, almost 2 years after the issue of the divorce in Spain, that the husband finally sought full financial relief - in the conventional English sense - in the Spanish proceedings. Curiously however the Spanish court then held it had no jurisdiction in relation to the financial claims because of the way in which the petition and answer had been drafted. For this narrow reason, some caution must be placed on Moore as it may be distinguishable on its very particular facts in relation to the proceedings.

The day after the Spanish court held it had no jurisdiction, the wife made application in England and Wales under Part III. A brief history to this legislation is referred to below.

The wife's (without notice) application for leave to proceed with her Part III claim set down for January 2007. The Spanish proceedings were also continuing. A Spanish court reversed its previous decision that Spain did not have jurisdiction for financial aspects and ruled that it did have jurisdiction for financial aspects. The wife challenged this decision. In December 2006, a Spanish court upheld the wife's challenge, in effect declaring that Spain did not have jurisdiction to deal with the financial matters. The husband appealed. Before the appeal was heard in Spain, the wife's application for leave to pursue the Part III application was heard by Mr Justice McFarlane in January 2007. He gave leave to the wife, observing that the litigation was complex and gave rise to novel points of law and that the wife had succeeded despite his provisional conclusion that she was a blatant forum shopper.

Subsequent to that English first instance decision in late January 2007, the husband's appeal in Spain preceded slowly onwards. The husband also appealed the Part III leave application. This appeal was heard by the Court of Appeal in April, still before the Spanish appeal had dealt with whether it had jurisdiction. What a mess! This is why the European Judicial Network (in its family law capacity) fully espoused and encouraged by Lord Justice Thorpe as our International Liaison Judge must play a greater role in the future in these sorts of forum cases.

Part III Matrimonial and Family Proceedings Act 1984

Before turning to the circumstances of the husband's appeal in the English proceedings, it is worth considering a short history of this piece of legislation.

In the 1970s and early 1980s as the amount of international travel increased, the English family courts were placed in a major difficulty. If they recognised a foreign divorce as was public policy to do so as much as possible, that effectively closed the door altogether to any further opportunity for the English courts to grant financial provision to deserving spouses. Foreign recognised divorce: no English claims. Three decades ago, the financial provision in a good number of countries for women was simply appalling. Much worse than the position in some jurisdictions today. Hence there was substantial litigation over the circumstances in which England might or might not recognise an overseas divorce. Many recognition cases relate to this period.

Part III was introduced to overcome this problem. If there was jurisdiction for divorce in England and Wales alternatively an interest in a matrimonial home here and there had been an overseas divorce, the English courts nevertheless had a discretion to grant financial provision. It was discretionary. The

legislation set out the circumstances in which that discretion might be exercised. The applicant had to have taken a good part in the foreign proceedings, used local remedies and done her best to seek reasonable provision where the divorce had taken place. The court could then make, in effect, orders as if the divorce had been here. There is a curious two-stage process where the application is made initially without notice then resulting in a hearing at which formal leave is requested. There has been criticism of this two-stage process.

After the legislation was passed, there were a number of successful cases over the next 10 years. However the international family law globe was changing. Lawyers were frequently travelling to other jurisdictions and sharing developments in family law. Rights for women on divorce increased in many places. There was much greater international family law comity, including between judges.

The English family courts grew nervous and felt awkward about exercising this jurisdiction, in effect acting as a Court of Appeal upon the decisions of Supreme Courts in other jurisdictions. It became an unattractive feature in applications before the English courts from divorces of other westernised jurisdictions. So it was in the case of Holmes (1989) 2 FLR 364 that Lord Justice Russell said that “prima facie the order of the foreign court should prevail save in exceptional circumstances”.

For the next 15 years, it was a very underused jurisdiction. Certainly it was useful where the divorce had been in a jurisdiction in which, to all intents and purposes, one party, invariably the wife, had negligible rights and entitlements on divorce. However, even then, the English family courts trod warily.

Until the last six months or so.

In November 2006, Mr Justice Mumby dealt with the case of Agjabe. There had been divorce and financial proceedings before the court in Nigeria in which the wife had been fully represented and taken a full part. She then applied in England under Part III. Mr Justice Mumby was anxious that the wife was simply seeking a second bite of the cherry. He asked what were exceptional circumstances (Holmes above) to allow such an application to proceed when the proceedings in the other country were conducted appropriately and led to a financial order in the wife’s favour which had been implemented. The judge found that this was an exceptional case. It is unclear exactly what was exceptional. He clearly had in mind that the award for the wife was much lower than it might have been in this country. Yet the wife had not appealed the Nigerian order and there are many cases where, in English eyes, the financial outcome abroad is not good. England is an exceptionally fair, perhaps exceptionally generous, jurisdiction in certain regards. The case is subject to appeal to the Court of Appeal. It might have been thought that the appeal was likely to be successful until Moore!

A couple of months after Agjabe, mid January, the Court of Appeal gave a judgment in Ella (2007) EWCA Civ 99. The parties, both Jews, married in haste in Israel when the wife was pregnant and under much family and other pressure to marry. Shortly before the marriage she signed a pre-marriage agreement in very unfair terms. She had no independent legal advice. Crucially, it contained a jurisdiction clause that if there were any proceedings relating to the marriage, they would be in Israel. The parties married life was in England where the children were born and raised and where the husband acquired substantial wealth. On breakdown, there was an England/Israel forum dispute. Should the proceedings be in England, acknowledged as the country with which the family were most connected, or in Israel? The court relied on the pre-marriage agreement provision and transferred it to Israel. However in doing so, they remarked that if Israel held the wife to the pre-marriage agreement, which was accepted as giving unreasonable and unfair provision for her, she could again apply in England, and under Part III. This seems curious to many observers. Why transfer proceedings to another country expected to grant “unfair” provision under the terms of a parsimonious pre-marriage agreement and then in effect invite one party to apply subsequently in England for proper financial provision?

But Ella is part of a stream of recent cases in which the English courts have given weight to pre-marriage

agreements containing jurisdiction clauses. The others are S v S (Divorce: Staying Proceedings) (1997) 2 FLR 100 and C v C (Divorce: Stay of English Proceedings) (2001) 1 FLR 624

Therefore having had a period of almost 15 years in which the English courts have been quite reluctant to entertain this jurisdiction in good part for fear of upsetting other countries judges and judicial systems, in the space of about six months two major decisions have given it renewed life. Its vigour within Europe was one of the biggest issues for consideration in Moore.

The husband's appeal and Brussels I

The husband appealed on several grounds. He said his application in Spain was for maintenance under Brussels I and therefore took priority. The Spanish proceedings were first in time under Brussels I. The Spanish proceedings were still pending so the English court should have stayed its proceedings until they were finished. In any event, leave under Part III should not been granted.

To consider the appeal, it was necessary for the Court of Appeal to examine Brussels I. This is shorthand reference to the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, in force since 1987. It assists in the enforcement of family court and civil court orders across Europe. It specifically includes orders relating to maintenance. Just as specifically, it does not include orders which relate to the status or rights in property arising out of a matrimonial relationship. The primary reason for this distinction is the considerable difference in dealing with so-called divorce ancillary relief on the continent where matters of maintenance and rights in property are totally different, decided differently and often at different times and involve very different processes and sometimes even different lawyers (attorneys and notaries). In England, it is all part of the same process of deciding what is fair and just taking into account needs, sharing and compensation and mixing maintenance and need and fairness sharing to produce a just outcome.

Fundamentally for English court purposes, what is maintenance? Especially in the post White and post Miller era? The matter had already been decided in part in Van den Boogaard v Lauren (1997) 2 FLR 399, a European Court decision arising out of a English High Court order which combined capitalised maintenance and conventional property readjustment. The European court suggested that a wide interpretation should be given to the term maintenance, and not for instance merely income provision orders such as periodical payments, but that it should be possible to deduce from the face of the court order whether it was for maintenance or, for instance, capital readjustment, sharing and division.

The Court of Appeal judgment in Moore looks in considerable detail at the meaning of maintenance and must be read by all practitioners seeking to enforce under Brussels I. It found six propositions from the European court in Van den Boogaard v Lauren.

1. whether a claim is for maintenance depends on the interpretation of the term: the label given by a national law, e.g. maintenance order, is not decisive
2. payment of a lump sum or transfer of a property may be in the nature of maintenance if intended to support the spouse
3. if the only purpose is a division of property or compensation, then it is not maintenance
4. a lump sum payment or transfer of property intended as a division of assets will concern rights in property and is not maintenance
5. whether a claim relates to maintenance will depend on its purpose including whether to enable one spouse to provide for themselves
6. where the provision is concerned solely with dividing property between spouses, it will be regarding rights arising out of property and not enforceable under Brussels I.

The Court of Appeal found that the Moore proceedings in Spain were specifically for adjustment of wealth between the spouses and not maintenance. It was an intention to share the assets along the

lines of Miller rather than on needs and maintenance basis. It therefore did not relate to Brussels I. Therefore as the proceedings before the Spanish court were not under Brussels I they therefore did not get any priority in time. The Court of Appeal also looked at the fact that the Spanish courts themselves did not consider Brussels II to continue to apply as the divorce proceedings themselves were regarded in Spain as at an end – another critical factor which may not apply in many other finance forum cases in Europe.

The only consideration therefore, in the circumstances, was whether it was appropriate for leave to be given under Part III.

The first instance judge had found the family's connection with England and Wales was overwhelming. The spouses were English, spent most of their married life here, were only in Spain a matter of months together and the bulk of the marital wealth was in England. Secondly, neither party had initially tried to litigate financial issues in Spain. Thirdly, and said by the Court of Appeal to be the most striking feature, it was common ground that the Spanish court would apply the law of the parties' nationality. In other words, it would apply English law under the MCA 1973 and the principles of White and Miller.

On this third and fundamental aspect, the first instance judge had said that he would regard it as inadmissible for the English court to take this factor into account in determining which was the proper jurisdiction. He said that the superficially attractive argument, namely as it is English law that is to be applied so the English court and English procedure are best suited to resolve the dispute, was in his opinion to be ignored.

Crucially the Court of Appeal disagreed. The close connection of this family with England went even further than residency, location of assets and similar. The connection was that even the Spanish courts would treat English law as the governing law. So in the particular circumstances of the case, the parties nationality and their consequential connection with English law, as the law governing the dispute, were both highly relevant factors (para 115).

There must be placed a very considerable caution here before it is ever suggested that every case abroad applying English law should be transferred to England. Moore was in the context where the Spanish court was decidedly not dealing with matters of maintenance. It seems very likely that the English court will still be reluctant, and probably jurisprudentially unable within Europe, to deal with financial provision after an overseas divorce if the financial provision relates to maintenance. However the Moore case seems clearly to indicate that if it does not relate to maintenance then the gateway is open. Although maintenance is not to be construed narrowly, there is little doubt that in bigger money cases the arguments are not about maintenance itself, even generously interpreted, but about a fair division of the matrimonial wealth in the concept of sharing, perhaps compensation. It is in these categories of cases that Brussels I will not apply.

Transferring proceedings to the country of local law

Moore does in fact do no more than progress a series of cases in which the English higher courts have transferred proceedings to another country's court better placed abroad to deal with interpretation of procedure, law, marital agreements and similar.

In Chorley (2005) 2 FLR 38 there was an issue whether particular proceedings in France involving pre issue mandatory conciliation did or did not render the French court seized of the proceedings under Brussels II so that they would be first in time. At first instance in English forum proceedings, the judge had decided the matter on French law. However the Court of Appeal adamantly said that this was wrong and that the issue should have been decided by the French court. It was for France to decide on its own procedure.

In Elia above, the existence of a clause in the pre-marriage agreement stating that any proceedings pertaining to the marriage should be in Israel was vitally conclusive in the transfer of the proceedings to Israel even though the connection with England was very strong.

Bentinck (2007) EWCA Civ 175, Court of Appeal involved another pre marriage agreement which provided that any issues concerning the marriage was to be subject to Swiss law. On marriage breakdown there was a forum fight between Switzerland and England. For England to determine which country was first seized of the proceedings would require expert evidence from Swiss lawyers which was conflicting. The Court of Appeal said it was undesirable that a London judge should determine that issue when the Swiss courts were so much better placed to decide interpretations of Swiss law. The English court would allow Switzerland to decide first if it had jurisdiction.

So there are a number now of higher court decisions that interpretations of other country's laws should be left to those countries – a position totally at odds with the whole doctrine of applicable law found throughout much of Europe and which Brussels is keen to impose on England.

Whither applicable law?

Whilst the higher courts including the Court of Appeal have at times over the past few years attracted criticism from those who have wanted greater clarity and certainty in our financial provision law, one can only stand back and admire the incredible way in which they have faced and dealt with the expansionism from Brussels of applicable law.

Over the past few years, there has been increasing clamour and onslaught raging against our English shores to adopt applicable law. Most of the rest of Europe apply the law of the country with which the couple may have the closest connection, howsoever that closest connection is defined, rather than necessarily local law. This onslaught reached its highest point in July 2006 with the draft regulation known as Rome III. The SFLA international committee has been opposing the introduction on behalf of the English family law solicitors profession including putting forward what we considered were really excellent counter proposals to overcome the need for the imposition of applicable law. These counter proposals were thoroughly endorsed by the House of Lords European committee looking into the matter. In the meantime, despite not inconsiderable political pressure to opt in, the United Kingdom government decided to opt out of the draft regulation.

Whilst this frantic activity was going on, the English higher family court judges have created their own jurisprudence. Thoroughly committed as most of them are to the continuation of England applying English law, a series of cases have created the principle that if there is a dispute about interpretation of foreign law, procedure or practice, that issue should be sent to the courts of that country as best placed and most competent to resolve the issue. Local lawyers resolving disputes according to local law.

However the stunning corollary is that England is allowing, on the authority of Moore and via Part III, cases from abroad which would be decided according to English law to be decided here. Automatically, it would then be in accordance with English law. This is not trespassing on Brussels I as it will not be in cases involving maintenance, the category of Miller needs. It is relevant in those cases requiring a fair and just sharing of the matrimonial property, the bigger money cases. If England sends cases requiring an understanding of foreign law to the courts of that country, then it is reasonable to expect to adjudicate upon cases which would be decided in any event on English law. At a stroke, applicable law could be otiose in non maintenance cases.

As stated at the beginning, this fits in absolutely with the thinking of probably the vast majority of English specialist family law solicitors and barristers. It almost certainly fits in with the thinking and philosophy of the very many family law specialists in other countries around the world which apply only local law. Australia, New Zealand, Canada, the Indian subcontinent, many American states and very many

other countries come into this category. These are countries with which England has very many dealings in international family law cases, and possibly at least as many dealings as with the European Union applicable law countries. Moreover these are countries for which the concept of applicable law is even more alien than it is to us in England. This jurisprudence adopted and created by our higher family courts will be perfectly acceptable to these are many local law jurisdictions.

It will be very unacceptable to many of the European Union countries staunchly committed to applicable law. Yet at the same time, there are no complaints when England rightly transfers cases to those countries for them to resolve under their local law.

The onslaught of applicable law from Brussels on to English domestic family law will not end. Our resistance must continue for several more years, probably until the year 2011 when the present family law reform programme of Brussels comes to an end. The Court of Appeal in Moore has given an incredible bulwark to the onslaught. The repercussions on jurisdictions across Europe will reverberate throughout this summer and the next couple of years.

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