FORUM SHOPPING – HAVING THE BEST OF BOTH WORLDS?
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[1] What is the point of forum shopping? Parties set out to secure a decision in the court which best suits their case, applying the law that best suits their case. But what if one could cherry pick, and have the best of two jurisdictions? Recent case law in England admits of such a possibility, although the scope for a 'two shop solution' is much more limited in Scotland. There are two cases in particular that illustrate the possibilities. They are the decision of he Supreme Court on 10 March 2010 in *Agbaje v Agbaje* [2010] UKSC 13, [2010] 2 WLR 709 and that of the Court of Appeal in *Moore v Moore* [2007] EWCA Civ 361, [2007] FCR 353.

[2] Both cases relate to applications under the Matrimonial and Family Proceedings Act 1984, which allows a domestic claim to be made for financial provision, following an overseas divorce. The Act arose from concerns over recognition of overseas divorces. As international movement of persons increased, the family courts in the United Kingdom were faced with divorces properly granted overseas, which did not make financial provision for a spouse, usually the wife. Public policy demanded recognition. The Recognition of Divorces and Legal Separations Act 1971 was passed (subsequently repealed and replaced by Family Law Act 1986). On the other hand it would be contrary to public policy to endorse a course of action designed to leave a dependent wife with no provision (see *Chaudhary v Chaudhary* [1985] Fam 19). The solution was the 1984 Act. The Act has been little used. There is one reported case in Scotland (*Tahir v Tahir* 1993 SLT 194, *Tahir v Tahir (No 2)* 1995 SLT 451). Enthusiasm in England was dampened by the case of *Holmes v Holmes* (1989) 2 FLR 364, where the court declined to use allow the Act to be used to interfere with the decision of a foreign court on a question of financial provision. The situation may be changing.

[3] The decision of the in Supreme Court *Agbaje v Agbaje* has drawn attention to the 1984 Act, and to the differences in its application in England and Scotland. Mr and Mrs Agbaje were born in Nigeria. They met and married in London in the 1960s. They acquired British nationality, as well as retaining their Nigerian nationality. They had five children, all born in London. In the 1970s they returned to live in Nigeria, but four of the children went to school in England and the husband bought a house in Barnet. In 1999 they separated and the wife moved back to England and took up residence in the house in Barnet. The husband started divorce proceedings in Lagos. The wife petitioned for divorce in England. Both applied for a stay (sist) of the other party's proceedings. Neither was successful. Divorce was granted in Lagos. The Nigerian court lacked the power to transfer property, but ordered that the parties' home in Tin Can Island, Lagos be settled on the wife for life and that she should have a capital sum of about £21,000 for her own support. The wife applied to the English Court for financial relief, under Part III of the Matrimonial and Family Proceedings Act 1984. She

required leave to apply, which she secured, and after a hearing in the High Court, before Coleridge J, she was awarded 65% of the proceeds of the house in Barnet, expected to amount to about £275,000. This represented 39% of the total value of the matrimonial property. The husband appealed successfully. The Court of Appeal took the view that there had been insufficient deference to the Nigerian court, which was the natural and appropriate forum for resolution of the wife's claims. Despite hardship to the wife, comity commanded respect for the Nigerian order. The Supreme Court disagreed and restored the decision of Coleridge J.

[4] The Supreme Court decision is of interest in Scotland in so far as it endorsed a "two forum" approach. The application of the 1984 Act does not involve a decision on *forum conveniens*. There is no need to consider which court offers the appropriate forum. The whole point of an application under the Matrimonial and Family Proceedings Act 1984 is that two jurisdictions will be involved. One will grant the divorce and the other will deal with the money (or in the case of *Agbaje* further deal with the money). The task of the judge in England was to apply Part III of the 1984 Act. At that point the case ceases to be directly applicable in Scotland, where the court is required to apply Part IV.

[5] There is a single judgment of the Supreme Court, given by Lord Collins, but Lord Rodger was a member of the Court giving the decision. The judgment refers to the legislative history and to the reports of the Law Commissions in both England and Scotland, who came up with quite different solutions. The Scottish Law Commission explained that whereas the English preferred a solution in which there are wide grounds of jurisdiction and it is left to the courts to sift out cases where an award would be inappropriate on the basis of judicial self-restraint, the Scottish Law Commission recommended a solution with strict grounds of jurisdiction, so the legislation identified in advance the cases where an award would not be appropriate, even if this excluded some cases where a judge might in his discretion allow the claim to proceed. The differences are now found in Parts III and IV of the 1984 Act. The most obvious of them are:

Issue	England and Wales	Scotland
Leave	An applicant requires the leave of the court to make an application (section 13). This is usually granted *ex parte*, but can be set aside on an application heard *inter partes*.	There is no requirement for leave in Scotland, but the circumstances in which an application may be made are much narrower.
Jurisdiction	There are broad jurisdictional criteria. An application may be made if either party is domiciled in England and Wales on the date of the application, or on the date of the divorce, or either has been habitually resident in England and Wales for a year ending with the date of the foreign divorce (section	Not only must the applicant be domiciled or habitually resident on the date the application was made, the defender must also satisfy domicile or habitual residence requirements on the date of the application or the date of separation (section 28(2)). This has the potential to hand an argument to the defender.

	15). The applicant can rely on his or her own domicile or habitual residence alone.	
Conditions	The court is required to consider whether in all the circumstances of the case it would be appropriate for an order to be made, having regard to a list of factors. These include the connection which the parties have with England and Wales, their connection with the country in which the marriage was dissolved and their connection with any other country outside England and Wales (section 16(2)(a) – (c)). The court should also consider any financial benefit which the applicant of a child of the family has received or is likely to receive in consequence of the overseas divorce and matters such as the enforceability of any order and the length of time since the divorce was granted. The judge is required to exercise judgment based on these factors. The factors permit a degree of discretion.	There are a much more rigid set of conditions to be met before the court may make an order, ie the position is much more rigid. The conditions are: (a) the divorce falls to be recognised in Scotland; (b) the other party to the marriage initiated the proceedings for divorce; (c) the application was made within five years after the date when the divorce took effect; (d) a court in Scotland would have had jurisdiction to entertain an action for divorce between the parties if such an action had been brought in Scotland immediately before the foreign divorce took effect; (e) the marriage had a substantial connection with Scotland; and (f) both parties are living at the time of the application. The only condition that requires any form of judgment by the Scottish court relates to the issue of "substantial connection".
Award	The judge in England may grant orders of the same kind as could be awarded in an ordinary application for financial provision (section 17). There are then three criteria found in section 18, including regard being had to all the circumstances of the case, first consideration being given to the welfare of minor children (section 18). In *Agbaje* the Supreme Court rejected the proposition that orders should be restricted to the minimum to avoid injustice, but at the same time held that it was not the intention of the legislation to allow a simple 'top-up' of any foreign award to equate with the level of an English award.	If an application can be made, it proceeds under the same rules as a domestic application (section 29(1) and (2)). The Family Law (Scotland) Act 1985 applies (albeit enacted after the Matrimonial and Family Proceedings Act 1984). The court is however required to have regard to one or two extra matters. These are: (a) the parties' resources, present and foreseeable at the date of disposal of the application; (b) any order made by a foreign court in or in connection with the divorce proceedings for the making of financial provision in whatever form, or the transfer of property, by one of the parties to the other...
Matrimonial home	There are separate and more limited provisions for applications relating solely to a matrimonial home within the jurisdiction.	There are similar more limited provisions for applications relating solely to a matrimonial home within the jurisdiction.

[6] By way of footnote, the more limited Scottish approach may carry with it a problem in relation to recognition of overseas divorces. The public policy exception to recognition is now

set out in section 52(3)(c) of the Family Law Act 1986. If an overseas divorce has been secured to preclude financial provision for a spouse, and there is no remedy under the 1984 Act, then there is an argument for non-recognition, allowing a domestic divorce and a domestic claim for financial provision.

[7] Forum shopping is all very interesting, but as was recognised in England in the case of *Moore v Moore*, it may be very expensive. That case is interesting for the additional complication of the Brussels Regulations regime. The parties' combined expenses in relation to establishing the right to make an English application totalled £1.5 million. The wife was described as a "blatant forum shopper". The point of the exercise was not entirely clear as English law would have applied whether the case proceeded in Spain (as the husband wished) or in England (as the wife wanted). The Court of Appeal commented that the husband may have entertained the cynical hope that the Spanish court would misapply English law to his benefit. The point for present purposes is however that the husband secured a divorce in Spain and the wife presented an application for financial relief in London, under the Matrimonial and Family Proceedings Act 1984. The law allowed her to proceed in London, notwithstanding the Spanish divorce.

[8] The facts of the case may be quite special. The proceedings in both jurisdictions were exceptionally convoluted. The starting point was that the husband got to court first with his divorce. The wife's petition for divorce had to be stayed. The Brussels II Regulation that then applied (pre Brussels II bis) imposed a requirement on the court second seised to stay proceedings. The husband eventually asked the Spanish court to decide on financial matters. The Spanish court held it could not do so, on the basis of a point peculiar to Spanish procedure. The wife leapt into court in London with a claim under the 1984 Act. There were applications and appeals in both jurisdictions. The wife was allowed to proceed with her English claim.

[9] The first point was that Brussels II no longer applied. So far as the Spanish court was concerned the divorce proceedings were at an end. That was a matter for them. The question for the English court was therefore whether an English application was precluded by Brussels I. This applies to maintenance, but not to applications relating to status or rights in property arising out of matrimonial relationships. If the husband's application in Spain could be characterised as an application for maintenance, then the wife could not be allowed to proceed under the 1984 Act. The question of what is maintenance was considered by the European Court of Justice in *Van den Boogaard v Laumen* C-220/95, 1997 QB 759. Maintenance is not just a periodical payment, or an award that describes itself as maintenance. It is necessary to look at the nature and intention of any award. A lump sum or transfer of property intended to support a spouse will be maintenance. An award to divide property or give compensation is not maintenance. An award that constitutes division of assets concerns right in property and does not fall within Brussels I. In the *Moore* case the husband had made an application for adjustment of wealth between the spouses, not for an

award of maintenance. His claim could not preclude the English court proceeding under the 1984 Act. There was the added complication that the Spanish court was not prepared to entertain his claim, albeit this point was still subject to appeal, but in the event that was academic.

[10] The case does raise interesting issues about the differences in approach to financial provision across Europe. Other European countries will apply foreign law, usually the law of closest connection, to issues of financial provision. There are however a variety of approaches to the choice of applicable law. The European Commission proposed a Regulation to harmonise the rules on choice of law. This was the draft Rome III Regulation. The United Kingdom objected strongly to the Regulation. All parts of the United Kingdom apply domestic law in family matters. Acceptance of Rome III would have meant a fundamental change. There were fears that this would prove difficult and expensive in the UK. Ultimately the Regulation foundered, although certain EU countries agreed on measures of co-operation. The English approach apparent in *Moore* is that a case may most appropriately be decided in the place whose law is to be applied. If English law was to be applied, then England would be an appropriate *forum*. Reasoning based on *forum conveniens* in relation to the 1984 Act may not have survived the rejection by the Supreme Court in *Agbaje* but there is a discernible tone in the English family court.

[11] We are however now faced with further developments. Council Regulation (EC) 4/2009 of 18 December 2008 on maintenance is due to come into force on 18 June 2011. The UK did not originally opt into this regulation. The Regulation applies the Hague 2007 Protocol on applicable law, and provides for abolition of exequatur (a decision on enforceability) between states bound by that Protocol. The UK has now opted into the Regulation but not ratified the Protocol, so we are still resisting the application of foreign law in UK courts.

[12] The next step for the Commission relates to 'régimes matrimoniaux' ('rights in property arising out of a matrimonial relationship'). Neither England nor Scotland, nor any other part of the UK have a matrimonial property regime. Spouses generally retain their individual property and remain responsible for their own debts. On divorce an award of financial provision may serve a number of functions, one of which may be maintenance. The next European family project is the harmonisation of rules relating to such regimes. There is a draft Regulation. The United Kingdom's approach thus far has been quite negative. The aim in Brussels appears to be to eliminate forum shopping. The short term effect of the European intervention thus far has not been encouraging, at least if *Moore* is anything to go by.