Recent Judicial Aberrations in Australian Private International Law

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Abstract

This article discusses three Australian first-instance decisions of 2010 on matters of private international law. The cases are *Singh v Singh*, where an injunction restraining a person from participating in foreign criminal proceedings was granted; *Independent Trustee Services Ltd v Morris*, where a foreign judgment was recognised at common law on the ground that the judgment-debtor was a citizen of a foreign country; and *Nygh v Kasey*, where a marriage celebrated in a foreign country without complying with the form requirements of that country's law was recognised at common law. This article criticises the three decisions with regard to their outcome and the methodology used.

I Introduction

Australian private international law is still largely governed by common law principles. The development of the common law is based on the doctrine of precedent, which requires courts to follow prior decisions that are binding and cannot be distinguished. Where such precedent is absent, the court is theoretically free to make any decision. However, the court's decision in such a case ought to be informed by an examination of non-binding judicial statements, views expressed by commentators, and policy considerations. This article discusses three Australian first-instance decisions of 2010 in which a novel approach was taken without the decision being fully informed in the way described. There is one case each from the three areas of private international law, namely jurisdiction (including the restraint of foreign proceedings), recognition of foreign judgments, and choice of law. The cases are *Singh v Singh*,[1] where an injunction restraining a person from participating in foreign criminal proceedings was granted; *Independent Trustee Services Ltd v Morris*,[2] where a foreign judgment was recognised at common law on the ground that the judgment-debtor was a citizen of a foreign country; and *Nygh v Kasey*,[3] where a marriage celebrated in a foreign country without complying with the form requirements of that country's law was recognised at common law.

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[1] (2010) 242 FLR 90.

[2] [2010] NSWSC 1218 (20 October 2010).

[3] [2010] FamCA 145 (2 March 2010).

II Injunction Restraining Participation in Foreign Criminal Proceedings

Courts in common law countries have assumed the power to restrain parties from commencing or continuing foreign[4] civil proceedings in certain circumstances.[5] In *CSR Ltd v Cigna Insurance Australia Ltd*,[6] the High Court of Australia laid down that Australian common law (in the sense of judge-made law, including equity) allows courts to grant an anti-suit injunction for either of two purposes. One purpose is the protection of the court's own proceedings or processes.[7] An example is an (intended) foreign action to obtain the sole benefit of foreign assets while bankruptcy or winding-up proceedings are pending in Australia.[8] The other purpose is the restraint of unconscionable conduct or the unconscientious exercise of legal rights.[9] This purpose is engaged where (intended) foreign proceedings are vexatious or oppressive, or occur in breach of a promise not to litigate in that country.[10] Foreign proceedings may be vexatious or oppressive, for example, where proceedings in which complete relief may be had are pending in Australia and one party to those proceedings commences foreign proceedings between the same parties on the same subject matter.[11]

While the first purpose of granting an anti-suit injunction (protection of the court's own proceedings or processes) is largely uncontroversial,[12] the second purpose (restraint of unconscionable conduct or the unconscientious exercise of legal rights) is not. Anti-suit injunctions have been said to interfere, at least indirectly, with the administration of justice in the foreign country.[13] A direct interference would violate the principle of territorial sovereignty under customary international law,[14] but is said to be absent in cases of anti-suit injunctions because they operate in personam against the person restrained, not the foreign court itself.[15] It has nonetheless been recognised that the power to grant anti-suit

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4 Domestic proceedings in another court can also be restrained, but the following discussion is confined to the restraint of foreign proceedings.

5 *United States v Davis*, 767 F 2d 1025, 1038 (2nd Cir, 1985); *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 892–6; *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897, 930–4; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390–4; *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 133; *The Convenience Container* [2007] 3 HKLRD 575, 604.

6 (1997) 189 CLR 345.

7 Ibid 392.

8 Ibid 391.

9 Ibid 392.

10 Ibid.

11 Ibid 393.

12 See Thomas Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008) [1.23].

13 *British Airways Board v Laker Airways Ltd* [1985] AC 58, 95; *South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provincien' NV* [1987] AC 24, 40; *Turner v Grovit* (C-159/02) [2004] ECR I-3565, [27]–[28]; Clare Ambrose, 'Can Anti-Suit Injunctions Survive European Community Law?' (2003) 52 *International and Comparative Law Quarterly* 401, 408–9; Trevor C Hartley, 'Comity and the Use of Antisuit Injunctions in International Litigation' (1987) 35 *American Journal of Comparative Law* 487, 506.

14 Raphael, above n 12, [1.47] n 159. See also *R v Hape* [2007] 2 SCR 292, [45]–[46], [65]; *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, [18]; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 311–12.

15 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 892; *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897, 940; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 395; *Turner v Grovit* [2002] 1 WLR 107, [23]; *E & J Gallo Winery v Andina Licores SA*, 446 F 3d 984, 989 (9th Cir, 2006). This explanation has been criticised: *Laker Airways Ltd v Pan American World Airways*, 559 F Supp 1124, 1128 n 14 (DC Cir, 1983); *Re Maxwell Communications Corp plc (No 2)* [1992] BCC 757, 761.

injunctions raises concerns with regard to comity and must therefore be exercised with caution.[16]

This article does not seek to add to the existing literature on the merits of anti-suit injunctions in general.[17] What will be discussed is the grant of such an injunction with regard to foreign *criminal* proceedings in *Singh v Singh*.[18] Even though the court exercised a power granted by statute, the decision has significance for anti-suit injunctions in general since the court regarded its decision as being in line with common law principles.

Mr and Ms Singh were married in 2002 in India according to Sikh rites. Both of them were Australian citizens and lived in Australia. They had one child, born in 2006. They subsequently separated and applied for Federal Magistrates Court consent orders on child custody and the parties' property. Mr Singh sought an order restraining Ms Singh from taking any action, or causing or allowing or assisting any other person to do so, under the *Dowry Prohibition Act 1961* (India), which makes the requesting, giving or receiving of a dowry an offence on the part of the relevant (future) spouse or that spouse's relatives.[19] Mr Singh also sought a 'notation' that, contrary to Ms Singh's allegation, no dowry had been paid, received, requested or demanded by him or his family. An expert witness on Indian law testified that there was no time limit for proceedings under the *Dowry Prohibition Act 1961* and that in an Indian court the testimony of the bride and her parents in relation to a dowry at the time of the marriage was complete evidence, requiring the husband to adduce evidence in defence.[20]

Neville FM granted the injunction sought by Mr Singh. He set out the common law principles on anti-suit injunctions,[21] and explained his decision to grant an injunction pursuant to s 114(1)(a) of the *Family Law Act 1975* (Cth) in this way:[22]

> In my view, an injunction should be granted as sought by Mr Singh under s 114(1)(a), which section refers to 'the personal protection of a party to the marriage'. From what has been stated, there is sufficient evidence before the court to be concerned that Mr Singh faces a risk of imprisonment if ever criminal proceedings are instituted in India. The fact that there is no time limit in which such proceedings may be instituted, and that there is a complete absence of clarity from Ms Singh in relation to her intentions in relation to such proceedings, and that no such proceedings have been commenced, only adds to the need, in my view, to afford some personal protection to Mr Singh.

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16 *US v Davis*, 767 F 2d 1025, 1038 (2nd Cir, 1985); *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 892; *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897, 934; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 396; *Airbus Industrie GIE v Patel* [1999] 1 AC 119, 133; *The Convenience Container* [2007] 3 HKLRD 575, 604.

17 See, eg, George A Bermann, 'The Use of Anti-Suit Injunctions in International Litigation' (1990) 28 *Columbia Journal of Transnational Law* 589, 605–31; Hartley, above n 13, 506–11; Stephen Males, 'Comity and Anti-Suit Injunctions' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 543; Raphael, above n 12, [1.11]–[1.48].

18 (2010) 242 FLR 90.

19 The Indian Law Commission has recommended making the offence compoundable, ie subject to settlement by the offender and the victim with the court's approval: Law Commission of India, *Compounding of (IPC) Offences* (Report No 237, 2011) 16–25, 34.

20 (2010) 242 FLR 90, [23].

21 Ibid [125]–[131].

22 Ibid [141]. Neville FM alternatively based the injunction on s 114(3), which empowers the court to grant any injunction that is 'just or convenient': ibid [142].

The grant of the injunction is problematic with regard to both the assumption of discretion to grant such an injunction and the exercise of that discretion. Considering the latter issue first, it is unclear why the injunction was necessary. Neville FM made no finding in respect of Ms Singh's allegation that she had not even contemplated instigating criminal proceedings in India before Mr Singh applied for the injunction.[23] An expert witness on Indian law testified that the Indian courts would not entertain criminal proceedings against Mr Singh if the Australian court made a declaration that no dowry had been paid or demanded.[24] This requirement may have been satisfied by Neville FM's 'notation' that Ms Singh failed to establish that a dowry had been paid, received, demanded or requested by Mr Singh or his family.[25] Furthermore, the injunction afforded Mr Singh no real protection. Neville FM pointed out that the injunction restrained only Ms Singh, leaving her relatives free to raise the dowry issue with authorities in India.[26] Equity does not normally act in vain.[27]

More importantly, an injunction to restrain a party from participating in foreign criminal proceedings raises concerns with regard to the principle of territorial sovereignty under customary international law.[28] This principle would be infringed by an injunction that purports to restrain foreign authorities from commencing or continuing criminal proceedings in their own country.[29] The principle may also be infringed by an injunction that restrains a person from appearing as a witness in foreign criminal (or indeed civil) proceedings where the person lives in the foreign country and is obliged to appear under the foreign law.[30]

On the other side of the spectrum is an injunction that merely restrains a person from raising or pursuing a civil claim within foreign criminal proceedings,[31] which is possible under the procedural law of some countries.[32] Such an injunction is not significantly different to an injunction that restrains a person from commencing or continuing foreign civil proceedings proper. More difficult is an injunction that restrains a person from acting as an 'accessory prosecutor' in foreign criminal proceedings initiated by the authorities in that jurisdiction. Some legal systems allow the alleged victim of the crime to join the public prosecutor and independently exercise certain rights of the prosecution, such as presenting evidence or appealing a decision.[33] Since such an 'accessory prosecutor' assumes a public, rather than private, function, an injunction restraining a person from acting as an 'accessory prosecutor' is inappropriate.

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23 He merely noted the allegation: ibid [99], [118].

24 Ibid [24].

25 Ibid [134]–[139].

26 Ibid [143].

27 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425; Normann Witzleb, '"Equity Does Not Act in Vain": An Analysis of Futility Arguments in Claims for Injunctions' (2010) 32 *Sydney Law Review* 503.

28 '[S]erious concerns' with regard to comity are identified by Raphael, above n 12, [3.06]. The power to restrain *domestic* criminal proceedings is recognised: *Thames Launches Ltd v Trinity House Corp (Deptford Strond)* [1961] Ch 197, 204–5; *Thames Hudson Ltd v Design and Artists Copyright Society Ltd* [1995] FSR 153, 157–8.

29 Raphael, above n 12, [1.47] n 159. See also *R v Hape* [2007] 2 SCR 292, [45]–[46], [65]; *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, [18]; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 311–12.

30 Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (Longman, 9th ed, 1992) vol 1, 464.

31 Such an injunction was granted in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2012] VSC 1.

32 The criminal justice systems of several countries are described in Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002).

33 Ibid.

That leaves the situation where the foreign law provides that criminal proceedings cannot take place unless the alleged victim initiates those proceedings or formally requests the public prosecutor to do so. Is an injunction restraining the alleged victim from taking either course appropriate? That depends upon whether the alleged victim's act of initiating criminal proceedings or requesting the public prosecutor to do so is considered more akin to the commencement of a civil action or to acting as an 'accessory prosecutor'. On the one hand, the decision on whether to initiate criminal proceedings in those circumstances is a private decision by the alleged victim alone, like the decision on whether to bring a civil action. On the other hand, the victim's decision to initiate criminal proceedings (or request the public prosecutor to do so) has a public function, since it is the starting point of proceedings enforcing society's interest in preventing and punishing crimes.

Considering that concerns in respect of comity are already raised by injunctions restraining the commencement or continuation of foreign civil proceedings, injunctions restraining a person from initiating foreign criminal proceedings should only be granted, if at all, for the purpose of protecting the court's own proceedings or processes. The injunction in *Singh v Singh* was not granted for that purpose and did more than merely restrain Ms Singh from raising or pursuing a civil claim within criminal proceedings. Neville FM should not have granted the injunction and, in any event, should have recognised the concerns with regard to comity and the principle of territorial sovereignty under customary international law.

III Citizenship as a Ground of Recognising Foreign Judgments at Common Law

The recognition and enforcement of foreign judgments in Australia is governed by a mix of common law and legislation.[34] An essential requirement for the recognition of foreign judgments at common law is that the foreign court had 'international jurisdiction', which means that the foreign court was a competent court in the eyes of the law of the recognising forum.[35] The applicability of the common law rules and the determination of a foreign court's 'international jurisdiction' at common law were issues that arose in *Independent Trustee Services Ltd v Morris*.[36]

Independent Trustee Services Ltd ('ITS'), a professional trustee company, was appointed independent trustee of a number of United Kingdom ('UK') pension schemes by the UK pensions regulator. The appointment arose out of an alleged fraudulent misapplication of £52 million of the pension schemes' assets by the former two trustees. ITS sought to recover those assets or their proceeds in an action in the High Court of Justice for England and Wales. One of the defendants was Mr Morris, a UK citizen who was living in Australia when the English proceedings commenced. He was served with the claim form in Australia, but took no part in the proceedings.

It was held that £52 million had been paid out of the pension schemes in breach of trust and that Mr Morris had orchestrated that breach, rendering him liable for dishonest

[34] The following discussion ignores the special rules for the recognition of foreign orders in bankruptcy and family law matters.

[35] *Trainor Asia Ltd v Calverley* (2007) 53 SR (WA) 277, [16]; *Armacel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573, [82]; *Mobi-Light Inc v KK Machinery Pty Ltd* [2010] WADC 105 (19 July 2010), [18].

[36] [2010] NSWSC 1218 (20 October 2010).

assistance and knowing receipt.[37] A number of orders were made, two of which are relevant in the present context. Order 3 ordered a number of defendants including Mr Morris to file and serve on ITS by a certain date an account of the use and application of, and any profit made on, the relevant assets from their receipt by each defendant to the taking of the account. Order 8 ordered Mr Morris to pay £52 million plus interest to ITS. Mr Morris complied with neither order.

ITS brought an action against Mr Morris in the Supreme Court of New South Wales, asking the Court to give effect to Orders 3 and 8 in the English judgment. ITS submitted that the English judgment was itself the cause of action, but ITS was also prepared to base its case on the underlying causes of action which had been upheld by the English court. Bryson AJ considered the latter course unnecessary,[38] holding that he could give effect to the English judgment itself.

With regard to O 8, which he described as 'a judgment for payment of money',[39] Bryson AJ said that the English judgment was entitled to recognition on the ground that Mr Morris was a UK citizen and this citizenship was 'active' since Mr Morris had relied on it for his travel to Australia and other purposes.[40] Bryson AJ said that he would give effect to O 8 by ordering Mr Morris to pay ITS a sum of money, the amount of which was yet to be calculated.[41] With regard to O 3 in the English judgment, which requested Mr Morris to provide an account of profits, Bryson AJ said that this was not a money judgment,[42] but that he could still give effect to it on the ground that there was a 'sufficient connection' between Mr Morris and England and Wales due to Mr Morris' UK citizenship.[43] He made an order substantially identical to O 3 in the English judgment.

Bryson AJ's decision is problematic in respect of the criteria used for the recognition of the foreign judgment at common law (in the sense of judge-made law) and in respect of the applicability of the common law rules to O 8 of the English judgment. Considering the latter issue first, s 10(1) of the *Foreign Judgments Act 1991* (Cth) prohibited Bryson AJ from giving effect to O 8 in the way he did. This Act, which Bryson AJ failed to mention, applies to judgments from specified courts of specified countries,[44] and the High Court of Justice for England and Wales is one of these courts.[45] The Act distinguishes between a 'money judgment' (defined as 'a judgment under which money is payable'[46]) and a 'non-money judgment', but fails to specify how mixed judgments are to be treated. The most sensible approach is to sever mixed judgments and treat the order to pay money as a 'money judgment', and the other orders as a 'non-money judgment', for the purposes of the Act. Bryson AJ did sever the English judgment, although not in the context of the Act.

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37 *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch) (1 July 2010), [240].

38 *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218 (20 October 2010), [19].

39 Ibid [20].

40 Ibid [20]–[21].

41 ITS did not seek judgment for the full amount as there had been credits of various kinds: ibid [16].

42 Ibid [32].

43 Ibid [33], [35].

44 One of these countries is New Zealand, but the enforcement of New Zealand judgments in Australia is now exclusively governed by pt 7 of the *Trans-Tasman Proceedings Act 2010* (Cth).

45 The Schedule to the *Foreign Judgments Regulations 1992* (Cth) lists the 'Supreme Court of England and Wales', which includes the High Court of Justice. The term 'Supreme Court of England and Wales' was used when the Regulations were made, but it has since been superseded by the term 'Senior Courts of England and Wales': *Constitutional Reform Act 2005* (UK) sch 11.

46 *Foreign Judgments Act 1991* (Cth) s 3(1).

Section 6 of the *Foreign Judgments Act 1991* provides for the registration in a designated Australian court of a money judgment from a specified court, and for the general enforceability of the registered foreign judgment as if it had originally been given in the court in which it was registered. With regard to O 8, therefore, ITS could have registered the English judgment in the Supreme Court of New South Wales (or of any other Australian state or territory) and, had the registration not been impeached, enforced the judgment as if it had been given in the court in which it was registered. ITS sought no such registration, and it would have been futile to do so since the court, on Mr Morris' application, would have had to set aside the registration pursuant to ss 7(2)(a)(iv) and (3) on the ground that the English court had had no (international) 'jurisdiction' over Mr Morris. None of the grounds of (international) 'jurisdiction' of the foreign court, which notably do not include the judgment-debtor being a citizen of the foreign country, was satisfied *in casu*.

Section 10(1) of the Act provides: 'No proceedings for the recovery of an amount payable under a judgment to which this Part applies, other than proceedings by way of registration of the judgment, are to be entertained by a court having jurisdiction in Australia.' Section 5(4) provides that pt 2 applies to a final and conclusive money judgment from a foreign court specified in the *Foreign Judgments Regulations 1992* (Cth).[47] Section 10(1) thus provides that registration in the designated Australian court is the only permitted procedure of 'recovering' money under a final and conclusive money judgment rendered by a specified foreign court, such as O 8 in the English judgment. A 'recovery' of money under the common law rules is precluded for such a judgment. It is not entirely clear, however, what 'recovery' means in this context.

At common law, a foreign judgment cannot as such be enforced in the forum.[48] The judgment-creditor needs to obtain a judgment from the forum court that gives effect to the foreign judgment. Depending on the nature of the foreign judgment, the judgment-creditor may pursue either or both of the following avenues to obtain a judgment from the forum court. Where the foreign judgment orders the judgment-debtor to pay money to the judgment-creditor, the judgment-creditor can bring an action for debt against the judgment-debtor in the forum, the foreign judgment itself being the source of the debt.[49] This applies whether the foreign court gave judgment in favour of the then plaintiff, or dismissed the claim and made a cost order in favour of the then defendant. Where the foreign court did give judgment in favour of the then plaintiff, the judgment-creditor may commence proceedings against the judgment-debtor in the forum based on the original cause of action, and then plead the foreign judgment as raising a cause-of-action estoppel

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47 In fact, s 5(4) provides that pt 2 applies to an 'enforceable money judgment', which is defined as a judgment under which money is payable other than in respect of fines, penalties and certain taxes: *Foreign Judgments Act 1991* (Cth) s 3(1).

48 *Perry v Zissis* [1977] 1 Lloyd's Rep 607, 613; *Martyn v Graham* [2003] QDC 447 (13 November 2003), [16]; *Bank of Western Australia v Henderson (No 3)* (2011) 253 FLR 458, [39]–[40].

49 *Russell v Smyth* (1842) 9 M & W 810, 819; 152 ER 343, 347; *Godard v Gray* (1870) LR 6 QB 139, 148; *White v Verkouille* [1990] 2 Qd R 191, 194; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484; *Lewis v Eliades* [2004] 1 WLR 692, [48]; *Dennehy v Reasonable Endeavours Pty Ltd* (2003) 130 FCR 494, [8]; *Trainor Asia Ltd v Calverley* (2007) 53 SR (WA) 277, [16]. A widening of that rule so as to include non-money judgments is favoured by Kim Pham in 'Enforcement of Non-Monetary Foreign Judgments in Australia' (2008) 30 *Sydney Law Review* 663.

or *res judicata*, preventing the judgment-debtor from defending the claim.[50] This applies whether the order made in the foreign judgment is an order to pay money or another order. Where the foreign court gave a money judgment in favour of the then plaintiff, the judgment-creditor thus has two options, which can be pursued in the alternative.[51]

An action for debt based on the foreign judgment as the source of the debt constitutes 'proceedings for the recovery of an amount payable under a judgment' and is thus precluded by s 10(1) of the *Foreign Judgments Act 1991*.[52] Section 10(1) may not preclude the bringing of fresh proceedings on the original cause of action and the pleading of cause-of-action estoppel based on the foreign judgment,[53] since the amount claimed can be said to 'be payable' under the original cause of action, rather than under the foreign judgment.

In addition, s 12(3) provides that a foreign judgment to which pt 2 applies, or would apply if the judgment were a money judgment, and which is not entitled to recognition under the Act (because its registration has been, or would be, set aside) is 'conclusive of any matter of law or fact decided in the judgment' if the judgment is entitled to recognition at common law. This means that a judgment from a specified foreign court is entitled to recognition if it is so entitled either under the Act or at common law. There can be no doubt, therefore, that a *non-money* judgment from a specified foreign court that is entitled to recognition at common law raises a cause-of-action estoppel not only where the foreign court dismissed the claim, but also where it gave judgment in favour of the then plaintiff. But s 10(1) might limit the effect of s 12(3) on a *money* judgment from a specified foreign court in that such a judgment can raise a cause-of-action estoppel only where the foreign court dismissed the claim, but not where it gave judgment in favour of the then plaintiff.

Be that as it may, s 10(1) at least precludes a specified foreign court giving effect to a money judgment by bringing an action for debt in the forum. But this is exactly the way in which Bryson AJ in *Independent Trustee Services Ltd v Morris* gave effect to O 8 in the English judgment.[54] Section 10, or indeed the whole *Foreign Judgments Act 1991*, does not seem to have been cited to Bryson AJ. This does not necessarily excuse him, since the language of s 10(1) ('No proceedings … are to be entertained by a court') suggests that the court must apply s 10(1) on its own motion. Things were different for O 3 because it was a non-money judgment and thus not affected by s 10(1).

Bryson AJ's decision is also problematic with regard to the requirement for the recognition of a foreign judgment at common law that the foreign court had 'international jurisdiction'.[55] This requirement aims to ensure that it was appropriate for the foreign court

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[50] *Harris v Quine* (1869) LR 4 QB 653, 658; *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 917–18; *Miller v Caddy* (1985) 80 FLR 398, 404–5; *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* (2011) 91 IPR 438, [45]. In England and Wales, this avenue is now prohibited by the *Civil Jurisdiction and Judgments Act 1982* (UK) s 34.

[51] *Delfino v Trevis (No 2)* [1963] NSWR 194, 196–7.

[52] See *Martyn v Graham* [2003] QDC 447 (13 November 2003), [15].

[53] Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (Oxford University Press, 2002) 189–90. The opposite view is taken by Niv Tadmore, 'Recognition of Foreign *in personam* Money Judgments in Australia' (1995) 2 *Deakin Law Review* 129, 173–4.

[54] [2010] NSWSC 1218 (20 October 2010), [18] ('the judgment itself being the cause of action').

[55] In addition, the foreign judgment must be final and conclusive and there must be an identity of parties: *Nouvion v Freeman* (1889) 15 App Cas 1, 9–10; *The Sennar (No 2)* [1985] 1 WLR 490, 499. The creation of an estoppel additionally requires that the cause of action or issue be the same in the two sets of proceedings and that the foreign court's ruling on the cause of action or issue be part of the ratio of its judgment: *Hoystead v Commissioner of Taxation* [1926] AC 155, 170; *Blair v Curran* (1939) 62 CLR 464, 531–3. Even where all threshold requirements for

to assume jurisdiction over the judgment-debtor, which requires some connection between the foreign court and the dispute it decided. The following pronouncement on the possible connections was made by Buckley LJ in *Emanuel v Symon*:[56]

> In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

The last four categories mentioned by Buckley LJ have been applied in many cases and are uncontroversial. But the first category, that the judgment-debtor is (in modern parlance) a citizen of the foreign country, has remained highly controversial. It is the category applied by Bryson AJ in *Independent Trustee Services Ltd v Morris* with regard to O 8. It had previously been recognised obiter in at least one Australian case,[57] and applied in *Federal Finance and Mortgage Ltd v Winternitz*,[58] where Sully J in the Supreme Court of New South Wales recognised a judgment from a court in Hawaii on the grounds that the judgment-debtor, who lived in Australia, was a United States ('US') citizen, was a registered voter in Hawaii, had applied for a US pension and had used his US passport for international travel.

A different trend has emerged in other common law jurisdictions. An Irish court refused to recognise a judgment rendered by an English court against a UK citizen living in the Republic of Ireland.[59] In England and Wales, no case in point seems to exist, but there have been a number of dicta on the issue. Until the 1970s, courts in England and Wales mentioned citizenship as a ground of 'international jurisdiction'.[60] Doubts were expressed in the 1960s and 1970s,[61] and subsequently this ground of 'international jurisdiction' seems to have been silently laid to rest since the Court of Appeal for England and Wales, in 1990 and 2010, listed the grounds of 'international jurisdiction' without including citizenship. In

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the recognition of a foreign judgment are satisfied, recognition will be refused if the judgment-debtor establishes a defence such as fraud, violation of natural justice or *ordre public*: *Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137, 141; *NML Capital Ltd v Argentina* [2011] 2 AC 495, [85].

56 [1908] 1 KB 302, 309. An almost identical statement had been made by Fry J in *Roussillon v Roussillon* (1880) 14 Ch D 351, 371. Fry J mentioned a possible further category, namely that of the judgment-debtor having real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst the judgment-debtor was within that jurisdiction. This category was disapproved in *Emanuel v Symon* [1908] 1 KB 302.

57 *Malaysia-Singapore Airlines Ltd v Parker* (1972) 3 SASR 300, 302. See also *De Santis v Russo* [2002] 2 Qd R 230, [9]. By contrast, only presence, residence and submission were listed as grounds of 'international jurisdiction' in *Martyn v Graham* [2003] QDC 447 (13 November 2003), [22].

58 (Unreported, Supreme Court of New South Wales, Sully J, 9 November 1989).

59 *Rainford v Newell-Roberts* [1962] IR 95.

60 *General Steam Navigation Co v Guillou* (1843) 11 M & W 877, 894; 152 ER 1061, 1068; *Schibsby v Westenholz* (1870) LR 6 QB 155, 161; *Phillips v Batho* [1913] 3 KB 25, 29; *Gavin Gibson & Co Ltd v Gibson* [1913] 3 KB 379, 387–8; *Harris v Taylor* [1915] 2 KB 580, 591; *Re Trepca Mines Ltd* [1960] 1 WLR 1273, 1276; *Societe Cooperative Sidmetal v Titan International Ltd* [1966] 1 QB 828, 838; *Perry v Zissis* [1977] 1 Lloyd's Rep 607, 613.

61 *Blohn v Desser* [1962] 2 QB 116, 123; *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352, 382–3; *Vogel v R & A Kohnstamm Ltd* [1973] QB 133, 140–1.

Rubin v Eurofinance SA,[62] the court approvingly quoted the following statement made by Slade LJ on the court's behalf in *Adams v Cape Industries plc*:[63]

> [I]n the absence of any form of submission to the foreign court, ['international'] competence depends on the physical presence of the defendant in the country concerned at the time of suit. (We leave open the question whether residence without presence will suffice.)

In summary, Bryson AJ in *Independent Trustee Services Ltd v Morris* was free from binding precedent and faced conflicting non-binding judicial statements. His Honour could not be criticised had he said that he would follow *Federal Finance and Mortgage Ltd v Winternitz* rather than the Irish and recent English decisions. In fact, he solely relied on the statement made by Buckley LJ in 1908, on the ground that a decision by the Court of Appeal for England and Wales on a common law question should ordinarily be followed unless it was clearly erroneous.[64] On that basis, however, Bryson AJ should have followed the statements made by the Court of Appeal for England and Wales in 1990 and 2010, and rejected citizenship as a ground of 'international jurisdiction'. His decision on that issue was thus due to his apparent lack of awareness of *Adams v Cape Industries plc* and *Rubin v Eurofinance SA*.

Bryson AJ did acknowledge that the use of the judgment-debtor's citizenship as a ground of the foreign court's 'international jurisdiction' had been rejected in an Irish case and by many commentators.[65] But he failed to set out what those objections were and, moreover, why he preferred the opposite view. While scholarly and non-binding judicial objections to a certain approach do not prevent a court from taking that approach, one can expect the court to engage with those objections.

So what are the merits of using the judgment-debtor's citizenship as a ground of the foreign court's 'international jurisdiction' in general civil matters?[66] Old dicta that mentioned this ground of 'international jurisdiction' based it on the notion of an 'allegiance' to a legal system or sovereign.[67] Dicey said in 1896 that 'a subject is bound to obey the commands of his sovereign, and, therefore, the judgments of his sovereign's Courts'.[68] While the notion of 'allegiance' may have had some currency in the 19th century, it is out of fashion today. The cross-border movement of people has increased dramatically, and many people today live permanently in a country other than that of their

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62 [2011] 2 WLR 121, [36] (Ward LJ speaking for the court).

63 [1990] Ch 433, 518. Slade LJ's statement was also approvingly quoted in *Motorola Credit Corp v Uzan* [2004] EWHC 3169 (Comm), [24] (Cooke J).

64 [2010] NSWSC 1218 (20 October 2010), [28].

65 Ibid [27]. Australian commentators oppose the use of citizenship as a ground of 'international jurisdiction': Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 8th ed, 2010) [40.24]–[40.25]; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 2nd ed, 2011) [5.20].

66 Citizenship is used in this way with regard to foreign decrees of divorce, the annulment of a marriage or legal separation: *Family Law Act 1975* (Cth) s 104(3)(d).

67 *General Steam Navigation Co v Guillou* (1843) 11 M & W 877, 894; 152 ER 1061, 1068; *Schibsby v Westenholz* (1870) LR 6 QB 155, 161–2; *Gavin Gibson & Co Ltd v Gibson* [1913] 3 KB 379, 386–93.

68 Albert Venn Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens & Sons, 1896) 375, where he went on to say that the allegiance had to exist when the foreign judgment was given, not when the foreign proceedings commenced.

citizenship. A migrant's citizenship can thus be 'dormant',[69] which is particularly relevant to Australia as a country with high immigration numbers.

Indeed, Bryson AJ seems to have required that the judgment-debtor's citizenship be 'active', rather than 'some relic of an early stage of his life'.[70] But it may be difficult to decide whether a person's citizenship is 'active' or passive', which *Independent Trustee Services Ltd v Morris* demonstrates. Bryson AJ's primary reason for regarding Mr Morris' UK citizenship as active was the fact that Mr Morris had used his UK passport in his travel to Australia.[71] Since international travel is impossible without using a passport, it is unclear why the use of a passport in a trip *away from* the country of citizenship should demonstrate that the citizenship is active.

Another practical problem of using the judgment-debtor's citizenship as a ground of the foreign court's 'international jurisdiction' arises where the judgment-debtor is the citizen of a federal country with several jurisdictions. Do the courts in all jurisdictions of the federal country have 'international jurisdiction',[72] or only the courts in one jurisdiction? If the latter, how is that one jurisdiction identified? Interestingly, these questions were ignored in the two Australian cases in which citizenship was used as a ground of 'international jurisdiction', even though each case involved a federal country. Bryson AJ in *Independent Trustee Services Ltd v Morris* made no effort to establish Mr Morris' link specifically with England and Wales, rather than the UK as a whole, and Sully J in *Federal Finance and Mortgage Ltd v Winternitz* made no effort to establish Mr Winternitz' link specifically with Hawaii, rather than the US as a whole, although such a link may have been found in Mr Winternitz' registration as a voter in Hawaii.

Further, the other four grounds of a foreign court's 'international jurisdiction' mentioned by Buckley LJ in *Emanuel v Symon*, which can be consolidated into the categories of presence and submission, mirror the grounds upon which the forum court itself exercises jurisdiction at common law.[73] Citizenship is no ground of jurisdiction at common law,[74] nor indeed under the statutes that allow service of originating process out of the jurisdiction.[75] 'It seems strange that nationality should be accepted as a basis of jurisdiction in the case of a foreign judgment, when it is clearly not so in the case of the [forum court] itself.'[76]

Bryson AJ's reason for recognising the English judgment thus lacks merit.[77] This is not to say that good reasons for such recognition cannot be found, assuming that the matter was free from authority. The basis for the English court's jurisdiction under its own law, which was not mentioned in either the English judgment or Bryson AJ's judgment, was presumably that Mr Morris had committed the allegedly wrongful acts in England,[78] or was

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69 Davies, Bell and Brereton, above n 65, [40.25].

70 [2010] NSWSC 1218 (20 October 2010), [21].

71 Ibid [20]–[21]. Bryson AJ said (at [21]) that Mr Morris had used his UK passport for other purposes too, but his Honour did not specify those purposes.

72 This is the position with regard to foreign decrees of divorce, the annulment of a marriage or legal separation: *Family Law Act 1975* (Cth) s 104(2).

73 See *Re Deposit and Investment Company Ltd (rec apptd)* (1991) 30 FCR 463, 464; *Sheahan v Joye* (1995) 57 FCR 389, 396; *Waller v Freehills* (2009) 177 FCR 507, [42].

74 *Rainford v Newell-Roberts* [1962] IR 95, 102–3.

75 Those statutes only mention domicile and ordinary residence: see Mortensen, Garnett and Keyes, above n 65, [2.44].

76 *Rainford v Newell-Roberts* [1962] IR 95, 103 (Davitt P).

77 Adrian Briggs, 'Foreign Judgments: The Common Law Flexes its Muscles' (2011) 17 *Trusts and Trustees* 328, 331–2.

78 *Civil Procedure Rules 1998* (UK) r 6.36, PD 6B para 3.1(16).

a proper party to the claim against one or more of the other defendants.[79] England was the natural forum for the dispute. In the reverse situation of the pension schemes and ITS being Australian corporations and Mr Morris being an Australian citizen living in England, the Supreme Court of New South Wales (or of another Australian state or territory) would have assumed exorbitant or 'long-arm' jurisdiction.[80] Australian law could recognise the English judgment under a principle of reciprocity of jurisdiction,[81] which the courts have so far rejected,[82] or on the basis that England was the natural forum,[83] or on the basis that an Australian court would not have granted an anti-suit injunction restraining ITS from pursuing the English proceedings.[84]

Alternatively, the English judgment would be entitled to recognition in Australia at common law if Australian courts generally[85] adopted the test laid down by the Supreme Court of Canada, under which a Canadian court recognises a foreign or interprovincial judgment at common law if the foreign or interprovincial court had a 'real and substantial connection' with either the judgment-debtor or the subject matter of the action.[86] However, this test is too uncertain and should not generally be adopted in Australia.[87]

With regard to O 3 in the English judgment, which ordered an account of the use of certain assets, Bryson AJ held that he could make an order mirroring O 3 without deciding on the underlying cause of action. In exercising equitable jurisdiction, he said, the forum court can give direct effect to the judgment of a foreign court that also exercised equitable jurisdiction. All that is required is a 'sufficient connection' between the judgment-debtor and the foreign jurisdiction.[88] Bryson AJ found a sufficient connection between Mr Morris and the English court in Mr Morris' active UK citizenship.[89]

For the proposition that an equitable remedy in a foreign judgment can be enforced in the forum without the intermediate step of a forum judgment on the underlying cause of action, Bryson AJ relied on *White v Verkouille*,[90] where McPherson J in the Supreme Court

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79 Ibid para 3.1(3).

80 The relevant grounds of exorbitant jurisdiction are discussed by Davies, Bell and Brereton, above n 65, [3.44], [3.45], [3.77], [3.78]. A stay of proceedings on the ground of *forum non conveniens* would have been very unlikely: see *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [45]–[48].

81 See F A Mann, 'The Doctrine of Jurisdiction in International Law' (1964-I) 111 *Recueil des cours* 1, 75–6.

82 *Re Trepca Mines Ltd* [1960] 1 WLR 1273, 1281–2; *Malaysia-Singapore Airlines Ltd v Parker* [1972] 3 SASR 300, 303–4; *Crick v Hennessy* [1973] WAR 74; *Felixstowe Dock & Railway Co v United States Lines Inc* [1989] QB 360, 373–6; *Gordon Pacific Developments Pty Ltd v Conlon* [1993] 3 NZLR 760, 765; *Murthy v Sivajothi* [1999] 1 WLR 467, 476.

83 See Adrian Briggs, 'Which Foreign Judgments Should we Recognise Today?' (1987) 36 *International and Comparative Law Quarterly* 240; Peter R Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (Oxford University Press, 2001) [2.30]–[2.33].

84 See Jonathan Harris, 'Recognition of Foreign Judgments at Common Law — The Anti-Suit Injunction Link' (1997) 17 *Oxford Journal of Legal Studies* 477.

85 The test of real and substantial connection applies at common law with regard to foreign decrees of divorce, the annulment of a marriage or legal separation: *Indyka v Indyka* [1969] 1 AC 33, 77, 105, 113; *In the Marriage of Barriga (No 2)* (1981) 7 Fam LR 909, 916.

86 *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 1104 (for inter-provincial judgments); *Beals v Saldanha* [2003] 3 SCR 416, [24]–[37] (for foreign judgments). For criticism, see Vaughan Black, Joost Blom and Janet Walker, 'Current Jurisdictional and Recognitional Issues in the Conflict of Laws' (2011) 50 *Canadian Business Law Journal* 499, 502, 506, 507–8. A consequential widening of the defences to recognition is suggested by Adrian Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 *Singapore Year Book of International Law* 1, 17–21.

87 Mortensen, Garnett and Keyes, above n 65, [5.22]. The opposite view is taken by Tadmore, above n 53, 182–7.

88 [2010] NSWSC 1218 (20 October 2010), [33].

89 Ibid [35].

90 [1990] 2 Qd R 191.

of Queensland ordered Verkouille to transfer money held in an Australian bank account to White, who had been appointed as the receiver of Verkouille's assets by a court in Nevada. McPherson J found a sufficient connection between Verkouille and Nevada, and saw no need to investigate the cause of action underlying the Nevada judgment.[91]

It is beyond the scope of this article to discuss the merits of the decision in *White v Verkouille* or of the common law rule that a foreign judgment cannot as such be enforced in the forum. It should be noted, however, that *White v Verkouille* is no authority for the wide rule, pronounced by Bryson AJ in *Independent Trustee Services Ltd v Morris*, that any equitable order in a foreign judgment can be recognised without first deciding on the underlying cause of action. The foreign order in *White v Verkouille* was the appointment of a receiver. It stripped the debtor of the power to deal with certain assets, and transferred that power to a receiver. Thus, it was a judgment altering the status of the debtor. The cases upon which McPherson J in *White v Verkouille* relied had involved not only foreign judgments appointing a receiver,[92] but also foreign judgments appointing an administrator for the estate of a mentally incapacitated person.[93]

In *Independent Trustee Services Ltd v Morris*, by contrast, O 3 ordered that account of the use of certain assets be taken. It imposed an obligation upon the judgment-debtor without altering his status. Bryson AJ in *Independent Trustee Services Ltd v Morris* applied to obligation-imposing judgments a rule laid down for status-altering judgments. While a status-altering judgment may incidentally impose an obligation (the person stripped of the power to deal with certain assets may be ordered to transfer those assets to the person vested with the power to deal with them), it is a significant step to extend the rule to judgments that impose an obligation without altering any status.[94] Under Bryson AJ's approach, Australian courts could, at common law, give direct effect to foreign orders of specific performance. Such an approach may have merits,[95] but it is novel in Australia.[96] Bryson AJ failed to acknowledge the novelty and to provide reasons for taking that approach.

Bryson AJ's treatment of O 3 is also problematic with regard to the test of 'sufficient connection', which he applied in determining the English court's 'international jurisdiction'. It is difficult to see why this test should apply where the obligation imposed by the foreign judgment is of an equitable nature, while presence or submission is required where that obligation is a legal one. The same test should apply to all obligations, and that test should not be as vague as sufficient connection. Bryson AJ revealed the uncertainty of the test by holding that a sufficient connection between the foreign court and the judgment-debtor is created by the mere fact that the judgment-debtor is an active citizen of

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91 Ibid 194–7.

92 *Re Young (dec'd)* (1955) 29 ALJ 409; *Schemmer v Property Resources Ltd* [1975] Ch 273. A Mareva injunction granted by a foreign court was given effect to in *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676.

93 *Didisheim v London & Westminster Bank* [1900] 2 Ch 15; *Pélégrin v Coutts & Co* [1915] 1 Ch 696. Effect is also given to foreign judgments appointing a trustee in bankruptcy: *Re Anderson* [1911] 1 KB 896; *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

94 It has been held that the appointment of a receiver in England cannot be sought on the basis of a foreign money judgment without first obtaining an English judgment: *Perry v Zissis* [1977] 1 Lloyd's Rep 607, 613.

95 The Supreme Court of Canada has held that foreign non-money judgments can be given direct effect at common law: *Pro Swing Inc v ELTA Golf Inc* [2006] 2 SCR 612. An injunction granted by a Californian court was given direct effect at common law in *Blizzard v Simpson* [2012] ONSC 4312, [17].

96 Pham, above n 49, 666–7.

the foreign country. The problems of using citizenship as a connecting factor have been demonstrated before.

IV Recognition of Foreign Marriages not Complying with the *lex loci celebrationis*

The recognition of foreign[97] marriages in Australia is governed by a mix of common law and statute.[98] Before 1985, it was exclusively governed by the common law choice-of-law rules, which generally subject the formal validity of a marriage to the law of the place in which the marriage was celebrated (*lex loci celebrationis*),[99] and the essential (or material) validity to the parties' personal law.[100] The exclusive reign of the common law ended in 1985 with the coming into force of an amendment to the *Marriage Act 1961* (Cth),[101] which implemented the *Hague Convention on Celebration and Recognition of the Validity of Marriages*,[102] signed by Australia in 1980. This Convention, which has been ratified by only three countries, requires contracting states to generally recognise foreign marriages that are valid, essentially as well as formally, under the *lex loci celebrationis*. Recognition may be refused only on the ground of *ordre public* (art 14) and on certain other grounds, all of which relate to essential validity (art 11).[103] Sections 88C and 88D(1) of the *Marriage Act 1961* now provide for the recognition of foreign marriages that are valid under the *lex loci celebrationis* and ss 88D(2) and (3) provide for exceptions as permitted by art 11 of the Convention.[104]

In line with the spirit of the Convention, the amendment of the *Marriage Act 1961* intended to facilitate, not hinder, the recognition of foreign marriages.[105] The amendment was to lead to the recognition of foreign marriages that would not be recognised under the previous law, but the amendment was not to prevent the recognition of foreign marriages that would be recognised under the previous law. To this end, s 88E(1) provides for the recognition of foreign marriages that are entitled to recognition under the common law choice-of-law rules, and the subsection makes an exception only where, at the time of the

[97] The validity of marriages solemnised in Australia by or in the presence of a diplomatic or consular officer is governed by a mix of Australian domestic (or internal) law and the law of the relevant foreign country: *Marriage Act 1961* (Cth) ss 55, 56. The validity of other marriages solemnised in Australia is exclusively governed by Australian domestic law if the marriage was solemnised on or after 7 April 1986, and is determined in accordance with the common law choice-of-law rules (with minor modifications) if the marriage was solemnised before 7 April 1986: *Marriage Act 1961* (Cth) ss 2, 10, 40.

[98] This article does not discuss the special rules in pt V and s 88C of the *Marriage Act 1961* (Cth) for marriages by members of the Australian Defence Force overseas and foreign marriages solemnised by or in the presence of a diplomatic or consular officer.

[99] *Berthiaume v Dastous* [1930] AC 79; *Starkowski v Attorney-General* [1954] AC 155; *In the Marriage of X* (1983) 65 FLR 132, 135.

[100] Australian courts have settled on the dual-domicile doctrine, under which each party's capacity is governed by the law of that party's prenuptial domicile: *In the Marriage of Barriga (No 2)* (1981) 7 Fam LR 909, 911; *In the Marriage of Teves III & Campomayor* (1994) 18 Fam LR 844, 850. English law is still unsettled: see C M V Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford University Press, 4th ed, 2011) 355–64.

[101] The amendment was made by the *Marriage Amendment Act 1985* (Cth) and came into force on 26 April 1985.

[102] Concluded 14 March 1978, entered into force 1 May 1991 <http://www.hcch.net/index_en.php?act=conventions.text&cid=88>.

[103] Existing marriage, close blood relationship, lack of age, incapacity and lack of free consent.

[104] A recent example of lack of free consent is *Kreet v Sampir* (2011) 44 Fam LR 405.

[105] Art 13 of the Convention expressly permits contracting states to have laws more favourable to the recognition of foreign marriages than required by the Convention.

marriage, either party was domiciled in Australia and neither party was of marriageable age under Australian domestic law.

It follows that Australian law recognises a marriage solemnised in another country if either the marriage is valid (essentially as well as formally) under the *lex loci celebrationis* and further requirements relating to essential validity are satisfied, or the marriage is entitled to recognition under the common law choice-of-law rules and an age requirement is satisfied. Where essential validity is not an issue, Australian law thus recognises a marriage solemnised in another country if the marriage is formally valid either under the *lex loci celebrationis* or under the law specified by the common law choice-of-law rules. Since the common law generally specifies the *lex loci celebrationis* as the law governing formal validity, a resort to the common law with regard to formal validity is relevant only where the common law exceptionally specifies a law other than the *lex loci celebrationis*.

Such an exception is the 'common law marriage', or 'canon law marriage',[106] which is a marriage that complies with the form requirements of the common law. The common law rules, which ceased to apply to marriages celebrated in England and Wales when Lord Hardwicke's *Marriage Act 1753* (UK) came into force,[107] require only that the parties take each other as husband and wife in the presence of each other and of an episcopally ordained clergyman.[108] It is doubtful whether Australian common law adopted the requirement that an episcopally ordained clergyman be present,[109] and such presence should not be required at least where it is impossible or inappropriate,[110] in particular where neither party is Christian. In certain circumstances, therefore, Australian law recognises a foreign marriage where the parties failed to comply with the form requirements of the *lex loci celebrationis* and did no more than take each other as husband and wife in the presence of each other, and in the presence of an episcopally ordained clergyman if required.

But when will a 'common law marriage' be recognised? Apart from the controversial category of marriages by members of the occupying force in a country under belligerent occupation,[111] which is not relevant in the present context, a 'common law marriage' has been recognised where the parties faced an 'insuperable difficulty'[112] in complying with the *lex loci celebrationis*.[113] There have been cases of physical impossibility; for example, where no marriage registrar was available in the *locus celebrationis* due to (post-) war chaos[114] or

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106 'A common law marriage, sometimes called an English common law marriage, might be more aptly termed a canon law marriage, since it derives its origin from the canon law at the time when the canon law was the common law of western Europe': *Lazarewicz v Lazarewicz* [1962] P 171, 177 (Phillimore J).

107 26 Geo II c 33.

108 The requirement that an episcopally ordained clergyman be present was recognised in *R v Millis* (1844) 10 Cl & F 534; 8 ER 844. This decision has been widely criticised as being historically unsound: see, eg, J C Hall, 'Common Law Marriage' (1987) 46 *Cambridge Law Journal* 106, 115–19.

109 *Catterall v Catterall* (1847) 1 Rob Ecc 580; 163 ER 1142. See also *Penhas v Tan Soo Eng* [1953] AC 304, 319: requirement not adopted by the common law of Singapore.

110 *Hooshmand v Ghasmezadegan* (2000) FLC 93-044.

111 This category has been recognised in *Taczanowska v Taczanowski* [1957] P 301; *Merker v Merker* [1963] P 283; *Preston v Preston* [1963] P 411. The category has been widely criticised: see, eg, D Mendes da Costa, 'The Formalities of Marriage in the Conflict of Laws' (1958) 7 *International and Comparative Law Quarterly* 217, 226–85.

112 The term was first used by Lord Stowell in *Ruding v Smith* (1821) 2 Hag Con 371, 391, 394; 161 ER 774, 781, 782.

113 'Thus marriages have been approved when conducted by a British priest or clergyman in countries in which there was no local law providing for a monogamous marriage or where the union of the parties would not have been sanctioned by the local law': *Lazarewicz v Lazarewicz* [1962] P 171, 177 (Phillimore J).

114 *Savenis v Savenis* [1950] SASR 309; *Kuklycz v Kuklycz* [1972] VR 50.

where the *lex loci celebrationis* allowed marriages only for members of certain religions to which the parties did not belong.[115] But there have also been cases of what may be described as 'emotional difficulty' in, or 'serious conscientious objection' to, complying with the *lex loci celebrationis*.[116] In particular, a 'common law marriage' has been recognised where escaped prisoners of war, who were living in displaced-persons camps, underwent a religious marriage ceremony in Germany immediately after the end of World War II.[117] German law required the involvement of a marriage registrar, which was available to the parties. However, the parties fervently hated the Germans and wanted no contact with any German authority.

The concept of 'conscientious objection' to compliance with the *lex loci celebrationis* was invoked in *Nygh v Kasey*.[118] Ms Nygh, who had migrated from Thailand to Australia, and Mr Kasey started a relationship in 1980. In 1982, they travelled to Thailand where they underwent a marriage ceremony according to the Roman Catholic rites in a Catholic church. They returned to Australia almost immediately afterwards. They subsequently had three children, but the relationship deteriorated and they separated in 2003. In 2009, Ms Nygh filed an application for divorce in the Family Court of Australia. The marriage was void under Thai law because the parties had not effected a civil registration of the marriage in Thailand. Such registration was possible, but Ms Nygh and Mr Kasey decided against it. Ms Nygh explained the reasons for that decision in the following way:[119]

> Upon compliance with the formal requirement to register the marriage under Thai law, I would have been required, under the *Name Act of 1962* (Thailand), to change my surname to my husband's name. I held a strong conscientious objection to being forced to change my name under what I considered to be a discriminatory law.

Ms Nygh's application for divorce could be successful only if the parties were married under Australian law. In determining that question, Faulks DCJ started by observing that Australian law could not recognise the marriage pursuant to ss 88C and 88D of the *Marriage Act 1961* because the marriage was void under Thai law as the *lex loci celebrationis*.[120] His Honour went on to consider s 88E(1) of the *Marriage Act 1961* and the common law choice-of-law rules with regard to the formal validity of marriages.

At common law, he said, a marriage had to comply with the form requirements of the *lex loci celebrationis* unless such compliance 'is to be regarded as impossible, whether because there is no law enforce there or because facilities are denied or because compliance would be against conscience'.[121] After acknowledging that a registration of the marriage in Thailand had been physically possible,[122] Faulks DCJ opined that Ms Nygh had had a conscientious objection to registering the marriage in Thailand due to her firmly held belief

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115 *Hooshmand v Ghasmezadegan* (2000) FLC 93-044.
116 Mortensen, Garnett and Keyes, above n 65, [13.29].
117 *Kochanski v Kochanska* [1958] P 147; *Jaroszonek v Jaroszonek* [1962] SASR 157. The marriage was not recognised, however, in *Fokas v Fokas* [1952] SASR 152; *Grzybowicz v Grzybowicz* [1963] SASR 62.
118 [2010] FamCA 145 (2 March 2010).
119 Ibid [23].
120 Ibid [42]–[49].
121 Ibid [63], quoting *Milder v Milder* [1959] VR 95, 98 (Smith J). The Full Court of the Family Court approvingly quoted the same passage in *In the Marriage of Banh* (1981) 6 Fam LR 643, 649.
122 [2010] FamCA 145 (2 March 2010), [66].

that the ensuing consequences under Thai law involved discrimination against women.[123] He observed that the religious ceremony the parties had undergone in Thailand would have constituted a valid marriage ceremony had it been conducted in Australia,[124] and he recognised the marriage for the purposes of Australian law.[125]

Faulks DCJ's reasoning is problematic with regard to the requirements, as well as the consequences, of the common law exception to applying the *lex loci celebrationis* to the formal validity of a foreign marriage. His reasoning with regard to the consequences is at best unclear. It is established that the consequence of recognising an impossibility of complying with the *lex loci celebrationis* is an application of the common law rules on the celebration of a marriage; that is, the judge-made rules which no longer apply to marriages celebrated in either Australia or England due to the intervention of statute.[126] By contrast, Faulks DCJ seems to have subjected the marriage *in casu* to the law of Australia as applying to marriages celebrated in Australia (presumably in 1982). This is indicated by the fact that he referred to the 'the law of Australia' as the applicable law,[127] he did not use the term 'common law marriage', and he determined the formal validity of the marriage *in casu* by asking whether it would have constituted a valid marriage if the ceremony had been conducted in Australia (presumably at the same time it was conducted overseas).

Strictly, Faulks DCJ's approach would mean that a foreign marriage that did not comply with the form requirements of the *lex loci celebrations* can be recognised by Australian law only if the marriage ceremony complied with the form requirements prescribed by the *Marriage Act 1961* for marriages solemnised in Australia. In particular, the foreign marriage would need to have been conducted by an authorised celebrant registered in Australia.[128] Since it is very difficult to find such a person outside Australia, parties who are unable to comply with a foreign *lex loci celebrationis* would find it almost impossible to enter into a marriage recognised by Australian law. But the very reason for excusing non-compliance with the *lex loci celebrationis* where compliance is impossible is to enable the parties to enter into a marriage recognised by Australian law.

Indeed, it is highly doubtful that the priest who performed the marriage ceremony between Ms Nygh and Mr Kasey in Thailand was listed in the register of ministers of religion of any Australian state or territory.[129] So Faulks DCJ probably meant to apply the form requirements of the *Marriage Act 1961* in a loose way, dropping requirements that cannot properly be applied to marriages solemnised in another country. Such an approach might have merit, but Faulks DCJ should have clearly explained his approach and the reasons for deviating from the established practice of applying the common law rules.

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[123] Ibid [76]–[86].

[124] Ibid [21], [88].

[125] Ibid [89].

[126] An exception is *Maksymec v Maksymec* (1954) 72 WN (NSW) 522, where Myers J applied the law of Galicia as the husband's domicile at the time of the marriage. The law of the parties' common domicile at the time of the marriage was also considered in *Taczanowska v Taczanowski* [1957] P 301, 305–7, but only because that law was referred to by the conflict rules of the *lex loci celebrationis* (instance of *renvoi*).

[127] [2010] FamCA 145 (2 March 2010), [87]. He left open whether Australian law applied as the law of the forum or the law of the parties' common domicile at the time of the marriage. A discussion of that issue is beyond the scope of this article.

[128] *Marriage Act 1961* (Cth) s 41.

[129] See *Marriage Act 1961* (Cth) s 27.

More problematic is his Honour's reasoning on the *requirements* of the insuperable-difficulty exception to applying the *lex loci celebrationis* to the formal validity of a foreign marriage. He held that compliance with the form requirements of Thai domestic law had been impossible on the ground that Ms Nygh had held a conscientious objection to registering the marriage in Thailand due to her firmly held belief that the ensuing consequences under Thai law (change of her surname) involved discrimination against women. With respect, this reasoning contains two serious flaws.

First, Faulks DCJ confused an objection to *compliance with a legal system's form requirements* for a marriage with an objection to the *effects of the marriage* under that legal system. This can be demonstrated by comparing *Nygh v Kasey* to the marriages of escaped prisoners of war in post-war Germany, mentioned before. The parties to those marriages had a serious conscientious objection to dealing with any German authority, even a marriage registrar, because they had suffered greatly at the hands of the Germans during the war. They did not necessarily object to being married under German law. Indeed, if the recognition of the marriage by German law was necessary for the recognition of the marriage under the law of their home country, they were probably interested in being married under German law. Otherwise, they almost certainly did not care about the status of their marriage under German law. In *Nygh v Kasey*, Ms Nygh objected to being married under Thai law because she regarded the ensuing consequences as discriminatory. But she had no objection to dealing with Thai people or Thai authorities.

Second, even if Ms Nygh had had an objection to dealing with Thai authorities, she could have easily avoided that contact by getting married in a country other than Thailand. Indeed, both Ms Nygh and Mr Kasey lived in Australia and underwent the marriage ceremony during a short trip to Thailand. They could have easily been married in Australia as their country of residence. Excusing the non-compliance with the *lex loci celebrationis* in those circumstances is 'patently absurd'.[130] Of course, a celebration of the marriage in Australia may not have avoided the allegedly discriminatory consequences of Thai law (because Thai law may have recognised the marriage celebrated in Australia) if Thai law had become relevant to Ms Nygh (for example, if she moved back to Thailand). If Ms Nygh wished to avoid the consequences of being married under Thai law under any circumstances, it might have been necessary for her to refrain from getting married anywhere in the world. But she was adamant that she was married under Australian law.

Faulks DCJ held that where two people domiciled and resident in Australia undergo a marriage ceremony during a short trip to another country, compliance with the form requirements of Australian domestic law (at least insofar as those requirements can properly be applied to a foreign marriage), rather than the *lex loci celebrationis*, is sufficient for the recognition of the marriage by Australian law if one of the parties has a conscientious objection to the effects of the marriage under the *lex loci celebrationis*. That proposition is novel and without merit. It does not sit well with the idea of a comity of nations, since it pays insufficient respect to the legitimate interest of foreign countries that marriage ceremonies comply with the form requirements of the *lex loci celebrationis*. That interest was recognised as long ago as 1752 by Sir Edward Simpson in *Scrimshire v Scrimshire*:[131]

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[130] Clarkson and Hill, above n 100, 351.

[131] (1752) 2 Hag Con 395, 417; 161 ER 782, 790.

> All nations allow marriage contracts; they are 'juris gentium,' and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries — that is, the law where the contract is made. By observing this law no inconvenience can arise; but infinite mischief will ensue if it is not.

V Conclusion

The three decisions discussed in this article are problematic with regard to their outcomes and the methodology used. A novel approach was taken in all three cases. In *Singh v Singh* and *Nygh v Kasey*, there was neither an acknowledgment that the approach taken was novel nor an explanation as to why the approach taken was appropriate. In *Independent Trustee Services Ltd v Morris*, the novelty of the approach taken was acknowledged, but there was no engagement with arguments opposing that approach, and relevant legislation and non-binding precedent were either misunderstood or overlooked. These deficiencies in methodology led to problematic outcomes in all three cases. The decisions discussed should not be followed. They should be regarded as aberrations, rather than innovations.