



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: B21/2020  
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#### Important Information

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**APPELLANT'S REPLY**

1. This submission is in a form suitable for publication on the internet.
- 10 2. As is apparent from Respondent's Submissions paragraph 2 ("RS[2]"), the respondent's case is that the appellant's claims are precluded by the doctrines of res judicata or cause of action estoppel. Those propositions should not be accepted.
3. For res judicata to apply:
  - (a) "the very right or cause of action put in suit has in the former proceedings passed into judgment so that it is merged and has no longer an independent existence": *Blair v. Curran* (1939) 62 CLR 464 at 532 per Dixon J.;
  - (b) the "rule as to res judicata comes into operation whenever a party attempts in a second proceeding to litigate a cause of action which has merged into judgment in a prior proceeding. Here the indemnity cause of action *was not litigated* in  
20 the Soterales proceedings. The judgment in that case did not deal with that cause of action ... ": *Port of Melbourne Authority v. Anshun Pty Ltd* (1981) 147 CLR 589 at 597 per Gibbs C.J., Mason and Aickin JJ. (Emphasis added)  
  
See too *Tomlinson v. Ramsay Food Processing Pty Ltd* (2015) 256 CLR 507 at 516 [20] per French C.J., Bell, Gageler and Keane JJ.
4. In the present case the Dubai court did not have jurisdiction to deal with property outside the UAE.
5. Further the only jurisdiction which the Dubai court had to allow a party to claim an interest in property of the other party is that in the second sentence of Article 62.1 of the Personal Status Law. That jurisdiction was limited to circumstances where the  
30 claiming party had made a contribution towards "the development of the property".

6. In these circumstances the Dubai court's decision did not determine the claims made by the appellant. Nor did it have jurisdiction to do so. Nor did the Dubai court purport to do so. As is apparent from Ms Barton's affidavit paragraph 75 (AMFB 20), the decision, in financial terms, deals only with dowry and costs.
7. Insofar as the respondent relies on the case falling within the concept of *Anshun* estoppel that estoppel will arise only if the claim or issue "was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not have been made or the issue not to have been raised in that proceeding": *Tomlinson v. Ramsey Food Processing Pty Ltd* 256 CLR 517-518, [22].
8. In the present case the appellant's property claims could not have been made and adjudicated upon in the Dubai proceedings. It could hardly be unreasonable for her not to have raised them in those proceedings.
9. Further it is clear from *Henry v. Henry* (1996) 185 CLR 571 and the Full Court, upon which much reliance is placed by the respondent, that:
  - (a) It is relevant to consider which forum can provide more affectively for complete resolution of the matters involved in the parties' controversy.
  - (b) The matters referred to in the last paragraph of *Henry v. Henry* at 592 should also be taken into account.
10. The facts necessary for the appellant to found her right or claim for a property settlement in Australia are distinct from the facts relevant to support the respondent's application for divorce in Dubai. The facts relevant to an application under s79 of the *Family Law Act* include:
  - (a) The legal and equitable interests the parties have in property in Australia and other parts of the world, including property in the UAE whether or not both parties have made a financial contribution to it;
  - (b) The myriad of contributions of both parties during the marriage and post-separation, including direct and indirect financial contributions and other contributions to property, contributions made on behalf of a party, and contributions to the welfare of the family (s79(4) FLA).

(c) The personal and financial circumstances of each party which may call for an adjustment of property interests (s75(2) FLA).

11. It may be noted that the facts necessary for the appellant to found her claim for an order for payment of spousal maintenance are also those matters set out in s75(2) FLA.

12. Although the fact of marriage is necessary to found jurisdiction under the FLA, the facts that the parties have separated, the conduct of the parties during the marriage and the circumstances of the separation are of no consequence, as distinct from the facts relied upon in the foreign jurisdiction to support the divorce application. [see AFM9-13]

10 13. The RS move away from facts, substance of the action, and nature of the issue or the remedy, to discuss forms and procedures RS[10]-[11]. What follows is a conclusion drawn by inference, that the fact which establishes the cause of action is the marriage itself, and that this is the correct level of generality with which to identify the substance of the cause of action. RS[12]-[14].

14. The claims under s79 and s75(2) of the FLA are not simply matters of form or procedure. Those provisions provide a framework for the substance of the cause of action brought by the appellant. Much more is required to establish that claim than the mere fact of a marriage.

20 15. The respondent relies upon the passage quoted from *Henry v Henry*<sup>1</sup> RS[12], but on the other hand dissociates himself from the passages in *Henry* which follow the passage quoted RS[14]-[15]. To do so impermissibly takes the passage relied upon out of context. The sentence emphasized at RS[12] may also be taken too far.

30 16. The primary Judge was not searching in the Dubai law for a precise analogue to s. 79 of the FLA. The primary judge embarked on a careful consideration of the underlying facts in order to determine whether the Dubai decision determined a question raised in the current proceedings under the FLA . J[185]-[193] (CAB44-45). She did not find that the underlying cause of action was the financial consequence of the marital breakdown. Rather, she found that the causes of action determined by the Dubai proceedings are the divorce of the parties in Dubai and the financial consequences associated with divorce according to the law administered in Dubai, which the primary judge found to be limited to the issue of deferred dowry and alimony. J[193] (CAB45).

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<sup>1</sup> (1996) 185 CLR 571 at 591-592.

17. The respondent submits (RS[21]) that the Full Court’s finding that Article 62.1 provided the appellant with the means by which she could have sought a property adjustment was correct and “consistent with established principles”, but do not identify what those established principles are.
18. A passage from *Republic of India v India Steamship Co Ltd (The India Endurance and the Indian Grace)*<sup>2</sup> as cited by the Full Court [FC21] CAB 65 is relied upon by the respondent RS[23] without comment. The use made by that passage by the Full Court was to support the comment that “even when the outcome of a decision in the other court may be strikingly different, the question for determination is the identity of the underlying cause of action”. That principle does not detract from the appellant’s argument since the appellant contends that the causes of action in the two jurisdictions are distinct. This distinction was identified by the primary judge at (J[194], CAB 45 and AS 39).
19. Further, the passage relied upon from *The Indian Grace* RS[23] states that “...the principle is founded upon the public interest in finality of litigation rather than the achievement of justice as between the individual litigants...”. However to apply the principle to circumstances such as the present does not achieve finality of litigation, since the only remedy left for determining the interests of the parties in their Australian property is by proceedings in equity presently extant in the Supreme Court of New South Wales (instituted by the respondent) and based on an alleged agreement and “contributions to the marriage.” [AFM60-67]
20. The distinctions between the causes of action in the Dubai jurisdiction as compared with those under the FLA are not granular, or a matter of form or procedure. Rather, it is the substance of those causes of action, based on the underlying facts, which distinguish them. The causes of action are not the same. The principles are not “sufficiently like.” RS[25]
21. In reply to the respondent’s submissions that the Full Court found there were rights available to the appellant both as property adjustment and the equivalent of spousal maintenance in the Dubai proceedings which were finally determined “framed from the appropriate level of generality” RS[20]-[22], [30], [36] it is contended:
- (a) There was never any determination under Article 62.1.

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<sup>2</sup> [1993] AC 410 at 415.

- (b) There was never any determination in the Dubai proceedings of a spousal maintenance claim by the appellant (and it was unnecessary to file a Notice of Contention in the proceedings below).
- (c) There was no evidence in the proceedings below to support any proposition that a claim for spousal maintenance by the appellant was exhausted in the Dubai jurisdiction.
- (d) What was final was what was brought forward and determined.

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