

CLAYTON v BANT (B21/2020)

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 7 November 2019

Special leave granted: 17 April 2020

The Appellant (“the Wife”), a citizen of Australia, and the Respondent (“the Husband”), a citizen of the United Arab Emirates (“the UAE”), married in 2007 by executing a contract of marriage before a judge of the Sharia Court of Dubai in the UAE. The couple lived between Dubai and Australia until they separated in 2013, whereupon the Wife continued living in Australia (with the couple’s child). Property owned by one or both of the parties is located in the UAE, Australia and other countries. The total value of property owned by the Husband, which includes interests in various commercial ventures, far exceeds the value of property owned by the Wife.

In July 2013, proceedings by which the Wife sought parenting orders under the *Family Law Act 1975* (Cth) (“the FLA”) were amended so as also to seek orders in respect of property. In July 2014 the Husband commenced divorce proceedings in Dubai (“the Dubai proceedings”). The Wife was notified of the Dubai proceedings in October 2014, after she had filed a divorce application of her own under the FLA. In December 2014 the Wife commenced proceedings for final orders for property settlement and spousal maintenance (including capitalised child maintenance) under the FLA (“the Australian proceedings”).

A relevant legal provision in the UAE is Article 62.1 of Federal Law No 28/2001 (“UAE Article 62.1”), which provides as follows:

A woman ... is free to dispose of her property and the husband may not, without her consent, dispose thereof; each one of them has independent financial assets. If one of the two participates with the other in the development of a property, building a dwelling place or the like, he may claim from the latter his share therein upon divorce or death.

In the Dubai proceedings, the Husband sought a divorce with an extinguishment of all associated matrimonial rights of the Wife, including her entitlements to alimony and a “deferred dowry” (a fixed sum payable under the marriage contract upon either divorce or death). The Wife declined to appear in the Dubai proceedings, and in February 2015 the Personal Status Court of Dubai (“the Dubai court”) issued a ruling (“the Dubai decree”) granting the divorce sought by the Husband. The Dubai decree stated however that the Dubai court found it untimely to deal with the Husband’s application in respect of alimony and the deferred dowry. The Wife did not then appeal within a non-extendable appeal period, with the result that her rights to seek orders in respect of property under the law of Dubai came to an end.

The Husband subsequently applied for a permanent stay of the Australian proceedings, on the basis that the Wife’s cause of action had been finalised by the Dubai decree. On 18 September 2018 Justice Hogan dismissed the Husband’s application. Her Honour considered that the causes of action dealt

with by the Dubai proceedings were the divorce and associated financial consequences according to the law administered in Dubai, the latter being limited to alimony and the deferred dowry. Justice Hogan held that the issues dealt with in the Dubai proceedings did not include the right of one party to claim property from the other, because such a right did not exist under the law of Dubai save for the limited right prescribed in UAE Article 62.1. The broader rights to seek property settlement and adjustment orders under s 79 of the FLA therefore remained available to the Wife. The Wife could also pursue spousal maintenance, since the Dubai court had not determined the issue of her entitlement to alimony.

The Full Court of the Family Court (Strickland, Ainslie-Wallace and Ryan JJ) unanimously allowed an appeal by the Husband and permanently stayed the Australian proceedings. Their Honours found that Justice Hogan had erred by seeking in effect a direct analogue between UAE Article 62.1 and s 79 of the FLA. The former provision, though limited in scope, did provide a right to an adjustment of property, a right which the Wife had not pursued. The Full Court found that the issue of alimony had effectively been determined, consequent upon the Wife having failed to exercise her right to address it in the Dubai proceedings. Their Honours held that, since analogous causes of action had been determined by the Dubai court, the Wife could not be permitted to pursue claims for spousal maintenance and an adjustment of property under the FLA.

The grounds of appeal include:

- The Full Court erred in finding:
 - a) that the claims for property settlement and spousal maintenance which the Wife seeks to agitate in the Family Court of Australia had merged in the Dubai decree; and/or
 - b) that the Dubai decree had finally determined such claims as between the parties.
- In circumstances where the Wife could not have brought forward, as part of the contest in the Dubai proceedings:
 - a) the determination of ownership of property and contributions to property outside Dubai, it being common ground that the Dubai court had no jurisdiction over property outside Dubai;
 - b) an adjustment of the property of the parties except to the extent provided for by Article 62.1 of Federal Law No 28/2001 of the UAE;

the Full Court erred in holding that the Wife was prevented by *res judicata*, cause of action estoppel, the “Henderson extension” or otherwise from prosecuting her case under s 79 of the FLA.