HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA No. B21 of 2020

BRISBANE REGISTRY

BETWEEN: CLAYTON

Appellant

AND

BANT

Respondent

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

1. We certify that the submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF THE ISSUES

2. The grounds of appeal as framed in the Appellant's Notice of Appeal (CAB79) present one fundamental issue for determination: whether the nature of the determination of the claim in the Dubai Decree (AFB 9 – 13) means that the nature of the claim premised by the Appellant in the Australian proceedings and the subject of the instant appeal are precluded by the operation of the doctrine of res judicata or cause of action estoppel.

Part III: SECTION 78B NOTICE

3. The Respondent has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903, and the Respondent considers that no such notification is required.

Part IV: STATEMENT OF FACTS

4. As to the factual assertion at paragraph 8 of the Appellant's submissions (and the entries relevant to that factual assertion in the Appellant's chronology), there was no finding below (J[44], CAB17) as to the evidence of the Appellant (AFM6 [18]) that the Respondent was personally served with the Appellant's then application for Australian divorce, and as observed in that evidence, the Respondent disputed that he was personally served.

5. There are no other material facts set out in the Appellant's submissions or in the Appellant's chronology which are the subject of contest.

Part V: RESPONDENT'S ARGUMENT

6. The doctrine of res judicata or 'cause of action estoppel' is defined as follows:
"...the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence..."[1]

7. Estoppel by res judicata is a rule of evidence[2] and does not impinge on the jurisdiction of a Court.

8. As regards cause of action estoppel, the principle is stated in *Spencer Bower and Handley on Res Judicata* (4th ed) at 7.05 as follows,
"The identity of causes of action is determined as a matter of substance. This is particularly important where the first action was brought in a foreign forum."

9. The words "cause of action" comprise every fact, though not every piece of evidence, which it would be necessary for the plaintiff to prove, if traversed, to support his right to judgment of the court.[3] It has also been defined by Diplock L.J. as: *"simply a factual situation the existence of which entitles a person to obtain from the court a remedy against another person."*[4] In other words, it means the factual situation which confers a remedy, and not the evidence to support it, nor the nature of the remedy itself.[5]

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[1] *Blair & Curran* (1939) 62 CLR 464 at 532 per Dixon J.
[2] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at [18].
[3] *Black v Yates* [1992] 1 QB 526, *Republic of India v India SS Co Ltd: The Indian Grace (No. 1)* [1993] AC 410 at 419 – 421.
[4] *Letang v Cooper* [1965] 1 QB 232 at 242.
[5] *Dicey and Morris, the Conflict of Laws* (15th Ed) 2018, at 14-040.

10. A corollary of the above is that there is to be a distinction drawn between causes of action, and the forms of action, that is the procedure by which such action can be pursued.[6]

11. In other words, the fact that the law to be applied is different in each jurisdiction does not detract from the identity of the cause of action,[7] and when the doctrinal availability of res judicata is considered in the context of parallel jurisdictions in different countries, in which forms and procedures are bound to differ, this approach is readily and properly adaptable.[8]

12. Such was stated in *Henry v Henry*[9], as cited by the Full Court [FC [20], CAB 65]:

> *"If separate proceedings are commenced between husband and wife in different countries, differences in procedure, in available remedies and in the substantive law with respect to marriage and divorce will ordinarily ensure that the proceedings are different in significant respects. However, the proceedings will ordinarily be concerned with the same controversy. And that will be so even if the initiating party is not the same and even if the proceedings seek inconsistent remedies or outcomes. The marital relationship lies at the heart of all proceedings between husband and wife with respect to their marital status, especially proceedings for the dissolution of marriage. In such cases, it is the marital relationship itself which is the subject of controversy.* ***And if the marriage is still subsisting, disputes with respect to property, maintenance and the custody of children will ordinarily be but aspects of an underlying controversy with respect to the marital relationship.***
>
> **[emphasis added]**

13. Observing the passage cited above is not reasoning in a res judicata decision, it is submitted that the doctrinal coherence of that passage in *Henry* with the foregoing principles suggests that the method there offered of perceiving sufficient generality while other proceedings are pending, in order to consider the possibility of staying a local proceeding in a 'clearly inappropriate forum' action, should not differ much at all from the need to perceive a sufficient identity in substance between a controversy decided in foreign proceedings, and a pending controversy in local proceedings, for the purposes of a res judicata claim.

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[6] *Letang v Cooper* [1965] 1 QB 232 at 243, 244.
[7] *Caddy & Miller* (1986) FLC 91-270.
[8] *Black v Yates* [1992] 1 QB 526.
[9] (1996) 185 CLR 571 at 591 – 592.

14. What the further passages cited[10] from *Henry* in the Appellant's submissions [Appellant's Submissions at 41] describe are the factual considerations peculiarly relevant to a 'clearly inappropriate forum' action.

15. Not only does the reliance upon those further passages in *Henry* go beyond what was ever argued by the Respondent below, they are in their application rather remote from the doctrine of res judicata.

16. It is uncontroversial that the source of law applicable to a divorce application in the UAE is Federal Law No (28) of 2005: Concerning Personal Status **("PSL")**: [AFM17 – 59].

17. PSL Article 62.1 [AFM 37] states the following:

"A woman having reached the age of full capacity 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."

18. On the face of it, that provision is not dissimilar to the following precepts in the domestic system:

    a. That there is no community of property;

    b. There is a basis upon which existing interests in common property can be adjusted, having regard to contributions to the same.

    c. There is a regime for the resolution of financial adjustment claims between spouses following the breakdown of marriage including in which a party may *"...adduce cogent evidence of financial contribution...to purchase of a property, against said property."*[11]

19. Having regard to the foregoing and well established body of jurisprudence, the Respondent disputes that the finding of the Full Court on the re-exercise of its discretion, namely that the cause of action in the proceedings below is sufficiently analogous to the cause of action which merged in the judgment of the Dubai court, was erroneous.

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[10] Ibid at [592.8 – 593.2].
[11] Memorandum of Agreement and Disagreement between Ian Edge and Mary Barton, Exhibit 1, AFM 69 at Line 35.

20. The Full Court, it is submitted, framed those causes of action in the proceedings below correctly, at the proper level of generality, as being *the financial consequences to the parties arising from the breakdown of the marriage*. [[FC 25] CAB 66]

21. It is apparent, contrary to established principles, the Primary Judge was searching for too precise an analogue in the Dubai law to section 79 of the Act. The Full Court correctly found, consistent with established principles, that the relevant provision in the Dubai law, by its terms, provided for the adjustment of property as between spouses on divorce and provided the Applicant with the means by which she could have sought property adjustment [[FC27] CAB 66].

22. To frame it that way embraces, as the doctrine of res judicata impels, the radically different forms, procedures, relief available, and outcomes available, in radically different but parallel jurisdictions, in which there may be radically different cultural norms and precepts. To fail to frame it that way fundamentally eschews the doctrine and its plain purpose and invites comparison and judgment of merit and adequacy of the foreign law (in this instance being the law of a foreign place where the Appellant had lived for many years before and after marriage and where the parties had married).

23. In *Republic of India v India Steamship Co Ltd (The Indian Endurance and the Indian Grace)* [1993] AC 410 at 415; as was cited by the Full Court [[FC21] CAB 65], it was said:

> *"Indeed, it has to be recognised that consequences of this kind may result from the application of the principle, which is founded upon the public interest in finality of litigation rather than the achievement of justice as between the individual litigants..."*

24. The passage cited from *Tomlinson v Ramsey Food Processing Pty Ltd* (2016) 256 CLR 507 at [20] [Appellant's submissions at 28] no more than describes the exercise of judicial power. There is nothing in that apt description from which the foregoing as to the doctrinal availability of res judicata to the relevant causes of action in the instant case, properly framed, may be said to depart.

25. The Appellant, it is contended, persists in searching for a precise analogue to or a detailed resemblance of section 79 of the *Family Law Act 1975* (Cth) or the relief and consequent outcomes available to a litigant premising an application thereby, and, in the absence thereof and/or in the face of some difference perceived at that level of granularity [Appellant's submissions at 44], reasoning that an outcome arising from an

application of otherwise sufficiently like principles and grounded in the same cause of action is not *res judicata*:

a. By blandly observing by contrast that the Australian jurisdiction is not ancillary to divorce: Appellant's Submissions at [25].

b. By blandly observing the differences in extraterritorial remedies available, which is a forum argument as opposed to an appropriate application of the doctrine of res judicata: Appellant's Submissions at [22], [26], [29] and [33];

c. By parsing the relevant provisions of Article 62.1 of the PSL and in particular, the word 'participated' in such a particular way as to fail to observe that it, and the provisions of section 79 of the *Family Law Act*, commonly provide a head of judicial power under which existing interests in common property can be adjusted, having regard to contributions to the same: Appellant's Submissions at [21] and [24].

26. To proceed as the Appellant invites is to, of course, reach the inevitable conclusion at Appellant's submissions at 48, but is to restrict the doctrinal availability of res judicata by reference to an inappropriately domestic normative perspective. That is wrong at law and is an approach which is contrary to the established principles (and, on the facts as applicable in the proceedings below, wrong in fact), as it was so determined by the Full Court.

27. For these reasons, there is nothing in the attempt [Appellant's Submissions at 43] to distinguish the intermediate appellate decision of *Caddy & Miller*.[12]

28. For these reasons and contrary to the ultimate proposition of the Appellant [Appellant's Submissions at 45], there is, at law, no conflict between a hypothetical judgment under section 79 of the *Family Law Act* and the Dubai Decree.

29. There is a wider sense in which the doctrine of res judicata may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.[13]

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[12] (1986) FLC 91-270.
[13] *Republic of India v India SS Co Ltd: The Indian Grace (No. 1)* [1993] AC 410 at 417. See also *Henderson v. Henderson* (1843) 3 Hare 100, 115 and *Tomlinson v Ramsey Food Processing Pty Ltd* (2016) 256 CLR 507 at [22].

30. It is submitted that the Full Court correctly found[14] that, as there were rights and remedies available to the Wife both as to property adjustment and the equivalent of spouse maintenance in the Dubai proceedings which were finally determined, the "*Henderson extension*," or Anshun estoppel, operates to prevent the Appellant from making such claims in the Australian jurisdiction.

31. The conceptually distinct but doctrinally related *Henderson extension* serves to illustrate the importance of the substance but not form of the administration of justice, when determining the preclusive effect of earlier completed proceedings upon current pending proceedings.

32. The difficulty which confronts the Appellant is that the basis upon which the application of res judicata is premised by the Appellant permeates the purported application, or otherwise, of the *Henderson extension* to the remedies available to the Appellant in the Dubai proceedings.

33. The propositions advanced by the Appellant as to the cause of action in spouse maintenance which were determined by the Full Court to also have merged in *rem judicatam* in the judgment of the Dubai court, are also disputed.

34. Put specifically, the Appellant advances the proposition that the Full Court erred in determining that there was 'nothing left to pursue'.

35. Fundamentally, it is submitted that the claim for spouse maintenance is but an aspect of an underlying controversy with respect to the marital relationship; that controversy or cause of action being (as contended here and as determined by the Full Court) *the financial consequences to the parties arising from the breakdown of the marriage*, and, there having been a determination which led to financial consequences arising from the breakdown of the marriage [AFM 8 – 13], that determination has merged with the same cause of action here (which encompasses the form, process and particular relief premised by the Appellant in the domestic jurisdiction, including property and spouse maintenance).

36. In that way, as the Full Court observed [FC [37] CAB 67], the relevant cause (framed from the appropriate level of generality) was finally heard and determined.

[14] FC [29], CAB 66 and FC [37], CAB 67.

37. These submissions are fortified by the manner in which it can be observed that the particular claim for alimony was determined in the Dubai Decree, and in that regard, it is further observed:

a. The primary judge determined that the issue of *"alimony"* was *"...a concept similar to spouse maintenance under the [Family Law Act 1975 (Cth)],"* and consequently, but for the finding by the Primary Judge that this issue of spouse maintenance was 'not dealt with at all', the Primary Judge would have found that the Respondent's relief for spouse maintenance in the proceedings below would be barred.

b. The Reasons delivered in respect of the Decree include the following statement [AFM 12]:

> *"As for his request to drop off her deferred dowry and alimony, this subject is untimely. On top of that, the other party did not demand them and hence there is no need to make reference to them in the text."*

c. The context in which this statement is to be understood includes that the Respondent, in the Dubai proceedings, sought to 'drop off' the matrimonial rights of the Applicant, including 'all types of alimony' and the reversal of the dowry alleged to have been paid by the Respondent to the Applicant upon solemnisation of the marriage contract. The Respondent was not successful in his application in the Dubai proceedings in this regard.

d. As a consequence of the foregoing, it is plain by the language of the decree in its terms, relevant to the determination of alimony, that the Appellant had rights to claim alimony and did not seek to press an order for the same. The Respondent made a converse application which was not successful, and the issue was thus finally heard and determined.

e. No Notice of Contention was filed on behalf of the Appellant in the proceedings below including, relevantly, as to the finality of the Decree or that it was a determination on the merits [[J 179 and 184] CAB 43 and 44].

f. There was no evidence in the proceedings below to support any proposition that a claim for [the equivalent of spouse maintenance] was not, by the Dubai Decree, exhausted in that jurisdiction, and could be agitated by a claimant at some future time. Indeed, the expert evidence confirms the contrary:

"Yes, the decision was, and is, final....The case cannot be re-opened. The subject matter cannot be relitigated...once a decision is made."[15]

g. The comments above in respect of the 'Henderson extension' are apposite.

38. The Appeal should be dismissed, with costs.

Part VI: CROSS APPEAL

39. Not applicable.

Part VII: ESTIMATE FOR HEARING

40. The Respondent estimates that two hours will be required for the presentation of the Respondent's oral argument.

Dated 30 June 2020

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[15] Expert Report of Mary Barton, Annexure C to her Affidavit of 5 June 2015 paragraph 72: AFM 16. See also AFM72 at line 31 [10(e)], being a joint answer in the affirmative, by the parties' experts in their joint memorandum, as to the question as to whether the decision was final.