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
SYDNEY REGISTRY

BETWEEN: **BARNETT**
Appellant

and

SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification as to publication on the internet

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issues that the appellant contends the appeal presents

2. The issue raised by this appeal is whether the courts below were correct in holding that a declaration made by the District Court of the City E Metropolitan District on 12 April 2021 created an issue estoppel that precluded the appellant from having the primary judge hear and determine evidence as to whether, as matter of Irish law, the father had rights as at 30 August 2020 that answered the description of 'rights of custody' within reg 4 of the *Family Law (Child Abduction Convention) Regulation*s 1986 (Cth) ('**the Regulations**').

Part III: Whether any notice should be given under s 78B of the *Judiciary Act* 1903

3. The appellant does not consider that any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Citation of the reasons for judgment of the courts below

4. The reasons of the primary judge are *Secretary, Department of Communities and Justice v Barnett* [2021] FamCA 439 ('**J**'). The reasons of the Full Court are *Barnett v Secretary, Department of Communities and Justice* [2022] FedCFamC1A 20 ('**AJ**').

Part V: Narrative statement of the relevant facts found or admitted below

5. The mother and father were never married to each other. Their child, Z, was born in Ireland in 2019: Core Appeal Book ('**CAB**') 11, J [22], [24].

6. On 30 August 2020, the mother left Ireland with the child and travelled to Australia: CAB 12, J [39].

7. On 3 September 2020, the father initiated a proceeding in the District Court of the City E

Metropolitan District seeking an order for appointment as the guardian of the child pursuant to s 6A, and for custody of the child pursuant to s 11, of the *Guardianship of Infants Act* 1964 (IR) ('**the Act**'): CAB 15, J [52]. A copy of the s 6A application is at Appellant's Further Material ('**AFM**') 301 and the s 11 application at AFM 302; these are the originals of the poorly-reproduced images at p138 and p137 of the Digital Appeal Book before the Full Court (AFM 143 and 142) respectively.

8. Section 6A(1) of the Act, which is set out at CAB 15, J [50], provides:

> *Power of court to appoint parent as guardian*
>
> *6A. – (1) The court may, on an application to it by a person who, being a parent of the child, is not a guardian of the child, make an order appointing the person as guardian of the child.*

9. Section 11 of the Act is set out at AFM 86 (which is part of an agreed document containing excerpts of Irish legislation emailed to the Full Court on 30 September 2021). It does not appear that any order was ever made under s 11; at least, no such order was in evidence.

10. On 13 October 2020, the father initiated a further proceeding in the District Court seeking a declaration of guardianship pursuant to s 6F of the Act: CAB 17, J [60]; AFM 144. Sub-s 6F(1)-(2) of the Act, which are set out at AFM 84-85 and CAB 17, J [62], provide:

> *(1) A person specified in subsection (2) may apply to the court for a declaration under this section that a person named in the application is or is not a Guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of a child named in the application.*
>
> *(2) An application for a declaration under this section may be made, in relation to a child concerned, by—*
>
> *(a) a guardian of the child concerned, or*
>
> *(b) a person seeking a declaration that he or she is or is not a guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of the child concerned.*

11. Section 2(4A) of the Act, which is set out at CAB 17, J [64] and AFM 84, provides:

> *(4A) The circumstances referred to in paragraph (d) of the definition of 'father' in the subsection (1) are that the father and mother of the child concerned –*
>
> *(a) have not married each other, and*
>
> *(b) have been cohabitants for not less than 12 consecutive months occurring after the date on which this subsection comes into operation, which shall include a period, occurring at any time after the birth of the child, of not less than three consecutive months during which both the mother and father have lived with the child.*

12. Section 6B(3) of the Act, which is set out at CAB 17, J [65], provides:

> *The circumstances referred to in subsection (2)(b) are that the person and the mother of the child concerned have been cohabitants for not less than 12 consecutive months occurring after the date on which this subsection comes into operation, which shall include a period, occurring at any time after the birth of the child, of not less than three consecutive months during which both the mother and the person have lived with the child.*

13. Subsections 2(4A) and 6B(3) came into operation on 18 January 2016: CAB 16, J [54].

14. On 29 October 2020, the District Court made an order in the first proceeding appointing the father guardian of the child under s 6A: CAB 16, J [53]; and AFM 147-148.

15. On 3 November 2020, the father's s 6F application was served on the mother: CAB 17, J [60].

16. On 24 November 2020, the father filed an application for the return of the child in accordance with the Hague Convention ('**the Convention**'): CAB 52, AJ [12].

17. On 9 December 2020, the s 6F proceeding was listed for hearing. It was a 6 day contested hearing, with cross-examination and both parents represented by counsel: CAB 18, J [66]. The hearing dates appear to have been non-consecutive, and to have extended into February 2021: see AFM 93, [16]-[18]; AFM 150.

18. On 16 February 2021, the respondent, as State Central Authority for New South Wales, filed an application in the Family Court of Australia (as it was then known) seeking the return of the child: CAB 12, J [42]; a copy of the application appears starting at AFM 88. The respondent's appointment as State Central Authority is at AFM 101. The delegation from the State Central Authority at AFM 103 contains a mistaken reference to the regulations, but this would not appear to invalidate the delegation. (The source and extent of any power of delegation is unclear, but the application was brought in the name of the respondent, and so is apparently unaffected by the delegation.)

19. On 12 April 2021, the District Court made a declaration in the s 6F proceeding: CAB 18, J [70]. A copy of the order is at AFM 277. The operative part was '*THE COURT ... HEREBY DECLARES THAT [THE FATHER], a person named in the application *is a *guardian of the said child by virtue of the circumstances set out in section 2(4A) or section 6B(3) of the said Act.*'

20. There was no transcript or reasons for the court's decision in evidence below; the father had said in his affidavit that it was possible to apply for a transcript of the entire hearing

and the decision of the court, but he had not done so (although he said he was willing to do so if required): CAB 19, J [71]; AFM 234.

Part VI: Appellant's argument

A. Legal framework

21. The respondent applied for return of the child under the Regulations, which are made under s 111B of the *Family Law Act* 1975. Reg 13(1) requires the Commonwealth Central Authority to take action upon a request in accordance with the Convention. Reg 5(3) imposes a general duty of promptitude. Reg 13(4)(a) permits transfer of the request to a State Central Authority.

22. Reg 14(1) permits an application to be made for various orders by the responsible central authority (sub-reg (1)(a)), or a person, institution or other body that has rights of custody (sub-reg 1(b)). The latter may seek all orders that the central authority may seek, other than the orders specified in reg 14(1)(a)(vi).

23. Reg 16(1) requires the court to make a return order for a child if, inter alia, '*the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under subregulation (1A)*': reg 16(1)(c).

24. Reg 16(1A) specifies when removal is wrongful. The criteria in reg 16(1A)(c)-(e) are:

> *(c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and*
>
> *(d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and*
>
> *(e) at the time of the child's removal or retention, the person, institution or other body:*
>
> > *(i) was actually exercising the rights of custody (either jointly or alone); or*
> >
> > *(ii) would have exercised those rights if the child had not been removed or retained.*

25. Reg 4, via reg 2(1), defines when a person, institution or other body has rights of custody in relation to a child. Reg 4(1) and (2) provide:

> *(1) For these Regulations, a person, institution or other body has rights of custody in relation to a child if:*

(a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and

(b) rights of custody in relation to the child are attributed to the person, institution or other body, either jointly or alone, under a law in force in Australia or in the convention country in which the child habitually resided immediately before his or her removal or retention.

(2) For the purposes of subregulation (1), rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.

26. The respondent bore the 'burden of persuasion' to establish these matters: *MW v D-G, Dept of Community Services* (2008) 82 ALJR 628 at 649 [115]. Failure to prove any of those matters meant the Family Court had no power to make an order for return of the child to Ireland. These criteria are often termed 'jurisdictional facts': eg CAB 15, J [48].

B. Reasons of the primary judge

27. Before the primary judge, the respondent contended that the mother was precluded from litigating the issue of whether the father had rights of custody under Irish law because the District Court had already determined that the father was a guardian under Irish law: AFM 281, 291, [5], [16]; CAB 13, J [44](i). The parties proceeded on the basis that this could be dealt with as a preliminary issue, albeit apparently informally, as no order to that effect was made: AFM 7-8, T3.37-T4.12 ('*we would ask this court to make a determination as to the Central Authority's application regarding res judicata*').

28. In reply, the respondent recorded the effect of the preliminary issue as being (AFM 43, T39.1-9) that '*if you're against the Central Authority with the res judicata or of the three limbs … then this court will need to make a determination … as to did the father have rights of custody as at 30 August 2020 notwithstanding a judgment has already been decided on that point in Ireland. And that would entail at least some cross-examination and a determination by this court of an application of the Irish laws regarding the father's status as a guardian as at the time of removal of the child.*'

29. The 'three limbs' seem to have been res judicata, issue estoppel and abuse of process. In argument, the respondent accepted—and the primary judge found—that the s 6A order had only prospective effect from 29 October 2020: CAB 16, J [56]-[57]. Her Honour found that the 12 April 2021 s 6F order produced a res judicata and an issue estoppel (CAB 31, J [119]), but rejected the respondent's contention that re-litigation of the issues

would involve an abuse of process: CAB 34-5, J [141].

30. The means by which the primary judge found a res judicata and issue estoppel to exist reveal that her Honour treated them essentially interchangeably. *First*, at CAB 19, J [73]:

> *The submissions pertaining to res judicata, issue estoppel and abuse of process are predicated on the assumption that the declaration of 12 April 2021 had the effect of creating the father's rights under s 6F of the Guardianship Act, as at 30 August 2020 and those rights are rights of custody, for the purposes of the regulations. If the declaration pertains to automatic rights of guardianship which existed as at 30 August 2020, which are not created by the declaration, but which are recognised by the declaration, then the State Central Authority submits that issue has been determined by the Irish proceedings.*

31. This appears to record two alternative arguments: direct 'creation' of rights by the s 6F order, and 'recognition' by the s 6F order of 'automatic rights of guardianship'.

32. *Secondly*, her Honour said at CAB 19, J [74] that the statement in the order that the District Court was 'satisfied' as at 12 April 2021 that the circumstances in ss 2(4A) and 6B(3) were satisfied means that the determination '*must have been based on the factual circumstances of the parents prior to 30 August 2020, as they did not cohabit after that date*', and '*[i]t would be illogical to suggest that the court would have examined the circumstances of the parties, subsequent to that date, to establish the requisite cohabitation period*'.

33. *Thirdly*, her Honour referred to a paragraph of an Irish case extracted at CAB 20, J [77] in support of the proposition that Irish law recognised that a father should be recognised as '*having rights preferable [sic] to his child, even if such rights are contingent on a declaratory order*', and '*[w]hether such rights may also be described as 'inchoate rights' is a matter of choice and is largely inconsequential unless put in context*'. Her Honour referred to this as being reasons of McKechnie J at [51] in the Irish Supreme Court in a case reported as *HI v MG* [2000] 1 IR 110. In fact, McKechnie J was sitting in the High Court (ie at first instance) in *GT v KAO* [2008] 3 IR 567. Her Honour seems to have confused what Mr K said in his affidavit of laws at [20]-[21] (AFM 259-260), doubtless because neither he nor the mother's expert was heard from on this point. (The error was repeated by her Honour's omission of reference to *GT v KAO* at CAB 23, J [95].)

34. *Fourthly*, at CAB 21, J [82]-[83], her Honour referred to the mother's submission that evidence of the father's Irish law expert, Mr K, was that *HI v MG* predated the amendments to the Irish legislation that inserted s 6F and s 2(4A) and s 6B(3), and that

Mr K's opinion was not that the declaration created rights of custody. Her Honour referred to para 24(iii) of Mr K's opinion; the text of para 24(ii) and (iii) (at AFM 262) is:

> *ii. It is my Opinion that it cannot, firstly, be stated with certainty that [the father's] rights under Irish law at that time did not constitute a right of custody under the Convention, as a matter of interpretation of the Hague Convention by the Irish Courts;*
>
> *iii. Further, it is my Opinion for the reasons detailed above, that there is a real sustainable argument to be made that as of the 30th August, [the father's] rights did amount to a right of custody within the Convention. Invocation of Article 15 of the Convention may provide a route to clarification.*

35. *Fifthly*, at CAB 22, J [87]-[89], her Honour referred to a second Irish case, *LC v KC* [2019] IEHC 513, in which a single judge (MacGrath J) sitting at first instance stated, in *obiter* remarks at [31]-[32], that the '*Act of 2015 … conferred upon "cohabitants" automatic rights to guardianship in certain circumstances*'. Neither Mr K nor Ms D referred to these paragraphs in their affidavits; Mr K did not refer to the case at all.

36. *Sixthly*, her Honour stated at CAB 23, J [90] that '*the effect of the January 2016 amendments, as stated by MacGrath J in LC v KC was to confer automatic rights to guardianship. The certain circumstances referred to by His Honour would of necessity be the of [sic] requirements of ss 2(4A) and 6B(3) of the Guardianship Act*'. Neither expert said as much in their affidavits.

37. *Seventhly*, her Honour concluded at CAB 23, J [91] that '*[t]he point of the Irish proceedings, which is evident from'* the parties' submissions (AFM 173, 235) was '*to both determine whether the child was habitually resident in Ireland and whether or not the cohabitation requirements of the legislation had been satisfied. I am able to infer from the declaration that the court was satisfied on the requisite standard of proof, as to both matters, thereby invoking, in the words of MacGrath J, automatic rights of guardianship.*'

38. At CAB 23, J [92], her Honour said:

> *Despite the submission that H.I. v M.G. was decided prior to the January 2016 amendments, and that care should be exercised in referring to such authorities, those amendments expanded or improved the rights and remedies available to unmarried fathers, and did not seek to reduce or abrogate those rights. I am therefore content to rely on the statements of McKechnie J in that regard. L.C. v K.C. was decided in 2019, well post the January 2016 amendments'.*

39. In the last sentence, it appears that her Honour wrongly considered McKechnie J to have sat in *LC v KC*.

40. At CAB 23, J [93], her Honour said:

> *...the issue in the Irish proceedings focused on the factual situation of the parties to determine whether they were "cohabitants" for the requisite period of time, so that the father, would come within the definition of father in s 2(4A) of the Guardianship Act, and would therefore be entitled to apply for a Declaration of Guardianship pursuant to s 6F of the Act. That would of necessity involve an examination of the facts which existed for the relevant period prior to 30 August 2020, as the parties clearly did not live together subsequent to 30 August 2020 and any finding would have to be based on the factual events prior to 30 August 2020.*

41. At CAB 23-4, J [95], the primary judge said that she was persuaded on the balance of probabilities that '*the father's rights of custody were in existence as at 30 August 2020*', and '*[i]n particular, the comments of MacGrath J in LC v KC pertaining to the legislative changes and the conferral of "automatic rights to guardianship" lend weight to my conclusion*'. Her Honour said that to do otherwise would '*render the Convention ineffective*' if a father was unmarried and had not obtained an order under s 6A or s 6F.

42. At CAB 25, J [102], the primary judge found that the respondent had established '*all requisite jurisdictional facts to establish that the removal of the child was wrongful*'. That included the requisites in reg 16(1A)(d) and (e), to which no submissions had been directed, or cross-examination undertaken.

43. *Finally*, after discussing authority and literature about res judicata and issue estoppel, her Honour at CAB 31, J [119] accepted the respondent's submissions '*pertaining to res judicata and issue estoppel*'. The references to '*not re-determin[ing] the same factual issues*', '*offend[ing] the fundamental principles of finality of litigation*', '*multiple proceedings in respect of the same issues*' and maintaining '*the public integrity of judgments*' seem to treat res judicata interchangeably with issue estoppel.

C. Reasons of the Full Court on appeal

44. At CAB 59, AJ [47]-[49], the plurality (Aldridge and Hannam JJ) held that the primary judge erred in finding a res judicata. A key aspect of this reasoning was that the controversy quelled by the s 6F order was the father's status on and from 12 April 2021, as the order was prospective in nature: CAB 59, AJ [48].

45. At CAB 60, AJ [52], the plurality recorded the respondent's submission that, because the mother and child had left Ireland on 30 August 2020, and the District Court '*determined that the father had met the requisite definitions in s 2(4A) and s 6B(3) ... (that being cohabitation for 12 months and living continuously with the mother and child for three*

months) the Court must necessarily have determined that those criteria were met as at 30 August 2020'.

46. At CAB 60, AJ [53]-[54], their Honours noted that, although the District Court's reasons were not available, review of the written case outlines (which are at AFM 173 and 235) '*identified the father's contention as cohabitation commencing on 6 May 2019 and lasting until 9 June 2020, resuming on 1 July 2020 and lasting until 30 August 2020*' and:

> *Thus, whatever the nature of the evidence itself before the District Court, which was not before the primary judge, the father eschewed any reliance on matters arising after 30 August 2020. There can therefore be no uncertainty or speculation that the period of cohabitation, as found by the District Court, extended beyond that date. The statutory definitions must, therefore, have been met on or before that date.*

47. The plurality continued at CAB 60, AJ [55]:

> *It is to be recalled that the declaration was founded on a satisfaction that, in the circumstances, the definitions in s 2(4A) and s 6B(3) of the Guardianship Act had been met. The periods of cohabitation referred to in them, which the declaration recognised had occurred, must have taken place before. They are the essential elements of the claim to be a guardian and must have been established for it to be made.*

48. The plurality concluded that the primary judge had applied the principles of issue estoppel correctly: CAB 61, AJ [56].

49. As to the s 6A order, the plurality said at CAB 61, AJ [57] that s 6A '*provides that a parent of a child who is not a guardian may be appointed as one*' and continued: '*The section does not provide any criteria for appointment so it appears that the general requirement is that the court shall regard the best interests of the child as paramount (s 3 of the Guardianship Act) applies.*' Their Honours then said at AJ [58] that '*[s]ignificantly, the order was an interim order*', and '*the appointment under that section does not depend on the father satisfying the court that definitions in s 2(4A) or s 6B(3) of the Guardianship Act are met*'. There was no evidence from the experts on either point.

50. The third member of the court, Hogan J, reached the same conclusion by similar reasoning. At CAB 62, AJ [66]-[67], her Honour stated that the District Court had been satisfied that the father was a guardian '*by virtue of the circumstances set out in section 2(4A) and s 6B(3)*', and '*satisfaction of these circumstances also means that, under the Guardianship Act*':

> *(a) the father of the child shall be a guardian of the child jointly with the mother of the child; and*

(b) the mother is not, alone, the guardian of the child – because the father is, under the Guardianship Act, the guardian of the child.

51. At AJ [68], her Honour reasoned that satisfaction of those circumstances '*can only have related, in my view, to the period before [30 August 2020]*', and that the primary judge had not erred in finding that the father had '*satisfied the statutory prerequisites – which meant that he was to be regarded as a "father" for the purpose of s 6(1) of the Guardianship Act and, therefore jointly a guardian of the child with the mother*'.

52. All members of the Full Court disapproved of the primary judge's statement at CAB 24, J [95] that failure to find that the father had rights of custody as at 30 August 2020 would unintentionally render the Convention 'ineffective': CAB 57, AJ [33] and CAB 63, AJ [72](b). Hogan J disagreed with the plurality's statement (CAB 58, AJ [40]-[43]) that Mr K's evidence at para 24 (AFM 262) '*suggest[ed] that the more likely position is that the father's rights did amount to rights of custody*': CAB 64, AJ [72].

D. Submissions

53. In *Kuligowski v Metrobus* (2004) 220 CLR 363 at [21], this Court referred to the requirements for the doctrine of issue estoppel to apply:

> *(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.*

54. The present case raises the first and third requirements. The second cannot arise as, although the s 6A and s 6F orders are subject to appeal in Ireland (which appeals have been stayed pending resolution of proceedings in Australian courts), they are nonetheless final: *Kuligowski* at [25].

1. Third requirement: Privity

55. The parties to this proceeding are not identical to those in the s 6F proceeding. The respondent must thus be a privy of the father in order to obtain the benefit of any issue estoppel. The primary judge did not address this issue (which was raised at AFM 289, [9]; AFM 295, [7](a); AFM 15-6, T11.45-12.16) apparently because her Honour found a res judicata to exist and the 'proceedings' were *in rem*: CAB 29, J [116]-[117]. Privity was raised on appeal (AFM 312, [38]; AFM 325, [43]-[47]; AFM 58, T14.45-15.5; AFM 75, T31.9-30; AFM 80, T36.19-34) but all the Full Court said of it, apparently based on

a concession at T15.2, was '*the decision of the District Court was one in rem and therefore no question arose as to whether the father and the State Central Authority were privies*': CAB 59, AJ [46].

56. No authority was cited for why the question did not arise. *Burden v Ainsworth* (2004) 59 NSWLR 506 at [21] is to the contrary; *in rem* status is relevant only for a res judicata, not an issue estoppel, and privity must still be shown (ie only *orders*, not *findings*, are *in rem*). The respondent bears that onus. The mother submits that there was no privity, and that the courts below erred in treating it as unnecessary or assuming it existed. The point is open in this Court as the concession was one of law: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [31]. This point (ie privity, the third requirement of an issue estoppel) was not raised when seeking special leave, but no amendment would be needed to the Notice of Appeal if it is taken. If further leave be needed, the mother seeks it.

57. In the present case, it was open to the father to commence proceedings himself under the Convention (reg 14(1)(b)), in which case the third requirement would be satisfied, as the parties would be identical. However, he could also make a request of the Irish Central Authority (as here), or make a request directly to the Commonwealth Central Authority: reg 13(1)(a). In those two cases, the Commonwealth Central Authority may commence proceedings, or (as here) transfer the request to the State Central Authority, both of which may commence proceedings under reg 14(1)(a). At this point, differences emerge.

58. *First*, the Central Authority is not claiming through or under the father, as there is no legal interest of his in the sense explained in *Tomlinson v Ramsey Food Processing* (2015) 256 CLR 507 at [35] and *Ramsay v Pigram* (1968) 118 CLR 271 at 279. Rather, he retains the rights he has outside the Convention (Art 29; reg 6(1)); the Convention creates a parallel *sui generis* regime of *remedies*, chiefly a 'return order': s 2(1). The two courses under r 14(1) are not identical: a Central Authority may seek orders that the parent cannot seek (reg 14(1)(a)(vi), cf reg 14(1)(b)) and appears to have done so here: see AFM 90, orders (b), (c), (d), (g) and (j).

59. *Secondly*, the extent of representation identified in *Tomlinson* at [40]-[41] is lacking. The father has no right of control over the way the Central Authority conducts its case: *Tomlinson* at [39], [98], [116]. If it conducts the case in a manner he disapproves of, a relationship of privity would seem to deny him the ability to seek to intervene and be added as a party to protect his interests. It may also affect his ability to litigate his rights himself, particularly in any proceeding he brought outside the Convention, whether under

statute or a parens patriae jurisdiction of the kind discussed in *ZP v PS* (1994) 181 CLR 639 at 646-9. Indeed, as the regulations do not state that only one application may be brought under reg 14(1), it may even be that in appropriate cases a parent (or other body) might justifiably commence a second proceeding under the Convention following a failed application by the Central Authority (or vice versa), subject to any abuse of process.

60. *Thirdly*, there is an apparent want of mutuality: if the Central Authority litigates in Australia first, and loses, would the father be bound (ie take the burden) in subsequent proceedings in Ireland? If not, why should the Central Authority have the benefit of any prior litigation by the father? That would be one-way, not mutual. Reg 18(1)(c) and Art 19 suggest the father is not bound, so mutuality does not exist. The effect in Ireland of a failed application in Australia was not the subject of evidence below, noting that the respondent bears the onus to establish mutuality: *Tomlinson* at [18]; *Ramsay* at 276.

61. *Fourthly*, the Central Authority is required to take steps to uphold Australia's obligations, or secure benefits, under the Convention: reg 5(1)(a) and s 111B(1). It is not expressed to be acting on behalf of the foreign parent, or in their best interests, and the better view is that it is acting in its own 'statutorily defined area of responsibility' rather than in a truly representative capacity: *Tomlinson* at [41]. Nor is any fiduciary relationship or obligation imposed upon the Authority in favour of the father: *Tomlinson* at [40], [98].

62. So far as can be ascertained, the present situation, and the question of privity, has not arisen in other major common law jurisdictions. In the United Kingdom, Canada and the United States, this appears to be because the Convention is given force of law in whole or part directly or by enabling legislation, and individuals or bodies claiming the rights of custody are the litigants in Convention proceedings in those countries (not the Central Authorities), so the question of issue estoppel does not arise: see respectively: *Child Abduction and Custody Act* 1985 (UK), s 1, Sch 1 and *In re A (A Child)* [2016] 4 WLR 111 at [66]; *The Child Custody Enforcement Act* CCSM c C360 (Manitoba), s 17 (noting enabling legislation is at the Provincial level) and *Thomson v Thomson* [1994] 3 SCR 551 at 601; 22 USC § 9003 (*International Child Abduction Remedies Act*), US Constitution, Art VI and *Abbott v Abbott* (2010) 560 US 1 at 9. In New Zealand Pt 2, Subpt 4 of the *Care of Children Act* 2004 (NZ) is relevant, and s 105(1) permits an application to be made '*by, or on behalf of, a person who claims*' existence and breach of rights of custody. The question of privity does not appear to have arisen, nor been determined, there.

63. The original form of the Regulations (enacted in 1986 as No 85, 1986) provided for the

Central Authority to make applications, including for a return order: see reg 13 and 15(1). Reg 14 provided that nothing in the Regulations *'prevents a person, institution or other body from applying directly to a court of competent jurisdiction, whether or not under the Convention, in respect of the breach of rights of custody or, or breach of rights of access to, a child removed to Australia*'. However, in *A v GS* (2004) 187 FLR 240 the Full Family Court held that only the Central Authority could apply for a return order. The Regulations were amended by the *Family Law Amendment Regulations* 2004 (No 3) to allow other persons to apply for a return order (the explanatory memorandum makes clear that the amendment '*overcomes the effects of*' *A v GS*). Reg 14 took its current form in 2007 via the *Family Law (Child Abduction Convention) Amendment Regulations* 2007 (No 1).

64. The mother submits that questions of wrongful removal and hence existence of rights of custody under foreign law should either be dealt with by a cause of action or claim estoppel from any applicable foreign judgment (noting that a res judicata in the strict sense cannot arise: *Clayton v Bant* (2020) 272 CLR 1 at [26], [66]), or if (as here) there is no judgment conclusively determining the question of rights of custody at the relevant date, by the Convention formula being litigated in Australia via the Regulations, which will be without prejudice (via issue estoppel) to any foreign proceeding, as the majority noted in *MW* at [73]. The point at stake, which involves forced return of the child, and of necessity the mother, is too important to be left to a principle of preclusion where there is any doubt about any of the three requirements for an issue estoppel. The Convention itself (as Mr K noted at AFM 265, [24](iii)) contains in Art 15 a mechanism for obtaining a direct determination on point from the relevant legal system. It was not availed of here.

2. First requirement: 'The same question'

65. As to the first requirement, the reasoning of the courts below contains two fundamental errors, each of which involves the incorrect extension of any issue estoppel that arose from the 12 April 2021 s 6F order. The first was the retrospective extension of a finding of fact from a finding as at 12 April 2021 to a finding as at 30 August 2020. The second concerns the extension of that finding of fact to become one as to the status of the father, via what was said to be the principle of 'automatic rights to guardianship' under Irish law.

3. First error: extension of finding from 12 April 2021 to 30 August 2020

66. It is trite that an issue estoppel precludes raising of '*an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment*':

Tomlinson at [21]-[22]. However, it is equally fundamental that an estoppel '*as to one proposition … cannot operate to establish by estoppel another proposition which follows from the former proposition only when that proposition is combined with others the establishment of which depends upon evidence or assumption*': *O'Donel v Commissioner for Road Transport* (1938) 59 CLR 744 at 758-9 (Latham CJ).

67. At 763, Evatt J said that issue estoppel '*does not authorize the use of each issue originally determined merely as the first but unbreakable link in establishing a separate and independent issue*', and although a person will be '*bound by the authoritative determination of every fundamental issue but when a distinct and separate issue arises subsequently, he is not bound to submit to the second issue being established by the combination of a former issue with additional evidence, no matter how strong such evidence may be*'. At 768, McTiernan J likewise identified the impermissibility of seeking to employ the issue to reach '*a conclusion which is to be reached, if at all, by reasoning from the matters as to which the judgment in the action creates an estoppel*'.

68. That is what the Respondent sought to do—and, given the paucity of evidence, had to do—in this case. On its face, the s 6F order at most involved a finding of fact made as at 12 April 2021. The section, and the order, both talk in the present tense, and there is no language in either that states that rights are being (or can be) declared retrospectively. It was correctly found in the Full Court that the order had no retrospective operation, and this was the basis that the primary judge's conclusion on res judicata could not stand.

69. The means by which the finding as at 12 April 2021 which appears on the face of the s 6F order was extended into a finding of fact as at 30 August 2020 was to employ an assumption as to how the District Court 'must have' or 'can only' have decided matters: eg CAB 19, J [74]; CAB 60, AJ [54]-[55]; CAB 62, AJ [68]. That is an assumption as to the content of the Court's reasoning, and as to what it found, and it includes assumptions that (i) the Court actually considered that question (and did not undertake any different exercise), and (ii) did not err. That composite assumption could not be drawn on the material before the courts below.

70. Although it is permissible to have regard to the record of the Irish proceeding, there was no good evidence of it in this case. The courts below did not have a copy of any pleadings, or transcript, or reasons for judgment. That is the most important information in order to identify what issues were actually determined, and without it, one is reduced to what appears on the face of the order. In his affidavit (at AFM 234), the father acknowledged

(as noted in CAB 19, J [71]) that he had considered obtaining a transcript of '*the entire hearing and the decision of the Court*', but chose not to do so. (To that extent, the principle in *Blatch v Archer* (1774) 1 Cowp 63 [98 ER 969], would likely tell against the father.) All that the courts below had before them was the bare order itself (AFM 277) and the parties' outlines of submissions (AFM 173 and 235). Although the plurality relied upon the father's outline of submissions (CAB 60, J [54]), there was no evidence that the District Court had proceeded or reasoned in accordance with its contents. In short, there was no proper basis to conclude that the District Court had addressed, let alone 'necessarily resolved' (*Tomlinson* at [22]), the issue of cohabitation as at 30 August 2020.

71. Rather, it was clear from the face of the s 6F order that it had not determined the 'same question' that the primary judge needed to determine. The s 6F order recorded that the Court had been satisfied as of matters as at 12 April 2021. That was not an issue identical to one raised in this case, and was not the '*precise matter ... necessarily and directly decided*': *Kuligowski* at [40], citing Barwick CJ in *Ramsay* at 276. As the Court observed in *Kuligowski* at [47], estoppels must be certain, and the requirements are strict; see also *Jackson v Goldsmith* (1950) 81 CLR 446 at 455, 458.

72. The justification for preventing the extension of an issue estoppel is clear: the estoppel's rationale is to prevent re-assertion of particular issues or claims which a party has had a chance to litigate in full in precisely the same form, as a dispositive issue, in an earlier hearing (*Tomlinson* at [39]), and its effect is preclusion of the ability to litigate it again. Preclusion is a drastic consequence that denies a party the right to be heard in a court. That consequence should only exist where to do so does justice and does not work injustice: *Tomlinson* at [39]. That is done by confining it to cases where the relevant issue was actually the one asserted and litigated, in its precise form, as a determinative issue in the earlier litigation, and not one merely *assumed* to have been litigated. The party asserting preclusion must identify what the foreign court determined: *Clayton* at [53].

73. The courts below should have concluded that there was no issue estoppel preventing the mother from litigating the question—on all of the evidence, including cross-examination—of whether the father had satisfied whatever were the requirements under Irish law to give rise to his asserted rights of custody as at 30 August 2020.

74. This is all the more so given two facets of s 6F not addressed below. *First*, the text of the s 6F order (AFM 277) does not distinguish between s 2(4A) and s 6B(3), and refers to both disjunctively as being satisfied. The reason for the existence of two similarly-worded

sections does not appear on the extracts of Irish law below; it is because s 6B applies only to a 'donor-conceived child': s 5, *Children and Family Relationships Act* 2015 (Ire). The reason both sections are listed in the s 6F order is one of conjecture, but a likely explanation is that the non-operative parts of what appears to be a pro-forma order template (indicated by asterisks) have not been struck out. That appears also to be the case for the s 6A order at AFM 147: there are references to '*child(ren)*'; the portion reading: '*THE COURT *(being satisfied that the mother of the said child(ren) has consented in writing to the appointment, and)*' has not been struck out; and the portion reading '*having heard the evidence of the applicant *(and of the mother) *(and of the other guardian of the child(ren))*' remains, despite the fact that the mother's expert, Ms D, was instructed that the hearing for the s 6A order heard evidence only from the father: see AFM 194, [6](d). This suggests that caution is needed in taking statements on either of the orders at face value, and underscores the danger of proceeding without the record.

75. *Secondly*, it must be recalled that by the time the s 6F order was made, the father had been appointed a guardian by the s 6A order. Whether that had any effect on the District Court's reasoning and conclusion (noting s 6F(2)(a); AFM 85) is not known.

4. Second error: extension to include new question of Irish law

76. The second manner in which the courts below erred is an argument in the alternative: assuming it was permissible to extend the estoppel backwards in time from 12 April 2021 to act as a finding as of 30 August 2020, there was a second, impermissible extension by combining that finding with a second finding as to what was said to be the content of Irish law on guardianship. That was the basis on which an issue estoppel said to constitute a finding of *fact* on *cohabitation* as at 30 August 2020 was converted into one that was said to amount to a conclusion that the father was a *guardian* under Irish law (a conclusion of mixed fact and law) as at that date.

77. The key point is, of course, what (if any) legal significance in Irish law a finding of satisfaction of the requirements in s 2(4A) produced. In order to produce any consequence for the litigation before the primary judge, her Honour had to make a finding as to how the s 2(4A) finding would produce any rights in the father, and how those rights would be ones that—under Australian law—would amount to rights of custody under reg 4.

78. That was done below by a finding that Irish law contains a proposition of 'automatic rights to guardianship' that was activated upon the finding of the fact of cohabitation, to

form the conclusion that the s 6F order produced an issue estoppel that the father was a guardian as at 30 August 2020: CAB 23, J [91]; CAB 60, AJ [55]-[56]. That was an error of law given *O'Donel*, and suffices to allow the appeal. An issue estoppel as to a proposition of fact cannot be extended in that manner: it is using the issue estoppel as '*the first but unbreakable link in establishing a separate and independent issue*' by coupling to it a finding of the content of the Irish law as to matters including guardianship.

79. Properly analysed, that extension went beyond determining the preliminary issue by adding an additional inquiry into the content of Irish law and its application to the assumed facts. That was distinct from the existence of an issue estoppel, and could not and should not have been done without the benefit of input from the experts, including permitting their evidence to be tested by cross-examination, as noted at T39.8, AFM 39.

80. It should also be noted that, as Evatt J stated, the sequential chaining of reasoning is impermissible '*no matter how strong*' is the second finding. In this case, the finding was not at all strong, and required the input of experts and the testing of their evidence. It was an error for this not to be done. In addition to the error noted above concerning *GT v KAO*, numerous factors indicate that the record was '*patently imperfect*': *MW* at [49].

81. *First*, Mr K stated at [18], AFM 258, that '*it has to be said that due to the manner in which the amendments [to the Act] have been made and the definitions of 'parent', 'father' and 'guardian' the correct interpretation is difficult to understand. There is no definition of 'guardian'*.' He also stated at [19] that he agreed with the mother's expert that s 6F is a '*relatively untested jurisdiction*'. Thus, on the respondent's own independent expert evidence, significant caution was needed in construing the Irish statutory material, and an Australian court should not have proceeded to do so without full involvement of the experts.

82. *Secondly*, Mr K's opinion at [19]-[20], AFM 258 was apparently that the word 'shall' in s 6F(5) could and should mean something other than 'may', as a general principle of statutory interpretation in Irish law. This point of Irish law was not addressed in terms by the primary judge, but the plurality in the Full Court adopted that view despite the fact that the mother had never had a chance to test Mr K's opinion: CAB 55, AJ [28]. If a court has a discretion not to declare a person a guardian despite satisfaction of the requirements of s 2(4A), then satisfaction of those conditions certainly does not automatically, without more, make the father a guardian, regardless of the content of the phrase 'automatic rights to guardianship'.

83. *Thirdly*, at no point did Mr K express an unqualified opinion that the father was a guardian as at 30 August 2020, or that he had rights of guardianship. Nor did he express an opinion that Irish law contained a principle of 'automatic rights to guardianship'. Indeed, the highest that Mr K's opinion went was:

(a) the double negative in [24](ii) that '*it cannot ... be stated with certainty that [the father's] rights under Irish law at [30 August 2020] did not constitute a right of custody under the Convention, as a matter of interpretation of the Hague Convention by the Irish Courts*'.

(b) the positive statement in [24](iii) that '*there is a real sustainable argument to be made that as of the 30th August, [the father's] rights did amount to a right of custody within the Convention. Invocation of Article 15 of the Convention may provide a route to clarification*'.

84. Two points should be noted. One is that it is unclear what 'rights' Mr K was referring to in [24](ii) and (iii). The mother should have had a chance to test Mr K's evidence, noting that those 'rights' were the factum of the mandatory inquiry under Australian law (ie reg 4) and precise identification of them and how they were said to arise was needed.

85. The other, more obvious, point is that on which Hogan J differed from the plurality: [24] was expressed in a manner that suggested a *possibility*, but not a result on the balance of probabilities that needed to be applied under reg 16(1)(c). That is particularly given McKechnie J's statement at [22] of Mr K's opinion (which Mr K appears to adopt) that an unwed father at most had rights that were 'contingent on a declaratory order' and which may be 'described as "inchoate rights"'. It is unclear how those could satisfy reg 4.

86. *Fourthly*, given that Mr K does not adopt, nor use, the terminology of 'automatic rights to guardianship', and that that terminology is itself unclear (eg, is it simply a right to apply, or an inchoate right that does not exist until declared?) the mother should have had a chance to test Mr K's evidence on this point. As it was, the primary judge decided this point against the mother on a basis apparently not found in Mr K's opinion.

87. *Finally*, various matters of construction of the Act pointing against the father having any rights as at 30 August 2020 needed to have been addressed with input from the experts:

(a) the primary judge did not address the fact that the father obtained an order under s 6A, but an order under that section is only available to a person '*who, being a parent of the child, is not a guardian of the child*', and that the order '*appoint[s]*

the person as guardian of the child'. That suggests that the father was *not* a guardian until 29 October 2020. Although the plurality said it was '*significant[ ]*' that the s 6A order was '*interim*' (CAB 58, AJ [58]), and appointment did not depend on s 2(4A) or s 6B(3), the mother had no chance to test the nature of the order, what 'interim' meant, why it was 'significant', and why the terms of s 6A did not mean that the father was not a guardian on 30 August 2020;

(b) the wording of s 6F itself has pointers that the father is not a guardian until the declaration is made. One is use of the present tense: the wording in sub-s (1), (2) and (5) is 'is or is not'. A second is that an application under sub-s (2) may be made by (a) '*a guardian*' or (b) '*a person seeking a declaration that he or she is or is not a guardian*', suggesting that the latter does not include the former. The father applied as the latter. This is strengthened by the fact that when a guardian applies, notice under sub-s (3)(a) is to be given to 'each *other* guardian', whereas when a person 'seeking a declaration' applies, notice under sub-s (3)(b) is to be given to 'each *guardian* of the child'.

88. What is manifest is that all of these issues are ones involving the content of Irish law, and are not ones as to the issue estoppel that was to be determined upon the preliminary issue. The courts below erred in venturing into the content of Irish law by itself, without allowing the parties to lead all necessary evidence from their experts and to cross-examine the opposing expert: *MW* at [49]-[50]; *LK v Director General, Department of Community Services* (2009) 237 CLR 582 at [15]. The courts thus erred in holding that a determination as to the father's status as guardian as at 12 April 2021 raised an issue estoppel upon a different matter, not litigated or determined at all, as to the father's status as at 30 August 2020.

E. Conclusion

89. The s 6F order had no more effect than that the father was a guardian as of 12 April 2021, due to satisfaction of one of the two nominated subsections as at that date. The question of whether the father had rights as at 30 August 2020 which amounted to rights of custody under Australian law for the purposes of reg 16(1A)(c) was not the subject of an issue estoppel, and was able to be—and should have been—determined on such evidence as the parties chose to put before the primary judge. In turn, the questions of whether (i) removal was in breach of those rights under reg 16(1A)(d); and (ii) whether the father

was actually exercising those rights under reg 16(1A)(e) could have been determined.

90. The appeal should be allowed, and the matter remitted to be reheard. It is not apprehended that the change of name of the Family Court of Australia to the Federal Circuit and Family Court of Australia (Division 1) effected by s 8(1) of the *Federal Circuit and Family Court of Australia Act* 2021 affects the power of the Full Court of that Court to remit this matter, that being the effect of the orders sought in this Court. Under s 36(1)(a) and (c), the Full Court had power to affirm, reverse or vary the primary judge's judgment, or to set it aside in whole and remit the proceeding for further hearing and determination.

Part VII: Precise form of orders sought by the appellant

91. The appeal be allowed, the orders of the Full Court of the Federal Circuit and Family Court of Australia (Division 1) dated 18 February 2022 be set aside, and in lieu thereof order that:

(a) The appeal to that court be allowed.

(b) The orders made by the Family Court of Australia (as it was then known) dated 25 June 2021 be set aside, and in lieu thereof order that the matter be remitted for rehearing by a judge of the Federal Circuit and Family Court of Australia (Division 1).

Part VIII: Estimated number of hours required for the appellant's oral argument

92. The appellant estimates that she will require 1 hour in chief and 30 minutes in reply to present her argument.

Dated: 25 November 2022

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BARNETT**
Appellant

and

SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE
Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the particular constitutional provisions and statutes referred to in the appellant's submissions are as follows.

No	Description	Version	Provision(s)
1.	*Family Law (Child Abduction Convention) Regulation*s 1986 (Cth)	In force 3 April 2019 to 1 September 2021	Reg 2, 4, 5, 6, 13, 14, 16, 18; Sch 1 Arts 15, 19, 29
2.	*Family Law (Child Abduction Convention) Regulation*s 1986 (Cth)	As made 1 May 1986	Reg 13, 14, 15
3.	*Family Law Amendment Regulations* 2004 (No 3) (Cth)	As made 23 Dec 2004	Item 11
4.	*Family Law (Child Abduction Convention) Amendment Regulations* 2007 (No 1) (Cth)	As made 24 July 2007	Item 14
5.	*Guardianship of Infants Act (1964) (Ire)*	In force from 10 June 2020	s 2, 6A, 6B, 6F, 11
6.	*Children and Family Relationships Act 2015 (Ire)*	In force 6 October 2019 to 24 March 2021	s 5
7.	*Family Law Act* 1975 (Cth)	Current	s 111B
8.	*Child Abduction and Custody Act* 1985 (UK)	Current	s 1, Sch 1
9.	*The Child Custody Enforcement Ac*t CCSM c C360 (Manitoba)	Current	s 17(2)
10.	22 US Code Chapter 97 §9003 (formerly 42 US Code Chapter 121 §11603)	Current	§9003
11.	*Care of Children Act* 2004 (NZ)	Current	s 105(1)