HIGH COURT OF AUSTRALIA

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Details of Filing

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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 REPLY

Part I: Certification as to publication on the internet

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

Part II: Appellant's reply to the argument of the respondent

2. The respondent's submissions ('**RS**') address four topics:

   (a) whether the issue estoppel was confined to the 'fact' of 'cohabitation': RS [18]-[21];

   (b) the extension of any findings as to 'cohabitation' from 12 April 2021 to 30 August 2020 (which is termed the 'first error' in AS [66]ff): RS [22]-[44];

   (c) the extension of any issue estoppel to include the content of Irish law on guardianship (which is termed the 'second error' in AS [76]ff): RS [45]-[53];

   (d) whether there was privity between the respondent and the father: RS [54]-[72].

A. The basis on which the trial was conducted: RS [18]-[21] (and RS [27])

3. The thrust of RS [18]-[21] and [27] is that the primary judge considered and found an issue estoppel only as to facts concerning 'cohabitation', and considered and found the content of Irish law as to the existence of rights (under Irish law) amounting to rights of custody (under Australian law) as a wholly distinct issue which the mother was at liberty to challenge. Those submissions should be rejected; the trial was not run in that way.

4. *First*, the respondent's case in writing (AFM 287, [1], [10], [15]-[16], [18]) and orally (AFM 7, T3.37-45) was that the District Court had already determined that the father '*is a guardian of the child*', and *that determination* should '*therefore*' prevent the primary judge from '*mak[ing] a similar enquiry*' into s 2(4A): T3.41. Read in context, the transcript cited at RS [18] makes clear that the 'issue' said to be the subject of the estoppel was 'this issue as to whether or not the father is a guardian of the child': T3.39. In writing (AFM 291, [16], [18]) the respondent argued that the mother was precluded from arguing that the father

was '*not a guardian*', and it was not suggested that the preclusive effect was limited to the fact of 'cohabitation' only. This was advanced as the effect *both* of res judicata (AFM 17, T12.28-9) *and* issue estoppel: T12.47, T13.2-3, ('*the issue with respect to the father being a guardian*'), T13.44 ('*whether the father is a guardian*'). That is how the primary judge understood those submissions: CAB 14, J [44](i), (j)); CAB 73, J [73]; CAB 29, J [115](b).

5. *Secondly*, the respondent argued the scope of the informal 'preliminary issue' would not involve '*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*', as that would only be done (with cross-examination) if the primary judge was against the respondent on the 'three limbs' of res judicata, issue estoppel and abuse of process: AFM 43, T39.6-9. That was how the mother understood it (see AFM 297, [12]) and it was also confirmed on appeal: AFM 59, T15.25; AFM 65, T21.15-37. Contrary to RS [19]-[20], there did not need to be some positive assertion of preclusion from cross-examination, and no application needed to be made to cross-examine: the contest as to whether a res judicata or issue estoppel existed did not involve the need for determination of '*the Irish laws*' or cross-examination.

B. The 'second error' of enlarging the issue estoppel to cover Irish law: RS [45]-[53]

6. Proper identification of the basis on which the issue estoppel was framed at trial shows why the respondent's submissions on the 'second error' should be rejected. As set out at AS [76]ff, the primary judge expressed the issue the subject of estoppel as being whether the father was a guardian as at 30 August 2020, and that the effect was to prevent redetermination of 'the issue of the father's rights of custody': CAB 31, J [119].

7. In order to do so, the primary judge had to enlarge the issue estoppel by making findings as to the content of Irish law that was outside the scope of the preliminary issue, and on which there was not cross-examination or a proper exploration of all the evidence. This was the 'second error'.

8. RS [27] and [45]-[53] do not avail the respondent. At trial, the mother referred to the Irish cases and the expert evidence for the purpose of showing that the s 6A and s 6F orders did not have retrospective effect; ie that they did not themselves constitute a res judicata as alleged (more accurately, a claim estoppel: *Clayton* at [26]) and alternatively should permit declining to recognise the orders, if retrospective, on grounds of forum public policy. See AFM 294, [3], [5], [7](c)-(f), [10]-[12]; AFM 26, T22.5-23.15 (on the s 6A order) and AFM 27, T23.17ff, esp T23.17-38, T30.11-20, T31.3-11 (on the s 6F order). Hence the

submission at AFM 36, T32.34-39 that the respondent could still adduce evidence on which the court could 'make findings of fact which would then enable this court to find, independently of the foreign judgment, that as at 30 August 2020, the natural father had rights of custody'. The Australian cases cited by the mother at AFM 26-34, T22-30 were with respect to retrospectivity,[1] as was the reference to *LC v KC* at AFM 26, T22.8-29.

9. RS [48] elides the material actually referred to by the mother (the content of the Irish legislative provisions, and whether orders under them are retrospective) with material that was not addressed by the mother, but which the primary judge considered and pronounced upon (the so-called 'automatic rights' theory). The mother did not enlarge the content of
10 the preliminary issue to the latter matters. It is thus irrelevant that the father's solicitor deposed briefly and without reasons as to the content of Irish law (RS [50]); that evidence was potentially to be heard, and (if heard) tested if the preliminary issue failed.

C. The 'first error' of enlarging the issue estoppel backwards in time: RS [22]-[44]

10. The respondent's submissions on the first error should be rejected.

11. *First*, the respondent makes the same assumptions as the courts below as to what the District Court 'must have', 'necessarily', or 'could only have' decided: RS [26], [39]. They include: (i) 'cohabitation' (as a matter of Irish law) could not occur after 30 August; (ii) (as a matter of fact) it did not so occur; (iii) it thus made a finding as to the situation at 30 August 2020; (iv) it did not rely on the s 6A order under s 6F(2)(a) (see AS [75]). These
20 assumptions are needed to enlarge the issue estoppel (impermissibly contrary to *O'Donel*) from a finding of fact as at 12 April 2021 into a finding said to be at 30 August 2020.

12. RS [26] is wrong to assert that the 'finding' has not been challenged; it is the core of the 'first error', rests upon the assumptions set out above, and has always been disputed by the mother: AFM 296, [7](d); AFM 21, T17.24-T18.17. Without assumptions as to what the District Court found (and how it reasoned), there can be no 'inconsistency' with that finding; cf RS [30], [32]. Contentions as to what the mother 'lost' on, whether there is the 'very same factual determination', what the District Court 'determined', whether there will be 're-agitation' of a decided issue, and whether there is 'inconsistency' also rest on these assumptions: cf RS [32]-[37].

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[1] *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194; *Mathieson v Burton* (1971) 124 CLR 1 at 23-4; *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at [47]; *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at [30]-[31]; *PGA v The Queen* (2012) 245 CLR 355 at [245].

13. None of this is addressed by invoking substance over form (cf RS [33]), because identifying the substance of what the District Court decided requires knowing more about what it did than is available in this case. In circumstances where there are no reasons, pleadings or transcript, what the District Court actually did, and found, can only be assumed. That is insufficient to found an issue estoppel.

14. *Secondly*, aspects of the respondent's submissions on this issue are infected by (i) the 'second error' and (ii) an incorrect characterisation of the way the issue estoppel was framed below. As to the latter, RS [27] has been dealt with above. As to the former, the content of what the respondent calls 'the Criteria' (RS [24]) was to be determined only if the preliminary issue was resolved against the mother, and the primary judge erred in determining them on the preliminary issue; that was put clearly in AFM 297, [12]. This Court should not treat so-called 'findings' on matters beyond the preliminary issue as agreed or properly determined by the courts below, particularly on the content of Irish law.

15. The attempt at RS [41]-[42] to distinguish *O'Donel* by characterising it as only operating forwards in time should be rejected. There is nothing in the statements in that case to support such a limited view, and the Court's reasoning denies it. RS [40] makes the same error as made below about the supposed status of the 'interim' s 6A order without addressing the fact that there was no evidence from the experts on that issue of Irish law, as no doubt would have been adduced once the preliminary issue failed (along with the effect of s 6A(1) and s 6(4) of the Irish Act (SAFM[2] 5-6) upon the father's claimed rights).

D. Whether there was privity: RS [54]-[72]

16. It is open to the appellant to raise the issue of privity, and she should be allowed to do so.

17. Contrary to RS [56], no amendment of the notice of appeal is needed. The respondent had to prove privity in order to establish an issue estoppel. At trial, the mother denied it existed (AFM 295, [7](a)), and the respondent asserted that it did not need to be shown because the s 6F order was 'in rem', or it should be found because the father was the 'real party': AFM 14-16, T10.1-8, T11.47-T12.16. The father did not seek to be joined at any stage below, and issues of procedural fairness do not arise; cf RS [57]. RS [58] does not disclose any basis to prevent this Court satisfying itself that a prerequisite of an issue estoppel exists.

18. Contrary to RS [62], whether the mother was a party does not make the respondent a privy of the father, and RS [67] makes clear that the respondent is not asserting the same 'legal

[2] Supplementary AFM filed 9 January 2023, which contains the correct pages to replace AFM 83-87.

interest' as the father. Rather (consistently with RS [71]) he is fulfilling his bespoke statutory role, in consequence of which (inter alia): (i) determinations adverse to him would not bind the father (reg 18(1)(c)), demonstrating a lack of mutuality (*Ramsay v Pigram* at 282); (ii) he can seek orders unavailable to the father (AS [58]); and (iii) he has a costs immunity that the father would not enjoy had he brought proceedings himself: reg 7.

19. Contrary to RS [63], *Osborne v Smith* (1960) 105 CLR 153 does not assist the respondent. The ecclesiastical principle also *requires* (and does not *supply*) a commonality of interest: it derived from the practice where any 'person *having an interest* may have himself made a party by intervening' but stood by and saw 'his battle fought by somebody else *in the same interest*': *Osborne* at 158-9, citing *Wytcherley v Andrews* (1871) LR 2 P & D 327 at 328-9. The father also had no entitlement to intervene, unlike a beneficiary of an estate.[3]

20. Contrary to RS [64]-[70], although the father may make a request to the Irish Central Authority which results in an Australian Central Authority commencing proceedings, the request enlivens statutory duties and a statutory task which is then performed; those are different from the father bringing suit. (The 'may' in regs 14 and 25 also makes clear that a responsible Central Authority is not obliged always to apply, nor to seek all available orders.) The 'real party' metaphor is inapt, noting the respondent seems not to have made an access application under reg 25 on the father's request: AFM 233-4. The position is stronger than in *Tomlinson*, as there is no equivalent of s 682(1)(f) of the *Fair Work Act 2009* to allow a Central Authority to represent another person (cf *Tomlinson* at [44], [102]).

21. Additionally, the signed authority at RS [68] is from the father to the *Irish Central Authority*, not the respondent; it is part of the Irish form running from AFM 104-119, and is referred to at AFM 118 as being the 'next page'. There is no similar written authority to the respondent. RS [72] does not supply mutuality, which cannot exist given reg 18(1)(c). To be a privy, the father (in Ireland) would need to be bound by the Authority's result in Australia.

Dated: 9 January 2023

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[3] Leave to intervene would be needed under s 92 of the *Family Law Act* 1975 and (at the time of hearing) r 6.05 of the *Family Law Rules* 2004 and (currently) r 3.04 of the *Federal Circuit and Family Court of Australia (Family Law) Rules* 2021.