

PROPERTY

CLAYTON v BANT – effect of overseas order
on rights under the *Family Law Act 1975(Cth)*

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The High Court of Australia considered the impact of an overseas court order on Australia property settlement and maintenance proceedings in *Clayton v Bant* (2020) FLC 93-994; [2020] HCA 44. The issue arose because the language of the overseas order was not the same as the Australian order and the husband had not properly compared the rights under the overseas order with those under the Australian order. The Australian courts needed to look at the effect of the overseas order.

A ruling was made by the Personal Status Court of Dubai (the Dubai Court) in divorce proceedings by the husband against the wife. The High Court held that this ruling did not have the effect of precluding the wife from pursuing property settlement and spousal maintenance proceedings against the husband under the *Family Law Act 1975* (Cth) (FLA). Chief Justice Kiefel and Gageler JJ delivered the plurality judgment and, in separate judgments, Gordon J and Edelman JJ agreed for substantially the same reasons.

Background facts

The wife was an Australian citizen and the husband was a citizen of the United Arab Emirates (UAE). They met and commenced living together in 2006 in Dubai and were married in 2007 in a Sharia Court. They had a child together. In the UAE, marriage under the *Federal Law No 28 of 2005 on Personal Status* (UAE) (Personal Status Law) is a formal contract in which the husband can make provision to pay dowry to a wife. In this case the husband was required to pay “advanced” AED 100,000 on the formation of the contract and to pay “deferred” dowry of AED 100,000 in the event of death or divorce.

Between 2000 and 2013 the parties lived together partly in the UAE and partly in Australia and travelled extensively. The husband owned real and personal property in the UAE and many other parts of the world whilst the wife owned personal property in Dubai. Both parties owned real property in Australia. They separated in 2013, after which the wife and child lived in Australia. In 2013 the wife instituted proceedings in the Family Court of Australia seeking parenting orders in respect of the child. The proceedings were later amended to seek orders for property settlement and spousal maintenance. In June 2014 the husband lodged caveats over two properties owned by the wife in Australia.

In July 2014 the husband instituted proceedings in Dubai seeking a divorce. He also sought the extinguishment of all the wife’s “marital rights that are associated with the divorce in terms of all type[s] of alimony, deferred dowry and others as well as compensating him for all material and moral damage at the discretion of the court.” The wife received notice of the Dubai proceedings but did not appear.

In September 2014 the wife commenced divorce proceedings in Australia.

In February 2015 the Dubai Court granted the husband an “irrevocable fault - based divorce” the effect of which was to dissolve the marriage. The wife was ordered to pay AED 100,000 (corresponding to the amount of the advanced dowry) to the husband and to pay the husband’s costs of the proceedings. The husband’s request to drop-off (or extinguish) the wife’s deferred

dowry and alimony was described by the Dubai Court as “untimely”. The parties differed as to whether the refusal by the Dubai Court to deal with the husband’s request meant that the possibility of that court still entertaining an application by the wife for alimony was still open. The High Court plurality found that nothing turned on that difference.

There is limited ability in the UAE under the Personal Status Law for property settlement orders to be made. A party can claim upon divorce a share in real property which they had participated with the other in developing. It was unclear from the evidence whether there was any property within this description. However, it was found that property lay elsewhere that was beyond the scope of the Dubai proceedings as the Dubai Court had no jurisdiction in relation to the property located outside the territorial limits of the UAE.

In relation to alimony, the Personal Status Law gave the wife an ongoing entitlement to be paid living expenses by her husband during the term of their marriage and this was enforceable as a debt for up to three years afterwards but the ongoing entitlement ceased upon an irrevocable divorce taking effect if the wife was not pregnant at that time.

Application for permanent stay of proceedings in the Family Court

The husband applied to the Family Court for a permanent stay of the wife’s Australian property settlement and spousal maintenance proceedings on the basis that the ruling of the Dubai Court operated as a bar to those proceedings by virtue of the operation and principles of *res judicata* and cause of action estoppel.

The trial judge dismissed his application. In relation to the property settlement proceedings the trial judge found that the Dubai proceedings involved no issue of the wife’s right to claim property of the husband and in relation to the spousal maintenance proceedings the Dubai proceedings did not deal with any right of the wife to alimony but rather the Dubai Court described the husband’s application as “untimely”.

Appeal to the Full Court of the Family Court

The wife appealed to the Full Court of the Family Court. The Full Court unanimously granted the husband leave to appeal from the decision of the trial judge, allowed his appeal and ordered a permanent stay of the property settlement proceedings and spousal maintenance proceedings. The Full Court reasoned that the Dubai proceedings had determined the same “cause of action” as that sought to be pursued in the property settlement proceedings and so gave rise to what they referred to as “*res judicata* estoppel”. The Full Court drew on observations by the High Court of Australia in *Henry v Henry* (1996) 185 CLR 571 and by the Full Court of the Family Court in *In the marriage of Caddy & Miller* (1986) FLC 91-720 to identify the common cause of action as “the financial consequence to the parties arising from the breakdown of the matrimonial relationship” (*Bant & Clayton* [No 2] (2019) FLC 93-925 [at 25]).

The Full Court relied on *Henderson v Henderson* (1843) 67 ER 313 at 319 where the English Court of Chancery held that where a given matter becomes the subject of litigation, the court requires the parties to the litigation to bring forward their whole case and will not (except in

special circumstances) permit the same parties to open the same subject of litigation and bring forward other matters which could have been raised in the previous litigation. The Full Court accepted the husband's argument that the ability of the wife to have claimed in the Dubai proceedings a share in such real property located in Dubai as she may have participated with the husband in developing also precluded her pursuit of the property settlement proceedings by operation of the "*Henderson extension*". In Australia this principle is generally known as "*Anshun estoppel*" based on *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45.

In relation to the spousal maintenance proceedings the Full Court took the view that the reason the Dubai Court treated the husband's claim for extinguishment of the right of the wife to alimony as "untimely" was that the wife had chosen not to press a claim for alimony that was available to be made by her in the Dubai proceedings. Implicitly the Full Court equated spousal maintenance with alimony and concluded that the failure of the wife to press the claim for alimony meant that she was precluded from pursuing a claim for spousal maintenance by operation of the "*Henderson extension*".

Wife's appeal to the High Court

The wife was granted special leave to appeal to the High Court. The plurality's judgment was delivered by Kiefel CJ, Bell and Gageler JJ and upheld the appeal. Justices Gordon and Edelman delivered separate judgments which also upheld the appeal.

The plurality found it important to first identify with precision the jurisdiction of the Family Court to hear and determine the property settlement proceedings and the spousal maintenance proceedings instituted by the wife against the husband before turning to the identification and operation of potentially applicable principles of preclusion. Section 4(1) of the FLA includes para (c) of the definition of "matrimonial cause" which is "proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage" and para (ca)(i) which is "proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings ... arising out of the marital relationship". By force of s 31(2) the jurisdiction of the Family Court extends to persons and things outside Australia. Section 39(4)(a) and (4A) enable the proceedings to be instituted if a party to a marriage is an Australian citizen, is ordinarily resident in Australia or is present in Australia at the time of the institution of the proceedings.

The plurality then referred to s 79(1) FLA and accompanying provisions in relation to the right conferred on the wife as a party to the marriage to institute property settlement proceedings and the right of the wife to institute spousal maintenance proceedings under s 74(1) and concluded that these rights were (at [25]):

"created by a statutory provision which confers a discretionary power in the Family Court to make an order of the kind that is sought. The justiciable controversy as to whether such an order should be made constitutes the matter defining the jurisdiction of the

Family Court”.

The principles of preclusion and their application – Plurality view

The plurality found that as the rights in issue in the property settlement proceedings and in the spousal maintenance proceedings were the statutory rights of the wife to seek orders under s 79(1) and 74(1) FLA it was apparent that the ruling by the Dubai Court could not give rise to a *res judicata* in the strict sense in which that term is used in Australia. The rights created by s 79(1) and 74(1) cannot “merge” in any judicial orders other than final orders of the court having jurisdiction under the FLA to make orders under those sections. The rights of the wife to seek orders under s 79(1) and 74(1) continued to have separate existence unless and until the powers to make those orders were exercised on a final basis and thereby exhausted.

The plurality said (at [27]) that for the Dubai Court’s ruling to preclude the wife from pursuing the FLA proceedings:

“that preclusion can occur, if at all, through the operation of the common law doctrine of estoppel. No argument is made that the operation of that common law doctrine is excluded by the scheme of the Act.”

The plurality then considered the two forms of estoppel which were potentially applicable. The first was “cause of action” estoppel which the plurality said was better referred to by the more generic description of “claim estoppel”. The other form of estoppel they discussed was “*Anshun* estoppel” which the Full Court of the Family Court referred to as the “*Henderson* extension”. The plurality held (at [29]) that these “potentially applicable forms of estoppel” had not been “adequately differentiated in the reasoning of the Full Court.”

The plurality explained how the husband had erred in the presentation of his case (at [30]-[31]). As the applicant for the permanent stay in the Family Court, he bore the onus of establishing a factual foundation for the operation of one or other of those forms of estoppel. In order to do that he needed to prove that the ruling of the Dubai Court had the meaning and determinative operation for which he contended which meant that he had “to prove the content of applicable UAE law” for *Anshun* estoppel. He was also required “to prove the unreasonableness in all the circumstances of the choice made by the Wife to refrain from asserting such rights as were legally available to be asserted by the wife in the Dubai proceedings.” It was not enough for him to establish that the fact that the wife *could* have asserted a right in the Dubai proceedings meant that she *should* have asserted that right in the Dubai proceedings in the sense that it was unreasonable for her not to have done so. It was an error for him not to prove the unreasonableness of the choice made by the wife. Furthermore, a more fundamental problem lay (at [323]):

“In his failure to establish the requisite correspondence between the rights asserted by the wife in the property settlement proceedings and the spousal maintenance proceedings and any right the existence or non-existence of which was or might have been both asserted in the Dubai proceedings and finally determined by the Dubai Court. Absent such a correspondence of rights, neither form of estoppel can have any operation.”

The plurality found that the Full Court was correct by implicitly proceeding on the basis that *Anshun* estoppel can preclude the assertion of a right that is not identical to a right which could have been asserted and determined in earlier proceedings. The focus of the common law doctrine of estoppel is on “substance rather than form”. The doctrine does not look for absolute identity between the sources and incidents of rights asserted or capable of being asserted in consecutive proceedings. It operates where the rights are of a substantially equivalent nature and cover substantially the same subject matter.

In discussing the error made by the Full Court the plurality said [at 37]:

“The error lay in failing to look to the actual rights existence or non-existence of which were or might have been asserted in the Dubai proceedings and finally determined by the Dubai Court and then to look for correspondence between those rights and the statutory right asserted by the wife in the property settlement proceedings.”

The plurality discussed the two cases referred to by the Full Court and said that *Henry v Henry* did not support the Full Court’s broad-brush transactional approach as the context was not considering whether the proceedings in the Family Court were estopped by a final judgment of any other court but considering whether the Family Court was a clearly inappropriate forum given that the proceedings in Monaco were ongoing. However, even in that context, the plurality made clear (at [39]) of *Henry* that “it will be relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties’ controversy.”

The plurality said that *In the marriage of Caddy & Miller* provided even less support for the Full Court’s characterisation of the preclusive effect of the ruling by the Dubai Court. The Full Court of the Family Court in *Caddy & Miller* correctly held that a former wife was estopped from asserting a right to an order under s 79(1) of the FLA that her former husband transfer to her certain real property in Australia. A prior order of the Superior Court of California had been made in matrimonial proceedings instituted by the wife and which had finally determined the interests of both parties in real and personal property consequent upon the dissolution of their marriage. The orders specifically confirmed their respective interests in real property in Australia including the real property in respect of which she was seeking an order under s 79(1). The jurisdiction exercised by the Superior Court extended to real property in Australia and the power of the Superior Court was not dissimilar to s 79(1) albeit that Californian law mandated an equal division of property.

The position in *Clayton v Bant* was quite different. The limited property rights of the wife in Dubai (at [40]):

“were not in any degree equivalent in nature to the right to seek the discretionary alteration of property interests conferred by s 79(1) of the Act. And those rights were in any event capable of applying to only a fraction of the subject matter of the right conferred by s 79(1), “which encompasses all real and personal property of either or both parties to the marriage wherever located.”

Therefore, even if the ruling of the Dubai Court had determined the non-existence of an entitlement to a share in some real property in Dubai, that ruling would have been incapable of either form of estoppel operating to preclude the wife from asserting her right to seek an order under s 79(1). For the same reasons the wife’s choice not to claim a share in such real property as she might have participated in with the husband in developing in Dubai was incapable of founding an *Anshun* estoppel even assuming that some such real property existed and even assuming that her choice not to claim it was unreasonable in the context of the Dubai proceeding.

With respect to the spousal maintenance proceedings the plurality had little difficulty in characterising the right of the wife to seek alimony under the Personal Status Law as substantially equivalent in nature to the right which she had under s 74(1) FLA to seek an order for the provision of maintenance by the husband. The fact that the quantum might be different or that it might be informed by different discretionary considerations was not relevant. However there was a substantial difference in the coverage of the two rights with the former not being shown to be available to be claimed beyond the period up to the date when the irrevocable fault-based divorce took effect and the latter being able to be claimed beyond that date. The wife’s choice not to claim alimony in the proceedings instituted by the husband in the Dubai Court could not provide a foundation for the operation of *Anshun* estoppel even assuming her choice not to claim alimony to have been unreasonable in the context of the Dubai proceedings.

The plurality allowed the appeal with costs.

The minority – Justices Gordon and Edelman

Justice Gordon held that the only claim made in and determined by the Dubai Court was the divorce of the parties and the return by the wife of the advanced dowry. Neither party could have asked or did ask the Dubai Court to alter the property interests which the parties had in property outside the UAE or, subject to an irrelevant exception, any property inside the UAE. As these issues could not be and therefore were not raised in the Dubai Court, the ruling of the Dubai Court raised no *res judicata* or cause of action estoppel. Furthermore, no issue estoppel arose. The fact that neither party could have asked the Dubai Court to alter the interests which the

parties had in property outside the UAE meant that it was not unreasonable for the wife not to have made such a claim in the Dubai Court and therefore no *Anshun* estoppel arose.

The wife's claim for maintenance was not a claim that could be made in the Dubai Court. Whether the husband had failed to pay alimony that he should have paid before divorce was not decided by the Dubai Court so the Dubai Court had not decided any controversy between the parties that bore upon spousal maintenance. Again, as with the property settlement proceedings no form of estoppel or *res judicata* arose.

Justice Gordon also rejected the husband's reliance upon *Henry* as there was no foreign judgment and therefore no determination of any controversy or issue.

Justice Edelman considered that the main point in the appeal was whether the wife's property settlement and spousal maintenance proceedings were barred because they fell within the character of a claim that was pursued and decided by the Dubai Court. That point reduced to a simple question: should the husband's claim, as resolved by the Dubai Court, be characterised as a claim merely for dissolution of the marriage or should it be characterised as a claim for dissolution of the marriage and resolution of all the financial consequences of the marriage including distribution of the property of the parties? As the proper characterisation was that the claim resolved by the Dubai Court was only for the dissolution of the marriage, the wife could therefore maintain proceedings in Australia under the FLA for property settlement and spousal maintenance.

Justice Edelman pointed out that the Full Court did not rely upon *res judicata* in the strict sense of merger of the successful plaintiff's rights into the rights arising on a judgment. It could not have done so. Rights that are recognised in a local jurisdiction such as Australia do not merge into the final judgment of a foreign jurisdiction such as the UAE even where the foreign judgment is based upon the same facts as those that support the right in Australia. By contrast, it was common ground that a cause of action estoppel can arise from a foreign judgment. With respect to cause of action or claim estoppel the starting point was the lack of any jurisdiction to the Dubai Court to make orders for the redistribution of the parties' property. The experts agreed that there was no provision in Dubai for a redistribution of assets as understood in Australia.

The question of characterisation was one of substance not form and much depended upon the level of generality at which the claim is characterised. The question of characterisation was one of substance, not form, and much depends upon the level of generality at which the claim is characterised. The husband's submission was effectively that the orders of the Dubai Court should be characterised as having decided a cause of action or claim for dissolution of the marriage and all of its financial consequences. His case was that the absence of any law in Dubai concerning redistribution of property upon divorce left property rights where they lay and

was merely a different approach to adjudicating the claim or controversy. By contrast, the wife's submission was effectively that the husband's cause of action or claim should be characterised more narrowly, involving only the dissolution of the marriage in immediately related matters such as repayment of the dowry paid under the marriage contract.

Justice Edelman held that the husband's claim in the Dubai Court was best characterised as one for dissolution of marriage only. The expert evidence was that the Dubai Court had no jurisdiction with respect to property outside the territory of the UAE. The lack of any rule for redistribution of assets within or outside the UAE followed naturally from this lack of jurisdiction since any redistribution of property within the UAE might be expected to take into account respective foreign property holdings of the parties. No cause of action or claim estoppel could bar the wife's claim for a redistribution of property rights under s 79 FLA.

In relation to issue estoppel and *Anshun* estoppel the husband in oral submissions through his Senior Counsel properly accepted that an *Anshun* estoppel could not apply because it could never be unreasonable to fail to claim that which was not available.

In relation to the *Henderson* extension and its applicability to spousal maintenance, this required the husband's claim in the Dubai Court to be characterised as extending beyond the mere dissolution of marriage to include also financial consequences of alimony on the basis that this is equivalent to maintenance. The expert opinion concerning the nature and effect of alimony in the Personal Status Law was not provided to the High Court in the appeal books. In the absence of expert evidence the High Court could not interpret the Personal Status Law according to its own background understanding or rules of interpretation. The only conclusions that could be drawn about alimony were those unchallenged findings of the trial judge that alimony to a wife is forfeited if she abandons her home as was considered by the Dubai Court to be the case, but that alimony in addition to that payable during the "waiting period" would have been payable to the wife if the husband had divorced her on a basis other than that advanced to the Dubai Court.

Justice Edelman disagreed with the Full Court's conclusion that the issue of the wife's right to alimony had been "finally heard and determined" as no basis was given for that reasoning in the expert evidence or otherwise. Justice Edelman said (at [84]):

"An issue that has not been considered cannot be the subject of an issue estoppel nor can it be the subject of *Anshun* estoppel if it remains open to be determined at a future time."

Court delays

All members of the High Court expressed concern that the property settlement and spousal maintenance proceedings had been pending for nearly 8 years. There was a delay of over 3½ years between the filing of the stay application and the delivery of judgment at first instance and

a delay of over 12 months between the commencement of the appeal and the delivery of judgment by the Full Court amounting to over 4½ years for the determination of an application for interim orders. The plurality said that these delays could not go unremarked and were unacceptable. Justice Gordon said (at [60]) “Justice delayed is justice denied; it is an injustice.”

Justice Edelman also commented on the unfortunate delays in the proceedings, but was more forgiving of the delays in the Family Court as there can be many reasons for delay and the reasons were not referred to during the hearing of the appeal. He also noted that there had also been a considerable delay in the High Court.

Conclusion

In *Clayton & Bant* the High Court highlighted that when dealing with applications under the FLA between parties who have also litigated with respect to their marriage in other jurisdictions, careful examination of the rights dealt with in the earlier proceedings is required. Often the parties will need to call evidence from a properly qualified expert in the overseas jurisdiction. It is possible that a form of estoppel may arise, but the precise form will be dependent upon the facts.