

# *Anshun* estoppel and res judicata in respect of a foreign family law judgment: *Clayton v Bant* [2020] HCA 44

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The ultimate question in this appeal was whether a ruling made by a court in Dubai in divorce proceedings precluded the wife from pursuing property settlement proceedings and spousal maintenance proceedings against the husband under the *Family Law Act 1975* (Cth) (the Act) by reason of a res judicata or *Anshun* estoppel.

## The facts

The wife was an Australian citizen. The husband was a citizen of the United Arab Emirates (UAE). They met in Dubai and married there in 2007 in a Sharia court.

Between 2007 and 2013, the husband and wife lived together partly in the UAE and partly in Australia. They had a child in 2009. The husband owned real and personal property in the UAE and in many other parts of the world. The wife owned personal property in Dubai. Both owned real property in Australia.

The husband and wife separated in 2013. After separation, the wife and child resided in Australia.

In 2013, the wife instituted proceedings against the husband in the Family Court of Australia at first seeking parenting orders, and subsequently amended the orders sought to seek orders for property settlement and spousal maintenance.

In 2014, the husband instituted the Dubai proceedings against the wife in the Personal Status Court of Dubai seeking a divorce. He also sought in those proceedings the 'dropping', in the sense of extinguishment, of 'all [the wife's] marital rights that are associated with that 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 was notified of the Dubai proceedings but did not appear.

## Ruling in the Dubai Court

In 2015, the Dubai Court granted the husband an 'irrevocable fault-based divorce', the effect of which was to dissolve the marriage. The Dubai Court's written reasons



for the ruling included a statement that had been translated from the original Arabic as follows:

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

## The husband's stay application

The husband applied to the Family Court for a permanent stay of the proceedings commenced by the wife on the basis that the ruling of the Dubai Court operated as a bar to those proceedings by reason of a res judicata or cause of action estoppel.

At first instance, Hogan J dismissed the application for a permanent stay. In relation to the property settlement proceedings, her Honour dismissed the application on the basis that the Dubai proceedings involved no issue of the wife's right to claim property of the husband given that the law of the UAE does not confer any such right other than 'in relation to property within the jurisdiction in which each have invested': *Clayton v Bant* [2018] FamCA 736 at [194]. Her Honour dismissed the application in relation to the spousal maintenance proceedings on the basis that the Dubai proceedings did not in fact deal with any right of the wife to alimony but, rather, described it as 'untimely': *Clayton v Bant* [2018] FamCA 736 at [196].

## The decision of the Full Court of the Family Court of Australia

In the Full Court, Strickland, Ainslie-Wallace and Ryan JJ unanimously granted the husband leave to appeal from the decision of Hogan J, allowed his appeal, and ordered a permanent stay of the property settlement proceedings and of the spousal maintenance proceedings.

Their Honours concluded 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 'res judicata estoppel': *Bant v Clayton* [No 2] (2019) FLC 93-925 at [25]. In relation to the spousal maintenance proceedings, their Honours considered that the reason the Dubai Court described the husband's claim regarding the wife's right to alimony as 'untimely' was that the wife had chosen not to press a claim for alimony that was available to her in the Dubai proceedings. Their Honours concluded that her failure to press that claim meant that she was precluded from pursuing a claim for spousal maintenance by operation of the 'Henderson extension', developed in *Henderson v Henderson* [1843] EngR 917, but more commonly referred to as *Anshun* estoppel in Australia.

## The High Court's decision

The High Court (Kiefel CJ, Bell and Gageler JJ in a joint judgment, Gordon J and Edelman J in separate judgments) allowed the wife's appeal, set aside the orders of the Full Court and dismissed the appeal from Hogan J. Each of the judgments referred to the long delays that had occurred in this proceeding, including a four and a half year delay for the determination of an application for interim orders between the filing of the stay application at first instance and the delivery of judgment by the Full Court (at [44], [60], [86]).

The first task the plurality (Kiefel CJ, Bell and Gageler JJ) undertook was to identify with precision the jurisdiction of the Family Court. The plurality concluded that the right in issue in each of the property settlement proceedings and the spousal



maintenance proceedings was a right that is created by a statutory provision which confers a discretionary power on the Family Court to make an order of the kind that is sought, specifically, s 79(1) and s 74(1) of the Act respectively. Their Honours found that because the foundation of the rights lay in statutory orders under the Act (at [26]):

*...it is apparent that the ruling made by the Dubai Court cannot give rise to a res judicata in the strict sense in which that term continues to be used in Australia.*

*The rights created by ss 79(1) and 74(1) cannot 'merge' in any judicial orders other than final orders of a court having jurisdiction under the Act to make orders under those sections. The rights of the wife to seek orders under ss 79(1) and 74(1) continue to have separate existence unless and until the powers to make those orders are exercised on a final basis and thereby exhausted.*

The plurality proceeded to explore two potentially applicable forms of estoppel: 'cause of action' estoppel (also referred to as 'claim estoppel') and *Anshun* estoppel.

Claim estoppel would operate to preclude assertion by the wife of any right the non-existence of which was asserted by the husband in the Dubai proceedings and finally determined by the ruling of the Dubai Court. *Anshun* estoppel would preclude assertion by the wife of any right

which she could have asserted in the Dubai proceedings but which she chose to refrain from asserting in circumstances which made that choice unreasonable in the context of the Dubai proceedings.

The plurality found that the husband failed 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 her in the Dubai proceedings, and therefore could not establish an *Anshun* estoppel (at [31]). Their Honours also found that, more fundamentally, he failed 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 was found to have any operation (at [32]).

In relation to the property proceedings, the plurality found that the property rights legally capable of being put in issue in the Dubai proceedings were limited to the entitlement of the wife to obtain deferred dowry from the husband and the entitlement of either of them to a share in such real property in Dubai as she or he might have participated with the other in developing (at [40]). Those rights 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.

In relation to the spousal maintenance proceedings, the plurality found that there was a substantial difference in the coverage of the rights under the Personal Status Law applicable in the Dubai Court and the Act: 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; the latter being available to be claimed beyond that date. There was therefore no foundation for the operation of *Anshun* estoppel (at [42]).

### Gordon J

Gordon J agreed with the plurality in the orders to be made but for different reasons. Her Honour observed that the preclusive effect of a foreign judgment is fixed by what was decided in the foreign court (at [54]). Her Honour found (at [56]):

*The fact that issues about altering the interests which the parties had in property outside the UAE could not be, and therefore were not, raised in the Dubai Court means that the ruling of the Dubai Court raised no res judicata or cause of action estoppel. Further, the fact that these issues could not be raised in the Dubai Court, either specifically or as part of a more general question about property settlement, means that no issue estoppel arises. And finally, the fact that neither party could have asked the Dubai Court to alter the interests which the parties had in property outside the UAE means it was not unreasonable for the wife not to have made such a claim in the Dubai Court and no Anshun estoppel arises.*

Her Honour also found that because the Dubai Court had not decided any issues regarding spousal maintenance no res judicata, cause of action estoppel, issue estoppel or *Anshun* estoppel can arise.

### Edelman J

Edelman J likewise agreed in the orders to be made by the Court. His Honour characterised the question to be answered as whether the husband's claim, as resolved by the Dubai Court, should 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? His Honour concluded that the proper characterisation is that the claim resolved by the Dubai Court was only for the dissolution of the marriage (at [64]).

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