HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 10 Feb 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S142/2022
File Title:	Barnett v. Secretary, Department of Communities and Justice
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellant
Date filed:	10 Feb 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BARNETT**
Appellant

and

SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE
Respondent

APPELLANT'S OUTLINE OF ORAL 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: Outline of the propositions to be advanced in oral argument

A. 'First Error' of extending issue estoppel backwards in time

2. The first requirement of an issue estoppel is that 'the same question has been decided': AS [53]. The respondent bore the onus to prove this: AS [56]. Issue estoppels must be clear and certain, and the party asserting preclusion must prove that the 'precise', 'identical' issue was fought and determined: AS [71]-[72]. The relevant date under Australian law is 30 August 2020: regs 14(1)(a)(i), 16(1)(c) and 16(1A)(c) (JBA 21). The only part of the record of the Irish Court in evidence below was the s 6A and 6F orders (AFM 147, 277), and the applications for them (AFM 301, 144). They were not proceedings under the Convention, let alone the Australian Regulations.

3. Given s 6A(1) (JBA 124), the s 6A order suggests the father was not a guardian when he applied for it on 3 September, and was only appointed a guardian on 29 October 2020: AS [87]. The s 6F order bears only a date of 12 April 2021 and declares the father 'is a guardian by virtue of the circumstances set out in section 2(4A) or section 6B(3)'.

4. The primary judge found that the Irish Court's finding as at 12 April 'would have to be based' on events prior to 30 August 2020 (J 93) and 'infer[red]' that a finding of satisfaction of s 2(4A) had been made as at that date (J 91), and accordingly 'the issue of the father's rights of custody' at that date could not be 'redetermine[d]' (J 119): AS [30]-[43]. The Full Court found no error in the primary judge's reasoning on issue estoppel, saying the Irish court 'must have' reasoned in that way (AJ [55], [68]): AS [44]-[52].

5. That was in error. It is not permissible to speculate or assume how the Irish court had reasoned, or what it had found: AS [66]-[69]; Reply [11]-[13]. One cannot take a finding on the face of an order, and combine it with an assumption or further evidence to extend any issue estoppel to create a new finding: AS [67]; Reply [14]-[15]. The evidence before the courts below was insufficient to justify the course taken: AS [70], [73]-[74].

B. ‘Second Error’ of including a new question of Irish law

6. The other part of the primary judge’s conclusion that the ‘issue as to the father’s status as a guardian’ could not be redetermined (J 115(b), 119) involved applying the extended ‘30 August’ finding to a proposition of Irish law to establish an enlarged issue estoppel: AS [76]. That proposition was the effect in Irish law of a finding that a person had satisfied the cohabitation requirements in s 2(4A), which was filled in by a finding that Irish law contained ‘automatic rights of guardianship’: AS [77]-[78].

7. Again, the first reason that this was in error was the enlargement of the issue estoppel. The s 6F order did not contain that reasoning or conclusion, and one cannot combine an (inferred) finding of satisfaction of s 2(4A) with a finding of Irish law to hold that the s 6F order produced an issue estoppel that the father was a guardian as at 30 August 2020.

8. The second reason is that in making that finding, the primary judge went beyond the scope of the preliminary issue that was being contested. What was being fought was the existence and extent of the res judicata, issue estoppel and any abuse of process asserted by the respondent: AS [79]; Reply [3]-[9]. That was to proceed without cross-examination. It did not include whether the father was a guardian under Irish law on 30 August if the declaration did not have that direct effect (ie supposed ‘automatic rights’): AFM 76, T32.17-40. The mother fought it on the basis that neither the s 6A nor s 6F orders had retrospective effect to create rights earlier than the dates they were made. Even if the extension of the s 2(4A) finding to 30 August 2020 was correct, once it was clear that the s 6F order said nothing more than the father is a guardian from 12 April 2021, the separate issue was not determinative of the proceeding, and the parties should have had an opportunity to litigate the issue of the effect of that finding in Irish law.

9. There was a contest in the expert evidence as to whether the father had any rights under Irish law that could amount to rights of custody prior to the s 6F declaration being made. In other words, just because the father came within the definition of ‘father’ in s 2(4A) he did not automatically become a guardian with all rights needed to satisfy r 16(1A).

This included issues of Irish statutory construction: AS [82]. The experts agreed that the correct interpretation of the legislation was 'difficult to understand, and the s 6F jurisdiction was 'relatively untested' in Ireland: AS [80]-[82]. The father's expert did not advance an unequivocal view as to 'rights of custody', nor use or endorse 'automatic rights to guardianship': AS [83]-[87]. The primary judge should not have proceeded to make findings without full testing of the experts, including cross-examination: AS [88].

C. Lack of privity between the respondent and the father

10. Privity is the third requirement for an issue estoppel to exist: AS [53]. It became dispositive after the Full Court accepted that no res judicata existed (AJ [47]-[49]), leaving issue estoppel as the only basis adverse to the appellant.

11. The respondent is not the father. To gain the benefit of an issue estoppel, there must be privity between them. Privity was contested at trial and on the appeal, and it was conceded not to matter for res judicata because the Irish court's decision was in rem: AS [55]; Reply [17]-[18]. That fell away when the Full Court accepted the s 6F order only spoke prospectively, as only orders, not findings, are 'in rem': AS [56]. The Full Court did not address the submissions at AFM 80, T36.19-34. The point is open in this court: AS [56].

12. Privity must be assessed against the bespoke statutory regime. Both the father and the respondent have rights to apply for a 'return order' under reg 14(1): AS [57]-[59]. Multiple applications are permitted under reg 14A. The respondent was not claiming through the father, nor suing in the same capacity, and does not have the same legal interest as the father: AS [58]. It was acting via a request from the Irish Central Authority, suing as the (referred) Australian central authority. It appears that the father would not be bound by a finding on a case brought by the respondent that the respondent had not established that the father was a guardian as at 30 August 2020: AS [60].

13. There is no element of representation or representative capacity. To the contrary, the respondent (and other Australian Central Authorities) have their own defined functions to gain benefits for Australia under the Convention: AS [61]. Any finding of privity would burden the father in any proceeding in Australia still open to him, including in a *parens patriae* jurisdiction of the courts below: AS [59].

Dated: 9 February 2023

.....
Ben Kremer

.....
Ada Lim