HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, GORDON AND EDELMAN JJ

CLAYTON APPELLANT

AND

BANT RESPONDENT

Clayton v Bant
[2020] HCA 44
Date of Hearing: 9 September 2020
Date of Judgment: 2 December 2020
B21/2020

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 2, 3 and 4 of the orders made by the Full Court of the Family Court of Australia on 7 November 2019 as amended on 15 May 2020 and, in their place, order that the appeal to that Court be dismissed.*

On appeal from the Family Court of Australia

Representation

D F Jackson QC with A-M McDiarmid and S F Gaussen for the appellant (instructed by Ferguson Legal Solicitors)

B W Walker SC with M W Todd for the respondent (instructed by Watts McCray Lawyers)

CATCHWORDS

Clayton v Bant

Family law – Foreign divorce – Property settlements – Spousal maintenance – Res judicata – Where appellant wife and respondent husband married in Dubai in 2007 and lived partly in Australia and partly in United Arab Emirates – Where wife and husband separated in 2013 with wife and child remaining in Australia – Where wife commenced proceedings in Family Court of Australia seeking parenting orders under *Family Law Act 1975* (Cth) ("Act") – Where proceedings later amended to also seek orders for spousal maintenance and property settlement under ss 74 and 79 of Act – Where husband commenced divorce proceedings in Personal Status Court of Dubai ("Dubai Court") – Where ruling of Dubai Court granted husband "irrevocable fault-based divorce" and ordered wife to repay amount of advanced dowry and costs – Where husband sought permanent stay of property settlement and spousal maintenance proceedings on basis of res judicata, cause of action estoppel and/or principle in *Henderson v Henderson* (also known as "*Anshun* estoppel") – Where primary judge dismissed application for stay – Where Full Court of Family Court permanently stayed property settlement and spousal maintenance proceedings – Whether ruling of Dubai Court had effect of precluding wife from pursuing property settlement and spousal maintenance proceedings against husband in Family Court by reason of res judicata, cause of action estoppel and/or *Anshun* estoppel.

Words and phrases – "advanced dowry", "alimony", "*Anshun* estoppel", "cause of action", "cause of action estoppel", "claim", "claim estoppel", "divorce", "estoppel", "*Henderson* extension", "irrevocable fault-based divorce", "issue estoppel", "merger", "permanent stay", "Personal Status Court of Dubai", "Personal Status Law", "preclusion", "property settlement", "res judicata", "spousal maintenance".

Family Law Act 1975 (Cth), ss 74, 79.

1 KIEFEL CJ, BELL AND GAGELER JJ. The question in this appeal, from a judgment of the Full Court of the Family Court of Australia[1] on appeal from a judgment of a single judge of that Court[2], is whether a ruling made by the Personal Status Court of Dubai ("the Dubai Court") in divorce proceedings by the respondent husband against the appellant wife ("the Dubai proceedings") has the effect of precluding the wife from pursuing property settlement proceedings and spousal maintenance proceedings against the husband under the *Family Law Act 1975* (Cth) ("the Act"). Contrary to the view of the Full Court, the ruling does not have that preclusive effect.

Background

2 The wife is a citizen of Australia. The husband is a citizen of the United Arab Emirates ("UAE"). They met and commenced living together in 2006 in Dubai. There they married in 2007 in a Sharia court.

3 Marriage under the Personal Status Law of the UAE is a formal contract in which provision can be made for a husband to pay dowry to a wife. The written contract of marriage between the husband and the wife here provided for the husband to pay "advanced" dowry of 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.

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

5 The husband and wife separated in 2013. Since separation, the wife and child have resided in Australia.

6 In 2013, the wife instituted proceedings against the husband in the Family Court seeking parenting orders in respect of the child. The proceedings were amended to seek orders for property settlement and spousal maintenance.

7 In 2014, the husband instituted the Dubai proceedings against the wife in the Dubai Court seeking divorce from the wife. He also sought in those proceedings the "dropping", in the sense of extinguishment, of "all her marital

---

1 *Bant & Clayton [No 2]* (2019) FLC ¶93-925.

2 *Clayton & Bant* [2018] FamCA 736.

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.

8 In 2015, the Dubai Court made a ruling in the Dubai proceedings after receiving and adopting a report of two arbitrators. The report of the arbitrators appears to have been based on evidence presented by the husband combined with information voluntarily provided to the arbitrators by the wife outlining events from her perspective. The ruling granted the husband an "irrevocable fault-based divorce", the effect of which was to dissolve the marriage. The ruling went on to order the wife 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.

9 The Dubai Court's written reasons for the ruling included a statement that has 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 evidence does not address what might have been meant by the word translated as "untimely".

10 The Personal Status Law of the UAE[3] makes limited provision in relation to the property of parties to a marriage and in relation to the obligation of a husband to pay alimony and deferred dowry to a wife.

11 In relation to property, the Personal Status Law provides[4]:

> "A woman having reached the age of full capacity is free to dispose of her property and the husband may not, without her consent, dispose thereof; each one of them has independent financial assets. If one of the two participates with the other in the development of a property, building a dwelling place or the like, he may claim from the latter his share therein upon divorce or death."

12 Except for the second sentence of that quoted provision, and for the capacity of a wife to be deprived of the deferred dowry if found to be at fault in divorce

---

3 Federal Law No 28 of 2005 on Personal Status.

4 Article 62.1 of the Personal Status Law.

proceedings, the Personal Status Law makes no provision at all for the alteration of property interests of the parties to a marriage in the event of a breakdown of the marriage or divorce. Such provision as is made by the second sentence of the quoted provision is limited to allowing a wife or husband upon divorce to claim a share in real property which she or he has participated with the other in developing.

13 There appears to be no dispute between the parties that a claim to a share in any real property located in Dubai which she had participated with the husband in developing could have been made by the wife in the Dubai proceedings. Whether any such property actually existed in Dubai is not clear from the evidence. What is clear is that property elsewhere lay beyond the scope of the Dubai proceedings. The Dubai Court has no jurisdiction in relation to property located outside the territorial limits of the UAE.

14 In relation to alimony, the Personal Status Law gives a wife an ongoing entitlement to be paid living expenses by her husband during the term of their marriage[5]. The entitlement is enforceable as a debt for up to three years afterwards[6]. The ongoing entitlement apparently ceases upon an irrevocable divorce taking effect if the wife is not then pregnant[7].

15 There appears again to be no dispute between the parties that the wife could have made a claim to alimony in the Dubai proceedings up to the date of the irrevocable fault-based divorce taking effect. The parties differ as to whether the refusal by the Dubai Court to deal with the husband's request to extinguish the wife's right to alimony left open the possibility of that Court still entertaining an application by the wife for alimony should she choose to make one. Nothing turns on that difference.

Permanent stay of the proceedings in the Family Court

16 The husband applied to the Family Court for a permanent stay of the property settlement proceedings and spousal maintenance proceedings on the basis that the ruling of the Dubai Court "operates as a bar" to those proceedings "by virtue of the operation of the principles of res judicata/cause of action estoppel".

---

5 Articles 55 and 63-65 of the Personal Status Law.

6 Article 67 of the Personal Status Law.

7 Article 69 of the Personal Status Law.

17 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"[8]. In relation to the spousal maintenance proceedings, her Honour dismissed the application 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'"[9].

18 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 went on to order a permanent stay of the property settlement proceedings and of the spousal maintenance proceedings.

19 In relation to the property settlement proceedings, their Honours 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 their Honours referred to as a "res judicata estoppel"[10]. Their Honours drew in that respect[11] on observations in *Henry v Henry*[12] and *In the Marriage of Caddy and Miller*[13] to identify the common "cause of action" as "the financial consequence to the parties arising from the breakdown of the matrimonial relationship"[14]. Referring to *Henderson v Henderson*[15], their Honours went on to accept an argument of the husband 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

---

8 *Clayton & Bant* [2018] FamCA 736 at [194].

9 *Clayton & Bant* [2018] FamCA 736 at [196].

10 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,289 [25].

11 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,288 [20].

12 (1996) 185 CLR 571 at 591-592.

13 (1986) 84 FLR 169.

14 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,289 [25].

15 (1843) 3 Hare 100 at 115 [67 ER 313 at 319].

have participated with the husband in developing also precluded her pursuit of the property settlement proceedings by operation of the "*Henderson* extension"[16].

20 In relation to the spousal maintenance proceedings, their Honours 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[17]. Implicitly equating spousal maintenance with alimony, and alluding again to *Henderson v Henderson*, their Honours concluded that the failure of the wife to press the claim for alimony meant that the wife was precluded from pursuing a claim for spousal maintenance by operation of the "*Henderson* extension"[18].

Rights in issue in the proceedings in the Family Court

21 Before turning to the identification and operation of potentially applicable principles of preclusion, there is a need to 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. Precision in that respect is necessary in order to be clear about the source and nature of the rights in issue in those proceedings.

22 The jurisdiction of the Family Court to hear and determine the proceedings is that conferred by ss 31(1)(a) and 39(5)(a) of the Act. The jurisdiction is relevantly with respect to "proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage"[19] and with respect to "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"[20]. Proceedings of those descriptions can be instituted under the Act if either party to a marriage is an Australian citizen, is ordinarily

---

16 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,289 [24], [29].

17 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,290 [36]-[37].

18 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,290 [37].

19 Section 4(1) of the *Family Law Act* (para (c) of the definition of "matrimonial cause").

20 Section 4(1) of the *Family Law Act* (para (ca)(i) of the definition of "matrimonial cause"). See *Stanford v Stanford* (2012) 247 CLR 108 at 118-119 [29].

resident in Australia or is present in Australia at the time of institution[21]. By force of s 31(2), the jurisdiction of the Family Court extends to persons and things outside Australia.

23 The right in issue in the property settlement proceedings that have been instituted by the wife is the right conferred on the wife, as a party to the marriage, by s 79(1) of the Act. That right is to obtain, in the "wide" though not "unlimited" discretion[22] of the Family Court, an order altering the interests of the wife and the husband in all property to which either or both of them are entitled if that Court "is satisfied that, in all the circumstances, it is just and equitable to make the order" under s 79(2) taking into account the matters referred to in s 79(4). Those matters extend beyond any financial or other contribution that either of them may have made to the acquisition, conservation or improvement of property[23] to include, amongst other things, the contribution made by the wife to the welfare of the family[24] as well as the matters referred to in s 75(2) so far as they are relevant[25].

24 The right in issue in the spousal maintenance proceedings that have been instituted by the wife is the right conferred on the wife, as a party to the marriage, by s 74(1) of the Act. That right is to obtain, in the discretion of the Family Court, such order for the provision of maintenance by the husband as that Court considers proper having regard to the matters referred to in s 75(2). Those matters include in the context of the marriage having ended in divorce a standard of living that in all the circumstances is reasonable[26], the duration of the marriage and the extent to which the marriage has affected the earning capacity of the wife[27], the need to

---

21 Section 39(4)(a) and (4A) of the *Family Law Act*.

22 *Norbis v Norbis* (1986) 161 CLR 513 at 521.

23 Section 79(4)(a) and (b) of the *Family Law Act*.

24 Section 79(4)(c) of the *Family Law Act*.

25 Section 79(4)(e) of the *Family Law Act*.

26 Section 75(2)(g) of the *Family Law Act*.

27 Section 75(2)(k) of the *Family Law Act*.

protect the wife as a party who wishes to continue her role as a parent[28] and the terms of any order made or proposed to be made under s 79[29].

25 Thus, the right in issue in each of the property settlement proceedings and the spousal maintenance proceedings is 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. The justiciable controversy as to whether such an order should be made constitutes the matter defining the jurisdiction of the Family Court[30].

The principles of preclusion and their application

26 Once it is appreciated that the rights in issue in the property settlement proceedings and in the spousal maintenance proceedings are the statutory rights of the wife to seek orders under ss 79(1) and 74(1) of the Act, 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[31]. 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[32].

27 For the ruling made by the Dubai Court to preclude the wife from pursuing the property settlement proceedings and the spousal maintenance proceedings, that

---

28 Section 75(2)(l) of the *Family Law Act*.

29 Section 75(2)(n) of the *Family Law Act*.

30 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 155, 165; *Hooper v Hooper* (1955) 91 CLR 529 at 538; *Vitzdamm-Jones v Vitzdamm-Jones* (1981) 148 CLR 383 at 411.

31 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 516 [20]; *Zetta Jet Pte Ltd v The Ship Dragon Pearl [No 2]* (2018) 265 FCR 290 at 294 [15]-[16], 296 [24]-[26].

32 *Mullane v Mullane* (1983) 158 CLR 436 at 440; *In the Marriage of Florie* (1988) 90 FLR 158 at 165-167; *Hickey and Hickey and Attorney-General for the Commonwealth of Australia (Intervener)* (2003) FLC ¶93-143 at 78,387-78,388 [44]-[48]; *Strahan v Strahan* (2009) 241 FLR 1 at 25-28 [106]-[113].

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.

28 Two forms of estoppel are potentially applicable. One is that sometimes referred to as "cause of action" estoppel[33]. The terminology has been recognised as problematic given the range of senses in which the expression "cause of action" tends to be used[34]. The relevant sense is that of title to the legal right established or claimed[35]. Especially in a statutory context such as the present, the form of estoppel would be better referred to by the more generic description of "claim" estoppel[36]. The other form of estoppel is most commonly referred to in Australia as "*Anshun* estoppel", after *Port of Melbourne Authority v Anshun Pty Ltd*[37], although the Full Court chose to refer to it as the "*Henderson* extension".

29 Both of those potentially applicable forms of estoppel operate to preclude assertion of rights by parties to proceedings. But they do so in ways not adequately differentiated in the reasoning of the Full Court. In the context of the property settlement proceedings and the spousal maintenance proceedings, claim estoppel would operate to preclude assertion by the wife of any right non-existence of which was asserted by the husband in the Dubai proceedings and finally determined by the ruling of the Dubai Court[38]. *Anshun* estoppel would preclude assertion by the wife of any right which she could have asserted in the Dubai proceedings but which

---

33 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517 [22].

34 See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 610-612; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508.

35 *Blair v Curran* (1939) 62 CLR 464 at 532; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 611. See also *Baltimore Steamship Co v Phillips* (1927) 274 US 316 at 321, quoted in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 514.

36 cf Casad and Clermont, *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (2001) at 9-10.

37 (1981) 147 CLR 589.

38 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517 [22].

she chose to refrain from asserting in circumstances which made that choice unreasonable in the context of the Dubai proceedings[39].

30 As the party seeking the permanent stay in the Family Court, the husband bore the onus of establishing a factual foundation for the operation of one or other of those forms of estoppel. That required him to prove that the ruling of the Dubai Court had the meaning and determinative operation for which he contended. For that purpose, it required him to prove the content of applicable UAE law. In the case of *Anshun* estoppel, establishing a basis for the relief he sought also required him 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[40].

31 In the manner in which the application for the permanent stay appears to have been conducted, the husband did not deign to prove the unreasonableness of the choice made by the wife. His case for the existence of *Anshun* estoppel seems to have been put on the basis 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. That approach to *Anshun* estoppel has rightly been said to involve "fundamental error"[41]. As was pointed out in *Port of Melbourne Authority v Anshun Pty Ltd*, "there are a variety of circumstances ... why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings eg expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few"[42].

32 But the problems with the husband's reliance on estoppel are not confined to his failure to engage with the unreasonableness element of *Anshun* estoppel. His more fundamental problem lies 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

---

39 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517-518 [22].

40 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-603.

41 *Champerslife Pty Ltd v Manojlovski* (2010) 75 NSWLR 245 at 247 [4].

42 (1981) 147 CLR 589 at 603.

proceedings and finally determined by the Dubai Court. Absent such a correspondence of rights, neither form of estoppel can have any operation.

33 The Full Court referred in traditional terms to cause of action estoppel as requiring an "identity" of causes of action[43]. The Full Court nonetheless proceeded on the basis that cause of action estoppel can preclude assertion of a right that is not identical to a right asserted and determined in earlier proceedings. The Full Court also implicitly proceeded on the basis that *Anshun* estoppel can similarly preclude assertion of a right that is not identical to a right which could have been asserted and determined in earlier proceedings. To that extent, the Full Court was correct.

34 Founded on the twin policies of ensuring finality in litigation (thereby promoting respect for and efficient use of courts as well as avoiding inconsistent judgments) and of ensuring fairness to litigants (by sparing them the stress and expense of duplicative proceedings)[44], the focus of the common law doctrine of estoppel is on "substance rather than form"[45]. The doctrine looks not for absolute identity between the sources and incidents of rights asserted or capable of being asserted in consecutive proceedings. The doctrine looks rather for substantial correspondence between those rights. Enough for its operation is that the rights are of a substantially equivalent nature and cover substantially the same subject matter. A common law right to damages for negligent misstatement has been held to correspond to a statutory right to damages for misleading and deceptive conduct[46],

---

43 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,288 [19]. See Handley, *Spencer Bower and Handley: Res Judicata,* 5th ed (2019) at [7.05]-[7.13], [21.03]-[21.05].

44 *Jackson v Goldsmith* (1950) 81 CLR 446 at 466; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 516-517 [21]. See Vestal, "Rationale of Preclusion" (1964) 9 *Saint Louis University Law Journal* 29 at 31-35; Campbell, "Res Judicata and Decisions of Foreign Tribunals" (1994) 16 *Sydney Law Review* 311 at 311.

45 *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 418. See also *Champerslife Pty Ltd v Manojlovski* (2010) 75 NSWLR 245 at 267 [136], quoting *MCC Proceeds Inc v Lehman Bros International* (*Europe*) [1998] 4 All ER 675 at 695; *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 454; *Republic of India v India Steamship Co Ltd* [1993] AC 410 at 420-421.

46 *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 422, not challenged on appeal (1993) 43 FCR 510 at 520.

for example, whereas a common law right to damages for personal injury has been held not to correspond to a common law right to damages for property damage arising from the same negligent conduct given that damage is a necessary element of a cause of action in negligence[47].

35 The common law of Australia has not gone down the path that has of late been taken in the United States[48], of treating rights precluded from assertion in subsequent proceedings as coterminous with the "transaction" which earlier proceedings concerned. The transactional approach does not so much answer an estoppel problem as reframe the question from "what are the rights?" to "what is the transaction?". "General adoption of a transactional approach", it has been observed, "will neither change resolution of the easy problems nor ease resolution of the difficult problems."[49]

36 The transactional approach should not be adopted in Australia. It would blur the carefully hewn distinction between claim estoppel and *Anshun* estoppel. It would diminish the significance of the unreasonableness element of *Anshun* estoppel. Our approach demands a more granular analysis.

37 The Full Court was therefore wrong to conclude that the wife was estopped from asserting her right to an order under s 79(1) of the Act in the property settlement proceedings on the basis that the ruling made by the Dubai Court determined "the financial consequence to the parties arising from the breakdown of the matrimonial relationship". 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.

38 *Henry v Henry* does not support the Full Court's broad-brush transactional approach. There separate proceedings had been commenced by a husband in the Family Court and by a wife in the Court of First Instance of Monaco.

---

47 *Jackson v Goldsmith* (1950) 81 CLR 446 at 467, explaining *Brunsden v Humphrey* (1884) 14 QBD 141.

48 eg *Lucky Brand Dungarees Inc v Marcel Fashions Group Inc* (2020) 140 S Ct 1589 at 1594-1595. See American Law Institute, *Restatement of the Law Second: Judgments* (1982), §24. See Casad and Clermont, *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (2001) at 62-82.

49 Wright and Miller, *Federal Practice and Procedure*, 3rd ed (2016), vol 18, §4407.

The observation of the plurality in this Court that "disputes with respect to property, maintenance and the custody of children will ordinarily be but aspects of an underlying controversy with respect to the marital relationship" was not made in the context of considering whether the proceedings in the Family Court were estopped by a final judgment of any other court but in the context of considering whether the Family Court was a clearly inappropriate forum given that the proceedings in the Court of First Instance of Monaco were ongoing[50]. Even in that context, the plurality made clear that "it will be relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy"[51].

39 *In the Marriage of Caddy and Miller* provides even less support for the Full Court's characterisation of the preclusive effect of the ruling made by the Dubai Court. There the Full Court correctly held that a former wife was estopped from asserting a right to an order under s 79(1) of the Act that her former husband transfer to her certain real property in Australia. The foundation for the estoppel was a prior order of the Superior Court of California which had been made in matrimonial proceedings which she herself had instituted and which had finally determined the interests of both parties in real and personal property consequent upon the dissolution of their marriage. The order specifically confirmed their respective interests in real property in Australia, including the real property in respect of which she was seeking the order under s 79(1). Critical to the outcome in that case was that the jurisdiction exercised by the Superior Court in making the order extended to real property in Australia and that the jurisdiction brought with it power on the part of the Superior Court not merely to declare the existing property rights of the parties to a marriage but also to alter interests in property consequent upon dissolution of the marriage in a manner not dissimilar to s 79(1) albeit that Californian law mandated an equal division of property[52].

40 The position here is quite different. 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. 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. 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),

---

50 (1996) 185 CLR 571 at 591-592.

51 (1996) 185 CLR 571 at 592.

52 (1986) 84 FLR 169 at 175.

which encompasses all real and personal property of either or both parties to the marriage wherever located.

41 For those reasons, the ruling of the Dubai Court would have been incapable of founding a cause of action or claim estoppel operating to preclude the wife from asserting a right to seek an order under s 79(1) of the Act even if the ruling had determined the non-existence of an entitlement to a share in some real property in Dubai, which it plainly did not. For the same reasons, the choice of the wife not to claim a share in such real property as she might have participated with the husband in developing in Dubai would have been 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 proceedings.

42 Turning to the spousal maintenance proceedings, there is 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 has under s 74(1) of the Act to seek an order for the provision of maintenance by the husband. The circumstances that the quantum might be different or that it might be informed by different discretionary considerations is neither here nor there. There appears nonetheless to be a substantial difference in the coverage of the two rights: 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. The wife's choice not to claim alimony in the proceedings instituted by the husband in the Dubai Court could in those circumstances provide no 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.

Disposition

43 The appeal must be allowed with costs. The orders of the Full Court other than the order granting leave to appeal from the judgment of Hogan J and those dealing with costs must be set aside. In their place, the appeal from the judgment of Hogan J must be dismissed.

44 The circumstance that the property settlement proceedings and the spousal maintenance proceedings have now been pending for nearly eight years cannot go unremarked. As this Court has had occasion to note in the past[53], the Family Court is obliged to ensure that proceedings under the Act are "not protracted"[54].

---

53 See *Hall v Hall* (2016) 257 CLR 490 at 496 [2].

54 Section 97(3) of the *Family Law Act*.

The delays that have occurred in the conduct of the proceedings to date, including a delay of over three and a half 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 four and a half years for the determination of an application for interim orders), are unacceptable. To be expected is that the proceedings will now be pursued by the parties under the supervision of the Family Court with appropriate expedition.

45 GORDON J. The husband, an Emirati, and the wife, an Australian, married in Dubai and had a child. The husband owns significant real property throughout the world including in the United Arab Emirates ("the UAE"), France, Jordan, Thailand and Australia. The wife owns real property in Australia. After some years, they separated and the wife returned to Australia with the child. After the wife instituted proceedings against the husband in the Family Court of Australia seeking, among others, orders for property settlement and spousal maintenance, the husband instituted proceedings in the Second Personal Status Family Circuit of the Dubai Court ("the Dubai Court") seeking a divorce from the wife as well as extinguishment of "all [of 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".

46 The trial judge found that the *Federal Law No 28 of 2005 on Personal Status* (UAE) ("the PSL") (unlike the *Family Law Act 1975* (Cth)[55]) makes no provision for the alteration of the interests of the parties in real property located outside the UAE[56]. In relation to alimony, the trial judge found that "the law of Dubai is that a wife is entitled to alimony ... if she is doing her job in the family. ... [T]he circumstances in which the alimony to a wife is forfeited include if she does not travel with her husband, or if she abandons her home"[57]. The trial judge found that, under Art 69 of the PSL, "the law of Dubai is that, in the case of a non-retractable divorce, only the costs of 'sheltering' (which I interpret to mean accommodation) would be payable by the [husband] to the [wife] during the waiting period ('idda') following the making of the divorce order"[58], but her Honour did not make a finding about any entitlement to alimony in a "non-retractable divorce". The trial judge further observed that "the law of Dubai provides for the payment of alimony in certain prescribed circumstances and for certain prescribed periods of time"[59].

47 The Dubai Court granted the husband an "irrevocable fault-based divorce" and ordered the wife to pay AED 100,000 (being the amount of an advanced dowry) to the husband and to pay the husband's costs. In relation to the husband's

---

55 *Family Law Act*, s 79(1), read with s 31(2).

56 *Clayton & Bant* [2018] FamCA 736 at [192].

57 *Clayton & Bant* [2018] FamCA 736 at [187]. The trial judge found that "[o]n the uncontested evidence, either both or one of these arguably occurred, according to the law of Dubai, at the parties' separation in July 2013 in Australia": at [131].

58 *Clayton & Bant* [2018] FamCA 736 at [190].

59 *Clayton & Bant* [2018] FamCA 736 at [196]. cf *Family Law Act*, s 74(1).

request to "drop off" the wife's deferred dowry and her alimony, the Dubai Court said that these subjects were "untimely" and that the wife "did not demand them and hence there [was] no need to make reference to them in the text".

48 The Full Court of the Family Court of Australia allowed the husband's appeal from the trial judge, who had refused the husband a permanent stay of the property settlement and spousal maintenance proceedings, on the basis that the ruling of the Dubai Court operates as a bar to the property settlement proceedings because of res judicata and *Anshun* estoppel and, in relation to the spousal maintenance proceedings, on the basis that, the Dubai Court having finally determined "alimony", the wife could not bring a claim for spousal maintenance because of *Anshun* estoppel. I agree with Kiefel CJ, Bell and Gageler JJ that the wife's appeal to this Court must be allowed with costs but for different reasons.

49 Other background facts and procedural history, which I gratefully adopt, are set out in the reasons of Kiefel CJ, Bell and Gageler JJ[60].

50 The rendering of a final judgment in an adversarial proceeding has consequences[61]. Those consequences may be recognised as one or more of res judicata, cause of action estoppel, issue estoppel, and *Anshun*[62] estoppel. The principles to be applied are recorded in the reasons of four members of this Court in *Tomlinson v Ramsey Food Processing Pty Ltd*[63]. This case calls for no reconsideration of those principles. Although the passage is long, it is as well to set it out fully. Their Honours first explained res judicata as follows[64]:

> "An exercise of judicial power ... involves 'as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons'[65]. The rendering of a final judgment in that way 'quells' the

---

60 Reasons of Kiefel CJ, Bell and Gageler JJ at [2]-[9], [13], [15]-[20].

61 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 516 [20].

62 After *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

63 (2015) 256 CLR 507 at 516-518 [20]-[22].

64 *Tomlinson* (2015) 256 CLR 507 at 516 [20].

65 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

> controversy between those persons[66]. The rights and obligations in controversy, as between those persons, cease to have an independent existence: they 'merge' in that final judgment[67]. That merger has long been treated in Australia as equating to 'res judicata' in the strict sense[68]."

51 Their Honours then addressed estoppel as a form of preclusion. They explained the common law doctrine and the three forms of estoppel recognised in Australia in these terms[69]:

> "Estoppel in relation to judicial determinations is of a different nature. It is a common law doctrine informed, *in its relevant application*, by similar considerations of finality and fairness[70]. ... It operates ... as a rule of law, to preclude the assertion of a right or obligation or the raising of an issue of fact or law[71].
>
> Three forms of estoppel have now been recognised by the common law of Australia as having the potential to result from the rendering of a final judgment in an adversarial proceeding.
>
> The first is sometimes referred to as '*cause of action estoppel*'[72]. Estoppel in that form operates to preclude assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment. It is largely redundant where the final judgment was rendered in the exercise of judicial

---

66 *Fencott v Muller* (1983) 152 CLR 570 at 608.

67 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 106; *Blair v Curran* (1939) 62 CLR 464 at 532; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 510.

68 *Blair* (1939) 62 CLR 464 at 532; *Jackson v Goldsmith* (1950) 81 CLR 446 at 466; cf *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at 180 [17].

69 *Tomlinson* (2015) 256 CLR 507 at 516-518 [21]-[22]. Paragraph breaks have been added.

70 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 604 [36]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34].

71 *Jackson* (1950) 81 CLR 446 at 466.

72 The expression was coined by Diplock LJ in *Thoday v Thoday* [1964] P 181 at 197-198.

power, and where res judicata in the strict sense therefore applies to result in the merger of the right or obligation in the judgment.

The second form of estoppel is almost always now referred to as '*issue estoppel*'[73]. Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment[74]. The classic expression of the primary consequence of its operation is that a 'judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies'[75].

The third form of estoppel is now most often referred to as '*Anshun* estoppel'[76], although it is still sometimes referred to as the 'extended principle' in *Henderson v Henderson*[77]. That third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim[78], or the raising of an issue of fact or law[79], if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding[80]. The extended form has been treated in

---

73 The expression was coined by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537 at 560-561.

74 *Blair* (1939) 62 CLR 464 at 510, 531-533; *Jackson* (1950) 81 CLR 446 at 466-467.

75 *Blair* (1939) 62 CLR 464 at 531. See also *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373 [21].

76 After *Port of Melbourne Authority* (1981) 147 CLR 589.

77 (1843) 3 Hare 100 [67 ER 313].

78 See, eg, *Port of Melbourne Authority* (1981) 147 CLR 589; *Bryant v Commonwealth Bank of Australia* (1995) 57 FCR 287 at 297-298; *Ling v The Commonwealth* (1996) 68 FCR 180 at 184, 188, 193.

79 *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290; [1926] AC 155.

80 *Port of Melbourne Authority* (1981) 147 CLR 589 at 598, 602-603.

> Australia as a 'true estoppel'[81] and not as a form of res judicata in the strict sense[82]. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument." (emphasis added)

As has been said, these principles are not in dispute and are to be applied.

52 This appeal concerns a foreign judgment. Common to all forms of preclusion concerning a foreign judgment, it is necessary to show that the foreign judgment relied on: (a) was by a court of competent jurisdiction; (b) was final and conclusive; (c) was on the merits[83]; (d) was between the same parties (or their privies); and (e) either quelled the same controversy (res judicata), determined the same cause of action (cause of action estoppel) or determined an issue that was raised, or that it would have been unreasonable not to have raised, in the proceeding (issue estoppel and *Anshun* estoppel)[84]. In this case, attention can be confined to the last requirement[85].

53 It is necessary to say something further about res judicata. In a case where there is no foreign element, the application of the doctrine of res judicata hinges on the controversy that has been quelled in the earlier proceeding. That controversy

---

81 *Rogers v The Queen* (1994) 181 CLR 251 at 275. See also *Port of Melbourne Authority* (1981) 147 CLR 589 at 601-602, rejecting the approach in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590.

82 *Chamberlain* (1988) 164 CLR 502 at 509, 512.

83 "On the merits" in the sense of "presentation of evidence and argument and the application of the law to the facts in a reasoned way" is not necessary for res judicata. Res judicata can arise due to a default judgment or a judgment by consent: see *Zetta Jet Pte Ltd v The Ship Dragon Pearl [No 2]* (2018) 265 FCR 290 at 300 [51]; see also 296 [27], citing *Chamberlain* (1988) 164 CLR 502, and 297 [32], citing *Blair* (1939) 62 CLR 464.

84 *Dicey and Morris on the Conflict of Laws*, 11th ed (1987), vol 1 at 431-433, citing *DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar (The Sennar (No 2))* [1985] 1 WLR 490 at 499; [1985] 2 All ER 104 at 110; *Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2]* [1967] 1 AC 853 at 917, 925, 967; see also 909-910, 935, 942-943. See also *Kuligowski* (2004) 220 CLR 363 at 373-374 [21]-[22]; *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 552 [18]; *Zetta Jet Pte Ltd* (2018) 265 FCR 290 at 294 [15], 295 [20].

85 See, eg, *Blair* (1939) 62 CLR 464 at 531-532; *Jackson* (1950) 81 CLR 446 at 466-467; *Chamberlain* (1988) 164 CLR 502 at 510.

may or may not be sufficiently identified by looking only to whether the claim was framed by reference to a particular statutory provision[86]. There will be cases where the quelling of the controversy necessarily determines rights and, in relation to that controversy, "creates a new charter by reference to which that question is in future to be decided"[87]. Where, as here, the decision of a foreign court is relied on as precluding the prosecution of claims made in an Australian court, it is always necessary for the party asserting preclusion to identify what claim was made in, or issue determined by, the foreign court[88].

54 The preclusive effect of a foreign judgment is fixed by what was decided in the foreign court. Only once that is identified does it become necessary or appropriate to consider what claims are made in the Australian court. Thus, as Gibbs CJ, Mason and Aickin JJ said in *Port of Melbourne Authority v Anshun Pty Ltd*, "res judicata comes into operation whenever a party attempts in a second proceeding to litigate a cause of action which has merged into judgment in a prior proceeding"[89]. That too is an inquiry about the character of the claim made and decided in the foreign court.

55 Here, 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 to those proceedings 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 a presently irrelevant exception, any property inside the UAE.

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

---

86 See, eg, *Victorian Stevedoring* (1931) 46 CLR 73 at 107-108; *Chamberlain* (1988) 164 CLR 502.

87 *Trade Practices Tribunal* (1970) 123 CLR 361 at 374.

88 See *Black v Yates* [1992] QB 526 at 530. cf *Jackson* (1950) 81 CLR 446 at 465; *Chamberlain* (1988) 164 CLR 502 at 506; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 518-519 [71]-[72].

89 (1981) 147 CLR 589 at 597.

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.

57 The wife's claim for spousal maintenance is a claim of a kind that was not 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, but was instead described as "untimely". It follows that the Dubai Court has not decided any controversy between the parties that bears upon spousal maintenance. Again, as with the property settlement proceedings, no res judicata, cause of action estoppel, issue estoppel or *Anshun* estoppel can arise.

58 Finally, it is necessary to say something about *Henry v Henry*[90]. That case was not concerned with preclusion of a kind in issue in these proceedings. It was concerned with whether an Australian court was a clearly inappropriate forum when determining whether a stay of the Australian proceedings should be granted because there were proceedings on foot in Monaco[91]. It was in that context, where there was no foreign judgment and thus no determination of any controversy or issue[92], that the plurality explained that "disputes with respect to property, maintenance and the custody of children will *ordinarily* be but aspects of an underlying controversy with respect to the marital relationship"[93] (emphasis added). That has nothing to say about the way in which an Australian court approaches an application for a stay by reason of the existence of a foreign judgment.

59 Moreover, the observation of their Honours in *Henry* that "[i]f separate proceedings are commenced between husband and wife in different countries, differences in procedure, in available remedies and in the substantive law with respect to marriage and divorce will ordinarily ensure that the proceedings are different in significant respects"[94] was to explain why "it [is] relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy"[95]. But that is not the relevant inquiry where there has been a foreign judgment and the contention is that the foreign judgment precludes an Australian court hearing and determining the controversy.

---

90 (1996) 185 CLR 571.

91 See *Henry* (1996) 185 CLR 571 at 586-588.

92 See *Henry* (1996) 185 CLR 571 at 593.

93 *Henry* (1996) 185 CLR 571 at 591-592.

94 (1996) 185 CLR 571 at 591.

95 (1996) 185 CLR 571 at 592.

60 Justice delayed is justice denied; it is an injustice. Why and how these property settlement proceedings and spousal maintenance proceedings remained not finally determined for over seven years was not explored or explained. I agree with Kiefel CJ, Bell and Gageler JJ that it is to be expected that the proceedings will be pursued by the parties under the supervision of the Family Court with appropriate expedition.

EDELMAN J.

Introduction

61 This appeal involves several different legal rules concerned with finality of litigation, variously described as res judicata, cause of action estoppel, issue estoppel, and *Anshun* estoppel[96]. The English translations of the Latin "res judicata" ("a thing decided") and the Norman French "estoppel" ("stopper, bung"), and a doctrine named after a case, do not provide much assistance in understanding the different legal rules. But when the dust is cleared from the different legal rules, a single and simple question arises on this appeal.

62 Ms Clayton and Mr Bant (both pseudonyms) were married in Dubai in 2007. Mr Bant owns considerable property in the United Arab Emirates, Paris, Jordan, Thailand and Australia. Ms Clayton owns personal property in Dubai and real property in Australia. They separated in 2013, following which Ms Clayton resided in Australia with their child. In July 2013, Ms Clayton sought property settlement and spousal maintenance orders in Australia as part of an extant application for parenting orders; and in September 2014 she commenced divorce proceedings in Australia. In June 2014, Mr Bant lodged caveats over two properties owned by Ms Clayton in Australia; and in July 2014, Mr Bant commenced divorce proceedings in Dubai. Ms Clayton did not take part in the Dubai proceedings.

63 In February 2015, the Second Personal Status Family Circuit of the Dubai Court delivered judgment and made orders in the Dubai proceedings. Mr Bant was granted an "irrevocable fault-based divorce", with Ms Clayton ordered to pay his costs and to repay an "advanced dowry" which Mr Bant had paid to her on formation of the contract of marriage. Under the Personal Status Law of the United Arab Emirates (Federal Law No 28 of 2005 on Personal Status), the Dubai Court had no jurisdiction with respect to property outside the territory of the Emirate and the Personal Status Law made no provision for the redistribution of any property anywhere in the world.

64 When the different finality doctrines are separated, and their principles understood, the main point in this appeal can be seen to concern whether Ms Clayton's property settlement and spousal maintenance proceedings are barred because they fall within the character of a claim that was pursued and decided by the Dubai Court. That point reduces to a simple question: should Mr Bant'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? The proper characterisation is that the

---

96 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

claim resolved by the Dubai Court was only for the dissolution of the marriage. Ms Clayton can maintain proceedings in Australia under the *Family Law Act 1975* (Cth) for property settlement and spousal maintenance.

Four relevant rules of finality

65 Four rules concerning finality are relevant to this appeal[97]. Although the principle of finality underlies all of them, and although each rule can apply where there is a final judgment on the merits[98] by a court of competent jurisdiction, the four rules should be kept separate.

Merger or res judicata in the strict sense

66 First, where a cause of action, or "the very right ... claimed"[99], has previously been established by a local court then at common law the "merger of the right or obligation in the judgment"[100] can be relied upon to preclude re-assertion of the extinguished right. The doctrine of merger is not merely based upon principles of finality. It exists because when a court order "replicates" the prior right[101], with added consequences such as enforcement mechanisms, the prior right "has no longer an independent existence"[102]. No action can be brought upon that extinguished right. The successful plaintiff's only right is a right on the local judgment, which is "of a higher nature"[103]. Since the expression "res judicata" has also been loosely used to describe all four rules discussed below, each of which is

---

97 Others, such as abuse of process, are not relevant.

98 *Kuligowski v Metrobus* (2004) 220 CLR 363 at 375 [25].

99 *Blair v Curran* (1939) 62 CLR 464 at 532.

100 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517 [22]. See also *Thoday v Thoday* [1964] P 181 at 197.

101 Zakrzewski, *Remedies Reclassified* (2005) at 54-55, 108-109.

102 *Blair v Curran* (1939) 62 CLR 464 at 532.

103 *Drake v Mitchell* (1803) 3 East 251 at 258 [102 ER 594 at 596]; *King v Hoare* (1844) 13 M & W 494 at 504 [153 ER 206 at 210].

underpinned by a policy of finality[104], the effect of the doctrine of merger is sometimes described as "res judicata in the strict sense"[105].

Cause of action or claim estoppel

67 Secondly, if the judgment finally resolved a conflict about the existence or extent of a "cause of action" then the parties to that proceeding, or their privies, will be precluded from relitigating that cause of action. This rule is independent of the doctrine of merger because even if the rights adjudicated upon were determined not to exist in the earlier proceeding, so that there was nothing to merge into the judgment[106], "the unsuccessful plaintiff can no longer assert" that a right exists[107]. The Full Court of the Family Court of Australia in this proceeding described the rule as "res judicata estoppel"[108]. In Australia, it is usually described as "cause of action estoppel". But, as has been pointed out on a number of occasions, the expression "cause of action" is imprecise and might extend either to the legal right claimed or to the facts that the plaintiff must establish for their claim[109].

---

104 See, eg, *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257, quoted in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602; *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 412. See also *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at 180 [17]; *Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47 at [59]-[60].

105 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 516 [20], 517 [22].

106 *Thoday v Thoday* [1964] P 181 at 197-198; *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 409.

107 *Thoday v Thoday* [1964] P 181 at 197-198; *Western Australia v Fazeldean [No 2]* (2013) 211 FCR 150 at 155 [25], quoted in *Zetta Jet Pte Ltd v The Ship Dragon Pearl [No 2]* (2018) 265 FCR 290 at 296 [24].

108 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,289 [25]. See also the reference to "estoppel per rem judicatam" in *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 412.

109 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 610-611; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508; *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 418.

68 The best approach is to recognise that both the legal right claimed and decided and the pleaded or asserted facts are relevant: "cause of action normally means a right alleged to flow from the facts pleaded"[110]. The focus is upon the whole claim, including the right and the essential facts upon which the right depends[111]. But much can depend upon the level of generality at which the claim is characterised. As Gummow J said in *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd*[112], characterisation must proceed by reference to substance rather than form. Regard can be had to the pleadings, the evidence, and the reasons for decision[113].

Issue estoppel

69 Thirdly, if a necessary legal foundation for the judgment is the resolution of an ultimate issue of fact or law then the parties or their privies are precluded from alleging or denying a state of fact or law that is inconsistent with that resolution[114]. This rule is well known by the description "issue estoppel", which was first coined by Higgins J[115]. The same issues of characterisation arise in respect of an issue for issue estoppel as arise in respect of a claim for cause of action or claim estoppel.

Anshun *estoppel or the extended principle in* Henderson v Henderson

70 Fourthly, there is an extension of the second and third rules[116]. A party will be precluded from relying upon a cause of action (within the meaning of the second

---

110 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 618.

111 See also *Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47 at [63].

112 (1992) 36 FCR 406 at 418.

113 Compare *Jackson v Goldsmith* (1950) 81 CLR 446 at 467; *Rogers v The Queen* (1994) 181 CLR 251 at 263.

114 *Blair v Curran* (1939) 62 CLR 464 at 531-532; *Jackson v Goldsmith* (1950) 81 CLR 446 at 466-467; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517 [22].

115 *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537 at 561. See *Jackson v Goldsmith* (1950) 81 CLR 446 at 466.

116 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517 [22].

rule) or an issue (within the meaning of the third rule) if it "was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it"[117]. This fourth rule, which was recognised in England in *Henderson v Henderson*[118] and in Australia in *Port of Melbourne Authority v Anshun Pty Ltd*[119], is commonly described as the extended principle in *Henderson v Henderson* or as *Anshun* estoppel[120].

Res judicata and "cause of action" or "claim" estoppel in this appeal

71 The first ground of Ms Clayton's appeal to this Court alleged that the Full Court had erred in finding that the claims for property settlement and spousal maintenance had merged in the Dubai decree or that the Dubai decree had finally determined such claims between the parties. Although the Full Court relied upon the "cause of action estoppel" rule rather than the rule of merger, the reliance upon merger in Ms Clayton's ground of appeal might have been due to a view that was taken of remarks in the joint judgment in *Tomlinson v Ramsey Food Processing Pty Ltd*[121] which suggested that a cause of action estoppel is "largely redundant" in the field of exercise of judicial power because the field is covered by res judicata in the strict sense of merger. Those remarks, however, should not be understood as suggesting that cause of action estoppel is co-extensive with the doctrine of merger or that there is not a sphere, perhaps even a significant sphere, of operation for cause of action estoppel. Cause of action estoppel remains important and the two rules must be kept separate in order to avoid "[m]uch confusion"[122].

72 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 the 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 United Arab Emirates, even where the foreign judgment is based upon the same facts as

---

117 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602.

118 (1843) 3 Hare 100 [67 ER 313].

119 (1981) 147 CLR 589.

120 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517 [22].

121 (2015) 256 CLR 507 at 517 [22].

122 Handley, *Spencer Bower and Handley: Res Judicata*, 5th ed (2019) at 2 [1.04].

those that support the right in Australia[123]. By contrast, it was common ground that a cause of action estoppel can arise from a foreign judgment[124].

73 Ms Clayton's second ground of appeal extended beyond the doctrine of merger and relied also upon "cause of action estoppel" and "the *Henderson* extension". Ms Clayton's submissions on cause of action or claim estoppel were based upon the assertion that the Full Court erred in holding that the estoppel precluded her from prosecuting her case under s 79 of the *Family Law Act*. She asserted that cause of action estoppel could not apply because the Dubai Court had no jurisdiction over property outside Dubai and the only extent to which she could have sought an adjustment of property was under Art 62.1 of the Personal Status Law.

74 Mr Bant's claim in the Dubai Court was as follows:

> "Second: Divorce the plaintiff from the defendant, dropping all her marital rights that are associated with that divorce in terms of all type of alimony, deferred dowry and others as well as compensating him for all material and moral damage at the discretion of the Court and to observe all the plaintiff's other rights".

75 In order to appreciate the nature of this claim, to which the Dubai Court responded with its ruling granting a fault-based divorce and ordering repayment of the dowry, the starting point is the lack of any jurisdiction for the Dubai Court to make orders for redistribution of the parties' property. The only possible candidate for such jurisdiction was Art 62.1. But that provision does not empower any redistribution of property. It provides:

> "A woman having reached the age of full capacity is free to dispose of her property and the husband may not, without her consent, dispose thereof; each one of them has independent financial assets. If one of the two

---

123 *In re Henderson; Nouvion v Freeman* (1887) 37 Ch D 244 at 250; *East India Trading Co Inc v Carmel Exporters and Importers Ltd* [1952] 2 QB 439 at 442; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 618. See also *Brali v Hyundai Corporation* (1988) 15 NSWLR 734 at 739-741; Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (2001) at 22 [1.44], 26 [1.53], 98 [4.28]; Davies et al, *Nygh's Conflict of Laws in Australia*, 10th ed (2020) at 974 [40.47].

124 See *Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2]* [1967] 1 AC 853 at 966-967. cf *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 346; Handley, *Spencer Bower and Handley: Res Judicata*, 5th ed (2019) at 284-285 [20.03].

> participates with the other in the development of a property, building a dwelling place or the like, he may claim from the latter his share therein upon divorce or death."

Article 62.1 might loosely be described, as the Full Court described it[125], as involving an "adjustment of property" or, more accurately, a distribution of rights to existing property. But, as the primary judge correctly concluded, although a party can establish an existing share based upon financial contribution in order to "displace a presumption of joint ownership"[126], the law of Dubai does not accord the parties with any rights to redistribution of property that are analogous to s 79 of the *Family Law Act*. The experts had agreed that there was no provision in Dubai for redistribution of assets as understood in Australia, although one of them had analogised a claim based on financial contribution with rights based on the rules and principles of equity.

76 The application of cause of action or claim estoppel reduces here to the question of characterisation. As explained above, the question of characterisation is one of substance, not form, and much will depend upon the level of generality at which the claim is characterised. For instance, a cause of action or claim estoppel barred a claim for compensation for negligent misrepresentation after an earlier, facially different, misleading or deceptive conduct claim under s 52 of the *Trade Practices Act 1974* (Cth) was characterised at a higher level of generality as a claim for recovery of loss flowing from the defendant's acts: "how much worse off is [the plaintiff] as a consequence of the acts and omissions of [the defendant]?"[127]

77 Mr Bant'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. On that submission, the absence of any law in Dubai concerning redistribution of property upon divorce leaves property rights where they lay and is merely a different approach to adjudicating the claim or controversy. By contrast, Ms Clayton's submission was effectively that Mr Bant's cause of action, or claim, should be characterised more narrowly, involving only the dissolution of the marriage and

---

125 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,289 [27].

126 *Clayton & Bant* [2018] FamCA 736 at [192].

127 *Trawl Industries of Australia Pty Ltd (In liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 422. This was not disputed on appeal: see *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (Receivers and Managers Appointed – In Liquidation)* (1993) 43 FCR 510 at 520.

immediately related matters such as repayment of the dowry paid under the marriage contract.

78 In many, possibly most, cases a prior final judicial adjudication upon the dissolution of marriage will be characterised as including all of the consequences, including distribution of property, that flow from the dissolution. As this Court said in *Henry v Henry*[128]:

> "differences in procedure, in available remedies and in the substantive law with respect to marriage and divorce will ordinarily ensure that the proceedings are different in significant respects. However, the proceedings will ordinarily be concerned with the same controversy ... [I]t is the marital relationship itself which is the subject of controversy ... [D]isputes with respect to property, maintenance and the custody of children will ordinarily be but aspects of an underlying controversy with respect to the marital relationship."

That characterisation will ordinarily apply even where, as the Full Court correctly held in *In the Marriage of Caddy and Miller*[129], different legal rules in the foreign proceedings might lead to different recovery such as the mandated equal division of property by Californian law in that case. But this is not an ordinary case.

79 Mr Bant's claim in the Dubai Court is best characterised as one for the dissolution of marriage only. The expert evidence was not that the Personal Status Law had adopted a rule requiring maintenance of existing property rights before marriage. Rather, the expert evidence was that the Dubai Court had no jurisdiction with respect to property outside the territory of the Emirate. The lack of any rule for redistribution of assets, within or outside the Emirate, follows naturally from this lack of jurisdiction, since any redistribution of property within the Emirate might be expected to take into account respective foreign property holdings of the parties. No cause of action or claim estoppel can bar Ms Clayton's claim for a redistribution of property rights under s 79 of the *Family Law Act*.

Issue estoppel and *Anshun* estoppel in this appeal

80 The Full Court also relied upon *Anshun* estoppel to conclude that Ms Clayton's claim for a redistribution of property rights under s 79 of the *Family Law Act* was barred. In his oral submissions in this Court, however, senior counsel

---

128 (1996) 185 CLR 571 at 591-592.

129 (1986) 84 FLR 169 at 177, citing *Taylor v Hollard* [1902] 1 KB 676.

for Mr Bant properly accepted that an *Anshun* estoppel could not apply because it could never be unreasonable to fail to claim that which was not available.

81 The remaining matter is the conclusion of the Full Court that Ms Clayton was barred from bringing a claim for spousal maintenance in the Family Court of Australia because "the issue was finally heard and determined" by the Dubai Court and she "cannot now bring a claim for spouse maintenance by operation of the 'Henderson extension'"[130]. This reasoning requires Mr Bant'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.

82 Although Mr Bant's claim in the Dubai Court included a claim for Ms Clayton "dropping all her marital rights that are associated with that divorce in terms of all type of alimony", the expert opinion concerning the nature and effect of alimony in the Personal Status Law[131] was not provided to this Court in the appeal books. It is unclear, for instance, the extent to which alimony can be ordered beyond the time at which a divorce is made final, although one Article[132], concerned with the "waiting period" before a "non retractable" divorce, prevents payment of alimony, but not "sheltering", if the divorced woman is not pregnant. Nor is it clear how the provisions for alimony for children should be applied[133]. In the absence of expert evidence, this Court cannot interpret the Personal Status Law according to its own background understanding or rules of interpretation. The only conclusions that can be drawn about alimony are those unchallenged findings of the primary judge that "alimony to a wife is forfeited ... if she abandons her home"[134], 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 Ms Clayton if Mr Bant had divorced her "on a basis other than that advanced to the Dubai Court"[135].

83 The Dubai Court ruled that the subject of Mr Bant's claim to "drop off" all of Ms Clayton's rights to alimony and deferred dowry "is untimely", adding that

---

130 *Bant & Clayton [No 2]* (2019) FLC ¶93-925 at 79,290 [37].

131 See Personal Status Law, Arts 55, 63-77.

132 Personal Status Law, Art 69.

133 Personal Status Law, Arts 78-86.

134 *Clayton & Bant* [2018] FamCA 736 at [187].

135 *Clayton & Bant* [2018] FamCA 736 at [188].

Ms Clayton "did not demand them and hence there is no need to make reference to them in the text". The natural understanding of this English translation is that the Court considered that Mr Bant's claim to exclude any of Ms Clayton's rights to alimony was premature and would be decided at a future time if there were a need to do so. As the primary judge concluded, the issue was not dealt with by the Dubai Court[136]. Although the Full Court considered that the issue had been "finally heard and determined", no basis was given for that reasoning, in the expert evidence or otherwise.

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

Conclusion

85 The appeal should be allowed with costs. Orders 2, 3, and 4 of the Full Court of the Family Court should be set aside and in their place it should be ordered that the appeal be dismissed. The appellant did not seek to disturb either the order of the Full Court granting the respondent leave to appeal (order 1) or the costs orders made by the Full Court (orders 5, 6, and 7).

86 Although this stay application has involved expert evidence and legal issues of some complexity, and although all courts have produced carefully reasoned judgments, it is unfortunate that there has been a delay of approximately five years between the hearing of the stay application by the primary judge and its final resolution in this Court. This remark is made to emphasise the need for expedition of this proceeding but not to cast any aspersion upon the thorough and thoughtful judgments, or the time taken to produce them, by all the Family Court judges involved in this proceeding. Although delay usually causes injustice, mere delay does not imply fault or blame on any court or decision maker. Reasons for delay, which were not the subject of question or comment during the hearing of this appeal, can be multifarious. They might include unavoidable personal issues confronted by the decision maker. They might include institutional reasons such as heavy case loads and backlogs. Or they might relate to the manner in which the parties have conducted the litigation in light of the usual processes of the court. Indeed, there was a very similar appellate delay between, on the one hand, the institution of the appeal in the Full Court of the Family Court and the delivery of reasons (during which period the Full Court of the Family Court also heard and resolved other disputes between the same parties) and, on the other hand, the application for special leave in this Court and the delivery of this Court's reasons.

---

136 *Clayton & Bant* [2018] FamCA 736 at [196].