



HIGH COURT OF AUSTRALIA

2 December 2020

CLAYTON v BANT
[2020] HCA 44

Today the High Court unanimously allowed an appeal from a judgment of the Full Court of the Family Court of Australia ("the Full Court"). The issue raised by the appeal was 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") had 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"). The wife and husband married in Dubai in 2007 where they had a child and lived partly in the United Arab Emirates ("UAE") and partly in Australia. They separated in 2013 and the wife and child remained in Australia. In 2013, the wife sought parenting orders in proceedings commenced in the Family Court, which were later amended to also seek orders for property settlement and spousal maintenance. In 2014 the husband instituted the Dubai proceedings, and in 2015 the Dubai Court made a ruling that granted the husband an "irrevocable fault-based divorce", which dissolved the marriage, and also ordered the wife to pay an amount corresponding to advanced dowry and costs. The husband applied to the Family Court for a permanent stay of the property settlement and spousal maintenance proceedings on the basis that the ruling of the Dubai Court operated as a bar to those proceedings by reason of the principles of *res judicata*, cause of action estoppel and/or the principle in *Henderson v Henderson* (also known as "*Anshun* estoppel").

The primary judge dismissed the husband's application for a stay, holding that the Dubai proceedings did not involve the issue of the wife's right to claim property from the husband other than certain joint investment property, and did not deal with any right of the wife to alimony but rather described it as "untimely". On appeal, the Full Court unanimously allowed the husband's appeal and ordered a permanent stay of the property settlement and spousal maintenance proceedings. The Full Court held that the Dubai proceedings determined the same cause of action as the property settlement proceedings and so gave rise to a "*res judicata* estoppel". The Full Court also held that, as the wife had chosen not to press a claim for alimony that was available in the Dubai proceedings, she was precluded from pursuing a claim for spousal maintenance by operation of the principle in *Henderson v Henderson*.

Following a grant of special leave, the High Court unanimously allowed the appeal from the Full Court's decision. A plurality held that the ruling of the Dubai Court could not give rise to a *res judicata* as the rights to seek orders for property settlement and spousal maintenance under ss 79 and 74 of the Act could only "merge" in the final judicial orders of a court having jurisdiction under the Act to make such orders. In relation to the property settlement proceedings, the ruling of the Dubai Court was incapable of founding a cause of action estoppel or an *Anshun* estoppel because the right to seek a share in joint investment property in the Dubai proceedings was not in any degree equivalent to the nature of the right to seek the discretionary alteration of property interests under s 79 of the Act. In relation to the spousal maintenance proceedings, while the nature of the rights to alimony under the law of the UAE and to spousal maintenance under s 74 of the Act were substantially equivalent, there was a significant difference in the coverage of the two rights, in that it had not been shown that the former was able to be claimed beyond the date of divorce. For that reason, the wife's choice not to claim alimony in the Dubai proceedings could provide no foundation for the operation of an *Anshun* estoppel. The remaining Justices also held that the ruling of the Dubai Court raised no *res judicata*, cause of action estoppel or *Anshun* estoppel.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*