



## HIGH COURT OF AUSTRALIA

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#### 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-Respondent's outline of  
Filing party: Respondent  
Date filed: 10 Feb 2023

#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

**BARNETT**

Appellant

and

**SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE**

Respondent

## **RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

### **Part I: Certification as to publication on the internet**

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1. This submission is in a form suitable for publication on the internet.

### **Part II: Outline of the propositions that the Respondent intends to advance in oral argument**

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#### **I. Revocation of special leave to appeal**

2. The lack of transcript of the judgment of the Irish District Court has been raised by the Appellant at first instance, on appeal and in the special leave hearing.<sup>1</sup>
3. The transcript of the judgment is available and a finding is made that the parties cohabitated from 23 May 2019 until 23 May 2020, at the very least. Guardianship is found to have commenced on 23 May 2020.<sup>2</sup>
4. The Appellant has conducted her case in the courts below on the basis that it was not proved that the father was a guardian at the time the child was removed from Ireland because the evidentiary basis of that declaration was not before the Court.
5. The challenges made to the Respondent's position because of the absence of judgment should then fall away.
6. The Appellant seeks to rely upon an email of Ms NJ dated 1 February 2023.<sup>3</sup> It is said to support a submission that on any remitter of the matter to the court below there will be a significant contest as to the effect of the declaration. The Appellant contends that the declaration that was made by the Irish court was not within their power. That presumes that

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<sup>1</sup> Appellant's Further Materials ('AFM') 21, Transcript of 31.5.21 at lines 24 – 47; AFM 23, Transcript of 31.5.21 at lines 16 – 20; AFM 24, Transcript of 31.5.21 at lines 30 – 35; AFM 47, Transcript of 27.9.21 at lines 19 – 20; AFM 52, Transcript of 27.9.21 at lines 45 – 47; AFM 53, Transcript of 27.9.21 at lines 27 – 35; AFM 55, Transcript of 27.9.21 at lines 13 – 24; AFM 58, Transcript of 27.9.21 at lines 32 – 41; Respondent's Further Materials ('RFM') 15, Transcript of 21.10.22 at line 456 to RFM 16, line 459.

<sup>2</sup> Affidavit of CS filed 20 January 2023, Exhibit "CS1" p.15 lines 14 – 20.

<sup>3</sup> Affidavit of RS filed 2 February 2023, Exhibit "RS1" pp.5–6.

the Australian courts would be seized with the power to go behind the declaration and the reasons, and re-litigate that issue. That is not within the role or power of the Australian courts. Rather, if the Appellant seeks to raise those issues the appropriate place to do so would be in the appellate courts in Ireland.

## II. Substantive appeal

7. The chain of reasoning supporting the contention of issue estoppel is:
  - (a) the declaration made on 12 April 2021 establishes that the father was a guardian due to the satisfaction of the Criteria set out in s 2(4A) of the *Guardianship of Infants Act 1964* (IR) (**‘the Criteria’**) by no later than that date<sup>4</sup>;
  - (b) the primary judge found on the balance of probabilities that because he satisfied the Criteria, the father was a guardian by no later than 30 August 2020 due to the factual circumstances of the Appellant leaving the jurisdiction on that date<sup>5</sup>, and this finding was supported, as found by the Full Court, relying on the submissions in the Irish proceedings<sup>6</sup>; and
  - (c) this in turn means that the father had rights of custody by no later than that date. It has been accepted that as a guardian he has rights of custody.<sup>7</sup>
8. The above chain of reasoning demonstrates that the dates of cohabitation are an ultimate issue of fact.<sup>8</sup> The dates of cohabitation must have been prior to the Appellant leaving the jurisdiction (August 2020). This inference does not impermissibly extend the estoppel – the finding of circumstance at a later point in time (April 2021) is estopping a determination of circumstance at an anterior point in time (a distinction from the facts in *O’Donel* at 763).<sup>9</sup>
9. The appropriateness of the determination as to what was the content of the Irish law on guardianship is supported by:
  - (a) the case of *L.C. v K.C.* [2019] IEHC 513<sup>10</sup>;

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<sup>4</sup> Core Appeal Book (‘CAB’) 23–24, [93]–[95].

<sup>5</sup> CAB 23–24, [95].

<sup>6</sup> CAB 60, [54].

<sup>7</sup> CAB 25, [101]; AFM 47, Transcript of 27.9.21 at lines 3 – 11.

<sup>8</sup> *Tomlinson v Ramsey Food Processing Pty Limited* (2015) 256 CLR 507, the plurality (French CJ, Bell, Gageler and Keane JJ) said at [22] (found at Joint Book of Authorities (‘JBA’) Parts C & D, 428).

<sup>9</sup> *O’Donel v Commission for Road Transport & Tramways (NSW)* (1938) 59 CLR 744 at 763 (found at JBA Parts C & D, 335).

<sup>10</sup> Found at JBA Parts C & D, 578.

(b) the experts of law, Ms DM, Ms NJ and Mr CC<sup>11</sup>; and

(c) the submissions made at first instance on the meaning of the Irish law.<sup>12</sup>

10. The first time that the Appellant raised the issue of privity in this Court was in the written submissions filed 25 November 2022. The Respondent says that the late articulation before this Court of that argument may give rise to a prejudice to the father because he is not a party to these proceedings.

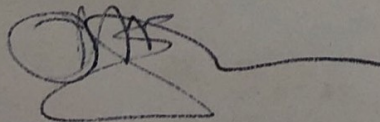
11. The Respondent has a limited statutory purpose in Convention proceedings.<sup>13</sup> It only seeks orders in relation to a child(ren) upon a parent making an application for their assistance.<sup>14</sup> It has the ability to reject an application for assistance to be provided if it is satisfied such a request does not comply with the Convention.<sup>15</sup> The Court has before it the application made to the Irish Central Authority by the left behind parent seeking assistance.<sup>16</sup> The father signed a Power of Attorney authorising the Respondent to act on his behalf in relation to matters that arise under the Convention.<sup>17</sup>

12. It is conceded that the Respondent does not act on instructions from the left behind parent. However, the degree of mutuality arises from the Respondent's acceptance to assist the left behind parent and to advocate for the return of the child. The Respondent would not have sought any orders in relation to the subject child had they not been asked to do so by the left behind parent. If the Irish Court determined as at April 2021 the father did not have rights of custody, the Respondent could not have brought the application. The contention that after a failed application by the Respondent the father could bring a fresh set of proceedings under the Convention, is not one the Respondent says should not find favour with this Court.<sup>18</sup>

Dated: 10 February 2023

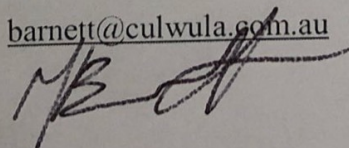
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<sup>11</sup> AFM 136, Affidavit of DM dated 24.11.20 [3(a)]; AFM 205–207, Affidavit of NJ dated 28.4.21; AFM 272, Affidavit of CC dated 14.5.21 [i].

<sup>12</sup> AFM 25, Transcript of 31.5.21 at lines 20 – 38; AFM 34, Transcript of 31.5.21 at lines 41 – 44.

<sup>13</sup> Reg 5 and Reg 9 of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ('the Regulations') (found at JBA Parts A & B, 15–16).

<sup>14</sup> Reg 11 of the *Regulations* (found at JBA Parts A & B, 17).

<sup>15</sup> Reg 13 of the *Regulations* (found at JBA Parts A & B, 18).

<sup>16</sup> AFM 104, Central Authority Application Form.

<sup>17</sup> AFM 119, Power of Attorney.

<sup>18</sup> Appellant's Submissions filed 25 November 2022 [59]. Page 4