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 27D - Respondent's submissions-Corrected to amend an
Filing party:	Respondent
Date filed:	19 Dec 2022

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 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: Concise statement of the issues that the respondent contends that the appeal presents

2. The proceedings raise the issue as to whether the courts below were correct in holding that a declaration from the District Court of the City E Metropolitan District of 12 April 2021 ('**the declaration**') satisfied the jurisdictional fact, that being that the father had rights of custody under the law of Ireland, as at the date of removal of 30 August 2020 and that the declaration created an issue estoppel that precluded the appellant from having the primary judge undertake a factual inquiry into the dates of cohabitation of the appellant and the left behind father ('**the father**').

Part III: Whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth)

3. The respondent does not consider that any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of any material facts set out in the appellant's narrative of facts or chronology that are contested with appropriate reference to the core appeal book and any books of further materials

4. Subject to the points below, the respondent agrees with the summary of material facts set out in the Appellant's Submissions ('**AS**').

5. It is agreed that on 30 August 2020, the appellant left Ireland with the child and travelled to Australia.[1] 30 August 2020 is the relevant date, as that is the date of abduction when the appellant removed the child from Ireland without the consent of the father. However, the evidence was that neither the appellant nor the father asserted that they lived together, or were in a relationship together thereafter.[2]

6. The appellant deposes that separation occurred prior to August 2020,[3] that the circumstances of her travelling to Australia were that she had decided to end the relationship,[4] and that the father has visited Australia with regular access to the child.[5] The father deposed to the dates he asserted that he and the appellant lived together were between May 2019 until 30 August 2020.[6]

Part V: Statement of argument in answer to the argument of the appellant

7. This Statement of Argument is divided into four parts. First, it sets out the respondents' contention regarding the relevant legal principles. Second, there is a response to issues raised in Part II of the AS. Third, it sets out the argument of the respondent. Lastly, there is a discussion which responds to the issue of privity, which was not an issue raised when special leave was sought.

Legal Principles

8. Section 111B of the *Family Law Act 1975* (Cth), provides for the creation of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ('the *Regulations*') to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the *Convention on the Civil Aspects of International Child Abduction* signed at The Hague on 25 October 1980 ('*the Convention*').

9. An application is made pursuant to the *Regulations* and can be made by the Central Authority, in this case the Department of Communities and Justice,[7] for the return of a child who has been removed to or retained in Australia.[8] The obligation to make a return order is premised on the requirement that the removal to or retention of the child in Australia is found to be wrongful. Regulation 16(1A) provides the requirements that must be satisfied for a child's removal to, or retention in, Australia to be found to be

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[1] Appellant's Submissions ('AS') [6].
[2] Core Appeal Book ('CAB') 23, [93].
[3] Appellant's Further Materials ('AFM') 164, Affidavit of the appellant filed 3.5.2021 at [99].
[4] AFM 167, Affidavit of the appellant filed 3.5.2021 at [130].
[5] AFM 169, Affidavit of the appellant filed 3.5.2021 at [155] – [158].
[6] AFM 128, Affidavit of the father sworn 24.11.2020 at [14].
[7] *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 8.
[8] Ibid reg 14.

wrongful. In this matter the focus was on reg 16(1A)(c), that is that "*the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia*".

10. The term "rights of custody" is defined within the *Regulations*.[9] The law applicable in the country of the child's habitual residence is the law that determines whether a person, institution or other body has rights of custody.[10] Rights of custody are defined as including "*rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child*".[11]

11. The father's rights of custody derive from the *Guardianship of Infants Act 1964* (IR) ('*Guardianship Act*'). In this matter the father and appellant were not married and therefore s 2(1) of the *Guardianship Act* applies, which indicates (**emphasis added**):

> *'father' includes a male adopter under an adoption order but subject to section 11(4), does not include the father of a child who has not married that child's mother unless –*
>
> *(a) an order under section 6A is in force in respect of that child,*
>
> *(b) the circumstances set out in subsection (3) of this section apply,*
>
> *(c) the circumstances set out in subsection (4) of this section apply,*
>
> *(d) **the circumstances set out in subsection (4A) of this section apply, or***
>
> *(e) the father is a guardian of the child by virtue of section 6D.*

12. Section 2(4A) then provides the specific context for an unmarried father to be a guardian of a child.[12] This section provides:

> *(4A) The circumstances referred to in paragraph (d) of the definition of 'father' in subsection (1) are that the father and mother of the child concerned –*
>
> *(a) have not married each other, and*
>
> *(b) have been cohabitants not less than 12 consecutive months occurring after the date on which this subsection comes into operation, which shall include a period, occurring at any time after the birth of the child, of not less than three consecutive months during which both the mother and father have lived with the child.*

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[9] Ibid reg 4.
[10] Ibid reg 4(1).
[11] Ibid reg 4(2).
[12] CAB 17, [64]; AFM 84.

13. In those circumstances, for the father to be a guardian as defined in s 2(4A) of the *Guardianship Act*, the mother and the father need to have been:

    a) Cohabitants for 12 consecutive months; and

    b) No less than three of those months must occur after the birth of the child.

14. Importantly, s 6B(3) the *Guardianship Act* has the same requirement for cohabitation.[13]

15. Section 6 provides that the father and mother of a child shall be guardians of a child jointly.[14]

16. Therefore, in the event a father satisfies the requirements of s 2(4A) he will be a guardian within the meaning of the *Guardianship Act.*

17. The father made an application pursuant to s 6F of the *Guardianship Act.* That section provides:

    (1) A person specified in subsection (2) may apply to the court for a declaration under this section that a person named in the application is or is not a guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of a child named in the application (in this section referred to as the 'child concerned').

    (2) An application for a declaration under this section may be made, in relation to a child concerned, by—

    (a) a guardian of the child concerned, or

    (b) a person seeking a declaration that he or she is or is not a guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of the child concerned.

    ...

    (5) Where on an application for a declaration under this section it is proved on the balance of probabilities that a person named in the application is or is not a guardian by virtue of the circumstances set out in section 2(4A) or 6B(3) of the child concerned, the court shall make the declaration.

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[13] CAB 17, [65].
[14] CAB 53, [24]; AFM 84.

Issue raised in Part II of the Appellant's Submissions

18. The appellant asserts that issue estoppel was argued to preclude the primary judge from hearing and determining evidence as to whether, as a matter of Irish law, the father had rights of custody as at 30 August 2020. This is too broad an assertion as to what was said to be precluded by the respondent at first instance. What was said to be precluded was "*whether or not the circumstances set out in s 2(4A) have been complied with or are... met by the factual circumstances of the parties' relationship, because that issue has been determined, has been declared, and this court ought to, because of the principles of res judicata, as well as issue estoppel, as well as the broader discretion to prevent the abuse of process – so there are three limbs to what I will be taking the court to – ought not to redetermine that matter*".[15]

19. There was no assertion that either party was precluded from a cross-examination of the experts. Senior Counsel for the appellant made a number of submissions regarding the expert evidence, the case law cited within the expert opinions, and the manner the court should interpret the Irish legislation.[16]

20. Furthermore, no application was made for cross-examination, and there is no evidence that an arrangement was organised for either party to cross-examine the experts as to law. The appellant is bound by the manner in which she chose to conduct the hearing at first instance.[17]

21. In the arguments on appeal, there was no argument put that involved an assertion that the appellant was precluded from challenging the expert evidence.[18] No such argument would have been available to the appellant given the conduct of the hearing at first instance.

Respondent's submissions

i) Overview

22. The fundamental question in the Australian proceedings is whether the father had rights of custody over the child immediately before her abduction on 30 August 2020.[19]

23. On 12 April 2021, the Irish Court declared that the father is a guardian. This was after a

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[15] AFM 7, Transcript of 31.5.2021 at line 41 to AFM 8, line 2.
[16] AFM 25, Transcript of 31.5.2021 at lines 20 – 38; AFM 34, Transcript of 31.5.2021 at line 41; AFM 22, Transcript of 31.5.2021 at line 43 to AFM 23, line 2.
[17] *Metwally v University of Wollongong* (1985) 60 ALR 68, 71.
[18] AFM 303 – 313.
[19] *Family Law (Child Abduction Convention) Regulations 1986* (Cth) regs 4, 16(1A)(c).

six day contested hearing, with cross-examination, and both parents represented by counsel ('**the Irish proceedings**').[20] It is not in dispute that a person who is a guardian for the purposes of Irish law is a person who has "rights of custody" for the purposes of Australian law. Therefore, a "guardian" under Irish law can be equated as having "rights of custody" for the purposes of the Australian proceedings.

24. The basis upon which the Irish Court declared the father to be a guardian is stated in the declaration as "being satisfied on the balance of probabilities that the said [father], a person named in the application is a guardian by virtue of the circumstances set out in s 2(4A) and s 6B(3) of the said Act of the said child".[21] Those sub-sections are detailed above and they require satisfaction of certain criteria of minimum cohabitation periods with the appellant and the child ('**the Criteria**').

25. Therefore, the declaration of being a guardian on 12 April 2021 demonstrates that the father had satisfied the Criteria by no later than that date. The declaration therefore establishes that the Irish District Court, on the balance of probabilities, found that the father (a) is a guardian as at 12 April 2021; and (b) has rights of custody as at 12 April 2021; and (c) has satisfied the Criteria by no later than 12 April 2021. The declaration establishes a *res judicata* as to these issues at the date of 12 April 2021.

26. Because the Criteria requires cohabitation for a set period of time and because it is common ground that there was no cohabitation after the removal of the child from Ireland on 30 August 2020, the satisfaction of the Criteria by no later than 12 April 2021 necessarily means that the Criteria must also have been satisfied by no later than 30 August 2020. This was expressly found by the primary judge[22] and that finding is plainly correct. No appeal has been brought against this finding. Accordingly, the respondent contends that the appellant ought be issue estopped from denying that the father had satisfied the Criteria by no later than 30 August 2020 and it ought be taken that the Criteria was satisfied by no later than that date.

27. The primary judge considered the competing expert evidence on Irish law, of which there was three,[23] and found in favour of the "automatic rights theory",[24] namely that the satisfaction of the Criteria means, as a matter of Irish law, that the father is a guardian. This finding was not predicated on any issue estoppel but rather a finding of fact on the

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[20] CAB 18, [66].
[21] CAB 18, [70].
[22] CAB 23, [93].
[23] Ms M, AFM 136; Ms C, AFM 235; Mr C, AFM 247.
[24] CAB 23, [90] – [91].

balance of probabilities and after considering competing expert evidence and the parties' competing submissions.[25] Detailed submissions were made on Irish authorities and the matters raised by the competing experts, no party sought for oral evidence to be adduced.

28. Therefore:

(a) The declaration made on 12 April 2021 establishes a *res judicata* that the father was a guardian by no later than that date and had also satisfied the Criteria by no later than that date;

(b) the appellant is issue estopped from denying that the father had satisfied the Criteria by no later than 30 August 2020;

(c) 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 and that finding was open to her Honour (and plainly correct); and

(d) this in turn means that the father had rights of custody by no later than that date as well, it being accepted that a guardian has rights of custody.

29. Therefore, the only finding that will result in success to the appellant in the Australian proceedings is a finding that is *necessarily* inconsistent with the declaration made in the Irish proceedings.

30. Put another way, the only way the appellant can resist the application in the Australian proceedings is for the appellant to urge on the Australian Court that (a) the father does not, or (b) as at 30 August 2020 did not, satisfy the Criteria.

31. The principles of *res judicata* prevent the appellant from asserting proposition (a). But given the date of the declaration, those principles do not prevent her from asserting proposition (b).

32. However, the principles of issue estoppel prevent the appellant from asserting proposition (b). The appellant can only succeed in the Australian proceedings, by asserting facts that are necessarily inconsistent with the declaration made in the Irish proceedings. This is precisely the very thing that the doctrine of issue estoppel is designed to prevent: that after a contested, 6-day hearing where she lost on the principal issue of cohabitation period(s), the appellant seeks to revisit the very same factual determination. This justification is recognised at paragraph [72] of the AS.

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[25] CAB 23, [95].

ii) *Discussion - Response to the Appellant's Submissions*

33. The common law doctrine of estoppel is one that is founded on ensuring the finality of litigation and ensuring fairness to litigants, and therefore the focus should be on "*substance rather than form*".[26] The majority in *Clayton v Bant* (2020) 272 CLR 1 held that per Kiefel CJ, Bell and Gageler JJ, [34]:

> *... 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...*

34. The particular form of estoppel as accepted by the Appeal Division of the Federal Circuit and Family Court of Australia, was that of issue estoppel, which precludes "*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*".[27]

35. In *Ramsay v Pigram* (1968) 118 CLR 271 Barwick CJ said at 276 (**emphasis added**):

> *... in a proceeding between parties, an estoppel is available to prevent the assertion in those proceedings of a matter of fact or of law in a sense contrary to that in which that precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties in the same respective interests or capacities, or between a privy of each, or between one of them and a privy of the other in each instance in the same interest or capacity.* ***The issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case...***

36. A necessary finding of fact, if identical, must be treated as being actually litigated and determined.[28]

37. There ought to be a preclusion of a further factual inquiry into the periods of cohabitation, being an essential factual determination as a prerequisite in making the declaration. The tenets of finality and fairness, as well as the objects and principles of the *Regulations*,[29] support the contention that the appellant was rightly precluded from reagitating factual

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[26] *Clayton v Bant* (2020) 272 CLR 1 ('Clayton v Bant'), per Kiefel CJ, Bell and Gageler JJ, noted at [34].
[27] *Tomlinson v Ramsey Food Processing Pty Limited* (2015) 256 CLR 507, the plurality (French CJ, Bell, Gageler and Keane JJ) said at [22].
[28] *Kuligowski v Metrobus* (2004) 220 CLR 363, per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ at [53].
[29] *Family Law (Child Abduction) Regulations 1986* (Cth), reg 1A(2)(a).

matters (with respect to cohabitation) in a different adversarial proceeding where they had already been determined in the Irish District Court. The appellant in this case should not have a second opportunity to establish relevant facts, or rather the absence of those facts, namely that the cohabitation requirements of s 2(4A) of the *Guardianship Act* were not met.

38. In response to AS [74], the reference to two sections, s 2(4A) and s 6B(3), does not undermine that the Criteria has been found to be satisfied, because the two sections require the same finding of fact(s), and does not underscore a danger in reliance on the declaration.

39. The District Court in Ireland could only have made the declaration upon making findings that determined the periods of cohabitation between the parties. This was a necessary step in the determination that resulted in the declaration of 12 April 2021. It flows that the appellant should be prevented from re-litigating the same factual matter that has already been disposed of as between the parents. It is true that no transcript has been provided, nor any judgment, but if the Court accepts the reasoning process outlined above, no transcript is needed. The Court must have determined the dates of cohabitation, concluding prior to 30 August 2020, as part of the reasoning process.

40. Likewise, the matters raised with respect to the father having made, and been granted an interim order pursuant to s 6A, should not be found to undermine the force of the declaration.[30] The declaration was made by the same court that made the interim order and as the plurality of the Appeal Division found, the s 6A order was not made on satisfaction of the Criteria, and it was an interim order, and whether the s 6F declaration should or could have been made was a question for (and determined) by the Irish Court.[31] What the declaration declares is, with respect, clear.

41. In *O'Donel v Commission for Road Transport & Tramways (NSW)* (1938) 59 CLR 744 ('*O'Donel*') a previous determination had been made that found that a worker's blindness had arisen, up to 15 February 1935, due to a workplace injury. A later court was asked to determine whether, in those circumstances, a respondent was estopped from challenging the current cause of the worker's blindness. In other words, although a particular cause of blindness was found historically, this was no bar in challenging the cause of the appellant's current blindness at a later time. Latham CJ said at 760:

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[30] AS [87(a)].
[31] CAB 61, [58] – [59].

the relevant rule of estoppel applies to what must be regarded as having been decided in prior proceedings, but that it does not apply to a proposition inferred from premises some only of which are the subject of estoppel.

42. Thus, *O'Donel* is about a determination regarding a particular proposition which cannot operate to establish by way of estoppel of a related, but not necessarily identical, proposition later in time. As Evatt J said at 763 **(emphasis added)**:

> *... In other words, as against a successful party the unsuccessful party is bound by the authoritative determination of every fundamental issue but when a distinct and separate issue arises **subsequently**, he is not bound to submit to the second issue being established by the combination of a former issue with additional evidence, no matter how strong such evidence may be.*

43. The appellant's categorisation that the decision of *O'Donel* provides a basis that the plurality has impermissibly 'enlarged' the issue of estoppel by inference is incorrect.[32] Indeed, the inference drawn in this matter is the converse. That is, the factual determination at a later time (April 2021) estops the assertion of the absence of those facts of an earlier time (August 2020). The issue estoppel of the facts (dates of the relationship that satisfy the Criteria) is not the first link to establish another proposition or fact which follows[33] but a finding which necessarily establishes the factual circumstances earlier in time. As the appellant indicates this was an application of the estoppel backwards in time.[34]

44. The appellant could only be successful in agitating the issue of the father's rights of guardianship if the court in Australia came to a different conclusion regarding the dates of cohabitation.

45. The second complaint is that there has been an impermissible extension of the estoppel being a finding as to the content of Irish law on guardianship.[35]

46. Pursuant to the *Regulations*, the Federal Circuit and Family Court of Australia, is required to determine the rights of custody of left behind parents in the country of habitual residence in determining whether the removal or retention of a child was

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[32] AS Part VI(D)(3).
[33] *O'Donel v Commission for Road Transport & Tramways (NSW)* (1938) 59 CLR 744 at 758 – 759 (Latham CJ).
[34] AS [76].
[35] AS Part VI(D)(4).

'wrongful'.[36] There is nothing novel regarding the primary judge so doing.

47. The primary judge relied upon the decision of *L.C. v K.C.* [2019] IEHC 513 of MacGrath J[37] ('*L.C. v K.C.*'). The primary judge relied upon this authority to support the finding that the legislative changes and the conferral of automatic rights of custody.[38] No authority has been referred to which indicates that this decision was wrongly decided or that asserts the contrary.

48. Furthermore, Senior Counsel for the appellant made submissions referring positively to that decision.[39] He indicated some concern for the interpretation and reliance placed by Ms C on that decision by saying "*your Honour, if we could then go to L.C. v K.C. Now, in her advice, my learned colleague at the Irish bar suggests in submissions that in L.C. v K.C., there was some encouragement for the construction of the orders for which we contend... but having read the case several times, I think I'm obliged to say that I'm not sure that it provides direct support for the proposition that we advance*".[40]

49. Senior Counsel for the appellant at first instance made submissions regarding the evidence of the experts,[41] he agreed that the date of the authorities is of import given the change in legislation in 2015,[42] and he made submissions regarding the interpretation of the legislation.[43]

50. Importantly, Ms M deposes that "*an unmarried father automatically becomes a guardian of his child*" if the Criteria are fulfilled.[44] It was therefore open to the primary judge to so find.

51. It was not the courts below which erred in determining the content of the Irish law without cross-examination but that it was the manner in which the parties, including the appellant, determined to run the case. Where counsel for the Central Authority indicates at first instance that if the Court is against it, then the matter will need further dates and at least some cross-examination, the High Court should not infer that the appellant was not allowed to cross-examine any witness she wished to do so.

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[36] *MW v Director-General, Department of Community Services* (2008) 82 ALJR 629; 244 ALR 205; 39 Fam LR 1, per Gummow, Heydon and Crennan JJ at [73].
[37] It is unclear as to whether the primary judge was under a misapprehension that McKechie J determined *L.C. v K.C.* [2019] IEHC 513, CAB 23, [92], however, her Honour referred to McGrath J in clear reference to the authority at CAB 24, [95].
[38] CAB 23 – 24, [95].
[39] AFM 26, Transcript of 31.5.2021 at line 10.
[40] AFM 34, Transcript of 31.5.2021 at lines 30 – 39.
[41] AFM 25, Transcript of 31.5.2021 at lines 20 – 38.
[42] AFM 25, Transcript of 31.5.2021 at line 25; AFM 34, Transcript of 31.5.2021 at line 41.
[43] AFM 25, Transcript of 31.5.2021 at lines 25 – 26.
[44] AFM 136, 3(a).

52. In those circumstances it is submitted that the determination of the dates of the relationship are fundamental, and that the appellant was rightfully prevented from arguing that the pre-requisites, for the finding that the father had rights of custody at 30 August 2020, had not been met.

53. Furthermore, in response to AS [89] the appellant should not be allowed to now assert that she would argue that regs 16(1A)(d) and 16(1A)(e) have not been satisfied as they are new contentions and not previously argued.

iii) Parties/ Privity

54. The special leave application in this Court was drawn and argued with respect to whether under Irish law "the father of the applicant's child had rights of custody as at 30 August 2020". There was no discussion regarding the third requirement of issue estoppel not being met. There was no assertion that the respondent not being a party to the proceedings in Ireland, or the father not being party to the proceedings in Australia, was fatal. It was not part of the application for special leave that the parties in the Australian proceedings, being different to those in the Irish decision meant that issue estoppel was unable to be relied upon.[45]

55. The respondent submits that leave is required for this argument to be agitated.

56. The respondent resists such leave being granted as the appellant has had sufficient opportunity to plead their case, and it ought to be too late for amendment.

57. The prejudice that may arise from this argument being pressed at this stage is that the father has not been given procedural fairness, in circumstances where he could have joined the proceedings prior to the determination of the appeal in the Federal Circuit and Family Court of Australia, or indeed, in these proceedings.

58. Furthermore, the raising of this issue may require the respondent to re-contemplate its position with respect to any notice of contention and reliance upon the third limb that was argued at first instance: abuse of process.

59. In those circumstances, only limited submissions will be made on the third limb of issue estoppel, that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.[46]

60. It is acknowledged that *Ramsay v Pigram* (1968) 118 CLR 271 ('*Ramsay v Pigram*') is authority for the proposition that, with respect to issue estoppel the parties, or their

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[45] *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507.
[46] Ibid.

privies must be the same.[47]

61. The particular circumstances of this matter are such that the third limb of issue estoppel should be found to be met, or possibly need not be met, and for issue estoppel to continue to bar the appellant from reagitating the factual matters of the Criteria.

62. First, the appellant in these proceedings was a party to each of the Irish and Australian proceedings, and it presents an injustice that she could re-litigate the original question simply because the Central Authority brought these proceedings rather than the father in his own right, or the father determining not to join the proceedings.[48] The appellant has been given the opportunity to present evidence and arguments to establish the facts and law on which she is now putting back in issue. That approach has broader implications to the conduct of matters arising under the *Regulations* given that the vast majority of matters are brought by the Central Authority.

63. Secondly, it is contended that given the father could have commenced proceedings and that he could join the proceedings if he so wished, he may be deemed a party to the Australian proceedings. Support for this proposition is found from the case of *Osborne v Smith* (1960) 105 CLR 153 and the discussion in *Res Judicata, Estoppel, and Foreign Judgments.*[49]

64. Similarly, where a party to a proceeding has commenced proceedings on account of, or for the benefit of another party, and relying on that person's right or title, the court can look behind the record to identify the 'real' party.[50] The Central Authority only seeks orders in relation to a child(ren) upon the making of an application by a parent for their assistance. If a left behind parent does not seek a return order the Central Authority would not seek to invoke the *Regulations*. That is indicative of who the "real party" is in these proceedings.

65. Lastly, it is open for the Central Authority to be seen as a privy for the father, with respect to issue estoppel. As is set out in *Ramsay v Pigram* by Barwick CJ at 279, the "*basic requirement of a privy in interest is that the privy must claim under or through the person of whom he is said to be a privy*".

66. Whether or not the Central Authority is the father's privy is not one where any authority

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[47] *Ramsay v Pigram* (1968) 118 CLR 271, per Barwick CJ at 276.
[48] *Tomlinson v Ramsey Food Processing Pty Limited* (2015) 256 CLR 507, per French CJ, Bell, Gageler and Keane JJ at [38].
[49] Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (Oxford University Press, 2001) 71 [3.24].
[50] Spencer, Bower and Handley, *Res Judicata* (5th ed, 2019) 136 [9.13] see *Goh v Goh* [2007] 1 SLR 453 at [32].

directly on point can be found. It is understood that there are only a limited number of countries where the Central Authority directly brings proceedings for the return of a child as opposed to facilitating an independent representative to represent the left behind parent to bring proceedings in the abducted to jurisdiction.[51]

67. In *Timbercorp Finance Pty Ltd (in liquidation) v Collins* [2016] HCA 44 the plurality said at [36] when discussing privies:

> *A person (the "second party") who seeks to make a claim in later proceedings may be bound by the actions of a party in earlier proceedings if the party in those proceedings represented the second party such that they could be described as the privy in interest of the second party. The same principle which is applied to determine when a party in earlier proceedings may be said to be a privy in interest of the second party applies with respect to all forms of estoppel. The interest in question is required to be a legal one.*
>
> (references omitted)

68. In favour of the contention that the Central Authority in the Australian proceedings would be seen as the father's privy is that the Central Authority in Australia has been asked by the Central Authority in Ireland to act on the behalf of the father for the return of the child. An application was filled out by the father, and signed by him, where he signs a power of attorney which states "*I authorise the requested Central Authority to act on my behalf, or to designate a representative so to act, in relation to an application which I have made under the 1980 Hague Convention on the Civil Aspects of International Child Abduction*".[52]

69. It is of course the father who had rights of custody to meet the requirements as set out at reg 16(1A)(c).

70. Thus, the respondent commenced proceedings, on the request of the father in a representative capacity, and could be found as a privy with respect to issue estoppel.[53]

71. That being said, it should be recognised that the role of the Central Authority in Australia is set out in the *Regulations*, and the Central Authority has a particular role and

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[51] The countries who, as at 1993, were involved directly in the litigation for the return of children included France, Argentina, Australia and Spain. See The Permanent Bureau, 'Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction' (The Hague Conference on Private International Law, 18-21 January 1993) <www.hcch.net/upload/abdrpt93e.pdf> 8.

[52] AFM 119.

[53] See *Ramsay v Pigram* (1968) 118 CLR 271, 276 per Barwick CJ.

responsibility to the proper administration of the convention.[54] It has a special statutory role. In the Pérez-Vera Report, the Convention is described as a '*convention of co-operation among authorities*'.[55]

72. The principle of mutuality "*by which an issue estoppel has traditionally been understood to be capable of assertion in a subsequent proceeding only by a party who was also a party, or the privy of a party, to the first proceeding*"[56] supports the contention of the privity between the father and the respondent. In other words, had the determination in Ireland determined that the father did not have rights of custody, that the father did not prove that he and the appellant's relationship satisfied the requirement as set out in s 2(4A) of the *Guardianship Act,* it is suggested that the respondent could not have sought the return of the child pursuant to the *Regulations.* The return application could not have been sustained if the judgment in Ireland had gone against the father.

iv) Conclusion

73. For the above reasons the appeal should be dismissed.

Part VII: Estimated number of hours required for the respondent's oral argument

74. The respondent estimates that they will require one hour to present their argument.

Dated 16 December 2022

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[54] Reg 5 of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth), *The Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, [1987] ATS No 2 (entered into force 1 December 1983) art 7.
[55] Elisa Pérez-Vera, 'Explanatory Report on the 1980 Hague Child Abduction Convention' (1982) www.hcch.net/upload/expl28.pdf [35].
[56] *Tomlinson v Ramsey Food Processing Pty Limited* (2015) 256 CLR 507, per French CJ, Bell, Gageler and Keane JJ at [18].

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BARNETT**
Appellant

and

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SECRETARY, DEPARTMENT OF COMMUNITIES AND JUSTICE
Respondent

ANNEXURE TO RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the particular constitutional provisions and statutes referred to in the respondent's submissions are as follows.

No	Description	Version	Provision(s)
1.	*Family Law (Child Abduction Convention) Regulations 1986* (Cth)	In force 3 April 2019 to 1 September 2021	Regs 1A, 4, 5, 8, 14, 16
2.	*Family Law Act 1975* (Cth)	Current	s 111B
3.	*Guardianship of Infants Act 1964* (IR)	Current	ss 2, 6, 6A, 6B, 6F
4.	*Judiciary Act 1903* (Cth)	Current	s 78B