IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA309/2022
[2023] NZCA 645

BETWEEN	RAFID MOHAMMED SALIH Appellant
AND	RAHLA HUSSEIN AMIN HARDER ALMARZOOQI Respondent

Hearing:	22 February 2023
Court:	Courtney, Collins and Thomas JJ
Counsel:	P W Michalik and M V Smith for Appellant JLW Wass and M Freeman for Respondent
Judgment:	14 December 2023 at 11.30 am
Reissued:	15 December 2023

JUDGMENT OF THE COURT

A The appeal is allowed.

B The case is remitted to the High Court for reconsideration in accordance with this decision.

REASONS OF THE COURT

(Given by Courtney J)

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Introduction

[1] This appeal concerns the enforcement of a *nikah* — an Islamic marriage contract, under which the husband is required to provide a gift (*mahr*) to the wife. The *mahr* is usually of monetary value and is given in part before the marriage (the "prompt" *mahr*) and in part on the earlier of death or divorce (the "deferred" *mahr*).[1] It is the first time the question of enforceability of a *nikah* has been considered by this Court.

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[1] There are various spellings of *mahr*. For convenience we adopt the spelling used by the parties and counsel in this case. We note, too, that the *mahr* is sometimes described as a dower or dowry, though that differs from the usual understanding of that word in New Zealand as a payment made by the bride's parents to the husband and his family.

[2] In 2013 Mr Salih and Ms Almarzooqi married in Dubai, in the United Arab Emirates (UAE), in a traditional Islamic ceremony, which included the signing of a *nikah*. The *nikah* provides for a deferred *mahr* of AED 500,000, equivalent to approximately NZD 230,000. The marriage only lasted a short time. The parties are now divorced, though both still live in New Zealand. There is a dispute over whether Mr Salih is liable for the deferred *mahr*, either in full or in part.

[3] In November 2016, Ms Almarzooqi obtained an order for divorce from the Dubai Personal Matters Court on the ground that Mr Salih had mistreated her. She also obtained an order for payment of the deferred *mahr* in full. Ms Almarzooqi brought proceedings to have the latter recognised and enforced in New Zealand by summary judgment and, in the alternative, to enforce payment under the *nikah* directly.

[4] The summary judgment application was determined first and was unsuccessful.[2] Ms Almarzooqi then advanced her claim for payment of the *mahr*. The issues for determination were the proper law of the contract, whether the *mahr* had become payable under that law and if so, whether the Court should reduce the amount payable on public policy grounds. In the High Court Mr Salih accepted the validity of the divorce but maintained that Ms Almarzooqi had to prove her allegations of misconduct in a New Zealand court and could not rely on the factual findings of the Dubai court.

[5] Simon France J held that the proper law of the *nikah* is UAE law and that under that law the *mahr* became payable upon the divorce being granted by the Dubai court, regardless of the ground on which it was granted. He also held that if New Zealand law applied, the *nikah* would be similarly enforceable and the *mahr* therefore payable.[3] He entered judgment against Mr Salih for the full amount of the *mahr*, to be assessed in New Zealand dollars. Mr Salih appeals.

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2 The application was refused because Mr Salih had not submitted to the Dubai court: *Almarzooqi v Salih* [2020] NZHC 2441 [HC enforcement decision]. Ms Almarzooqi's appeal against that decision was dismissed: *Almarzooqi v Salih* [2021] NZCA 330, [2021] NZFLR 501 [CA enforcement decision]. Her application for leave to appeal to the Supreme Court was declined: *Almarzooqi v Salih* [2021] NZSC 161, [2021] NZFLR 606.

3 *Almarzooqi v Salih* [2022] NZHC 1170, [2022] NZFLR 282 [judgment under appeal].

Issues on appeal

[6] Although Mr Salih still maintains that Ms Almarzooqi must prove the allegations against him and cannot rely on the factual findings of the Dubai court, he sought to advance new arguments on appeal. He asserted, for the first time, that there was no intention to be contractually bound. He also sought to argue that the *nikah* is not enforceable in New Zealand because it (1) is prohibited by the Domestic Actions Act 1975 (DAA) or (2) purports to contract out of the Property (Relationships) Act 1976 (PRA) but is void because it does not comply with the requirements of s 21F of that Act and (3) is void at common law.

[7] There is a dispute as to whether these issues, raised for the first time in this Court, should be considered. This dispute is reflected in the questions the parties identified for determination:

(a) In relation to section 5 of the DAA:

(i) Is Mr Salih entitled to rely on that section on appeal in circumstances where it was not pleaded or argued in the High Court?

(ii) If the answer is yes does that section bar Ms Almarzooqi's claim to enforce the contract to pay the *mahr*?

(b) Was the Judge right to conclude that the *nikah* was governed by UAE law or should he have concluded that the contract was governed by New Zealand law?

(c) If the Judge was right on question (b) and UAE law governs the *nikah,* was he nevertheless wrong to conclude that under UAE law, Mr Salih was obliged to pay the *mahr* once the parties were irrevocably divorced, such that Mr Salih was in breach of the contract?

(d) If the Judge was wrong on question (b) and New Zealand law governs the *nikah*:

(i) Is Mr Salih entitled to rely on the PRA on appeal?

(ii) If so, does the PRA bar Ms Almarzooqi's claim?

(iii) Is Mr Salih entitled to argue that the parties did not intend to enter binding legal relations?

(iv) If so, does it follow that Ms Almarzooqi's claim to enforce the *nikah* as a contract must fail?

[8] Mr Wass, for Ms Almarzooqi, submitted that Mr Salih should not be permitted to advance the new arguments because they were not raised on the pleadings, nor in argument in the High Court, and there had been no application to amend the pleadings. In addition, Mr Wass asserts that raising these issues now would amount to resiling from the concessions made at trial that the claim to enforce a *mahr* is contractual in nature and a *nikah* is, in principle, enforceable in a New Zealand court.

[9] In written opening submissions in the High Court, counsel for Mr Salih (not Mr Michalik) made the following concessions: the correct characterisation of the claim is in contract; in principle a deferred *mahr* is recoverable under New Zealand law provided the grounds of liability are established and in the circumstances an award would not offend conceptions of New Zealand public policy; the dispute should be determined by the application of New Zealand contract law informed by principles of Sharia law applicable to marriage and divorce.

[10] The Judge recorded the parties' positions as follows:[4]

> [6] First, as regards the issue of the proper law, both parties characterise the claim as being in contract. It is not argued, but it is arguable, that it should be analysed through a wider lens such as the law concerning marriage, divorce and relationship property.
>
> [7] Second, there is no challenge to the formation of the contract and its validity. …
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> [8] Third, it is not contended that as a matter of law or public policy, a New Zealand Court should not enforce this type of obligation.

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4 Judgment under appeal, above n 3. Footnote omitted.

[11] It can be seen from the pleadings and the submissions at trial Mr Salih must be taken to have accepted the claim as being contractual. Although he did not formally concede the validity of the contract and its enforceability under New Zealand law, any dispute as to these matters should have been raised affirmatively. They would cast Mr Salih's case in a very different light to the way it was advanced at trial.

[12] This Court has the power to permit the amendment of pleadings and may allow a matter not raised in the Court below to be argued where it is necessary to determine the real controversy between the parties. However, it is very unlikely to do so if it would result in injustice to the other party.[5]

[13] It is to be expected that the outcome of this case will be significant, not only to the parties, but also to wider Muslim communities in New Zealand. The issues are not straightforward. However, in a country as diverse as New Zealand it is important that civil disputes are able to be determined by the courts in a manner that both reflects the orthodox application of New Zealand law and recognises the cultural context in which the disputes arise. Unless there would be injustice to Ms Almarzooqi in allowing the new issues to be raised, it would (with one exception) be desirable to address them so as to ensure that the real controversy between the parties is properly identified and considered.

[14] Except for the question of whether the parties intended to be contractually bound, the new issues are matters of law. Although Mr Wass submitted that this Court should not entertain the arguments on appeal in the absence of them having been pleaded and been the subject of evidence and argument, he addressed both in his submissions, and did so without indicating that different or other evidence would have been adduced had the questions been raised in the High Court.

[15] It is, of course, unsatisfactory for a respondent to face new arguments on appeal that were not raised in the High Court and it means that this Court does not have the benefit of the High Court Judge's views of them. We will not permit Mr Salih to raise

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5 See for example *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA); *Mahon v Waimauri Ltd* [2022] NZCA 96 at [61]–[64]; and *Sportzone Motorcycles Ltd (in liq) v Commerce Commission* [2015] NZCA 78, [2015] 3 NZLR 191 at [106].

the question of the parties' intention to be contractually bound. Not only would this be a new proposition, it would also be untenable, in light of the evidence Mr Salih gave at trial. Nevertheless, we are satisfied that considering the other arguments regarding the enforceability of the *nikah* will not result in injustice to Ms Almarzooqi and that we should do so.

[16] We therefore address the following issues:

(a) Did the Judge err in finding that the proper law of the *nikah* is UAE law?

(b) If so, is the *nikah* unenforceable under New Zealand law by reason of the DAA, the PRA and/or public policy considerations?

(c) If the *nikah* is enforceable under New Zealand law:

(i) Properly interpreted, does the *nikah* require Mr Salih to pay the *mahr* by reason only of the fact of the divorce order made by the Dubai court?

(ii) Is Ms Almarzooqi entitled to rely on the factual findings made by the Dubai court?

The function of the *mahr* in Islamic marriage

[17] It is first necessary to describe the nature of the *mahr* and its function in Islamic marriage in a little more detail. We do so with circumspection — our knowledge, necessarily limited, is drawn mainly from Western academic commentary on the nature and function of the *mahr*.[6] We do not, however, presume to express a view on the complexities of Sharia law and seek only to provide some essential context.

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[6] Although Ms Almarzooqi adduced expert evidence at the trial, it was directed primarily towards the application of UAE law, which is sourced in Sharia law, rather than Sharia law itself. There was some, limited, expert evidence adduced by Mr Salih as to Sharia law but the focus of the case at that stage was very much on UAE law.

[18] Sharia — the "correct path", or "way" or "road" in Arabic — is regarded as the revealed word of God. It is derived from both the *Quran* — believed to be the direct word of God — and *hadith* — the sayings and practices attributed to the Prophet Mohammed. However, to the extent of the latter, Sharia law is interpreted differently by various schools of thought that exist within Islam. This is explained by Asifa Quraishi-Landes:[7]

> Muslim scholars engaged—and continue to engage—in rigorous interpretation of these sources to extrapolate detailed legal rules covering many aspects of Muslim life, from how to pray and avoid sin to making contracts and writing a will. Muslims refer to these rules every day in order to live a Muslim life. These rules are called *fiqh*.
>
> The use of the term "*fiqh*," and not "*sharia*," for these rules is significant. *Fiqh* literally means "understanding", reflecting the fundamental epistemological premise of Islamic jurisprudence: *fiqh* is fallible. That is, Muslim *fiqh* scholars undertook the work of interpreting divine texts with a conscious awareness of their own human potential to err. They thus recognized that their extrapolations of *fiqh* rules were at best only probable articulations of God's Law, and that no one could be certain to have the "right answer." In other words, divine law (*sharia*) represents absolute truth, but all human attempts to understand and elaborate that truth are necessarily imperfect and potentially flawed. *Fiqh* scholars have always been acutely aware that, although the object of their work is God's Law, they do not—and cannot—speak for God.

[19] In most Muslim-majority countries (including the UAE), civil law is based, to a greater or lesser extent, on Sharia law. However, as a result of differences in interpretation, the specific way Sharia law is applied may be quite different from country to country, sometimes in significant ways. The way, and extent to which, Sharia law is recognised in Western legal systems is evolving and is the subject of considerable academic writing.[8]

[20] An Islamic marriage is concluded by way of the traditional marriage contract, the *nikah*. Almost invariably, the *nikah* provides for *mahr*. As we have already described, the *mahr* is a gift from the husband to the wife, which may take the form of a token or of money, sometimes a substantial amount, and part of which is payable (if

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7 Asifa Quraishi-Landes "The *Sharia* Problem with *Sharia* Legislation" (2015) 41 Ohio North University Law Review 545 at 548. Footnotes omitted.

8 See for example Pascale Fournier *Muslim Marriage in Western Courts: Lost in Transplantation* (Ashgate, Surrey, 2010); and Ann Black and Kerrie Sadiq "Good Sharia and Bad Sharia: Australia's Mixed Response to Islamic Law" (2011) 34(1) UNSW Law Journal 383.

in money) or given (if in goods) upon the marriage (prompt *mahr*) and part upon either death or divorce (deferred *mahr*). In her book *Muslim Marriage in Western Courts: Lost in Transplantation*, Pascale Fournier cites the following to explain the important function of the *mahr*:[9]

> *Mahr,* when presented and accepted, makes a symbolic representation of the earnestness of each spouse to live with the other a mutually cooperative and trustful life. In other words, by giving and taking *mahr*, each spouse takes the vow to stand by the other with the purpose of attaining transcendent tranquillity under the chaste alliance known as *nikah* (marriage).

[21] Professor Fournier goes on to comment that Islamic marriage constitutes a contract of exchange with defined terms that legally affect each spouse in various ways and that the *mahr* relates to the respective rights and duties.[10]

[22] In the High Court, a New Zealand Imam, Sheikh Mohammed Zewada gave evidence that he presides over Muslim marriages in New Zealand and, to his knowledge, the vast majority of Muslim couples in New Zealand marry by *nikah* because it is a tenet of the Islamic faith. Such a marriage has no legal implications in terms of the Marriage Act 1955; couples married by *nikah* alone are treated as being in a de facto relationship under New Zealand law. Some couples choose to have a civil ceremony as well but most regard this as unnecessary.

[23] Disputes over the obligation to pay the deferred *mahr* are most likely to arise in the context of a marriage breakdown. Notwithstanding the differences arising from differing schools of thought, there are generally recognised norms regarding divorce under Sharia law and the consequences for the obligation to pay the deferred *mahr.* Pascale Fournier observes that:[11]

> Islamic family law structures the economic relations of the spouses and maintains its regulatory power at the dissolution of marriage. Legal institutions such as *talaq* divorce, *khul* divorce and *faskh* divorce determine the degree to which each party may or may not initiate divorce and the different costs associated with it. As pointed out by Dr Wani … *mahr* will play itself out differently under each institution: "The position of a divorced

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9 M A Wani *The Islamic Law on Maintenance of Women, Children, Parents and Other Relatives: Classical Principles and Modern Legislations from India and Muslim Countries* (Upright Study Home, Kashmir, 1995) at 193, cited in Pascale Fournier *Muslim Marriage in Western Courts: Lost in Transplantation*, above n 8, at 17. Citation omitted.

10 Fournier at 18.

11 At 20. Citation omitted.

> woman's claim to *mahr* can be determined with reference to the respective form of marriage dissolution followed in a particular case".

[24] A husband can divorce his wife unilaterally by speaking the recognised words. This is the *talaq* procedure. *Talaq* may be declared and withdrawn twice but if done a third time, the marriage is finally over and the *mahr* becomes payable. A *mahr* is often seen as a disincentive to declaring *talaq*. As Pascale Fournier explains:[12]

> What comes with this unlimited "freedom" of the husband to divorce at will and on any grounds, is the (potentially costly) obligation to pay *mahr* in full as soon as the third *talaq* has been pronounced. *Talaq mahr* was Islam's attempt to make of *mahr* "a real settlement in favour of the wife, a provision for a rainy day and, socially, … a check on the capricious exercise by the husband of his almost unlimited power to divorce. A husband thinks twice before divorcing a wife when he knows that upon divorce the whole of the dower would be payable immediately" …

[25] Alternatively, the wife may ask for a divorce with the husband's prior consent. This is the *khul* divorce and it has the effect of releasing the husband of his obligation to pay the *mahr*:[13]

> … divorce by this method dissolves the husband's duty to pay the deferred *mahr* … The further risk is that, in allowing the legal separation, the *qadi* [Muslim judge] can also require the woman to repay all or part of the prompt *mahr* paid to the woman at the time of her marriage … *Khul* divorce is therefore the *exchange* of *mahr* for "freedom," a form of divorce that has "often proved very costly indeed" … This reality is reflected in the old Persian saying: "I release you from my *mahr* to free my life …" …

[26] The third form of divorce is the *faskh* (literally annulment or dissolution), where the wife seeks a divorce without the husband's consent. This requires a judicial decree (such as from a Sharia Council) and can only be obtained on one of the recognised grounds. It is described by Pascale Fournier in the following terms:[14]

> If the *khul* divorce route is not desirable or available, the wife may apply for a *faskh* divorce, but only in so far as she can demonstrate to the *qadi* that her case meets the limited grounds under which such divorce can be granted. As a *faskh* divorce is essentially a fault-based divorce initiated by the wife, it is only available in certain situations delineated by specific conditions … In the case of termination of marriage by *faskh* divorce, the wife is entitled to *mahr*. Tucker [an academic] … thus concludes that *faskh* "appears the most favourable to the woman insofar as she obtains a wanted divorce but yet

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12 At 21. Citation omitted.
13 At 22. Citations omitted.
14 At 23. Citations omitted.

> retains her claim to the balance of the *mahr* and support during her waiting period (*iddah*)."[15]
>
> Although it is most favourable to Muslim women, *faskh* divorce is also the most difficult to obtain. … The situation in which a woman would petition the *qadi* for a *faskh* divorce would arise when the husband refused to consent. The wife would thus appear before the *qadi* to state her reasons for requesting a divorce. Grounds to issue a decree of *faskh* often include … mental or physical abuse …

[27] In the High Court, Ms Almarzooqi adduced expert evidence from a UAE lawyer, Ms Hamade, that, under UAE law, the reason for divorce was irrelevant to the husband's obligation to pay the *mahr*. Mr Salih adduced evidence from a New Zealand lawyer, Mr Taha, that this was not the case under Sharia law generally. We return to this issue later.

The proper law of the contract

Relevant principles

[28] The Judge stated the relevant principles as they are set out in *The Conflict of Laws in New Zealand*:[16]

> Where the parties have failed to make a choice of law, New Zealand courts apply the law of the place with the closest and most real connection to the contract. Here courts may take account of a broad range of connecting factors, including the place of performance of the contract, the parties' places of business, the nature and location of the subject matter of the contract, a connection with a previous transaction, the form of the documents, the place where the contract was made, the currency in which payment is to be made, a jurisdiction or arbitration agreement, the fact that the contract or its terms may not be enforceable under one of the potentially applicable laws, and references to particular statutes or provisions.

[29] There is no criticism of this statement. We would add the following summary given by this Court in *New Zealand Basing Ltd v Brown* (in the context of an employment agreement):[17]

> (a) When a court confronts a private problem with a foreign element, it must look for what has been called the "seat" of the legal relationship

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15 The *iddah* is a period, usually three months, which follows the dissolution of a marriage, during which the husband is still contractually obliged to provide the wife maintenance.

16 Maria Hook and Jack Wass (eds) *The Conflict of Laws in New Zealand* (LexisNexis, Wellington 2020) at [6.17]. Footnotes omitted.

17 *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [30]. Footnotes omitted.

> — that is, the legal system to which in its proper nature the relationship belongs or is subject. Following the old English common law, which has diverged since accession to the European Union, the courts of New Zealand apply a well-settled choice of law process to identify the system that will resolve the issue on its merits. This determination of what law should apply is distinct from the related question of whether a court has jurisdiction to hear and decide the case.
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> (b) The issue must first be characterised. If an issue is characterised as contractual in nature, the relevant connecting factor is the proper law of the contract. This is presumptively the parties' bona fide and legal choice of law or, if the written agreement is silent on this point, the system with the "closest and most real connection" to the contractual relationship.

[30] To summarise, in the absence of an express choice of law the task for the Court is to identify the jurisdiction with the closest and most real connection to the contract. This is an objective inquiry, undertaken by reference to all the relevant circumstances. In the present case, the factors that we see as relevant to the inquiry are: the place the contract was entered into and the circumstances in which it was entered into; the form of the contract; the currency in which the *mahr* was to be paid, the place where the contract, including payment of the *mahr*, was to be performed; and the enforceability of the contract in the two jurisdictions, and any barriers to that process.

The circumstances in which the nikah *was concluded*

[31] Mr Salih is Iraqi by birth. He came to New Zealand in 2005 and has lived here ever since, working as a dentist. He has been a New Zealand citizen since 2012. In cross-examination Mr Salih said that he grew up in a mixed community in Iraq and went to a Christian school. He explained that he prayed but did not go to mosque and described himself as "a moderate or less than moderate Muslim".

[32] Ms Almarzooqi is a citizen of the United Arab Emirates (UAE). Her family lives in Sharjah, an emirate of the UAE. However, prior to her marriage, and consequent move to New Zealand, she had lived and studied in Canada and Australia. There was no evidence as to the extent to which Ms Almarzooqi adhered to her faith.

[33] Mr Salih and Ms Almarzooqi met in 2010, through a Muslim online dating website. Ms Almarzooqi was then living in Australia. The relationship progressed to

the point where they wished to marry. There was some inconsistency between the parties as to how the agreement to marry was reached. Ms Almarzooqi described going back to the UAE in October 2010 and, while there, Mr Salih telephoning Ms Almarzooqi's father and asking for his blessing for them to get married. According to Ms Almarzooqi, her father was reluctant, preferring that she married an Emirati. Eventually however, Ms Almarzooqi's father became more accepting of Mr Salih. Ms Almarzooqi and her parents came to New Zealand in 2013 to discuss the marriage. According to Ms Almarzooqi, her father would not agree to the marriage until Mr Salih had his New Zealand passport so that he could go to the UAE and be eligible for residency there:

> Dad told [Mr Salih] to come to the UAE and ask him then whether he would agree to the marriage.
>
> [Mr Salih] got his passport in September 2013. He went to the UAE in early December 2013 because that was the Christmas holiday in New Zealand.

[34] In comparison, Mr Salih said in cross-examination that when Ms Almarzooqi's parents came to New Zealand:

> … the father suggested, he told me, come and … try and take annual leave from the Defence Force, where I used to work and you guys get married there and you [go] back and live in New Zealand. She will, you guys settle there, it's better to live in a Western country, that's fine.
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> …
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> … when we met there in Auckland, he already agreed and yes, I told him that I am waiting for to get my New Zealand passport which I got it around August 2013. August or September 2013. And I told him probably the only time that I can get annual leave from Defence Force is around December. He told me okay, come there and get married guys and go back to live in New Zealand.

[35] Mr Salih and Ms Almarzooqi discussed the prompt *mahr* at an early stage. The amount was constrained by what Mr Salih could afford. Ms Almarzooqi said that she asked for AUD 50,000, which Mr Salih agreed to. However, just before Mr Salih came to the UAE in December 2013, he called her to say that he could only afford about AUD 10,000 and she accepted that. This is consistent with Mr Salih's evidence that he took cash of NZD 13,000 or 15,000 with him to Dubai in December 2013 and gave the cash to Ms Almarzooqi's father, but that the father gave it back to him for the couple to use in establishing themselves.

[36] Mr Salih and Ms Almarzooqi never discussed the deferred *mahr*. Ms Almarzooqi explained that the deferred *mahr* is only ever discussed between the woman's father and the husband-to-be. However, nor, on the evidence, was there any discussion about the deferred *mahr* between Mr Salih and Ms Almarzooqi's father prior to the wedding ceremony.

[37] Mr Salih and Ms Almarzooqi both gave evidence about the circumstances of their marriage. Ms Almarzooqi's evidence on this aspect was limited to the sequence of events leading up to the ceremony and to the facts of the separation and divorce. She referred to obtaining a licence from the Dubai court the day of the wedding. She did not refer to any other steps. She referred to the person who officiated as "the Sheikh who married us". She did not identify him by any other status or by name.

[38] Mr Salih said that there had been difficulties in the days preceding the marriage in obtaining approval for the marriage because he was not a UAE citizen. In this regard, we note that the UAE Government Portal, which sets out the requirements for marriages, includes a requirement for a "positive pre-marriage screening certificate for the couple issued from the concerned public healthcare facilities in the UAE" and, where the groom is not a UAE citizen, "a certificate of good conduct issued from the UAE". There was no evidence that either was obtained.

[39] Mr Salih described being taken to the house of Ms Almarzooqi's aunt on the night of the marriage and being introduced to a court registrar who advised that he was able to officiate. Again, that person was not named.

[40] Mr Salih was cross-examined at some length about his reasons and expectations regarding the location of the marriage ceremony. The following evidence is relevant:

> Q. Well you agreed, when you and [Ms Almarzooqi] were talking about marriage, you wanted to have an Islamic marriage didn't you?
>
> A. No
>
> Q. She wanted to have an Islamic marriage?
>
> A. No, always we do here, is basically is; my intention is to keep living in New Zealand. I was working towards my citizenship and my post

graduate study and it was just a matter of any Islam contract, just to sign Islam, the most important is New Zealand marriage, yes civil marriage.

Q. But you were familiar with what an Islamic marriage entailed, weren't you?

A. All no, all what I know is for the Islamic marriage and for any Islamic contract, if the man says to the woman you are divorced, he has to pay the first payment. If the lady is asking for divorce, she has to settle on the deferred payment, it's all that I know.

And later:

Q. Did you discuss a dowry of $50,000?

A. She might have mentioned she wanted that, she wanted a mansion like what her father provided her brothers. I told her I am different, I am not rich, I was still paying student loan … I might not be the suitable person for you.

Q. But nevertheless in that discussion you initially agreed to a dowry of $50,000 didn't you?

A. No I didn't agree.

Q. So how did that discussion then end up? She wanted 50,000, what was the ultimate agreement?

A. There wasn't any agreement, when I travelled to UAE I took NZ$13,000 with me, 13 or 15,000, something like that and I declared it at the border, New Zealand and UAE and yeah I told her already before that, before we met, I went to her family house, I told her this is what I can afford paying, she said: "Yeah that's fine, even you don't have to pay anything." I told her that I'm feeling a bit embarrassed so I will pay $10,000 to cover the cost of the wedding and this is as your forward payment …

Q. So because the prompt dowry had come up between you and [Ms Almarzooqi], that must have led you to understand that she was going for a traditional marriage, yes?

A. I don't think so, because she mentioned that she doesn't want anything. That's what the discussion over the phone there in UAE when I stayed in the hotel and she was staying with her family.

Q. And if there was going to be an upfront or prompt dowry, there might also be a deferred dowry?

A. Not necessarily. Lots of Muslim ladies they get married on a copy of Koran as forward and copy of Koran as deferred payment, not necessarily.

Q. Not necessarily but possibly, yes? You must have expected that it might be a consideration?

A. It wasn't up to my attention at all about the talk of deferred payment. No one brought it to my attention, neither she, neither her family.

[41] In answer to questions from the Court:

Q. Well did you know about – that these things existed?

A. We heard about them, but your Honour it's different between cultures, between countries, between –

Q. Did you know about it? Did you know of the system whereby there could be a deferred [dowry]?

A. Well to be honest with you Sir, all what I know that deferred payment, not necessarily to be a money. There are families where they can waive it, there are families who, they ask for a copy of Quran to bless the marriage. Nothing has been discussed with me and all what I know about the Islamic marriage contract is those two things. That if the man initiates the divorce he has to pay, because it is a punishment for him, if he divorces the woman without any fault. And if the lady wants a divorce, she has to agree with the man to give her the divorce, provided that she severs her deferred payment and even her forward payment, if any.

[42] The cross-examination resumed:

Q. And you said this morning, when I was questioning you, you didn't particularly want, care about Islamic marriage?

A. No I didn't say I didn't care.

Q. So –

A. I said that we get married, we live under New Zealand civil law, but the Islamic marriage contract, this is to fulfil our religious [beliefs].

Q. – so it is important to you that get married under Islam.

A. Yes, from a religious point of view, yes. But submit and to live under a New Zealand civil law.

[43] It was intended that the marriage take place in Sharjah but Mr Salih's status as a non-citizen and non-resident precluded that. He described what happened:

A. … I don't know UAE, their law and have no knowledge about the system there. It was the first time in my life to visit that country, for just getting married and going back to New Zealand.

Q. So you went to Dubai where you were able to get a, I guess a marriage licence from the Court there.

A. All what I have been told by her family is to come with us at night to the aunty's home. They were just trying to figure out how to get approval or get someone to sign a marriage contract for us, which I went to them.

Q. So the marriage happened in Dubai at the home of one of [Ms Almarzooqi's] aunts, yes?

A. Yeah.

…

Q. And at the home there were, I don't know what to call them, I think [Ms Almarzooqi] refers to them as Sheikhs, but it was put to her as registrars of the court but court officials who deal with marriage?

A. I think it was sheikh probably, yeah, I don't know his title exactly. It was the first time that I met this man but he seems an Emirati, local.

Q. And you must have been aware on 26 December 2013, you were going to get married to [Ms Almarzooqi], yes?

A. No, I have been called into that, to go into that house with her family and they were trying to get someone to do marriage, Islamic marriage contract between us because of the possible difficulties that we faced before that and as I told you, they were in charge, her family was in charge of this process.

Q. Did you want to get married to [Ms Almarzooqi]?

A. Yes I wanted to get married to [Ms Almarzooqi].

Q. Did you go to the United Arab Emirates to get married to [Ms Almarzooqi]?

A. Yes to get married and come back to New Zealand and live in New Zealand, just to appease the family to go there.

[44] Mr Salih described the circumstances in which the *nikah* was signed. Ms Almarzooqi's male relatives were present. Mr Salih did not have any family members present. According to Mr Salih there was no discussion about the deferred *mahr* but the Sheikh was told by Ms Almarzooqi's father to write in the figure of AED 500,000. Mr Salih, feeling "helpless, pressured, [and] extreme embarrassment", signed the *nikah*.

[45] Ms Almarzooqi was not present when Mr Salih signed the *nikah* — as was customary, she was in an adjoining room and the *nikah* was taken to her to sign after Mr Salih had signed it.[18]

[46] The opening words of the *nikah* stated:

> This marriage contract is solemnized this Thursday, 23 Saffar 1435H, corresponding to 26 of December 2013, at Dubai First Instance/Sharia Court by judge/ Mohammed Eshaq Mal Allah Feroz', by proposal and acceptance, and in accordance with Islamic Sharia, God's Holy Book, and the Traditions of His Prophet, to whom all God's prayers and blessings be between the two contracting parties.

[47] We note that this statement does not reflect the fact that the marriage took place at a private residence, not the Dubai First Instance/Sharia Court, nor that the person officiating was, it appears, a court registrar, not a Judge, though a Judge's stamp appears on the certificate at the foot of the *nikah*, presumably following certification at a later date.

[48] The parties' details are recorded in the contract — Ms Almarzooqi's birthplace as Sharjah, her nationality as UAE, her UAE ID number and her religion as Muslim. For Mr Salih it noted that he was born in Baghdad, his nationality as New Zealand and his religion as Muslim. The following provisions record:

> Prompt Dowry: AED Thirty Thousand Received by the wife
>
> Deferred Dowry: Five Hundred Thousand only 500,000 AED
>
> The nearest of divorce or death
>
> Dowry Accessories: Nil.
>
> Other Conditions: -
>
> Guardian of Husband: Himself.
>
> Guardian of the Wife: her father Hussain Amin Haidar Almarzooqi.
>
> The wife was present: Herself

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[18] Ms Almarzooqi relayed statements said to have been made to her by the "sheikh" after the *nikah* was signed, apparently without objection but we do not see them as significant to the present issue.

> The two parties were acquainted with the legal implications of marriage and it was verified that they are free and clear from all legal impediments in the presence and testimony of the two witnesses.

[49] Ms Almarzooqi gave evidence about what her father had said to Mr Salih about the deferred *mahr* and what the Sheikh said to Mr Salih regarding his ability to pay the deferred *mahr* selected by Ms Almarzooqi's father. There was no affidavit evidence from Ms Almarzooqi's father. Mr Salih was not cross-examined on that aspect and Ms Almarzooqi's evidence differs from the account that Mr Salih gave. Nor was there an affidavit from the Sheikh. It would be inappropriate to put significant, if any, weight on this evidence.

The Judge's finding

[50] The Judge's reasons for finding that UAE law was the proper law of the contract were as follows:[19]

> [21] The issue of the proper law of the contract arises here on these facts because the couple travelled to UAE to be married in accordance with the law applicable there. As it happens, however, the form of the marriage and the applicable law is not unique to UAE but is common to Muslim marriages wherever they occur. The reality is that had they married in New Zealand the form, and the Nikah, would be the same. Obviously, there would be some differences such as the currency of the Mahr but otherwise the essence would be the same.
>
> [22] The universality of the contract lessens the significance of the particular jurisdiction where the contract arose, but does not eliminate it. It remains the case that it was the couple's choice to travel to UAE, to have the marriage solemnised in that jurisdiction and to register the marriage in that jurisdiction. The Nikah and the certificate evidencing it carry the authority of the Dubai Personal Status Court.
>
> [23] The intended residence of New Zealand is of some significance but should not be overstated. It was their intended residence at the time of the marriage but need not be forever. Furthermore, the contract obligation (the Mahr in issue) is unaffected by the place of residence. It only becomes relevant once the marriage is ended.

[51] The Judge also referred to Mr Salih's argument regarding the circumstances in which the deferred *mahr* would become payable under Sharia law, observing:

> [24] … The defendant submits that the Mahr is only payable under Sharia law if the husband initiates the divorce or the wife obtains divorce via the

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19 Judgment under appeal, above n 3.

> proof of harm route. If that were correct, it would suggest that divorce processes and grounds are significant to the terms of the contract. That in turn would suggest, in my view, that a Sharia law system is more likely to be the proper law of the contract, since those concepts are not, for example, part of New Zealand divorce law and would be unlikely to be recognised.
>
> [25] The same argument requires the defendant to submit that the law of the contract is New Zealand contract law "informed by principles of Sharia law applicable to marriage and divorce". Putting to one side for now the viability of that proposition, the need to attach to New Zealand contract law Sharia law on marriage and divorce again suggests the proper law is that of UAE which is a system reflecting such principles.

[52] The Judge concluded that:

> [26] On balance, I consider the proper law of the contract is UAE. This reflects the particular facts of the case where the couple travelled to that jurisdiction to be married in accordance with a particular tradition (albeit one not unique to the jurisdiction), and the agreed characterisation of the case as solely one in contract. …

An express choice?

[53] Mr Wass, for Ms Almarzooqi, submitted that the terms of the *nikah* disclosed an express choice of UAE law. It is not clear that this argument was advanced in the High Court and no notice of intention to support the judgment on other grounds was filed. However, no objection was taken to the argument being made.

[54] The argument relied on the opening words of the *nikah* set out above. We do not accept that this statement discloses an express choice of UAE law. The statement refers only to the *nikah* being entered into "in accordance with Islamic Sharia, God's Holy Book, and the Traditions of His Prophet". Although Sharia may be described broadly as Islamic religious law which is observed throughout the world in all Muslim communities (albeit with differences in interpretation) it is not a system of law for the purposes of determining the proper law of a contract. In comparison, UAE law is not Sharia law, but rather a system of civil law that is sourced from Sharia law.

[55] We consider that, while the contract showed an intention to be subject to Sharia law, that did not equate to an express choice of UAE law. The Judge correctly approached the issue of proper law by enquiring into which jurisdiction had the closest and most real connection with the marriage contract.

Did the Judge err in concluding the UAE had the closest and most real connection with the marriage contract?

[56] Mr Wass supported the Judge's reasoning. He described it as nonsensical for New Zealand law to apply to a contract expressed consciously in UAE form in accordance with Sharia concepts, just because the parties anticipated living for some time in New Zealand. He submitted that the parties had a genuine connection to the UAE both through Ms Almarzooqi's nationality and through their shared Muslim faith and he also placed significance on the involvement of Ms Almarzooqi's father, who was her guardian in terms of the *nikah*.

[57] Mr Michalik, for Mr Salih, advanced the following arguments in support of his submission that the Judge's conclusion regarding the proper law of the contract was wrong.

[58] First, the parties had intended to marry in Sharjah, where Ms Almarzooqi's family had its home. It was only the fact that Mr Salih, a non-citizen, was not permitted to marry there that resulted in the marriage taking place in Dubai, where Ms Almarzooqi's aunt lived. Mr Michalik submitted that the fact that Dubai and Sharjah were different emirates within the UAE detracted from the significance of the marriage taking place in Dubai on the basis that, for conflict of laws purposes, each constituent part of a federation is to be treated as a separate "country" if it has its own separate legal system.[20] However, the expert evidence from UAE lawyer, Ms Hamade, was to the effect that marriage and divorce was subject to a federal code. We therefore see no basis on which to treat the decision to marry in Dubai rather than Sharjah as affecting the proper law question.

[59] Secondly, a decision to travel overseas to get married could not create a connection with the place of the marriage ceremony. Mr Michalik invited us to view the situation analogously with so-called "destination weddings", suggesting that the Judge's decision would elevate such weddings into a decision that the laws of the wedding destination should govern the commitment made there. Mr Michalik did not

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[20] Marcus Pawson *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [3].

consider the fact that Ms Almarzooqi's family lived in UAE altered this — notwithstanding that, he described UAE as a jurisdiction of convenience.

[60] This argument misses the rationale for the Judge's decision, namely that these parties were seeking an Islamic wedding and it was no coincidence that they decided to solemnise and register their marriage in the UAE where Ms Almarzooqi's family lived and where the law was sourced from Sharia law. It is obvious from Mr Salih's evidence set out above that, although Muslim, Mr Salih clearly did not put a particular value on having the *nikah* enforceable in the UAE, where he had never been, did not intend to live and the laws of which he knew nothing about save, presumably, the assumption that the civil law would be based on Sharia. Nevertheless, Mr Salih went to the UAE for a traditional Islamic wedding to satisfy the wishes of Ms Almarzooqi's family. These circumstances are far removed from a "destination wedding" in which there is no genuine connection of any kind with the destination.

[61] Mr Michalik's third argument was that the Judge failed to recognise that performance of the obligations arising under the *nikah* — being the usual obligations of married couples under Sharia law — would be performed in New Zealand, where the couple planned to live permanently. In fact, the Judge considered that this issue was of "some significance but should not be overstated".[21] The Judge was also influenced by his conclusion that payment of the *mahr* was unaffected by residency because the obligation would only arise once the marriage had ended. We respectfully differ from these views and agree that the place where the contract would be performed, and the parties' residency were significant.

[62] Mr Salih is a New Zealand citizen with a professional occupation in New Zealand and no plans to leave. On Mr Salih's evidence, Ms Almarzooqi's father had encouraged the couple to live in New Zealand because he considered a Western country preferable. This suggested that the parties, and Ms Almarzooqi's family, expected that the couple would live permanently in New Zealand. There is no reason to play down this aspect by suggesting that they might not do so.

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21 Judgment under appeal, above n 3, at [23].

[63] Nor does the fact the deferred *mahr* would only become payable upon the end of the marriage make the question of residence irrelevant. Given the clear intention of the couple to live permanently in New Zealand, it is relevant that if the marriage ended with Mr Salih's death, payment would be made in New Zealand. On the other hand, given Ms Almarzooqi's evidence of the stigma of divorce in UAE, if the marriage ended in divorce, the place of payment was just as likely to be New Zealand — or, at least, not the UAE. Since payment was never likely to be made in the UAE, we see the fact that it was to be made in UAE currency as neutral.

[64] As to the other factors identified by the Judge, while the *nikah* and the certificate evidencing it carried the authority of the Dubai Personal Status Court, we do not see these as indicating a particular connection with the UAE. The certificate was plainly incorrect insofar as the place of the marriage was concerned and, it appears, as to the person who officiated. There was no evidence that the certificates required by UAE law were obtained. As the Judge properly acknowledged, a Muslim marriage contract would have the same characteristics wherever the marriage took place, including New Zealand. So the mere reference to the Dubai Personal Status Court is of limited significance, there being nothing to indicate that the contract was any different by virtue of that fact than it would have been had the marriage simply been conducted in accordance with Islamic tradition.

[65] There is another aspect on which we differ from the Judge. It will be recalled that the Judge treated Mr Salih's submission that the *mahr* is only payable under Sharia law if either the husband initiates the divorce or the wife obtains a divorce by proving harm by the husband as suggesting that "a Sharia law system is more likely to be the proper law of the contract, since those concepts are not, for example, part of New Zealand divorce law and would be unlikely to be recognised".[22] Sharia law is not a system of private law for conflict of law purposes and we infer that the Judge meant that the fact the parties wished to be married in accordance with Sharia law is indicative that the proper law of the contract is UAE because UAE law is sourced in Sharia law but New Zealand law is not.

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[22] At [24].

[66] We are cautious about this conclusion for two reasons. First, on Sheikh Zewada's evidence there is a widespread practice of Muslim couples marrying by *nikah* in New Zealand without also marrying under civil law. It is self-evident that, although some might be in a position to return to their home countries to marry under a civil law system based on Sharia law, that option is not available for many because of their residency and citizenship status (for example those who have come to New Zealand as refugees or those who were born in New Zealand and only hold New Zealand citizenship). Therefore, the basis for such an inference is not especially strong.

[67] Secondly, as we discuss later, although Sharia law concepts are not part of New Zealand law, we consider that in appropriate cases involving contractual disputes, they are capable of being recognised as part of the factual matrix.

[68] We are satisfied that the parties married in the UAE to satisfy Ms Almarzooqi's family. Mr Salih was cross-examined closely on this issue and was clear that was the only reason he went to the UAE. Ms Almarzooqi did not address the issue at all. Further, Mr Salih did not know what to expect from the ceremony, and received no advice about either the ceremony or the *nikah*.[23] Nor did the circumstances of the ceremony give any indication that it was any more than a traditional Islamic ceremony held at a private residence, as opposed to a ceremony conducted under civil law in formal surroundings. Overall, the circumstances of the marriage suggest that the decision to travel to the UAE primarily reflected the wishes of the bride's family that the couple marry in the UAE in a religiously appropriate ceremony, rather than for the purpose of securing access to UAE law.

Enforcement of the *nikah* in overseas jurisdictions

[69] Before we consider the question of enforcement of the *nikah* in New Zealand, we examine how this issue has been addressed in other jurisdictions.

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[23] The *nikah* was taken away after the ceremony and returned to him some time later. We note that the certified copy of the *nikah* is dated 2 April 2014, some four months after the ceremony, well after the couple had returned to New Zealand and only a month before they separated.

The United Kingdom

[70] As a result of the relationship between the United Kingdom and its former colonies, courts in the United Kingdom have longer experience with the issues arising from Islamic marriage contracts. Both historically, and more recently, there is explicit recognition by the courts of the cultural context in which the *nikah* exists.

[71] *Shahnaz v Rizwan* concerned parties married in India under what the Divisional Court referred to as "Mohammedan" law.[24] The contract provided for deferred *mahr* in the event of the husband's death or a divorce. The marriage was validly dissolved, though the grounds for the dissolution are not recorded. The wife sought to enforce the *mahr* as a contract that conferred a proprietary right arising out of the marriage. The husband defended the claim on the basis that the marriage was, or was potentially, polygamous with the result that the marriage contract (and consequently the *mahr*) was contrary to the policy and good morals of English law and could not be determined in an Englishcourt. This argument failed.

[72] Winn J noted that in the vast majority of Muslim marriages the bridegroom promises contractually to provide a dower, prompt and deferred. As to the latter:[25]

> That deferred dower becomes payable to her in the event of the husband's death or upon a divorce, whether she be the party divorcing (which is a very rare thing for a woman to do or be able to do) or the party divorced (which happens more often and easily, and is the event against which in particular the dower is intended to protect her). It is quite clear on the evidence that the right to dower, once it has accrued as payable, is a right in action, enforceable by a civil action without taking specifically matrimonial proceedings, regarded by Mohammedan law as a proprietary right assignable under section 3 of the Transfer of Property Act, 1882, of the Indian Code, and is a right for the support or protection of which, should the wife or widow gain physical possession or control of any property of her spouse, she is entitled to assert a lien. In my judgment, it is quite different in essence from maintenance as understood in English or in Mohammedan law. This right is far more closely to be compared with a right of property than a matrimonial right or obligation, and I think that, upon the true analysis of it, it is a right ex contractu, which, whilst it can in the nature of things only arise in connection with a marriage by Mohammedan law (which is ex hypothesi polygamous), is not a matrimonial right. It is not a right derived from the marriage but is a right in personam, enforceable by the wife or widow against the husband or his heirs.

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24 *Shahnaz v Rizwan* [1965] 1 QB 390.
25 At 401.

[73] The Judge rejected the suggestion that such claims ought not be considered in English courts, saying that:[26]

> … it is better that the court should recognise in favour of women who have come here as a result of Mohammedan marriage the right to obtain from their husband what was promised to them by enforcing the contract and payment of what was so promised, than that they should be bereft of those rights and receive no assistance from the English courts.

[74] *Qureshi v Qureshi* concerned a wife's application for a declaration as to the status of a marriage entered into in England in an Islamic ceremony.[27] The husband had divorced his wife by way of *talaq*. If that form of divorce was recognised in England as valid, it was common ground that the wife would be entitled to the *mahr* agreed at the time of the marriage. Simon P in the High Court recognised the *talaq* divorce and declared that it was valid, with the consequence that the wife recovered her *mahr*. The Judge observed that:[28]

> It is, therefore, immaterial whether the claim arises ex contractu or as an incident of status: judgment in the matter can be given in the present suit, according to the decision on the validity of the talaq in the eyes of English law. To hold otherwise would be to put the forensic clock back a hundred years …

[75] In *NA v MOT*, following the end of a short marriage between Iranian citizens (the husband a United Kingdom resident and the wife a resident of Iran who moved to England upon the marriage) the wife sought ancillary relief under the Matrimonial Causes Act 1973 and made a separate claim (seemingly under pt 8 of the Civil Procedure Rules) for the recovery of one thousand gold coins (or their sterling equivalent) payable pursuant to the marriage contract entered into in Iran.[29] Baron J in the High Court declined to deal with the claim for recovery of the money due under the marriage contract on the basis that, even if the wife was entitled to it, in disposing of the claim for ancillary relief, the Court had the power to adjust the sum to be recovered. She determined the ancillary relief taking into account expert evidence that if the husband divorced the wife by *talaq*, or failed to give her a divorce at all, the

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26 At 401–402.

27 *Qureshi v Qureshi* [1971] 2 WLR 518.

28 At 534.

29 *NA v MOT* [2004] EWHC 471 (Fam). We note that, in addition to the thousand gold coins, the *mahr* included a copy of the Quran, a mirror and some candlesticks. This point is of interest because it is consistent with Mr Salih's evidence that, in his experience, the *mahr* might either include, or actually comprise, objects of value rather than money.

whole amount of the *mahr* would be payable but also that the wife was unlikely to have succeeded in obtaining a divorce in Iran and if she wanted a divorce she would have had to negotiate a reduction in the amount she received in order to secure her freedom from the marriage. The Judge concluded that it would be unfair to require the husband to pay the full amount in these circumstances and made an order that resulted in the amount payable under the marriage contract being reduced, conditional on the husband providing a *talaq* divorce.

[76] Finally, the case of *Uddin v Choudhury* concerned an arranged Islamic marriage undertaken pursuant to *nikah* which included a deferred *mahr*.[30] The marriage was short and was not consummated. It was dissolved by the Islamic Sharia Council. Thus, neither the marriage, nor the divorce were the subject of determination under United Kingdom civil jurisdiction. The Islamic Sharia Council did not make any order regarding gifts made to the bride before the marriage, nor for payment of the *mahr*. The groom's father brought an action for the return of the gifts. The bride counterclaimed for the *mahr*. There was expert evidence as to Sharia law. Relevantly, the expert evidence was that the bride was entitled to payment of the *mahr* because the marriage had not been consummated and that situation was not of her making. In the lower court the Judge found in favour of the bride in respect of both claim and counterclaim.

[77] The Court of Appeal declined to grant leave to appeal. Giving the reasons for the Court, Mummery LJ referred to the effect of expert evidence on Sharia law and said:[31]

> … [the Judge] decided that, as evidenced by the marriage certificate, there was a properly agreed dowry or *mehar*, and he found, on the basis of the evidence given by Mr Saddiqui, that that was a valid contract which, on the evidence he had heard, was enforceable by the court. There was no legal reason in the decided cases or in policy for refusing to enforce an agreement that the parties had made for the payment of the dowry. So he said that the counterclaim for the payment of that should succeed and there were no grounds for making deductions.
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> ….

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30 *Uddin v Choudhury* [2009] EWCA Civ 1205.

31 At [7], [11] and [14].

> … The judge summarised in his judgment the essence of the expert's opinion. He was a single joint expert whose views were binding on both parties, and it seems clear to me that the judge correctly summarised and applied what was said by Mr Saddiqui in relation to the matters of the Sharia law of marriage and dowry. … it seems to me that, on the basis of the evidence given by Mr Saddiqui and the findings of fact by the judge, it was a valid marriage under Sharia law and that it was then validly dissolved by decree of the Islamic Sharia council. This was not a matter of English law. There was no ceremony which was recognised by English law, but it was a valid ceremony so far as the parties were agreed and it was valid for the purposes of giving legal effect to the agreement which had been made about gifts and dowry.
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> … as a matter of Sharia law in the circumstances of this marriage and its dissolution, the gifts were absolute, not returnable, not deductible from the dowry, and the dowry was payable notwithstanding the failure of the marriage.

[78] This case is significant for two reasons. First, consistently with the earlier decisions in *Shahnaz* and *Qureshi*, it recognised the *nikah* as enforceable in a civil court independently of issues regarding the division of relationship property (or, apparently, maintenance) under United Kingdom legislation, notwithstanding that the event triggering the contractual obligation to pay was the religious divorce granted by the Islamic Sharia Council. Secondly, the decision that the *mahr* was payable was not based just on the plain wording of the contract but took into account expert evidence as to whether payment was required under Sharia law.

[79] One might compare the approach taken in *Shahnaz, Qureshi* and *Uddin*, in which the contractual claims arose independently of claims for the division of property and maintenance, and that in taken *NA v MOT*, where the recoverability of the *mahr* was reduced partly to reflect the expert evidence regarding its recoverability under Sharia law and partly to reflect the overall effect of ancillary relief under the Matrimonial Causes Act. Reduction of the claim for the latter might, on one view, seem inconsistent with the earlier cases which recognise that the right to the *mahr* arises independently of the status of marriage. However, where the claim is brought together a claim for relief under the statutory framework, there is obviously a potential for unfairness if both are not dealt with together.

Canada

[80] Prior to 2007, the Canadian response to the enforceability of the *mahr* was inconsistent. In *Nathoo v Nathoo*, in the context of a claim for the division of property

following the breakdown of the marriage, the wife sought to recover the deferred *mahr* in addition to the division of assets under the Family Relations Act 1996.[32] The specific terms of the marriage contract had included an undertaking by the husband to pay:[33]

> … an agreed sum of money by way of "Maher" to my said wife [and] … to pay the agreed sum of money by way of Maher to my wife shall be in addition, and without prejudice to, and not in substitution of all my obligations provided for by the laws of the land.

[81] Having fixed the division of property in accordance with the legislation Dorgan J in the Supreme Court of British Colombia concluded that the agreement to pay the *mahr* was a "marriage agreement" pursuant to the Family Relations Act. Noting that under that Act the terms of a marriage agreement could be varied if they were found to be unfair, the Judge held that the agreement was not unfair and that the wife was entitled to the total amount of the *mahr* in addition to the division of family assets. The Judge made the following observation:

> [25] Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define various groups who live in a multi-cultural community. Nothing in the evidence before me satisfies me that it would be unfair to uphold the provisions of an agreement entered into by these parties in contemplation of their marriage, which agreement specifically provides that it does not oust the provisions of the applicable law.

[82] However, in *Kaddoura v Hammoud*, the Ontario Supreme Court declined to enforce a marriage contract in a traditional form, with no reference to relevant legislation.[34] The Court had the benefit of expert evidence regarding the obligation to pay the *mahr* but concluded that it was "essentially and fundamentally an Islamic religious matter" and not a matter for the civil courts.[35]

[83] Subsequently, in *Amlani v Hirani*, the Supreme Court of British Colombia again held that a marriage contract, in very similar terms to those considered in *Nathoo*, was enforceable.[36] In an application by the husband for divorce and for a

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32 *Nathoo v Nathoo* [1996] BCJ No 2720.
33 At [8].
34 *Kaddoura v Hammoud* [1998] OJ No 5054.
35 At [25].
36 *Amlani v Hirani* 2000 BCSC 1653.

declaration that the marriage contract did not constitute a marriage agreement for the purposes of the Family Relations Act, the Court found that the contract was subject to the Family Relations Act and the *mahr* was payable upon the breakdown of the marriage.

[84] In 2007 the question of the justiciability of religious marriage contracts was considered by the Supreme Court of Canada in *Bruker v Marcovitz*, which concerned an agreement between a Jewish couple reached in a rabbinical court, under which the husband undertook to grant the wife a *get* — a Jewish divorce order.[37] The husband failed to fulfil this obligation and the wife sought to enforce the agreement in the civil courts. The Supreme Court of Canada held that the fact that a dispute has a religious aspect does not preclude it being determined in the civil courts on the basis that religious obligations could be transferred into legally binding ones.[38]

[85] Mr Michalik contends that this approach does not support the direct enforceability of a marriage contract, given that the contract being enforced in *Bruker* was effectively a settlement agreement reached by consent in the rabbinical court. However, subsequent Canadian cases involving Islamic marriage contracts have proceeded on the basis that the contracts are directly enforceable in the civil courts, although usually on the basis that they fall within the scope of the relevant relationship property legislation.

[86] *Nasin v Nasin*, for example, concerned an oral marriage contract.[39] The question of enforceability of the *mahr* arose in the context of the division of relationship property under the Alberta Matrimonial Property Act. The husband acknowledged that he had obligations under religious law but did not accept that the obligations should be enforced by the civil courts.[40] The Alberta Court of Queen's Bench found that the *mahr* was an oral contract, and a prenuptial agreement for the purposes of the Matrimonial Property Act.[41] It was, however, unenforceable because it did not satisfy the requirements of the Act, including the requirement for

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37 *Bruker v Marcovitz* 2007 SCC 54.
38 At [64].
39 *Nasin v Nasin* 2008 ABQB 219.
40 At [8].
41 At [14].

independent legal advice, and the division of the property was therefore undertaken in accordance with the relevant statutory provisions.[42] Moen J observed that "if parties enter into pre-nuptial agreements in a religious context, they will be enforced if they meet the requirements under the *Matrimonial Property Act* and the courts do not find the contracts invalid for other reasons".[43]

[87] In *Khanis v Noormohamed* the Ontario Superior Court of Justice relied on *Bruker* in considering whether a marriage contract was valid and binding under the Family Law Act, which permitted the parties to agree on their respective rights and obligations on separation as regards the ownership and division of property and other matters.[44] An agreement would, however, be unenforceable unless in writing, signed by the parties and witnessed and, in addition, could be set aside in specified circumstances including if a party did not understand the nature and consequences of the contract. Neither party had obtained legal advice before signing and neither party had provided financial disclosure.[45] The contract provided that the payment of the *mahr* was "in addition and without prejudice to and not in substitution" of the husband's obligations under the Family Law Act.[46] The Court rejected the husband's claim of duress, held that the contract fell within the scope of the Family Law Act and that the *mahr* was excluded from the net family property to be divided in accordance with the Act.[47] As a result, the wife recovered both the *mahr* and property divided in accordance with the Act.

[88] In Canada, it is evident that a marriage contract will be enforced as a marriage agreement for the purposes of the relevant relationship property legislation if it meets the statutory requirements. Apart from *Kaddoura*, none of the Canadian cases we have discussed involve the question whether a marriage contract is enforceable outside the context of the division of relationship property under a statutory framework. Having regard to the general statements regarding the recognition to be afforded to different

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42 At [22].
43 At [24].
44 *Khanis v Noormohamed* [2009] OJ No 2245 at [67]–[68]. This decision was upheld on appeal: *Khanis v Noormohamed* 2011 ONCA 127.
45 At [72].
46 At [71].
47 At [70].

cultural traditions, however, it seems likely that such contracts would also be held to be enforceable on a stand-alone basis.

Australia

[89] There has been very limited consideration in Australia of the enforceability of an Islamic marriage contract. However, some of the UK and Canadian cases discussed were referred to by the New South Wales Supreme Court in *Mohamed v Mohamed*.[48] This case concerned a prenuptial contract (not, apparently, entered into as part of an Islamic marriage ceremony) under which one partner (a man) was to pay the other (a woman) AUD50,000 in the event that the man initiated "separation and/or divorce". The agreement recorded that the parties had "been living in a relationship blessed by Islamic Sharia within the meaning of the Property Relationships Act 1984 (NSW)", that they intended to marry under Australian law in the future and that they wished to enter into a "financial agreement before marriage to preclude claims of any nature relating to financial matters that either party has or may have against the other pursuant to [the relevant legislation] in the event the relationship ends, the parties separate after the date of marriage or one of the parties dies".[49] The agreement included the following clauses:

> In the event that the [1st Partner] initiates separation and/or divorce, [1st Partner] is to pay [2nd Partner] the sum of fifty thousand ($50,000) dollars ("Moackar Sadak" also known as "Dowry").
>
> Moackar Sadak is not payable to the [2nd Partner] if she initiated the separation or divorce or if both parties mutually agree to separation or jointly applied for divorce.

[90] At first instance the Magistrate made a factual finding that the man had initiated separation and the obligation to pay the agreed amount was triggered. On appeal, the Judge rejected the submission that the meaning of "separation" was to be interpreted by reference to Sharia law on the basis that, had the parties intended the word to be interpreted in that way, the term could have been defined accordingly and there was no evidence before the Court as to the meaning of that term under Sharia

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48 *Mohamed v Mohamed* [2012] NSWSC 852.
49 At [20].

law.[50] We infer that, had such evidence been adduced it would have been taken into account.

[91] The Judge referred to *Nathoo*, *Kaddoura, Nasin* and *Shahnaz*, before concluding that "[it] is clear that courts in other common law countries have not interpreted these types of agreements in accordance with Sharia law but have applied common law or the relevant legislation, if any, governing the relationship between the parties".[51] The Court did not, however, refer to *Uddin*, which was expressly decided on the basis of expert evidence as to Sharia law.

Is the *nikah* unenforceable?

A general observation

[92] Provided the *nikah* satisfies the pre-requisites for an enforceable contract, the mere fact it was entered into in the context of a religious ceremony should not, in itself, preclude it being enforceable as a contract at civil law. It is evident that the *nikah* is, by tradition, an agreement reached between parties to an Islamic marriage who understand that it is intended to create a solemn moral obligation. If, however, the requirements of a valid contract are met, there is no reason that this obligation should not also be held to be legally binding at civil law.

[93] The essential elements for a binding contract were not explored before us (save for intention to be contractually bound, which we consider is satisfied on the evidence). In particular, no mention was made of consideration. There are varying views on this issue.[52] However, in the circumstances of this case, we consider that the *nikah* is properly viewed as a deed, having been executed in writing, witnessed and delivered.[53] As a result, we proceed on the basis that no issue arises as to consideration in this case and that, subject to the issues being raised by Mr Salih, the *nikah* is enforceable.

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50 At [61].
51 At [47].
52 See, for example, the discussion in John R Bowen "How Could English Courts Recognize Shariah?" (2010) 7 U St Thomas LJ 411.
53 As the facts in *Nasin* indicate, this will not always be the case.

Does s 5 of the Domestic Actions Act 1975 apply?

[94] Section 5 of the DAA which provides that "[no] agreement between 2 persons to marry each other, wherever made, shall be a contract, and the action for breach of promises of marriage is hereby abolished". Insofar as Mr Salih's argument regarding the DAA is concerned, we are satisfied that the *nikah* is not a contract that offends s 5. It is not an agreement to marry but rather an agreement entered into upon marriage to take effect, in part, immediately and, in part, at the end of the marriage.

Does the Property (Relationships) Act 1976 apply?

[95] Mr Michalik submitted that the *nikah* is a contract to which s 21 of the PRA applies but that it is void because it does not comply with the requirements of a valid contracting out agreement in s 21F of the PRA, particularly the need for the parties to have independent legal advice. We do not accept this submission.

[96] The PRA is a code that governs the basis on which, at the end of a marriage, civil union or de facto relationship, the status of property owned by the parties is determined and property deemed to be relationship property divided. Pursuant to s 4(1), the PRA has effect "instead of the rules and presumptions of the common law and of equity to the extent that they apply". The form of the proceedings is immaterial — if issues covered by the PRA are raised in the proceedings, then the PRA is to be applied.

[97] Section 21 of the PRA permits parties to contract out of the regime by entering into an agreement "for the purpose" of contracting out of it. Such an agreement may do any of the things provided for in s 21D, which include specifying the status of certain property as relationship or separate property and defining the share of the property to which each party will be entitled when the relationship ends. To be valid, a s 21 contract must satisfy the requirements imposed by s 21F. These include that both parties received independent legal advice before signing the agreement.

[98] However, not every contract between domestic partners relating to property will be subject to the PRA, or constitute a contracting out agreement.[54] In this case, there is no basis on which to conclude that the *nikah* was entered into for the purpose of contracting out of the PRA or that it purported to do any of the things that a s 21 agreement may do under s 21D. It is in a form that is used universally, and which was prepared in the UAE without reference to the PRA. In this sense, it can be contrasted with the forms of a *nikah* considered in the some of the Canadian cases, where the parties specifically sought to recognise the existence of statutory rights.

[99] The question whether a contract falls within the scope of s 21 is, of course, a question of fact in each case and our conclusion reflects the particular circumstances before us. We do not preclude the possibility that a *nikah* entered into in different circumstances or which contains different terms could be found to be subject to s 21 or, as Mr Wass submitted, taken into account in making determinations under other provisions of the PRA such as s 9(4) (classification of property as separate/relationship property), s 15 (taking account of property in terms of economic disparity) or s 13 (where equal sharing would be repugnant to justice). Those considerations may invite an approach of the kind taken in *NA v MOT*. They are, however, beyond the ambit of the present case. If such issues did arise, we would expect that extensive consideration would be required as to the principles to be applied and may warrant the input of interveners.

Is the nikah *void as contrary to public policy?*

[100] Mr Michalik submitted that a contract to pay deferred *mahr* on divorce is void under a common law principle that a contract between spouses while they are living together which provides for separation at some future time, is void as being against public policy. He relied for this proposition on *T v T*.[55] That case concerned a separation agreement signed between husband and wife where the couple had agreed to separate, with the wife returning to England but, pending her departure, they continued to live in the same house. On the question of the validity of the separation agreement, North J, delivering the judgment for this Court, said:[56]

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54 See for example *Kake v Napier* [2022] NZHC 2395, [2022] NZFLR 489.
55 *T v T* [1961] 1 NZLR 352 (CA).
56 At 362–363. Citations omitted.

> There is no doubt that agreements for separation made during cohabitation, which provide for the event of a future separation as distinguished from an immediate separation, are void as contrary to public policy … No useful purpose would be served by tracing the long line of authority on this question. It will be sufficient to say that from the earliest times it was recognised that the maintenance and safeguarding of the marriage relationship was regarded as being a matter of public interest. Indeed, for a time, the Courts would not recognise an agreement for an immediate separation. Later … the House of Lords … finally decided that agreements for immediate separation or made when there was actual present separation were legal and valid. What, however, was not recognised was a contract before marriage or before the spouses actually separated or agreed to separate which provided for the position if in future they did separate. Agreements of this nature still were regarded to be against the public policy of the law. As Lord Wright said in the case just cited: "The distinction between that and the case of actual separation is obvious. If a separation has actually occurred or become inevitable, the law allows the matter to be dealt with according to realities and not according to a fiction. But the law will not permit an agreement which contemplates the future possibility of so undesirable a state of affairs."

[101] Notwithstanding the long history of this rule at English law, it was not referred to in any of the English cases in which the *nikah* was recognised by English courts. In any event, the rule itself must be in doubt in New Zealand following the decision of the United Kingdom Supreme Court in *Radmacher v Granatino*.[57] That case concerned a prenuptial agreement reached in contemplation of marriage which provided that neither party would benefit from property of the other either during the marriage or on its termination. The United Kingdom Supreme Court held that the rule that agreements which provided for the future separation of the parties (whether entered into before or after a marriage) were contrary to public policy was "obsolete and should be swept away".[58] The reasoning for such agreements being regarded as contrary to public policy was founded on the enforceable duty of a husband and wife to live together and that no inducement ought to be encouraged for them to live apart. No such duty is now recognised and, importantly, there is no provision by which a husband and wife could be forced by the courts to continue living together.

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57 *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534. The decision was also cited in *Mohammed v Mohammed*, above n 48, at [28] as support for the view that the agreement in that case was not contrary to public policy.

58 At [52].

Interpretation of the *nikah* and proof of entitlement to *mahr*

[102] We have concluded that the *nikah* entered into by these parties is enforceable in New Zealand, and that New Zealand law applies. Two issues remain. First, whether the wording in the *nikah* requiring the payment of the deferred *mahr* on "divorce" means divorce regardless of the grounds on which the divorce was granted or divorce on a particular ground. Secondly, if Ms Almarzooqi must prove the ground on which divorce was granted, whether she can rely on the factual findings of the Dubai court to prove that ground.

Interpretation

[103] Although a *nikah* is not a form of contract that has come before the New Zealand courts previously, it is nevertheless a binding agreement and one that is commonly used in Muslim communities. We see no reason to depart from the recognised approach to contractual interpretation summarised by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[59] This requires an objective inquiry to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[60] The objective meaning is taken to be that which the parties intended.[61] There is no conceptual limit on what can be regarded as background for this purpose though, self-evidently, it must be background that a reasonable person would regard as relevant. The Supreme Court added:[62]

> [61] The requirement that a reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that

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59 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[61]. Given the settled state of the law on contractual interpretation, we find it unnecessary to address an argument advanced on behalf of Mr Salih that the *nikah* should be interpretated by application of the contra proferentem rule.

60 At [60], citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffman.

61 At [60], citing *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [16].

62 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 59. Footnotes omitted.

> a purposive or contextual interpretation is not dependent on there being any ambiguity in the contractual language.
>
> …
>
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[104] A court tasked with interpreting the contract must therefore identify the background knowledge that the parties to the contract — and the hypothetical reasonable bystander — would have had at the time the contract was entered into. Great care is needed when courts embark on the task of interpreting a contract made within a particular cultural context. The present case has some parallels with cases decided within the context of tikanga.[63]

[105] Given the universal use of *nikah* by Muslim communities both historically and currently, we consider that *nikah* cannot properly be interpreted in any given case without reference to that context. The interpretative task in this case will depend on evidence about the general principles of Sharia law. It seems tolerably clear that there are generally recognised norms regarding divorce and the payment of *mahr*. The approach taken in England appears not to have been impeded by the fact that Sharia law can be subject to different interpretations.

[106] We do not, however, consider that there is sufficient evidence before us to interpret the *nikah*. As we have already noted, in the High Court, the focus was on UAE law and Ms Almarzooqi adduced evidence about UAE law from a UAE lawyer; Ms Hamade's evidence was clear that under UAE law the reason for divorce was irrelevant to the obligation to pay the deferred *mahr* and that once divorce has occurred for any reason the *mahr* is automatically owed and enforceable as a debt. However, UAE law does not assist because it is not the proper law of the *nikah*.

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[63] See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; and *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

[107] Further, the position under UAE law described by Ms Hamade was inconsistent with the general position under Sharia law described by Mr Taha, a New Zealand lawyer with knowledge and experience of Sharia law, who said during cross examination:

> … it's a duty on the husband to pay mahr, when the divorce is made by the sole will of the husband. If there is a dispute around the responsibility or liability for the harm that caused or has caused the breakdown of the institution of marriage, people may consider disputing the amount of mahr paid to the wife … it is supposed to be fair, mahr, the husband is required to pay mahr and he make divorce by his sole intention and will, then he will be obliged, morally, religiously as well to pay mahr but if there is dispute about the harm … about the decision and these go to the arbitrators, then there will be another story regarding the payment of the mahr, whether it is paid in full, part or not.

[108] Sheikh Zewada gave only very general evidence about the practice of Islamic marriage and divorce in New Zealand and was not asked about specific principles of Sharia law.

[109] Ideally, the principles of Sharia law, as they would have been understood by the parties and by a reasonable bystander, would have been addressed more extensively, either by an expert jointly engaged for that purpose or by each party adducing evidence. We make no criticism of the parties for not addressing this issue more fully because Sharia law (as opposed to UAE law) was not identified as a relevant topic on which evidence was required and the issues in the case have taken some time to emerge fully. However, we do not feel able to do justice to the parties on the limited evidence available to us. The proper course is to remit the matter to the High Court for this purpose.

The UAE court's findings of fact

[110] Mr Salih maintains that, properly interpreted, the *mahr* only becomes payable upon proof of his mistreatment of Ms Almarzooqi (as opposed to the mere fact of divorce) and that fact must be proved in a New Zealand court. Ms Almarzooqi, however, wishes to rely on the Dubai court's findings of fact. In seeking to rely on the findings of the Dubai court, Ms Almarzooqi is asserting *res judicata* as an issue estoppel.

[111] An issue estoppel by *res judicata* arises where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of litigation; any party or privy to such litigation is estopped, as against any other party or privy, from disputing or questioning the decision on the merits.[64] The two-fold rationale for the rule is, first, the interest of the community in the determination of disputes and the finality and conclusiveness of judicial decisions, and secondly, the protection of individuals from repeated suits for the same cause.[65]

[112] In *Spencer Bower and Handley*: *Res Judicata*, the learned author summarised the requirements for establishing a *res judicata*:[66]

> A party setting up a *res judicata* as an estoppel against his opponent's claim or defence, or as the foundation of his own, must establish its constituent elements, namely that:
>
> (i) the decision, whether domestic or foreign, was judicial in the relevant sense;
>
> (ii) it was in fact pronounced;
>
> (iii) the tribunal had jurisdiction over the parties and the subject matter;
>
> (iv) the decision was:
>
> (a) final;
>
> (b) on the merits;
>
> (v) it determined a question raised in the later litigation; and
>
> (vi) the parties are the same or their privies, or the earlier decision was *in rem*.

[113] The requirement that the court had jurisdiction over the parties in the litigation is critical in this case. In the context of Ms Almarzooqi's attempt to enforce the decision of the Dubai court in New Zealand, it was determined that Mr Salih had not submitted to the jurisdiction of that court.[67] This finding cannot be challenged. The effect of it is to preclude Ms Almarzooqi being able to rely on the factual findings of

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64 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 (HL) at 933.

65 *Van Heeren v Kidd* [2016] NZCA 401, [2017] 3 NZLR 141 at [1].

66 KR Handley *Spencer Bower and Handley: Res Judicata* (5th ed, LexisNexis, London, 2019) at [1.02]. Footnotes omitted.

67 HC enforcement decision, above n 2, at [40]; and CA enforcement decision, above n 2, at [58]–[59].

the Dubai court as a *res judicata*. If the High Court ultimately finds that, properly interpreted, the *nikah* requires Mr Salih to pay the *mahr* only upon proof of his misconduct, Ms Almarzooqi will need to prove that fact.

Result

[114] We have concluded that:

(a) The proper law of the *nikah* is New Zealand law.

(b) The *nikah* is enforceable under New Zealand law and expert evidence as to the cultural context in which the contract was entered into may be relied on to interpret its meaning.

(c) In enforcing the *nikah*, Ms Almarzooqi may not rely on the factual findings of the Dubai court.

[115] The appeal is allowed. The case is remitted to the High Court for reconsideration in accordance with this decision.

[116] Parties may address the issue of costs by memoranda to be filed (1) by the appellant by 22 January 2024 and (2) by the respondent by 29 January 2024.

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