IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B54 of 2017

BETWEEN:

UBS AG
Appellant

and

SCOTT FRANCIS TYNE AS TRUSTEE OF THE ARGOT TRUST
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification for publication

1. The appellant certifies that this outline of oral submission is in a form suitable for publication on the internet.

Part II: Outline of the propositions the appellant intends to advance in oral argument

2. The appellant contends that the approach taken by the majority of the Full Court has at least three difficulties, which to some extent overlap.

3. *First*, the majority's approach is inconsistent with the "overarching purpose" of the practice and procedure provisions applicable to civil litigation as prescribed by s 37M of the *Federal Court of Australia Act* 1976 (Cth) and its various State counterparts, and with principles of finality[1] in litigation: see appellant's written submissions ("**AWS**") at [34]-[42], [48]-[49] and Reply at [10]-[15].

[1] *D'Orta-Ekanaike v Victorian Legal Aid* (2005) 223 CLR 1 at [34], [45]; *Attwells v Jackson Lalic Lawyers Pty Limited* (2016) 259 CLR 1 at [34], [36].

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4. By reason of s 37M and cognate State provisions, the proper question in a case of this kind is whether bringing or maintaining the new proceedings is consistent with the legislature's aim of the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.[2]

5. The "overarching purpose" identified in s 37M cannot be achieved by allowing one or more of a number of plaintiffs, controlled by the same individual, to discontinue proceedings, then stand back and allow those proceedings to continue to a final judicial determination then, depending on the outcome of the first proceedings and without any explanation, commence fresh proceedings raising the same underlying substratum of facts and, in substance, the same claims against the same defendant.

6. *Secondly*, the majority of the Full Court paid no regard to whether the Argot Trust's bringing and maintaining the proceedings below would, in all the circumstances, bring the administration of justice into disrepute: see AWS at [34], [40], [46]-[49] and Reply at [9], [11]-[15].

7. In particular, the majority failed to give any or sufficient regard to the combination of delay, increased costs, vexation and waste of public resources arising from dealing with the same matter twice.

8. The majority should not have sought to resolve the issue by asking whether UBS will be required to "do now what it otherwise would have had to do in 2013" (at [108]; AB2/868.55).

9. Even if that were the case, the continuance of the proceedings would still be oppressive to UBS and would still bring the administration of justice into disrepute.

10. If the administration of justice permits a person controlling a number of plaintiffs to proceed as described above – namely, to cause one of those plaintiffs to discontinue and then, when and if the remaining plaintiff fails, to start fresh proceedings raising the same substratum of facts, without any explanation – the administration of justice is likely to be perceived as inefficient, careless about the incurrence of cost by the parties, and

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[2] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [56] – [57], [59]; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [92]-[93], [95], [98]-[100].

profligate in the application of public monies, as observed by Dowsett J in the minority below (at [17]; AB2/835.20).

11. *Thirdly*, the approach taken by the majority of the Full Court depends upon the identification and application of a rigid, and erroneous,[3] principle of law, namely: if one of the original plaintiffs to earlier proceedings brings fresh proceedings, against the same defendant and raising the same facts, it is not open to a Court to find that the new proceedings are an abuse if the earlier proceedings were judicially determined otherwise than through a trial on the underlying merits: see AWS at [33], [44]-[48] and Reply at [6]-[8].

10 12. The rigidity of the principle was compounded, in this case, by the failure of the majority to have regard to all the relevant circumstances, including the earlier proceedings in the High Court of Singapore: see AWS at [50]-[58] and Reply at [16]-[18].

13. This principle is inconsistent with the notion that the doctrine of abuse is inherently flexible and capable of arising in *any* circumstance in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute.[4]

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[3] *Walton v Gardiner* (1993) 177 CLR 378 at 397-398.
[4] *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [25]-[26]; *Timbercorp Finance Ltd (in liq) v Collins* (2016) 259 CLR 212 at [69].