

UBS AG v SCOTT FRANCIS TYNE AS TRUSTEE OF THE ARGOT TRUST (B54/2017)

Court appealed from: Full Court of the Federal Court of Australia
[2017] FCAFC 5

Date of judgment: 20 January 2017

Special leave granted: 15 September 2017

This dispute has been litigated (in broadly similar terms) before the Federal Court of Australia (“the Federal Court proceedings”), the High Court of Singapore (“the Singapore proceedings”) and the New South Wales Supreme Court (“the NSW proceedings”). It concerns allegedly negligent advice given by UBS AG (“UBS”) in 2007 and 2008 to Mr Scott Tyne, the sole trustee of the Argot Trust. That advice allegedly caused the Argot Trust losses, while Ms Clare Marks (Mr Tyne’s wife) also claimed to have suffered losses as a guarantor.

Ms Marks was never a party to either the Singapore or the NSW proceedings, while the previous trustee of the Argot Trust, ACN 074 971 109, was a party to both the Singapore and NSW proceedings, but not the Federal Court proceedings. The Singapore litigation was ultimately decided against the Tyne interests, while the New South Wales litigation was permanently stayed and never decided on its merits.

On 8 January 2016 Justice Greenwood held that the Federal Court proceedings were to be permanently stayed as an abuse of process. On 20 January 2017 however, a majority of the Full Federal Court (Jagot & Farrell JJ; Dowsett J dissenting) allowed the Tyne interests’ appeal. The majority held that an original plaintiff (or someone closely related, such as Ms Marks) *could* relitigate the same issues against the same parties, given the particular litigation history of this dispute. Furthermore, they could do so without causing either unfairness to those parties or by bringing the administration of justice into disrepute.

Justice Dowsett however found that the combined effect of delay, the increase in costs, vexation and the waste of public resources associated with the duplication of proceedings may be sufficient to give rise to manifest unfairness to UBS or to bring the administration of justice into disrepute. This was having regard to the public interest in the finality of litigation and the overarching purpose stated in section 37M of the *Federal Court of Australia Act 1976* (Cth).

The grounds of appeal include:

- The majority of the Full Court (Jagot & Farrell JJ) erred at [107]-[108] in failing to recognise, or to take account of, (i) the manifest unfairness to UBS and (ii) the effect of the proceedings in bringing the administration of justice into disrepute, which were constituted by those matters identified by Dowsett J at [23], [28] and [32], namely the significant delay in resolution of the dispute for a period of three or more years, the additional costs incurred or to be incurred by UBS, the vexation of UBS

and the waste of public resources associated with the duplication of proceedings.

On 15 December 2017 Justice Bell made an order, by consent, removing Ms Marks (the then Second Respondent) as a party to this appeal.