IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

HIGH COURT OF AUSTRALIA
FILED
20 OCT 2017
THE REGISTRY SYDNEY

No. B54 of 2017

BETWEEN:

UBS AG
Appellant

and

SCOTT FRANCIS TYNE AS TRUSTEE OF THE ARGOT TRUST
First respondent

CLARE ELIZABETH MARKS
Second respondent

APPELLANT'S SUBMISSIONS

Part I: Publication on the internet

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

Part II: The issues on the appeal

2. First ground of appeal: If one of the plaintiffs in proceedings which were judicially determined otherwise than by a trial on the underlying merits brings new proceedings agitating the identical factual issues against the identical defendant, is a finding of abuse of process:

   (a) open, having regard to the combination of delay, increased costs, vexation and waste of public resources arising from dealing with the same matter twice, as held by Justice Dowsett in the minority below and as the appellant ("**UBS**") submits is consistent with authority and principle; or

   (b) not open, as held by the majority of the Full Court (Jagot and Farrell JJ) below, because in those circumstances the defendant to the new proceedings

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"must do now what it otherwise would have had to do" in the earlier proceedings: (see at [108]).

3. Second ground of appeal: Was it open to UBS to submit, and open to the Court to conclude, that the existence and outcome of earlier proceedings in Singapore could support or contribute to a finding that the proceedings below constituted an abuse of process?

Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

4. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and has concluded that no such notice is necessary.

Part IV: Citations of the decisions below

5. The decision of the Full Court of the Federal Court is reported in *Tyne (Trustee) v UBS AG (No 2)* (2017) 341 ALR 415, [2017] FCAFC 5.

6. The decision of the primary judge is reported in *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5.

Part V: Relevant facts

7. The first respondent, Mr Tyne, sues in the Federal Court in his capacity as trustee of the Argot Trust ("**Argot Trust**").[1] Mr Tyne, together with his wife – the second respondent ("**Ms Marks**") – and their children are the sole beneficiaries of the Argot Trust.[2]

8. The proceedings concern an investment account formerly held with UBS by Telesto Investments Limited ("**Telesto**"), a company incorporated in Jersey. At all relevant times, Mr Tyne was the guiding mind of Telesto.[3] In the period from 2007 to 2010, UBS, through its Singapore branch, made certain credit facilities available to

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[1] Amended statement of claim filed 24.3.14 ("**ASOC**") at [2].
[2] Affidavit of Scott Francis Tyne affirmed 8.1.15 at [63]; *Tyne v UBS AG* (2014) 102 ACSR 403, [2014] FCA 1073 at [125].
[3] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [392].

Telesto.[4] Mr Tyne agreed to guarantee the amounts owing by Telesto to UBS under the facilities ("**Guarantee**").[5]

9. The primary allegations in the Federal Court proceedings are that UBS engaged in misleading or deceptive conduct or gave negligent advice to Mr Tyne which induced Telesto to acquire and retain certain bonds issued by banks located in Kazakhstan.[6] The Argot Trust also alleges that UBS breached fiduciary duties allegedly owed to it.[7] The Argot Trust claims that the allegedly misleading conduct of UBS induced Mr Tyne and "through him", the Argot Trust, to take steps to its detriment.[8]

10. At all material times, Mr Tyne was a director of the trustee of the Argot Trust
10 ("**Argot**", later named ACN 074 971 109 Pty Limited ("**ACN 074**")). By reason of an Investment Management Deed made between Argot as trustee of the Argot Trust and Mr Tyne dated 13 April 2000, Mr Tyne was engaged by the Argot Trust to manage the Argot Trust's investment portfolio pursuant to the terms of the Deed.[9]

11. Further, at all material times, Mr Tyne remained the controlling mind of ACN 074 as trustee of the Argot Trust[10] until Mr Tyne himself became the trustee of the Argot Trust four days before the commencement of the proceedings below in the Federal Court.[11]

12. In September 2008, the value of the collateral provided by Telesto declined. UBS issued a margin call requiring Telesto either to provide additional collateral or to
20 reduce the amount owed under the facilities.[12]

13. Telesto and Mr Tyne requested that UBS not sell the collateral provided by Telesto or make further margin calls in relation to amounts owing under the facilities. UBS agreed not to do so on certain conditions that were contained in a letter dated

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[4] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [42]-[44], [167]-[168].
[5] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [160], [211].
[6] ASOC at [26]-[79], [80]-[81].
[7] ASOC at [87]-[92].
[8] ASOC at [81A]-[86], [93]-[104]. See *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [25]-[155].
[9] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [28]; ASOC at [3].
[10] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [394], [414], [424].
[11] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [5], [414]; ASOC at [2].
[12] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [75], [162].

14 December 2009 countersigned by Telesto on 31 December 2009 ("**Standstill Agreement**").[13]

14. In the Standstill Agreement, Telesto undertook to procure that ACN 074, as the then trustee of the Argot Trust, enter into a letter of undertaking in favour of UBS ("**Letter of Undertaking**"). On 28 January 2010, ACN 074 executed the Letter of Undertaking.[14]

15. On 15 October 2010, UBS commenced proceedings 801 of 2010 in the High Court of Singapore ("**Singapore 801 proceedings**") against Telesto, as principal debtor, and Mr Tyne, as guarantor, alleging that Telesto's account with UBS was in default.[15] The trustee of the Argot Trust was not a party to those proceedings.[16]

16. The High Court of Singapore later found[17] that between 31 December 2009 and October 2010, three events of default occurred under the Standstill Agreement, with the effect that the Standstill Agreement was terminated. Accordingly, the amounts owed by Telesto under the facilities became due. Mr Tyne also became liable for those amounts pursuant to the Guarantee.

17. On 2 November 2010, Mr Tyne (in his personal capacity), ACN 074 as the trustee of the Argot Trust and Telesto commenced proceedings no 2010/363808 in the Supreme Court of New South Wales ("**SCNSW proceedings**") against UBS.[18]

18. On 21 February 2011, in proceedings 1160 of 2010 ("**Singapore anti-suit proceedings**"), the High Court of Singapore granted an anti-suit injunction preventing Telesto, Mr Tyne in his personal capacity and the trustee of the Argot Trust from prosecuting the SCNSW proceedings or other proceedings in Australia in relation to the subject matter of the Singapore 801 proceedings.[19] An appeal by

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[13] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [163]-[167]; Tender Bundle, Part F, Tab 29, pp 982-983.
[14] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [164], [198], [220]; Tender Bundle, Part F, Tab 30, pp 984-985.
[15] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [157], [158]; Tender Bundle, Part D, Tab 11, pp 594-616.
[16] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [384].
[17] *UBS AG v Telesto Investments Limited* [2011] SGHC 170 at [32]-[33].
[18] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [170].
[19] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [196]-[201], [401]-[402]; Tender Bundle, Part D, Tab 12, pp 617-625.

Telesto, Mr Tyne and the Argot Trust was dismissed.[20] In these submissions, the Singapore 801 proceedings and the Singapore anti-suit proceedings are referred to collectively as the "**Singapore proceedings**".

19. By commencing and conducting the proceedings below, Mr Tyne (as trustee of the Argot Trust) has contravened and continues to contravene the anti-suit injunction.[21]

20. On 21 February 2012, Ward J granted leave to the plaintiffs in the SCNSW proceedings to amend their pleading.[22] The effect of the amendments was that, without objection from UBS and with the leave of the Court, Mr Tyne and ACN 074 as trustee of the Argot Trust withdrew as plaintiffs and discontinued their claims in the SCNSW proceedings, leaving Telesto as the sole plaintiff in those proceedings.[23]

21. Mr Tyne, as director and guiding mind of ACN 074, made the decision to cause the Argot Trust to discontinue as plaintiff in the SCNSW proceedings and not to agitate in those proceedings the causes of action later asserted in the Federal Court in the proceedings below.[24] The Argot Trust chose not to maintain those claims in the SCNSW proceedings when it could have done so without suffering any juridical disadvantage.[25]

22. On 27 July 2012, the Singapore 801 proceedings proceeded to final hearing. Telesto and Mr Tyne did not appear and the hearing proceeded in their absence. At the conclusion of the hearing, Lai J delivered *ex tempore* reasons and granted final declaratory relief, including the following declaration:[26]

> [Telesto and Mr Tyne] are estopped from asserting, and/or have compromised, any claims or defences they may have arising out of, or in relation to, the Investments and/or Total Liabilities due and owing to

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[20] *UBS v Telesto* [2011] SGHC 170. See *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [204]-[219], [221]-[223].
[21] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [403].
[22] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [234]; *Telesto v UBS* (2012) 262 FLR 119, [2012] NSWSC 44 at [4]-[5], [224]; Tender Bundle, Part E, Tab 23, pp 875-876 at [6]; Exhibit CMM-2, Tab 14.
[23] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [181]-[182], [225]-[238], [378]; Tender Bundle, Part E, Tab 22, pp 840-873.
[24] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [414].
[25] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [415]-[417], [419].
[26] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [250]-[253]; Tender Bundle, Part D, Tab 16, pp 676-785, and Tab 17, pp 786-789.

> [UBS], including but not limited to, the acquisition or management of the Investments and/or the Total Liabilities.

23. In the proceedings below, the primary judge found that, had Telesto and Mr Tyne chosen to engage in the Singapore 801 proceedings, Mr Tyne could have also caused the Argot Trust to join those proceedings and to assert the factual matrix asserted in the Federal Court proceedings.[27]

24. On 9 May 2013, Sackar J permanently stayed[28] the SCNSW proceedings on the ground of *res judicata* and issue estoppel arising from the judgment of Lai J in the Singapore 801 proceedings.[29] At that time, Telesto was the sole remaining plaintiff in the SCNSW proceedings. No appeal was brought from this decision.

25. It follows that on or by 9 May 2013 the SCNSW proceedings had been finally concluded; the previous plaintiffs to the SCNSW proceedings, including the trustee of the Argot Trust, had long since elected to cease any involvement in those proceedings and were apparently not agitating any claim against UBS; and the Singapore 801 proceedings had been concluded after a hearing on the merits from which there had been no appeal. From the point of view of UBS, the issues had been resolved, after some years of litigation in two countries.

26. On 13 January 2014, the respondents commenced the proceedings below in the Federal Court, raising in substance the same factual matters as those alleged in the SCNSW proceedings.[30]

27. On 8 January 2016, the primary judge ordered that the Federal Court proceedings be permanently stayed as an abuse of process.[31]

28. On 20 January 2017, the Full Court, by majority, allowed an appeal from this decision.[32]

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[27] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [382], [391], [394].
[28] *Telesto v UBS* (2013) 94 ACSR 29, [2013] NSWSC 503 at [185]-[201], [210]-[223], [287]; Exhibit CMM-1, Tab 3.
[29] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [260], [285]-[304], [410].
[30] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [25], [156], [185], [417].
[31] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5.
[32] *Tyne (Trustee) v UBS AG (No 2)* (2017) 341 ALR 415, [2017] FCAFC 5.

29. In March 2017, UBS became aware that Ms Marks had become a bankrupt upon the making of a sequestration order on 11 June 2014.[33] This had not been brought to the attention of the primary judge, nor the Full Court.

30. On 8 March 2017, UBS notified the trustee of Ms Marks' bankrupt estate of the Federal Court proceedings and requested that the trustee make an election under s 60(3) of the *Bankruptcy Act 1966* (Cth) whether to prosecute or discontinue the action on behalf of Ms Marks.[34] On 6 April 2017, the trustee in bankruptcy notified the Federal Court that the 28-day election period under s 60(3) had expired, with the consequence that Ms Marks' proceeding was deemed to have been abandoned.[35] Consequently, on 11 April 2017, the primary judge made orders dismissing, with costs, the proceeding brought by Ms Marks.[36]

31. In those circumstances, there is no ground of appeal directed to the Full Court's conclusion regarding Ms Marks.

32. The dismissal of the proceeding brought by Ms Marks brings into stark relief the nature of the abuse of process constituted by the Argot Trust's proceeding. The reasons of the majority took as their primary focus the position of Ms Marks ([91]-[98]), before dealing, secondarily, with the Argot Trust ([99]-[108]). However, as Dowsett J observed at [24]: "If the Trust were the sole appellant in these proceedings, the abuse of process would be clear." That is, in substance, the position which now exists following the orders made dismissing Ms Marks' proceeding.

Part VI: The appellant's argument

First appeal ground: The majority erred in concluding that the Argot Trust's proceeding was not an abuse of process

33. As noted above, the majority of the Full Court held that there was no abuse in the Argot Trust bringing fresh proceedings in 2014 against the same defendant and raising the same facts as those it had raised in the SCNSW proceedings. Indeed, the majority held that in such circumstances it was "not open" to a Court to find that the

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[33] *Tyne v UBS AG (No 4)* [2017] FCA 374 at [1], [6].
[34] *Tyne v UBS AG (No 4)* [2017] FCA 374 at [14].
[35] *Tyne v UBS AG (No 4)* [2017] FCA 374 at [14].
[36] *Tyne v UBS AG (No 4)* [2017] FCA 374 at [15]-[18], [21] and orders 1 and 2.

new proceedings were an abuse of process, because the SCNSW proceedings were judicially determined otherwise than through a trial on the underlying merits: [108]-[109].

34. In overview, the difficulties with the approach of the majority include the following (which to some extent overlap). First, the approach pays no or insufficient regard to whether bringing the new proceedings would bring the administration of justice into disrepute. In particular, it fails 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. The approach taken by the majority identifies and applies a rigid principle of law precluding an abuse in the circumstances arising in this litigation, yet this Court has made clear that abuse of process is a flexible doctrine. Importantly, the approach taken by the majority is inconsistent with the "overarching purpose" of civil litigation now prescribed by s 37M of the *Federal Court of Australia Act 1976 (Cth)* ("**Federal Court Act**") and with principles of finality in litigation. The authorities on which the majority relied in arriving at their decision, including *Reichel v Magrath*[37] in 1889, do not consider s 37M or its State equivalents and need to be interpreted and applied in the light of that provision.

35. In examining these difficulties in more detail, the starting point is that this Court affirmed in *Tomlinson v Ramsey Food Processing Pty Ltd*[38] and in *Timbercorp Finance Ltd (in liq) v Collins*[39] that the doctrine of abuse of process is inherently broader and more flexible than estoppel and is capable of application in any circumstances 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.

36. The doctrine of abuse of process reflects "a central and pervading tenet of the judicial system", namely that "controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances."[40] The doctrine also reflects the precepts which are now given statutory force by provisions such as s 37M of the Federal Court Act and which were referred to in *Expense Reduction Analysts Group*

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[37] (1889) 14 App Cas 665.
[38] (2015) 256 CLR 507 at [25]-[26] (French CJ, Bell, Gageler and Keane JJ).
[39] (2016) 339 ALR 11, (2016) 91 ALJR 37 at [69] (French CJ, Kiefel, Keane and Nettle JJ).
[40] *D'Orta-Ekanaike v Victorian Legal Aid* (2005) 223 CLR 1 at [34], [45] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Attwells v Jackson Lalic Lawyers Pty Limited* (2016) 259 CLR 1 at [34], [36] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd[41] and in *Aon Risk Services Australia Ltd v Australian National University*.[42] These include that speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings; and the achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants.

37. Section 37M(1) gives effect to those considerations by stipulating that the "overarching purpose" of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law and "as quickly, inexpensively and efficiently as possible". Sub-section (2) identifies, in a non-exhaustive fashion, certain objectives which are included in the overarching purpose. Those objectives include "the efficient use of the judicial and administrative resources available for the purposes of the Court" (sub-s (2)(b)); "the efficient disposal of the Court's overall caseload" (sub-s (2)(c)); "the disposal of all proceedings in a timely manner" (sub-s (2)(d)); and "the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute" (sub-s (2)(e)).

38. Section 37M was introduced by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth).[43] The Explanatory Memorandum which accompanied the Bill for that Act said that a "key objective" of the reforms was "to bring about a cultural change in the conduct of litigation"; that "the need for courts to have powers to ensure the use of public resources are proportionate to the issues in dispute" was "essential for ensuring access to justice for all court users"; that providing for an overarching purpose would "ensure that the Court considers broader aims than simply the interests of justice between the parties"; that the reforms implemented an "intention that both the Court's and the litigant's resources are spent efficiently"; and that the new s 37M was "the centre-piece of the case management reforms".[44] In

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[41] (2013) 250 CLR 303 at [51] (French CJ, Kiefel, Bell, Gageler and Keane JJ).
[42] (2009) 239 CLR 175 at [92]-[93], [95], [98]-[100] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[43] Section 3 and Sch 1, item 6.
[44] Explanatory Memorandum, *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* (Cth) at p 3 and [1], [4], [14], [18].

the Second Reading Speech, the Attorney-General said that "without an accessible system of justice, the public's confidence in the rule of law is compromised."[45]

39. These considerations received attention in the reasons of the dissenting judge in the Full Court. At [15]-[16], Dowsett J identified the knowledge that is to be attributed to the "right-thinking person"[46] whose perception as to the bringing into disrepute of the administration of justice is a touchstone of an abuse of process. This included knowledge that "a democratic society depends heavily upon the existence of a fair, efficient, effective and economical process for resolving disputes": [15]. His Honour added at [17]:

> ... in general, where previous proceedings have been discontinued, and similar proceedings subsequently commenced, the right-thinking person would infer that there had been a loss of time, an increase in costs, some degree of repetition of process and undue vexation to the other party. Such a person would likely perceive that if the administration of justice allows such conduct, without any explanation, it is inefficient, careless about the incurrence of cost by the parties, and profligate in the application of public monies.

40. Unlike Dowsett J, save for a passing reference at [98] when stating their conclusion regarding Ms Marks, the majority judges did not give consideration to whether continuation of the proceedings would bring the administration of justice into disrepute.

41. Nor did the majority advert to the significance of s 37M of the Federal Court Act. As Dowsett J observed at [20], the overarching purpose stated in that provision will generally not be achieved by allowing a party to discontinue and then re-commence proceedings; and the older authorities must be interpreted and applied "in light of that provision".

42. At [91], the majority concluded that the present case "extends the circumstances in which an abuse of process has been found". However, this conclusion was arrived at following the majority's analysis at [70] to [89] of the authorities commencing with

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[45] Commonwealth of Australia, *Hansard: House of Representatives*, 22 June 2009, p 6732.

[46] See *Walton v Gardiner* (1993) 177 CLR 378 at 392-393 (Mason CJ, Deane and Dawson JJ) and *D'Orta-Ekanaike* (2005) 223 CLR 1 at [74], [75], both referring to *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 (Lord Diplock).

Reichel v Magrath[47] in 1889. Those authorities were not concerned with s 37M of the Federal Court Act and, as noted above, must be interpreted and applied in the light of that provision.

43. In any case, this Court has repeatedly emphasised that the categories of abuse of process are not closed.[48] As Dowsett J observed at [19], it is unwise to seek to identify limits to the circumstances in which proceedings may be characterised as an abuse of process or to seek to identify factors as being more or less likely to lead to such a conclusion. Hence the lack of utility in seeking to identify limits beyond which the cases have not previously gone. In addition, as Dowsett J remarked, *Batistatos v Roads & Traffic Authority of NSW*[49] was a case in which a permanent stay was granted absent an earlier determination on the merits: [19]. So too was *Walton v Gardiner*.[50]

44. Any proposition to the effect that proceedings concerning the subject matter of previous litigation are capable of constituting an abuse of process only if the earlier litigation was disposed of on its underlying merits is inconsistent with (i) the reasoning in *Batistatos*[51] and the decision in *Walton v Gardiner*;[52] (ii) the flexibility inherent in the statement of principles in *Tomlinson*;[53] and (iii) the rationale for *Anshun*[54] estoppel which, of necessity, applies where the claim which attracts the estoppel was not made, and hence was not determined on its merits, in the earlier proceeding. Justice Dowsett referred to these matters at [10] to [11] of his reasons.

45. Further, the fact that the earlier proceedings may or may not have been determined after a trial on the merits is merely one of the circumstances to which a Court may wish to have regard in determining whether there is an abuse; it is not, of itself, and without more, an overriding or determinative criterion, contrary to the approach taken by the majority. The circumstances need to be looked at in their totality.

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[47] (1889) 14 App Cas 665.
[48] See, eg, *Tomlinson* (2015) 256 CLR 507 at [25] (French CJ, Bell, Gageler and Keane JJ); *Batistatos v Roads & Traffic Authority of NSW* (2006) 226 CLR 256 at [14]-[15] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
[49] (2006) 226 CLR 256 at [27], [31], [72] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
[50] (1993) 177 CLR 378 at 397-398 (Mason CJ, Deane and Dawson JJ).
[51] (2006) 226 CLR 256 at [27], [31], [72] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
[52] (1993) 177 CLR 378 at 397-398 (Mason CJ, Deane and Dawson JJ).
[53] (2015) 256 CLR 507 at [25]-[26] (French CJ, Bell, Gageler and Keane JJ).
[54] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-604 (Gibbs CJ, Mason, Aickin JJ).

46. At [32], Dowsett J observed that all of the claims arising out of UBS's conduct could have been resolved in 2013, but for a decision taken by the Argot Trust, Ms Marks and/or Mr Tyne not to permit such resolution. His Honour continued:

> ... the manifest unfairness to UBS lies in the delay of the final resolution of the matter for a period of, probably, three or more years, the inevitable additional costs which have been, or will be incurred and the inconvenience of having to deal with the matter again, after lengthy litigation. Those matters, by themselves, would be likely to bring the administration of justice into disrepute, particularly if the right-thinking person were to form the view that toleration of the relevant conduct in this case bespoke the general attitude of the courts.

47. The majority took no account of those matters. Instead, their Honours said only that "if the trust or Ms Marks had made their claims in the Supreme Court proceedings, UBS would have been required to admit or defend those claims. That is the same position as UBS would now be in but for the grant of the permanent stay by the primary judge": [107].

48. As noted above, one effect of the position articulated by the majority is that it will not be an abuse of process to bring fresh proceedings against a defendant where there has not previously been a hearing of those issues on the merits: [90]-[91], [101], [103], [107]. A further effect is that delay, increased costs, vexation and duplication of proceedings will not itself give rise to an abuse of process: [107]-[108]. The majority's conclusion was that it is "not open", as a matter of principle, for an abuse to arise in such circumstances: [108]. These propositions of law by an intermediate appellate court are impermissible limitations upon the inherent breadth and flexibility of the doctrine of abuse articulated by this Court.[55]

49. If left uncorrected, the reasons of the majority are apt to convey a general attitude of toleration by the courts for repeated attempts at re-litigation, by closely related parties, of substantially the same claims based upon a common substratum of fact. Indeed, that tolerance extends to permitting the re-litigation without any explanation by affidavit or otherwise of the reason for discontinuing and not re-joining an earlier action which itself had been permanently stayed so as to vindicate finality in litigation.

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[55] *Tomlinson* (2015) 256 CLR 507 at [25]-[26] (French CJ, Bell, Gageler and Keane JJ); *Timbercorp* (2016) 339 ALR 11, (2016) 91 ALJR 37 at [69] (French CJ, Kiefel, Keane and Nettle JJ).

Second appeal ground: The relevance of the Singapore proceedings

50. The majority erred at [53] in concluding that the primary judge's reasons for deciding that the Federal Court proceedings constituted an abuse of process did not include the Singapore proceedings; that it was "not open" to UBS to rely upon those proceedings in the appeal without having filed a notice of contention below; and that the existence and outcome of the Singapore proceedings "could not found any claim that the current proceedings ... constituted an abuse of process".

51. The primary judge carefully set out the course of events in the Singapore 801 proceedings and the Singapore anti-suit proceedings at [157] to [169], [221] to [223], [239] to [284] and [191] to [219] respectively. From [305], his Honour analysed the principles applicable to the determination of the issues before him, including those governing abuse of process ([342]-[352]). His Honour's reasons from [376] to [434] appeared beneath the heading "The application of these principles to this case". That section commenced with brief reference to the SCNSW proceedings and the Singapore 801 proceedings ([377]-[384]) before explaining (at [385]-[412]) his Honour's reasons for concluding that the respondents were not bound by a *res judicata*, issue estoppel or *Anshun* estoppel arising from the Singapore 801 proceedings ([386]-[400]), the Singapore anti-suit proceedings ([401]-[409]) or the SCNSW proceedings ([410]-[412]).

52. His Honour then turned immediately to the question of abuse of process ([413]-[429]). That portion of his Honour's reasons included two express references to the Singapore 801 proceedings ([418], [422]). Nothing in this portion of the reasons suggested that his Honour intended that it be read without regard to what appeared before it, including his Honour's extensive description and analysis of the Singapore proceedings. The majority in the Full Court erred at [53] in so reading the primary judge's reasons.

53. As a matter of principle, a determination as to whether conduct amounts to an abuse of abuse necessarily requires an evaluation, in the particular case, of all the relevant circumstances.[56] The particular conduct must be viewed in its proper context. That

[56] *Walton v Gardiner* (1993) 177 CLR 378 at 393, 396, 398-399 (Mason CJ, Deane and Dawson JJ); *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31 (Lord Bingham, with whom Lord Goff, Lord Cooke and

context may include relevant events which occurred prior to the commencement of the instant proceedings, including the conduct of earlier litigation, where such prior conduct has a bearing upon the quality or character of the acts or omissions which are relied upon as constituting the abuse of process.[57]

54. There is a risk of injustice if the Court shuts its eyes to relevant circumstances. The circumstances in which Mr Tyne and the Argot Trust ceased to be plaintiffs in the SCNSW proceedings were relevant to whether the Federal Court proceedings are an abuse of process. So too was the existence or otherwise of any relevant juridical advantage in suing in either New South Wales or in Singapore. A third relevant consideration was the fact that, in commencing and conducting the Federal Court proceedings, the Argot Trust was acting in continued contravention of the anti-suit injunction granted in Singapore.

55. Further, an important question explored in argument before the primary judge and in the Full Court was whether, or the extent to which, the Argot Trust had been afforded a reasonable opportunity to litigate its claims or had been given a "hearing on the merits". That question necessarily required consideration not only of the SCNSW proceedings but also of the Singapore proceedings.

56. It was artificial, and wrong in principle, for the majority to seek to answer those questions, or to evaluate whether the Federal Court proceedings were an abuse of process, without considering the whole of the relevant history of dealings between the parties, including the Singapore proceedings. The majority failed to pursue the enquiry, mandated by the authorities, which is inherently evaluative, fact-specific and contextual.

57. One practical consequence of that error is that, in concluding that there was no abuse of process, the majority overlooked the fact that there had been a hearing on the merits. There was such a hearing in the Singapore 801 proceedings – except that Mr Tyne and Telesto chose not to appear at that hearing: see paragraph 22 above.

Lord Hutton relevantly agreed); *Batistatos* (2006) 226 CLR 256 at [14] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at [100]-[107] (Beazley P, with whom McColl JA and Tobias AJA agreed).

[57] See, eg, *Walton v Gardiner* (1993) 177 CLR 378 at 384-388, 396, 398-399 (Mason CJ, Deane and Dawson JJ).

The hearing proceeded in their absence, with Lai J receiving evidence and questioning some witnesses about factual matters before delivering judgment.[58]

58. Contrary to [53] of the majority reasons, there was no requirement for UBS to file a notice of contention in the appeal below. That requirement exists only where a respondent "contends that the judgment should be affirmed on grounds other than those relied on by the court appealed from": *Federal Court Rules 2011* (Cth), r 36.24.[59] Upon a proper understanding of the primary judge's reasons, his Honour relied on the Singapore proceedings, among other matters, in ordering that the proceedings below be permanently stayed as an abuse of process.

10 **Part VII: Applicable statutory provisions**

59. See Annexure A to these submissions.

Part VIII: Orders sought by the appellant

60. The appellant seeks the following orders:

1. Appeal allowed.

2. Set aside the orders made by the Full Court of the Federal Court on 20 January 2017 and, in their place, order that:

(a) The appeal from the orders made by Greenwood J on 8 January 2016 is dismissed.

(b) The appellants in the Full Court are to pay the respondent's costs of
20 the appeal to that Court.

3. The respondents in this Court are to pay the appellant's costs of the appeal to this Court.

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[58] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [251]-[253], [276]-[281].
[59] See *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380 at [76] (Branson J, with whom French J agreed).

Part IX: Estimate of time for oral argument

61. The appellant estimates that 1.5 hours will be required for the presentation of its oral argument, including submissions in reply.

Dated: 20 October 2017

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ANNEXURE A

Federal Court of Australia Act 1976 (Cth)

[As at the date of hearing before the primary judge, namely 8 May 2015 – electronic compilation ComlawId C2015C00067.]

[These provisions are still in force, in the same form as set out below, as at the date of these submissions.]

Section 37M:

The overarching purpose of civil practice and procedure provisions

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:

(a) according to law; and

(b) as quickly, inexpensively and efficiently as possible.

(2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:

(a) the just determination of all proceedings before the Court;

(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;

(c) the efficient disposal of the Court's overall caseload;

(d) the disposal of all proceedings in a timely manner;

(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

(3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

(4) The ***civil practice and procedure provisions*** are the following, so far as they apply in relation to civil proceedings:

(a) the Rules of Court made under this Act;

(b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court.

Section 37N:

Parties to act consistently with the overarching purpose

(1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

(2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:

(a) take account of the duty imposed on the party by subsection (1); and

(b) assist the party to comply with the duty.

(3) The Court or a Judge may, for the purpose of enabling a party to comply with the duty imposed by subsection (1), require the party's lawyer to give the party an estimate of:

(a) the likely duration of the proceeding or part of the proceeding; and

(b) the likely amount of costs that the party will have to pay in connection with the proceeding or part of the proceeding, including:

(i) the costs that the lawyer will charge to the party; and

(ii) any other costs that the party will have to pay in the event that the party is unsuccessful in the proceeding or part of the proceeding.

(4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).

(5) If the Court or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.