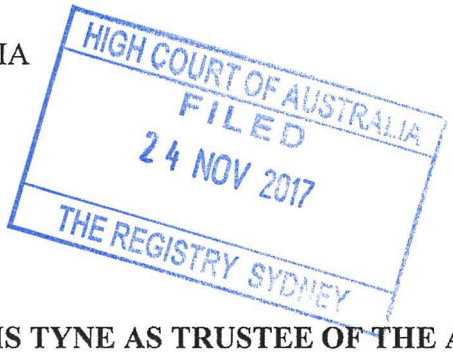
IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B54 of 2017



BETWEEN:

UBS AG
Appellant

and

SCOTT FRANCIS TYNE AS TRUSTEE OF THE ARGOT TRUST
First respondent

CLARE ELIZABETH MARKS
Second respondent

APPELLANT'S REPLY

Part I: Publication on the internet

1. UBS certifies that this reply is in a form suitable for publication on the internet.

Part II: Reply

2. UBS refers to its written submissions ("**AS**") and those filed by the first ("**1RS**") and second ("**2RS**") respondents.

Relevant facts

3. ***Re 1RS [3]:*** There *were* findings as to the relevant identity of pleaded facts in the Federal Court proceedings and the SCNSW proceedings. The primary judge found that "the essential allegations are the same as those made in the SCNSW proceedings"; that all of the claims "arose out of a common substratum of fact" and the formulation of the proceedings in the Federal Court was "very substantially in the same terms as the factual contentions asserted in the SCNSW proceedings"; and that the Argot Trust had advanced "the claims in precisely the same terms as formulated in the Federal Court proceedings".[1] The Full Court accepted that the claims arose from "the same facts" as pleaded in the SCNSW proceedings: [60] (2 AB 849); see also [43], [51](1), [64] (2 AB 843, 847, 850).

[1] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [185], [417], [419] (2 AB 748, 793-794).

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4. ***Re 1RS [12]:*** Although the Argot Trust was not a party to the Singapore 801 proceedings, it was a defendant in the Singapore anti-suit proceedings and was bound by the anti-suit injunction.[2]

5. ***Re 1RS [15]:*** The findings made the primary judge at [236] (2 AB 758) – which concerned the circumstances in which the Argot Trust ceased to be a plaintiff in the SCNSW proceedings in February and March 2012 – do not gainsay the submission at AS [25] that, upon the final determination of the SCNSW proceedings in May 2013, the Argot Trust was apparently not agitating any claim against UBS and, from the point of view of UBS, the issues had been resolved, after some years of litigation in two countries. That is an accurate description of the effect of the objective events.

First appeal ground: The Argot Trust's proceeding was an abuse of process

6. ***Re 1RS [2](b), [17], [24]:*** Contrary to IRS [17], UBS does address the error identified in the first part of the last sentence of the majority's reasons at [108] (2 AB 868-869). That is the very error articulated in the first ground of the notice of appeal (2 AB 877-878) and in AS [34]-[49], especially at AS [46]-[49].

7. As to the submission that the majority was not stating a principle of law, three observations may be made. First, at [109], their Honours themselves used that terminology, namely an "error of principle" (2 AB 869). If the primary judge made an error of principle in concluding that the finding was open, it must be because the principle is that such a finding is not open. That is the principle which the majority concluded the primary judge dealt with erroneously.

8. Secondly, at [108], the majority used the language that a finding of an abuse of process was "not open" (2 AB 869). Thirdly, contrary to 1RS [2](b), [24], having found error in the primary judge's reasons, the majority did not then proceed to consider the question afresh and re-exercise the evaluative judgment or discretion to grant or withhold a permanent stay. Rather, having identified a suggested legal principle to the effect that a finding of abuse of process was "not open", the majority treated that principle as, without more, dispositive of the appeal without any re-exercise of discretion in the Full Court: [109] (2 AB 869).

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[2] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [191], [196]-[201], [401]-[402] (2 AB 749, 750-751, 790); 1 AB 420-421.

9. ***Re IRS [26], [40]:*** In assessing whether UBS had discharged its "heavy" onus,[3] it was significant that, as both the primary judge (at [421] 2 AB 794) and Dowsett J (at [13], [17], [28], [30]-[31] 2 AB 833-834, 838-839, 839-840) emphasised, the abuse of process followed not from the discontinuance alone but from a consideration of all the circumstances including, importantly, the absence of any reasonable or proper explanation, by affidavit or otherwise, as to why the Argot Trust had chosen to discontinue the SCNSW proceedings while Telesto had prosecuted them to final determination. That any such explanation lay wholly within the respondents' knowledge was relevant to ascertaining whether the heavy onus was discharged.

10. ***Re IRS [28], [42]:*** The policy in favour of finality is not concerned only, or even primarily, with preventing attempts to re-agitate matters already decided. The policy extends, in an appropriate case, to prevent a party from making a claim or raising an issue which ought reasonably to have been made or raised (or, as in this case, which was made and ought reasonably to have been continued) in an earlier proceeding.[4]

11. ***Re IRS [29], [45]-[46], [54]:*** Considerations of fairness were satisfied.[5] The Argot Trust, and Mr Tyne as its controlling mind,[6] had every fair opportunity to present evidence and argument in the SCNSW proceedings. Mr Tyne, as controlling mind of Telesto,[7] had the same opportunity in the Singapore 801 proceedings. In the SCNSW proceedings, the Argot Trust chose to avail itself of that opportunity until it chose to cease its claim, and Mr Tyne caused Telesto continue to prosecute its claim in those proceedings until their final determination.

12. ***Re IRS [28], [37], [47]-[50], [55]:*** Contrary to [103] (2 AB 866) and [107]-[108] (2 AB 868-869) of the majority's reasons, this was not simply a case of unconditional discontinuance. There was no complete cessation of litigation between the parties followed by the resumption of litigation between them years later.[8] Rather, two out of

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[3] *Williams v Spautz* (1992) 174 CLR 509 at 529 (Mason CJ, Dawson, Toohey and McHugh JJ).
[4] *Tomlinson v Ramsay Food Processing Pty Ltd* (2015) 256 CLR 507 at [24], [26] (French CJ, Bell, Gageler and Keane JJ). See further at AS [43]-[45].
[5] See *Tomlinson* (2015) 256 CLR 507 at [39].
[6] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [394], [414], [424] (2 AB 789, 792, 794).
[7] *Tyne v UBS AG (No 3)* (2016) 236 FCR 1, [2016] FCA 5 at [392] (2 AB 788).
[8] This may be contrasted with the typical case in which a discontinuance followed by fresh proceedings has been held not to give rise to an abuse of process: see, eg, *SZFOG v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 88 ALD 138, [2005] FCA 1374 at [4]-[7], [28]-[31] (Edmonds J) and [2006] FCA 1170 at [8]-[12], [24]-[27] (Cowdroy J).

three closely related co-plaintiffs discontinued proceedings (the SCNSW proceedings) which thereafter proceeded to final determination in the form of a permanent stay, and one of the discontinuing parties then commenced new proceedings (the Federal Court proceedings) against the same defendant advancing, in substance, the same claim.

13. ***Re 1RS [46], [50]:*** It is inapt to speak of the Argot Trust's "right to have its claims determined" or of its "right to sue". As this Court emphasised in *Batistatos v Roads & Traffic Authority of NSW*,[9] the "right" of a party to institute an action is not at large; rather, it is subject to the operation of the whole of the applicable procedural and substantive law to be administered by the court, including principles respecting abuse of process. The power to order a permanent stay exists to enable the court to protect itself from abuse of its process, thereby safeguarding the administration of justice; and that purpose may transcend the interest of any particular party to the litigation.[10]

14. ***Re 1RS [35]-[37], [51]:*** The majority below, at [108] (2 AB 868-869), erred in its identification of the unfairness to UBS because it failed to take account of the matters identified by Dowsett J at [23], [28] and [32] (2 AB 837, 838-839 and 840). Those matters were the significant delay, for three or more years, in quelling the controversy; the additional costs incurred, or to be incurred, by UBS; the vexation to UBS; and the waste of public resources consequent upon the duplication of proceedings.

15. ***Re 1RS [51]-[52]:*** Section 37M of the Federal Court Act, and principles of efficiency and finality in the management of litigation, indicate that costs orders are not a panacea for the institutional harm which is caused to the administration of justice, and the disservice to the public and to other litigants, in permitting re-litigation of, in substance, the same claim.[11] That is particularly so where Mr Tyne has furnished no explanation as to why he caused Telesto to litigate its claim to conclusion in the SCNSW proceedings while causing the Argot Trust to discontinue its closely related claim in that action, only to begin it afresh in a different jurisdiction two years later. The first respondent's submissions do not engage, in any substantive manner, with the

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[9] (2006) 226 CLR 256 at [65] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
[10] (2006) 226 CLR 256 at [12] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
[11] See generally *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [51] (French CJ, Kiefel, Bell, Gageler and Keane JJ) and *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [92]-[93], [95], [98]-[100] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

fundamental change effected by s 37M and the requirement which now exists to understand the obligations of litigants in light of that provision.

Second appeal ground: The relevance of the Singapore proceedings

16. ***Re 1RS [59]:*** This Court's intervention is justified. If it is necessary to do so, at least two errors in the *House v The King*[12] sense may be identified in the reasons of the majority at [53] (2 AB 848).

17. First, their Honours mistook the facts by finding that the primary judge had not given weight to the Singapore proceedings in deciding that the Federal Court proceedings constituted an abuse of process. That is the error addressed in AS [51]-[52]. Secondly, their Honours acted upon a wrong principle by failing to reach an evaluative judgment upon the whole of the relevant circumstances, including the earlier proceedings. That is the error addressed in AS [53]-[57].

18. ***Re 1RS [62]-[65]:*** The existence of a juridical advantage in litigating in Australia rather than in Singapore, and the anti-suit injunction, were both relevant, but not conclusive, considerations. The majority erred by putting entirely to one side the existence and outcome of the Singapore proceedings: see, further, AS [53]-[57].

The position of Ms Marks

19. ***Re 2RS [5]-[14]:*** Ms Marks was properly joined as a respondent to the application for special leave (HCR, r 41.01.1) and the grant of special leave was not relevantly qualified so as to exclude her (2 AB 874-875). However, given the lack of utility in Ms Marks remaining a respondent, UBS would consent to an order for her removal as second respondent if the Court considered it appropriate to make such an order.

Dated: 24 November 2017

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[12] (1936) 55 CLR 499 at 505; *R v Carroll* (2002) 213 CLR 635 at [73] (Gaudron and Gummow JJ); *Batistatos* (2006) 226 CLR 256 at [7].