IN THE HIGH COURT OF AUSTRALIA
SYDNEY 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

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. The first respondent ("the Argot Trustee") certifies that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. There are three issues on the appeal:

   (a) Did the Full Court of the Federal Court err in deciding that the primary judge had erred in deciding to grant a permanent stay of the proceedings?

   (b) Did the Full Court of the Federal Court err in its re-exercise of the power to stay?

   (c) If the Full Court erred, should this Court order that the proceedings before Greenwood J be permanently stayed because they are an abuse of process?

3. The issues identified by the Appellant ("UBS") in paragraphs [2] and [3] of its submissions filed on 20 October 2017 ("AS") are incomplete and inaccurate. The issue identified in paragraph [2] mischaracterises the reasons of the Full Court at [109]. The majority in the Full Court did not find that a conclusion of abuse of process was not open *merely* because the defendant "must do now what it otherwise would have had to do": cf

Filed on behalf of the First Respondent by
Russells Lawyers
Solicitors
Level 3, 32 Martin Place
Sydney NSW 2000

Dated: 10 November 2017
Tel: (02) 9216 5600
Fax: (02) 9216 5699
Ref: Andrew Sutherland
Email: asutherland@russellslaw.com.au

AS [2(b)]. The Full Court found at [109] that the primary judge had impermissibly failed to have regard to the issue of prejudice. The Full Court *also* found that it was not open "on the facts as found" – that is, all the facts – to "characterise the circumstances as involving an abuse of process": at [109]. The issue identified in paragraph [2] of the AS also assumes that the factual issues in the Federal Court proceedings are identical to those in the Supreme Court proceedings. There is no finding to that effect.

PART III: CERTIFICATION

4. It is certified that the Argot Trustee has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). The Argot Trustee does not consider that such a notice is necessary.

PART IV: FACTUAL BACKGROUND

5. UBS' statement of the material facts is incomplete and inaccurate.

6. Factual matters additional to those mentioned in the AS should be noted.

7. While UBS refers to its claim for debt in the Singapore 801 proceedings[1] (AS [15]), it does not observe that the debt it claimed against Telesto had been satisfied in full prior to judgment: see PJ[2] [205]. That left only a rump of a claim: for "declarations as to certain matters and a claim for costs on an indemnity basis" (PJ [205]).

8. The Argot Trustee was not a party to the Singapore 801 proceedings and the declaration made in it was not made as against the Argot Trustee: PJ at [243], [391]. UBS "did not join the [Argot Trustee to the Singapore 801 proceedings] to put in controversy, as against it, the content of the declaration": PJ at [391]. The declaration made "was confined to a position declaratory of matters *inter se* between UBS, on the one side, and on the other side of the record, Telesto and Mr Tyne": PJ at [391].

9. At all material times, the Argot Trustee has not been privy in interest with Telesto or Mr Tyne: PJ at [400], [410].

---

1 These submissions use the same shorthand expressions for the proceedings and parties as are used in the judgments below.

2 Decision of the primary judge, *Tyne v UBS AG (No 3)* (2016) 236 FCR 1.

10. Had the Argot Trustee sought to pursue its current claims in the Singapore 801 proceedings, it could "have suffered at least *some* degree of juridical disadvantage in seeking to characterise UBS's contended conduct as relevantly contravening conduct in Singapore, as compared with the way in which it would have sought to characterise that conduct under Australian law with its range of available remedial orders": PJ at [395]. The juridical difference arose from the breadth of Australian misleading and deceptive conduct law.

11. There are unchallenged findings of the primary judge that the Argot Trustee is not "precluded by either *res judicata* or issue estoppel or an *Anshun* estoppel [arising out for the Singapore 801 proceedings] from maintaining its claims as formulated in the Federal Court proceedings": PJ at [399].

12. The anti-suit injunction ordered by the High Court of Singapore was "in *aid* of the *integrity* of the High Court of Singapore's adjudicative processes in the Singapore 801 proceedings": PJ at [406]. The Argot Trustee was not a party to those proceedings and was not subject to any res judicata or relevant estoppel arising out of them: PJ at [399]. In those circumstances, the primary judge observed that the anti-suit injunction ought not "to deprive the trustee of an opportunity to commence and prosecute a claim properly engaging the jurisdiction of a relevant Australian court if it is *proper* to do so": PJ at [409].

13. The Argot Trustee discontinued the SCNSW proceedings so far as they concerned it by the filing of an amended summons removing it as a party: FCAFC[3] at [45]-[47]. UBS did not object to the grant of leave: FCAFC [46]. Nor did UBS seek the imposition of any condition on leave: FCAFC [47]. Nor was any condition imposed by the Court on the grant of leave: FCAFC [47]. At all material times, UBS was represented by King & Wood Mallesons and a senior counsel.

14. The stay granted by Sackar J in the SCNSW proceedings was based on res judicata and issue estoppel against Telesto arising out of the Singapore 801 proceedings: see PJ at [297], [300]. Sackar J held that it was not unreasonable, in an *Anshun* sense, for Telesto to pursue the SCNSW proceedings: PJ at [301]. Sackar J also held that there was no

---

3 Judgment of the Full Court below: *Tyne v UBS AG (No 2)* (2017) 341 ALR 415.

abuse of process in Telesto bringing the SCNSW proceedings: PJ at [302]. For Sackar J, there was no *Anshun* estoppel and no abuse of process because there was a "significant"[4] or "highly significant"[5] juridical advantage in pursuing proceedings under Australian rather than Singaporean law. The finding of juridical advantage was based on an expert opinion of Mr Justin Gleeson SC: PJ [215], [289]

15. UBS overreaches in asserting, as fact, the matters in AS [25]. There is no finding that, upon the conclusion of the SCNSW proceedings, the Argot Trustee was "apparently not agitating any claim against UBS". Nor is there any finding that "[f]rom the point of view of UBS, the issues had been resolved". It is not open to UBS to invite the Court (as it does) to find a representation by the Argot Trustee coupled with reliance by UBS. There is no finding to that effect below. Indeed, the primary judge's findings are to the contrary: PJ at [236].[6]

16. UBS also mischaracterises the decision below and therefore directs its attacks to an irrelevant straw man. UBS suggests that the sole basis of the Full Court's decision was a finding that it "was 'not open' to a Court to find that the new proceedings were an abuse of process, because the SCNSW proceedings were judicially determined otherwise than through a trial on the underlying merits": AS at [33]. The observation of the Full Court to which this is directed is the last sentence of FCAFC [108] where the majority said:

> [I]f it is necessary to identify the error with precision it is either that the primary judge did not consider the unfairness to or oppression of UBS that was involved in the particular circumstances of this case, or that it was not open on the facts as found to characterise the circumstances as involving an abuse of process by the Argot Trust in bringing this proceeding.

17. It is clear from this passage that the majority identified two separate and disjunctive reasons why the trial judge had erred, the first of which was a failure to have regard to a material consideration. UBS fails to address this first error. It is also clear from this passage that the majority did not adopt some strict rule that there can never be an abuse of

---

4 PJ at [301].

5 PJ at [302].

6 "UBS contends, in these proceedings, that, on the footing that ACN 074 as trustee of the Argot Trust had elected to abandon its claims in the SCNSW proceedings and had no further claims against UBS, did not object to the withdrawal of Mr Tyne or ACN 074 as trustee of the Argot Trust from those proceedings. However, the submissions suggest that those parties withdrew from the proceedings on the identified footing that no liability arose on their part udner any of the relevant instruments namely, the Tyne guarantee, the Mortgage and the Letter of Undertaking."

process when further proceedings are brought after a discontinuance and absent a hearing on the merits. Rather, the majority's conclusion was based on all the facts as found. This Court should not interpret the majority as having adopted any strict rule of the kind suggested by UBS in circumstances where the majority expressly recognised that "the fact of discontinuance might be relevant to characterising circumstances as an abuse of process": at [103].

PART V: APPLICABLE PROVISIONS

18. The AS omit reference to the statutory source of the relevant power which was relied on by the trial judge to grant the permanent stay and by the Full Court in allowing the appeal. The relevant source of the primary judge's power was s 23 of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act") which states:

> The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

19. The relevant sources of the Full Court's power were ss 28(1)(b) and (c) of the FCA Act, which relevantly state:

> Subject to any other Act, the Court may, in the exercise of its appellate jurisdiction:
>
> ...
>
> (b) give such judgment, or make such order, as, in all the circumstances, it thinks fit, or refuse to make an order;
>
> (c) set aside the judgment appealed from, in whole or in part, and remit the proceeding to the court from which the appeal was brought for further hearing and determination, subject to such directions as the Court thinks fit ...

PART VI: SUMMARY OF ARGUMENT

Foundational principles

20. It is convenient to begin by articulating some foundational principles.

21. The relevant powers being exercised by the Full Court of the Federal Court in deciding to dismiss UBS' interlocutory application were those given by ss 28(1)(b) and (c) of the FCA Act (set out in paragraph 19 above). The power given by s 28(1)(b) relevantly

included power, if appropriate, to stay the proceedings below on the ground that they were an abuse of process.

22. The order made by the primary judge which was the subject of the Full Court appeal was an order made in the exercise of the power given by s 23 of the FCA Act.[7] It can be accepted that the power given by s 23 includes the power permanently to stay the proceedings on the ground that their institution or maintenance is an abuse of process.

23. While a finding that an abuse of process has occurred is not strictly a discretionary decision,[8] appellate review of such a finding "looks to whether the primary judge acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration": *R v Carroll* (2002) 213 CLR 635 at [73] ("*Carroll*"); note also *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [7]. By analogy with *House v The King* (1936) 55 CLR 499 at 505, a further criterion of appellate intervention is if the finding was "unreasonable or plainly unjust". These propositions reflect the position in the United Kingdom which has been stated in the following way:[9]

> [A]n appellate court will be reluctant to interfere with the decision of the judge where the decisions rests upon balancing such a number of factors ... The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him.

24. It follows that the first question for the Full Court was whether the primary judge's determination that there was an abuse of process had miscarried because, for example, he had failed to take into account some material consideration or had made a finding that was unreasonable. If the answer to that question was yes, it fell to the Full Court to decide for itself whether there was an abuse of process. If the Full Court was satisfied both that the primary judge's reasoning had miscarried and that there was no abuse of

---

7 The text of s 23 is set out at [18] above.

8 "Either the proceedings are an abuse of process of the Court or they are not": *Stuart v Goldberg Linde* [2008] 1 WLR 823 at 832.

9 *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748 at [16] (CA); *Kamoka v The Security Service* [2017] EWCA 1665 at [90].

process, it was appropriate for it to exercise the powers given to it by s 28(1)(b) and (c) of the FCA Act. That is what the Full Court did.

25. The questions for this Court are relevantly the same as those which were before the Full Court: did the Full Court's decision-making miscarry in a *Carroll* sense and, if it did, is this Court nevertheless satisfied for itself that the proceedings before the primary judge are an abuse of process. UBS' submissions do not always appreciate the precise issues which were before the Full Court and are now before this Court.

26. Whether the issue arises at first instance or in re-consideration on appeal, the onus of satisfying the court that there is an abuse of process is "a heavy one": *Williams v Spautz* (1992) 174 CLR 509 at 529 (Mason CJ, Dawson, Toohey and McHugh JJ); see also at 542 (Deane J) ("*Williams v Spautz*"). Further, the "power to grant a permanent stay is one to be exercised only in the most exceptional circumstances": *Williams v Spautz* at 529.

27. The concept of abuse of process is flexible and the categories of abuse of process are not closed. Nevertheless, the concept is not at large. In determining whether there is an abuse of process, courts must act judicially and in accordance with principle. The concept of abuse of process is constrained by the fundamental considerations of policy and principle which justify the power to stay or dismiss proceedings because they are an abuse of process.

28. One of those fundamental policy considerations is finality: see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [34] (French CJ); *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [24] (French CJ, Bell, Gageler and Keane JJ) ("*Tomlinson*"). The law's interest in finality is longstanding. It has been described as a "core value of judicial power": M Leeming, *Authority to Decide - The Law of Jurisdiction in Australia* (Federation Press, 2012) at 275. However, the policy in favour of finality is primarily concerned with protecting "parties to litigation from attempts to re-agitate what has been decided": *Achurch v R* (2014) 253 CLR 141 at [15]. The principle is (as stated at AS [36]) that "controversies, *once resolved*, are not to be reopened" (emphasis added).[10] The principle of finality has, at best, a limited

---

10 *D'Orta Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1 at [34], [45].

operation where something has *not* been decided or resolved. Where a matter has not been decided – for example, because proceedings were unconditionally discontinued – there has been no conclusive quelling of the relevant controversy and there is no collateral attack on any determination by the commencement of further proceedings. Further, and in any event, finality is not an absolute principle. As Lord Atkin, delivering the advice of the Privy Council, observed in *Ras Behari Lal v The King-Emperor* (1933) LR 60 60 Ind App 354 at 261, "[f]inality is a good thing, but justice is a better".[11]

29. A further fundamental policy consideration is fairness: *Tomlinson* at [24]; *Walton v Gardiner* (1993) 177 CLR 378 at 393 ("*Walton*"); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [38] (French CJ and Crennan J). The inquiry into fairness is not monocular; it includes fairness to both sides of the record.

30. A further fundamental policy consideration is the maintenance of public confidence in the administration of justice: *Batistatos* at [14], quoting *Ridgeway v R* (1995) 184 CLR 19 at 74-75 (Gaudron J); *Walton* at 393. Elsewhere, members of this Court have expressed doubt as to the helpfulness of using "public confidence" as a criterion for the exercise of judicial power: the concept is "hard to define, let alone apply by reference to any useful methodology".[12] A test that turns on public confidence has the potential to yield an unfettered discretion. That potential is lessened if the notion of public confidence is anchored in fundamental and longstanding legal values. Those values include the existence of a legal system which assumes the "rule of law"[13] and which therefore depends "upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve".[14] Further, those values include the principle that "the object of the judicial process is the *final* determination of the rights of the parties to an action": *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [47] (emphasis added).

---

[11] Quoted with approval in *Smith v Western Australia* (2014) 250 CLR 473 at [42] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

[12] *South Australia v Totani* (2010) 242 CLR 1 at [73] (French CJ) ("*Totani*"). See also *Totani* at [245] (Heydon J); *Forge v ASIC* (2006) 228 CLR 45 at [194] (Kirby J).

[13] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 at [40] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[14] *Johnson v Gore Wood & Co* [2002] 2 AC 1 (Lord Bingham).

31. While it is not clear that s 23 of the FCA Act is a "civil practice and procedure provision" of the kind referred to in s 37M of the FCA Act, it can be accepted that the policies articulated in s 37M of the FC Act may be relevant to an inquiry into whether proceedings are abuse of process. Importantly, the policies encapsulated in s 37M include the policy which favours "the just resolution of disputes ... according to law" and "the just determination of all proceedings before the Court: ss 37M(1)(a), (2)(a).

32. With these foundational principles in mind, each of the grounds of appeal can be addressed in turn.

Ground 1

33. Ground 1 of the notice of appeal asserts:

> The majority of the Full Court (Jagot and 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 the 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.

34. UBS' written submissions purport to go beyond this ground in material respects. In particular, UBS' submission that the Full Court erred in holding that it was not open to find that there is an abuse of process where an earlier litigation has not been disposed of on its underlying merits (see AS [33], [44]-[45] and [48]) are not available on the notice of appeal. In any event, that submission mischaracterises the majority's reasoning: see paragraphs 16-17 above.

35. The first error asserted in the notice of appeal is a failure to consider "the manifest unfairness to [UBS]". It is difficult to see how this allegation can succeed in circumstances where the majority expressly adverted to alleged unfairness to UBS, but concluded that there was no "material unfairness": FCAFC [108]. Whether the asserted unfairness was or was not material was an evaluative judgment that was for the Full Court to make.

36. UBS advances a slightly refined contention at AS [46]-[47] to the effect that the majority failed to take into account "the delay in 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".

37. What the majority did or did not consider is to be established by considering the text of their judgment, read fairly and without an eye keenly attuned to error. It is inherently unlikely that the majority failed altogether to advert to matters which were referred to expressly in the judgment of their learned colleague, Dowsett J. On a fair reading of the majority's reasons their Honours were of the view that any unfairness to UBS was not material in circumstances where UBS did not object to the Argot Trustee obtaining unconditional leave to discontinue and the Argot Trustee could have pursued the present claims in the SCNSW proceedings without being met by an *Anshun* or abuse argument: see particularly FCAFC [107]-[108]

38. The second error asserted in the notice of appeal is a failure to consider "the effect of the proceedings in bringing the administration of justice into disrepute": see also AS [40]. Again, it is necessary to read the majority's judgment fairly. The majority referred to whether the institution of proceedings by Ms Marks was apt to bring the administration of justice into disrepute: FCAFC [98]. While the majority did not expressly refer to the same point when turning to the position of the Argot Trust one paragraph later, it is inherently unlikely that they overlooked that matter in circumstances where they had only just referred to it. The better inference is that the majority considered that issue, but did not consider it to impact on their ultimate decision to refuse the stay: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [69].

39. Even if the matter were considered afresh, it would not be concluded that the proceedings are an abuse of process. That is so for the following reasons.

40. The bar is very high: there must be exceptional circumstances. UBS makes no attempt to suggest that the circumstances are exceptional.

41. UBS does not point to any case in which circumstances of the present kind have been found to involve an abuse of process.

42. There has been no determination of the Argot Trustee's claims. The finality principle, at least in its primary operation, is not engaged. If anything, the finality principle favours

the continuation of these proceedings so that there can be a final quelling of the controversy by a decision on the merits.

43. There is no suggestion that the Argot Trustee's claims are hopeless or do not have reasonable prospects of success.

44. Had the Argot Trustee remained a party to the SCNSW proceedings, they would not have been permanently stayed as against the trustee. The basis of Sackar J's permanent stay as against Telesto was a res judicata or issue estoppel arising out of the Singapore 801 proceedings. Res judicata and issue estoppel could not have grounded a stay against the Argot Trustee: the Argot Trustee was not a party to the Singapore 801 proceedings and was not a privy of Telesto. There can be no plausible contention that, had the Argot Trustee remained a party to the SCNSW proceedings, a stay would have been granted against it on the grounds of *Anshun* or abuse of process. Justice Sackar rejected UBS' arguments to that effect against Telesto. Any such arguments against the Argot Trustee would have been weaker (or hopeless) since the Argot Trustee was not a party to the Singapore 801 proceedings.

45. To deprive the Argot Trustee of its right to bring these proceedings would be contrary to the principle that citizens should be able to resort to the courts to resolve their disputes. The conclusive quelling of such disputes is the object of the judicial power.

46. It would be unfair to the Argot Trustee to prevent it from pursuing these proceedings. The Argot Trustee will be denied its right to have its claims determined.

47. UBS could have sought, but did not seek, conditions on the Argot Trustee's discontinuance. At all material times, the consequences of discontinuance of Supreme Court proceedings are expressly provided for in r 12.3 of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"), which states:

> (1) A discontinuance of proceedings with respect to a plaintiff's claim for relief does not prevent the plaintiff from claiming the same relief in fresh proceedings.
>
> (2) Subrule (1) is subject to the terms of any consent to the discontinuance or of any leave to discontinue.

48. UBS is a sophisticated litigant which, at all times, has had legal representation of the highest quality. If UBS assumed that the discontinuance was the end of any claims by the Argot Trustee, that assumption was unreasonable.

49. So far as UCPR 12.3 reflects a policy that discontinuance in the Supreme Court of New South Wales does not ordinarily prevent further proceedings that policy is even stronger in the Federal Court. At all material times, r 26.14 of the *Federal Court Rules 2011* (Cth) has stated: "[d]iscontinuance under this Division cannot be pleaded as a defence to a proceeding in relation to the same, or substantially the same, cause of action". Rule 26.14 was promulgated after the enactment of s 37M.

50. On UBS' argument, the effect of the Argot Trustee's discontinuance of the SCNSW proceedings was to deprive it of its right to pursue proceedings at all. That has the effect of unfairly converting an unconditional discontinuance into a discontinuance conditional on the loss of any right to sue.

51. There is no identified unfairness or prejudice to UBS. There is no evidence of additional cost. If cost of the SCNSW proceedings were an issue, it could have been addressed at the time of discontinuance. That would have been the usual course. If the cost of the Federal Court proceedings is an issue, that can be addressed by costs orders in the Federal Court proceedings, including (if appropriate) orders that costs not follow the event in the event that the Argot Trustee is successful. There is no evidence of any prejudice from "delay". There is no evidence or suggestion that UBS' defence might turn on witness' memories which have now faded. The proceedings are not barred by any relevant limitation period. The "delay", if there be any, has been wholly swamped by UBS' pursuit of the present application.

52. There is no material inconvenience to the judicial system. Had the Argot Trustee maintained its proceedings in the Supreme Court, they would have taken up judicial time. That that time will now be taken up in the Federal Court rather than the Supreme Court is of no moment. UBS' pursuit of this interlocutory application has taken up far more time (and yielded far more cost) than can be said to have been "wasted" by the discontinuance. In any event, the remedy for the time cost from the discontinuance was through the imposition of conditions on leave to discontinue, including costs.

53. It is difficult to see why it would be unreasonable for the Argot Trustee to pursue these proceedings when it was not unreasonable for Telesto to pursue the SCNSW proceedings.

54. Section 37M of the FCA Act is not to the contrary. That provision identifies, as a policy, the *just resolution* of disputes. The course proposed by UBS would prevent the just resolution of the Argot Trustee's dispute with UBS.

55. Nothing in the pursuit of these proceedings is apt to undermine public confidence in the administration of justice. As submitted, the object of the judicial system is the final determination of the parties' rights; and UBS' course impairs that object. So far as it is relevant, the fair-minded observer would appreciate that UBS had ample opportunity to seek protective orders at the time of the discontinuance of the SCNSW proceedings.

Ground 2

56. Ground 2 of the notice of appeal asserts:

> [t]he majority erred at [53] in concluding that the primary judge's reasons for deciding that the 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, particularly in circumstances in which UBS had made its decision as to whether to file a notice of contention on the basis of the appeal as formulated in the notice of appeal; and that the existence and outcome of the Singapore proceedings could not found, or contribute to, a conclusion of abuse of process.

57. It can immediately be noted that the second part of this ground – which concerns the reasons why UBS did not file a notice of contention – is not pursued in the AS. It is not addressed by evidence before this Court. This Court can safely put it to one side.

58. The relevant passage of the majority's reasons which is criticised in the ground of appeal is that at FCAFC [53], where the majority said:

> We do not agree with UBS that the primary judge gave weight to the Singapore proceedings in deciding that the current proceeding constituted an abuse of process. In our view, the primary judge's reasons for deciding that the current proceeding constituted an abuse of process are confined to the circumstances of the proceedings in the Supreme Court of New South Wales. UBS did not file a notice of contention. Accordingly, it was not open to UBS to rely on the Singapore proceedings as a relevant matter to support the decision of the primary judge. In any event, we consider it clear from the primary judge's reasons that the existence and outcome of the Singapore proceedings which were taken by UBS against Mr Tyne and Telesto could not found any claim that the current proceedings by Mr Tyne as the trustee of the Argot Trust and Ms Marks constituted an abuse of process.

59. This Court might expect that UBS has a high bar to meet before it can challenge this reasoning of the Full Court. Most of UBS' criticisms of the majority are directed to the first sentence of FCAFC [53], where the majority identified their interpretation of the primary judge's reasons. While minds might differ as to what the primary judge did, it might be expected that this Court would be reluctant to interfere with the Full Court's interpretation of the reasons of a single judge at least so long as that interpretation was "reasonably open": note *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd* (2013) 87 ALJR 668 at [36] (French CJ, Crennan, Kiefel, Gageler and Keane JJ). Further, whether UBS should have been able to take a point before the Full Court is a matter of practice and procedure. Not only would this Court be reluctant to intervene in such a matter,[15] but this Court would only do so if there was error of the *House v R* (1936) 55 CLR 499 kind. The only basis advanced in the AS for departing from the majority's view that the point could not be taken in the Full Court is that UBS does not consider the majority's interpretation of the trial judge's reasons to be the better one: see AS [51], [58]. That argument, even if accepted, would not warrant this Court's intervention.

60. As it is, the majority's interpretation of what Greenwood J did was correct. Greenwood J addressed the issue of abuse of process at PJ [413]-[431]. While the primary judge referred to the Singapore 801 proceedings twice in those paragraphs (at [418] and [422]), on neither of those occasions did the primary judge rely on those proceedings in support of the finding of abuse of process. UBS does not contend otherwise at AS [52]. While the primary judge did discuss the Singapore 801 proceedings earlier in his reasons (see the references at AS [51]), he did not connect that discussion to any of his findings on abuse of process. He did, however, expressly connect that discussion to his findings on res judicata, issue estoppel and *Anshun* estoppel: see at [394]-[399] and [401]-[409].

61. Even if UBS were entitled to rely on the point, the Singapore proceedings would not help it. That is so for the following reasons.

62. While the "factual matrix"[16] in the Singapore 801 proceedings might be substantially similar to that which was asserted in the SCNSW proceedings and now the Federal Court

---

15 See, eg, *In re the Will of F B Gilbert* (1946) 46 SR (NSW) 318).

16 The PJ emphasised the word "factual" at PJ [394].

proceedings, there is no foundation for any contention that the juridical and legal matrix in which those facts fall to be assessed is substantially similar (or even similar at all). To the contrary, the material before the Full Court was to the effect that the Australian trade practices regime gave rise to a "highly significant" juridical difference between Australia and Singapore: see PJ at [302].

63. It is immaterial that the Argot Trustee could have participated in the Singaporean proceedings. Given the significant juridical disadvantage the Argot Trustee would have suffered had it done so, there can be no reasonable expectation that it ought to have done so. Indeed, given the juridical disadvantage, it may well have been in breach of the trustee's duties to do so. This court would be reluctant to adopt as a premise of its reasoning that a trustee acts in abuse of process by doing that which appears to be in proper performance of its duties.

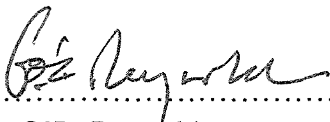
64. It is difficult to see how it could be relevant that Mr Tyne and Telesto chose not to appear in the Singaporean proceedings in their own capacity: cf AS [57]. UBS' submissions often elide the distinct legal capacity in which a person acts when acting as a trustee. For example, at AS [56], UBS refers to the history of the "dealings between the parties, including the Singapore proceedings" as if Mr Tyne and Telesto's conduct were necessarily attributable to the Argot Trustee. UBS furnishes no explanation as to why Mr Tyne's and Telesto's conduct should have any relevance to the Argot Trustee, which had distinct and overriding duties as trustee. The beneficiaries of the trust are children (PJ [125]) who have not been parties to any of the various proceedings connected to this appeal.

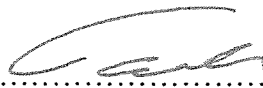
65. The existence and effect of the anti-suit injunction is of no moment for the reasons given by the primary judge at PJ [402]-[408]. That injunction went in aid of orders to which the Argot Trustee was not party.

PART VII: ESTIMATE OF TIMING

66. The Argot Trustee estimates he will require approximately two hours to present his oral argument.

Dated 10 November 2017





....

G. O'L. Reynolds
Counsel for the First Respondent
Ph: (02) 9232 5016
Fax: (02) 9233 3902
Email: guyreynolds@sixthfloor.com.au

....

David Hume
Counsel for the First Respondent
Ph: (02) 8915 2694
Fax: (02) 9233 3902
Email: dhume@sixthfloor.com.au