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**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
Respondent

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RESPONDENT'S SYNOPSIS OF ARGUMENT

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10 **Part I: Certification**

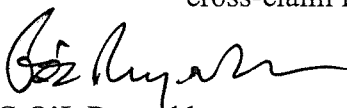
It is certified that this outline is suitable for publication on the internet.

Part II: Outline

1. It would be unfair for a defendant to assert that later proceedings are an abuse of process after an unconditional consent discontinuance with leave:
 - (i) there is inconsistency with the unconditional grant of leave by the judge;
 - (ii) the likelihood of further proceedings is known by the litigation lawyers involved;
 - (iii) the defendant has consented to and acquiesced in further proceedings;
 - (iv) to bar further proceedings is likely to cause substantial injustice and oppression to the plaintiff;
 - 20 (v) to have a full blown later hearing on abuse is a waste of the court's resources;
 - (vi) a later abuse application is apt unduly to delay the resolution of the case;
 - (vii) the abuse application will generate extra cost;
 - (viii) the issue of further proceedings could and should have been raised by the defendant with the judge granting leave;
 - (ix) if further proceedings are barred, there will have been no determination on the merits of the plaintiff's case;
 - (x) to hold that the discontinued proceedings cannot be recommenced would bring the law into disrepute.
2. The case law is uniformly against the defendant: *Running Pigmy* [2001] NSWSC 431 at [36]; *Kronprinz* (1887) 12 App Cas 256 at 259-260, 262; *KBRV* (2001) 51 NSWLR 516 at 527-8 [39]; *Dawson* [2007] NSWSC 542 at [22]; *Wagdy Hanna* (2012) 267 FLR 356 at [280]-[282]; *Pertsinidis* (2001) 80 SASR 76 (FC) at [89]; *Melbourne Money* (unreported, VCA, 8 December 1994) at 30-35; *Cormie* [2001] QCA 546 at [21]-[22]; *SZFOG* (2005) 88 ALD 138 at [16]-[18], [21]-[38]; *Beijing* [2015] WASC 186 at [33]-[39]; *Re Peat Resources of Australia Pty Ltd* (2004) 181 FLR 454 at [65] (WCA).
3. Similarly, in the present case, it would be unjust for UBS to assert that further proceedings are an abuse of process when it consented to an unconditional grant of leave to discontinue.
4. Further, all of the matters relied upon by UBS to ground an abuse are highly problematical.
5. First, the cost point:
 - 40 (i) the extra costs are not specified;
 - (ii) UBS has not proved that there are any extra costs;
 - (iii) the time to raise costs was before Ward J: it is too late now;
 - (iv) UBS argued before Ward J that there was a presumptive costs order (UCPR 42.19); whether this is correct or not, UBS has had its opportunity to seek costs;
 - (v) no "lost" costs other than of the NSWSC proceedings have been specified;
 - (vi) UBS sought no further condition re costs before Ward J (if there are any in addition to the costs of the NSWSC case);
 - (vii) having consented to leave and having sought no further costs order, UBS cannot now assert prejudice from additional cost;
 - 50 (viii) to raise costs now is inconsistent with Ward J's judgment;
 - (ix) NSWSC discontinued before defence filed – small costs;

- 10 (x) any costs of the FC will be compensated by FC costs orders;
- (xi) it may be presumed that the costs of running a case in the NSWSC and the FC are substantially the same.
6. Second, the delay for over 3 years since 2013 point:
- (i) this argument has not been specified or demonstrated;
- (ii) it cannot be asserted that the effect of discontinuance has been to delay resolution of the dispute by 3 or more years: if no discontinuance, NSWSC proceedings would have gone to trial and would not have been concluded in 2013: AB 868.35;
- (iii) if there is any delay it is no longer than 7 months, which has caused no prejudice to UBS (and none is asserted): cf the 29 year delay in *Batistatos*;
- 20 (iv) UBS consented to unconditional discontinuance without any conditions re expedition of further proceedings;
- (v) Ward J imposed no condition of expeditious further proceedings: UBS' argument is inconsistent with that judgment.
- (vi) UBS could have sought a condition re expeditious filing of further proceedings but did not: (compare similar order at AB 237.38).
7. Third, the otherwise unduly vexing point:
- (i) there is no specification of the undue vexation;
- (ii) there is no finding of vexation otherwise than by inference;
- (iii) there is no basis for inferring vexation merely from the discontinuance, which was with consent and leave, and subsequent recommencement;
- 30 (iv) such an inference has problems;
- (v) the majority found (AB 868.35) that UBS' position is substantially the same as if there had been no discontinuance. That is correct and unchallenged;
- (vi) Greenwood J found no such vexation;
- (vii) Tyne's conduct in discontinuing and recommencing cannot be "unjustifiably oppressive" (*Timbercorp* [69]) if UBS consented to unconditional discontinuance and sought no condition re further proceedings;
- (viii) to assert undue vexation now conflicts with the judgment of Ward J (unconditional);
- (ix) in the circumstances it is unfair to assert undue vexation;
- 40 (x) in the circumstances, if there is any vexation, it is "justifiable": cf *Timbercorp* [69].
8. Fourth, the manifest unfairness point:
- (i) as to delay, see [6] above, and as to costs, see [5] above;
- (ii) as to "inconvenience of dealing with the case again":
- the trustee's case has never been litigated;
 - the trustee's case has never been determined on its merits;
 - in the NSWSC, UBS never even filed a defence (very early discontinuance);
 - there is no inconvenience in dealing with the case in the FC rather than the SC;
 - UBS consented to unconditional discontinuance and cannot assert inconvenience now;
 - UBS asserts no prejudice;
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- there is no reason why a fair trial may not be had in the FC;
 - the time to complain was before Ward J;
 - to complain about such inconvenience is inconsistent with Ward J's ruling that there be unconditional discontinuance;
 - no unfairness in the FC case proceeding has been demonstrated.
9. Fifth, the waste of public resources from duplication point:
- (i) neither the dissentient nor UBS specify what the duplication is;
 - (ii) there is no duplication or waste of public resources from the discontinuance and recommencement: that the hearing is now in the FC not SC creates no duplication: AB 868.35;
 - 20 (iii) the NSWSC proceedings were discontinued very early – before a defence was filed;
 - (iv) a cause of any duplication is UBS' consent to unconditional leave to discontinue;
 - (v) Ward J granted leave and must be deemed to have considered this and other similar relevant factors and rejected them;
 - (vi) to raise this now is inconsistent with the ruling of Ward J.
10. Sixth, the administration of justice brought into disrepute point:
- (i) this point is entirely dependent on the five matters dealt with at [5]-[9] above (which are all problematical);
 - (ii) compare the disrepute occasioned if UBS entitled to prevent further proceedings after a consent unconditional discontinuance with leave.
- 30 11. Seventh, the breach of anti-suit point:
- (i) none of the four judges below regarded this as significant. They were correct;
 - (ii) other judges have come to the same view on this point;
 - (iii) UBS has shown no error in the reasoning of those various judges;
 - (iv) similarly, Sackar J found no abuse of process in relation to Telesto on this or any other basis (if anything, a stronger case for abuse than that against the trustee);
 - (v) the majority were correct to hold that this point required a notice of contention as the primary judge on no view upheld this argument by UBS.
12. Eighth, the Singapore 801 judgment point:
- (i) the majority did not "overlook" this issue: [53], [49(6)], [49(3)]; cf AS [57];
 - 40 (ii) the primary judge found that this did not advance UBS' argument for an abuse;
 - (iii) the majority referred to this issue, particularly at [57];
 - (iv) the dissenting judge did not treat this as relevant. Nor did Sackar J in UBS v Telesto;
 - (v) both Sackar J and the primary judge (at [49] point 3) were correct to have regard to forensic disadvantage;
 - (vi) on no view was the 801 judgment a judgment on the merits of the trustee's claims;
 - (vii) the trustee was not a party to the Singapore 801 case and could not have brought a cross-claim in that case.



50 G O'L Reynolds
Dated: 18 April 2018



D P Hume