Cultural Change – The Shift from Party Autonomy to Court-Managed Litigation

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Reform of the conduct of civil litigation in common law jurisdictions over the past 25 years has seen a distinct shift from party autonomy to the court management of proceedings. In New Zealand and the Australian jurisdictions, this has been driven, at least in part, by the enactment of a statement of the "overriding" or "overarching" purpose of the procedural code. Hong Kong with estimable subtlety has settled on a statement of "underlying" purpose. All have in common consideration of proportionality in case management decision-making. So, too, do the *Rules of the Supreme Court of Canada*.

Case management as the means of reducing the high costs and delays of civil litigation was pioneered in the United States. From their inception, the *Federal Rules of Civil Procedure* contained a statement that they should "be construed to secure the just, speedy, and inexpensive determination of every action". An amendment in 1993 made clear that federal courts were to administer the Rules to that end. Recognition that the 'just resolution' of cases requires consideration of proportionality in its individual and collective aspects was the innovation of the Woolf reforms. Under r 1.1(2)(c)

of the *Civil Procedure Rules 1998* (UK) ("the CPR"), the court is enjoined to deal with the case in a way that is proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of the parties ("individual proportionality"). Under r 1.1(2)(e), the court is enjoined to allot an appropriate share of court resources to the case while taking into account the need to allot resources to other cases ("collective proportionality"). The statements of overriding purpose adopted in other jurisdictions following the Woolf reforms are variously expressed but generally pick up both these aspects of proportionality.

The adoption of the overriding objective is suggested to have involved a shift in the theory of civil justice as fundamental as the shift effected by the judicature reforms of the late 19th century[1]. Professor Zuckerman characterises the latter as rejecting the fetish for rigid procedural formalism in favour of an equally strong fetish for the ideal of "doing justice on the merits"[2]. Professor Zuckerman does not subscribe to the siren call of the latter ideal. It is famously

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1 Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (2014) at 1.

2 Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 3rd ed (2013) at 23[1.65] 26[1.69].

encapsulated by Collins MR in *In the Matter of an Arbitration between Coles and Ravenshear*[3]:

> "The relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

The attainment of "complete justice" under the *Rules of Court 1875* (UK) was facilitated by orders XXVII and LXIX which required the court to make all necessary amendments and conferred power to grant relief from the consequences of procedural default. Together they fostered the conduct of civil litigation on the principles espoused by Bowen LJ in *Cropper v Smith*[4]:

> "Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

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[3] [1907] 1 KB 1 at 4.

[4] (1884) 26 Ch D 700 at 710.

There is force to the view that the liberal approach to amendment coupled with the forgiveness of procedural non-compliance and the rule in *Birkett v James*[5] effectively rendered the rules of court optional[6]. Doing "complete justice" not uncommonly favoured the litigant with deep pockets and came at a cost to other litigants waiting to have their disputes dealt with in a timely way. And, not uncommonly, as Professor Zuckerman observes[7]:

> "For desire not to allow matters of procedure to stand in the way of doing justice on the merits created extensive scope for litigation that had nothing to do with the merits but which could well prevent a merits based resolution of the dispute."

Against this background, it was the stated intention of the Woolf reforms to effect a fundamental transfer in the responsibility for the management of civil litigation from the litigants and their legal advisors to the courts[8]. There appears to have been considerable resistance in England from the profession and the bench to implementing that transfer[9]. This led, after Sir Rupert Jackson's

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5 [1978] AC 297.

6 Sorabji, *Civil Justice after the Woolf and Jackson Reforms* (2014) at 69-70.

7 Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 3rd ed (2013 at 31[1.81].

8 Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

9 Dyson, "The Jackson Reforms and Civil Justice" (2015) 39 *Australian Bar Review* 215.

review of litigation costs[10], to the reformulation of the overriding purpose to emphasise the need to enforce compliance with the rules and the introduction of new strictures on relief for non-compliance[11].

Following these amendments, the Court of Appeal laid emphasis on the need for strict compliance as of "paramount importance" to the determination of an application for relief from sanctions[12]. One unexpected consequence was the generation of a deal of opportunistic satellite litigation; parties were inclined to oppose applications for relief in the hope of securing a windfall gain[13]. The Court of Appeal has subsequently revisited the issue adopting a more nuanced approach which, among other things, cautions that opportunistic behaviour in taking advantage of minor errors by an opponent is to be visited with heavy costs sanctions[14].

The concern that court management of litigation may increase the costs burden, whether because of excessive management or as the result of "front loading" in the many cases that ultimately settle, led some to oppose its introduction in Australia. The impetus for its

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10 Jackson, *Review of Civil Litigation Costs: Final Report* (2009).

11 *Civil Procedure Rules 1998* (UK), rr 1.1(2)(f), 3.9.

12 *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795.

13 Dyson, "The Jackson Reforms and Civil Justice (2015) 39 *Australian Bar Review* 215 at 225.

14 *Denton v TH White Ltd* [2014] 1 WLR 3926.

adoption was the need to tackle delay. The modest hope of its early proponents was that costs might be at least maintained at the same level[15]. However, more than a decade before the enactment of provisions requiring the court to take account of collective proportionality in managing proceedings[16], the New South Wales Court of Appeal had acknowledged that the capacity to do justice for other litigants in a timely way is a relevant consideration in the administration of civil justice[17].

In *Sali v SPC Ltd*, the High Court of Australia allowed that the judge managing a case was "entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties."[18] As the joint reasons in *Sali* explained[19]:

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15 Sourdin, "Judicial Management and Alternative Dispute Resolution Process Trends" (1996) 14 *Australian Bar Review* 185 at 192; Allsop, "Judicial Case Management and the Problem of Costs" (2015) 39 *Australian Bar Review* 228 at 236-237.

16 *Civil Procedure Act* 2005 (NSW), ss 56 and 57.

17 *Byron v Southern Star Group Pty Ltd* (1995) 123 FLR 352 at 352-354 per Kirby P; *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543 at 553-554 per Clarke JA, 601-605 per Powell JA.

18 *Sali v SPC Ltd* (1993) 67 ALJR 841 at 843-844 per Brennan, Deane and McHugh JJ; 116 ALR 625 at 629; [1993] HCA 47.

19 *Sali v SPC Ltd* (1993) 67 ALJR 841 at 844 per Brennan, Deane and McHugh JJ; 116 ALR 625 at 629.

> "What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources."

Sali, however, proved to be somewhat ahead of its time. In late 1996, in *Queensland v J L Holdings*, the High Court took up the invitation to restate the rule in *Cropper v Smith* in the context of the application of case management principles[20]. At issue was the correctness of the trial judge's decision to refuse leave to amend the defence. This was complex commercial litigation. The application to amend came at a time when the case had been set down for trial after a series of contested interlocutory hearings. The amendment raised substantial new factual issues. The trial judge gave principal weight to the likely loss of the trial date if the amendment were allowed, observing that courts had come to recognise the need for some limits on a party's right to present its defence.

On appeal, the appellant complained that the trial judge had permitted case management to divert her from a proper balance of the relative injustice to each party. Notwithstanding the winds of change in the common law world (Lord Woolf's final report had been published five months before *J L Holdings* was heard), the High Court adhered to the classical theory of civil justice, holding that

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[20] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 148; [1997] HCA 1.

principles of case management were not to be allowed to supplant the attainment of justice[21]. In particular, the statements in *Sali* were not to be understood as suggesting that case management might be employed to shut out a party from litigating any fairly arguable claim or defence.

At the time *J L Holdings* was decided, the *Federal Court of Australia Act 1976* (Cth) did not contain a statement of overriding purpose. Over the course of the next decade the Australian jurisdictions largely incorporated statements modelled on r 1.1 of the CPR. In *Aon Risk Services Australia Ltd v Australian National University*[22] the High Court returned to a consideration of case management principles in the context of an action governed by a rule which provided that the rules of civil procedure were to be applied:

> "with the objective of achieving (a) the just resolution of the real issues in the proceedings and (b) the timely disposal of the proceedings, *and all other proceedings in the court*, at a cost affordable by the respective parties" (emphasis added)[23].

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[21] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154 per Dawson, Gaudron and McHugh JJ.

[22] (2009) 239 CLR 175; [2009] HCA 27.

[23] *Civil Procedure Rules 2006* (ACT), r 21(1).

As with *J L Holdings*, in issue were the principles governing the exercise of the power to grant leave to amend. Focus was on the rule, drawn from order XXVII of the *Rules of Court 1875* (UK), that "all necessary amendments ... must be made for the purpose of ... deciding the real issues in the proceeding; or ... avoiding multiple proceedings."[24]

The facts presented a somewhat egregious example of the conduct of substantial commercial litigation. The plaintiff commenced proceedings against its insurers and Aon, its insurance broker. On the third day of a trial which had been fixed for a four-week hearing, after settling with its insurers, the plaintiff applied for an adjournment to amend its statement of claim to plead a substantially different case against Aon. The application was allowed and the plaintiff was granted leave to amend. An appeal to the Court of Appeal was dismissed, the majority taking the view that the determination was governed by *J L Holdings*.

Aon was granted special leave to appeal to the High Court. The decision marks a departure from the conception of the "just resolution" of proceedings embraced in *J L Holdings*. The joint reasons spoke of the recognition in the common law world of the need for a new approach to tackle the problems of delay and cost in civil litigation. Their Honours endorsed Waller LJ's observation in

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[24] *Court Procedures Rules 2006* (ACT), r 501.

Worldwide Corporation Ltd v GPT Ltd, that the concern that case management not supplant the attainment of justice does not pay sufficient regard to the fact that courts are concerned to do justice to all litigants[25].

Aon rejects that the rules confer an unqualified duty to permit the late addition of a new claim. The requirement to make all "necessary amendments" did not extend in that case to an entirely new claim: the proposed claim was not at the time of the application a "real issue" in the proceeding between the plaintiff and Aon. While a proper opportunity must be given to parties to plead their case, *Aon* allows that limits may be placed on re-pleading when delay and cost are taken into account[26]. It follows that it is no longer acceptable for a party to be permitted to raise any arguable claim or defence at any stage in proceedings on payment of costs. The joint reasons in *Aon* acknowledge that even indemnity costs may not undo the prejudice of a late amendment. And they acknowledge that this may be so notwithstanding that the litigation is between sophisticated commercial parties.

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[25] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 212 [94]-[95] per Gummow, Hayne, Crennan, Kiefel and Bell JJ, citing *Worldwide Corporation Ltd v GPT Ltd* [1998] EWCA Civ 1894.

[26] (2009) 239 CLR 175 at 213 [98] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

The concern to avoid multiple proceedings was addressed by observing that Aon might have led evidence to answer the claim as originally framed against it and moved for judgment. In the circumstances, it was not apparent how the plaintiff could have resisted an application for a stay of any fresh proceedings based on its new claim on *Henderson v Henderson*[27] / *Port of Melbourne Authority v Anshun Pty Ltd*[28] grounds[29]. In his separate reasons, French CJ considered that abuse of process principles might be invoked against any attempt to litigate the new claim in later proceedings[30].

In Australia, post-*Aon*, where a discretion is sought to be exercised in favour of one party to the disadvantage of another, the court looks for an explanation for the indulgence sought. It does not suffice to show that the application is brought in good faith. It is necessary to identify circumstances giving rise to the need to amend (or the other relief sought) so that these factors can be weighed against the effects of delay in light of the overriding objective.

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27 (1843) 3 Hare 100 at 115 per Wigram V-C [67 ER 313 at 319].

28 (1981) 147 CLR 589 at 602 per Gibbs CJ, Mason and Aickin JJ; [1981] HCA 45.

29 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 209-210 [86]-[87] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

30 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 193 [33].

Considerations of individual and collective proportionality require courts to be astute to restrain opportunistic satellite litigation. In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* ("*ERA*")[31] the principles explained in *Aon* were developed in the context of an interlocutory skirmish which should not have been litigated.

The parties to a commercial dispute had been ordered to give verified, general discovery. ERA's solicitors used an electronic database to review some 60,000 documents. On 13 occasions, the reviewer incorrectly selected the option "no" in answer to an automatically generated question asking if privilege was claimed, and the documents were mistakenly disclosed to the Armstrong parties. ERA's solicitors brought the error to the attention of their opponents promptly. In the case of nine of the documents the error was evident since the documents were listed both in the privileged and non-privileged sections of ERA's Lists of Documents. Nonetheless, the solicitors for the Armstrong parties refused to return the documents contending that privilege had been waived.

ERA brought a motion seeking the return of the documents and that their opponents be restrained from making any use of them. Following a three-day hearing, the primary judge held that in the case of nine documents the disclosure had been inadvertent. The

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[31] (2013) 250 CLR 303; [2013] HCA 46.

Armstrong parties appealed to the Court of Appeal. Determination of the appeal gave rise to lengthy consideration of the basis in law or equity for the relief claimed. Ultimately, the Court of Appeal concluded that an obligation of conscience could not be sheeted home to the solicitors for the Armstrong parties and the appeal was allowed.

ERA was granted special leave to appeal to the High Court. The Court observed that the trial judge had been faced with an evident mistake which had occurred in the course of discovery, a court-ordered procedure. The orders which should have made were to permit ERA's lawyers to amend their Lists of Documents and to return the privileged documents. The Court was critical of the reliance of the solicitors for the Armstrong parties on waiver, noting that the rules of court impose a duty on parties to civil proceedings to further the overriding purpose and require that their lawyers not put the client in breach of that duty. Requiring the Court to rule on waiver and the availability of injunctive relief was not consistent in the circumstances with the discharge of the lawyer's duty[32]. The issue had served merely to distract the parties from progressing the

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[32] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 325 [64] per French CJ, Kiefel, Bell, Gageler and Keane JJ.

matter towards final hearing, encouraged the outlay of considerable expense and squandered the resources of the court[33].

ERA did not raise consideration of the scope of discovery that ERA had been required to give. Within a year of the initial hearing of ERA's motion, a practice direction was issued in the Equity Division of the Supreme Court limiting the nature and extent of orders for discovery in the Division. Under the practice direction, an order will not generally be made until after the parties have served their evidence and then only if it is necessary for the resolution of the real issues before the court. A party seeking discovery must not only set out the reasons why it is necessary but must also provide the court with an estimate of its likely cost[34].

Generally, the Australian jurisdictions have abandoned general discovery subject to the *Peruvian Guano* test[35]. In this respect, too, the rules governing the conduct of litigation evince a shift from earlier conceptions of "complete justice". Brett LJ's (as his Lordship then was) test was posited upon the view that the fullest facts

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[33] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 324 [59] per French CJ, Kiefel, Bell, Gageler and Keane JJ.

[34] Supreme Court of New South Wales, *Practice Note SC Eq 11*, 26 March 2012.

[35] *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 62-3.

should be before the court to enable it to do complete justice between the parties. Applied to the conduct of modern litigation, the test has been productive of excessive expense and oppression. The rules governing discovery in the Federal Court of Australia in terms require consideration of proportionality in determining whether to make an order and its scope.[36] The practice note issued by the Federal Court of Australia, states the expectation that parties and their representatives will "display common-sense and moderation in requests for discovery, in disputes about discovery and in expending costs on both"[37].

In England, the Woolf reforms, as enacted, made general discovery the exception. Discovery was to be limited to those documents the parties intended to rely upon, those that were adverse to their case and those that supported the opponent's case. Nonetheless, discovery remained a source of excess costs.[38] Following the Jackson reforms an approach more tailored to the circumstances of the particular case has been adopted. As with the Federal Court of Australia's practice, under the new regime the

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[36] *Federal Court Rules 2011* (Cth) r 20.11.

[37] Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management*, 25 October 2016 at [10.13].

[38] Dyson, "The Jackson Reforms and Civil Justice" (2015) 39 *Australian Bar Review* 215 at 218-219; Aikens, *Report and Recommendations of the Commercial Court Long Trials Working Party*, Judiciary of England and Wales, (2007) at 26ff.

expectation is that the parties will endeavour to agree on the level of disclosure that is reasonably necessary and on the most cost effective means of providing it[39]. It may be too early to gauge the extent to which these expectations are met.

The advent of civil procedure reforms has also given wider scope to the doctrine of abuse of process. In England, r 1 of the CPR has outflanked the rule in *Birkett v James*[40]. In *Securum Finance Ltd v Ashton*, Chadwick LJ made clear that the court will now take into account the fact that earlier proceedings have been dismissed for want of prosecution on any application to strike out fresh proceedings[41]:

> "The reason, as it seems to me, is that, when considering whether to allow the fresh proceedings to continue, the court must address the question whether that is an appropriate use of the court's resources having regard (i) to the fact that the claimant has already had a share of those resources in the first action and (ii) that his claim to a further share must be balanced against the demands of other litigants."

In *Tomlinson v Ramsey Food Processing Pty Ltd*, it was noted that while the doctrine of abuse of process may be invoked in areas in which estoppels also apply, it is inherently broader and more

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39 See *Civil Procedure Rules 1998* (UK) r 31.5(2)-(8).

40 [1978] AC 297 at 320.

41 [2001] Ch 291 at 308 [31].

flexible than estoppel. Abuse of process is capable of application to relieve against injustice to a party or impairment to the system of administration of justice notwithstanding that a party to a subsequent proceeding is not bound by an estoppel[42]. The reasons in Tomlinson cited *Johnson v Gore Wood & Co* in this regard[43].

The question in *Johnson* was whether the plaintiff's claim should be struck out on the ground that it should have been made in an earlier action brought by a company under his control. The focus, given that the parties to the two actions were different and estoppel could not run, was on what Lord Bingham of Cornhill described as "*Henderson v Henderson* abuse of process"[44]. While the plaintiff's action was not found to be abusive, it was not doubted that it may be an abuse to bring proceedings notwithstanding that the plaintiff is not bound by an estoppel. Lord Bingham of Cornhill described abuse of process on *Henderson v Henderson* grounds as distinct from cause of action estoppel and issue estoppel but as sharing the same underlying public interest: that there should be finality in litigation and that a party should not be twice vexed in the same matter. His Lordship added that it is a public interest that is reinforced by "the current emphasis on efficiency and economy in the conduct of

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42 (2015) 256 CLR 507 at 518-519 [25] ("*Tomlinson*").

43 [2002] 2 AC 1.

44 [2002] 2 AC 1 at 31; see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at 184-185 [24]-[25].

litigation" both in the interests of the parties, and the public as a whole[45].

The circumstances in which a claim which might have been pursued in earlier proceedings will be stayed as an abuse of process notwithstanding that the person making the claim is neither a party nor the privy of a party to the earlier proceeding, was squarely raised in for consideration in the High Court in *UBS AG v Tyne*[46]. Mr Tyne, in his capacity as a trustee of a family trust, commenced proceedings against UBS in the Federal Court of Australia claiming damages and equitable compensation arising out of advice and representations made by UBS to Mr Tyne and "through him" to certain "Tyne-related entities". The latter included the former corporate trustee of the family trust and an investment company, Telesto, of which in each instance Mr Tyne was the controlling mind. The trust's claimed losses arose in connection with the pledge of its assets to secure Telesto's liabilities under credit facilities extended by UBS. Mr Tyne in his personal capacity, Telesto and the former trustee had earlier brought proceedings in the Supreme Court of New South Wales ("the SCNSW proceedings") arising out of the same facts and making essentially the same claims as those made on behalf of the trust in the Federal Court.

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[45] *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

[46] *UBS AG v Tyne* (2018) 92 ALJR 968.

Mr Tyne and the former trustee discontinued their claims in the SCNSW proceedings, leaving Telesto as sole plaintiff. The SCNSW proceedings were permanently stayed on the ground that Telesto was seeking to re-litigate causes of action which in substance had been determined in proceedings in the High Court of Singapore, giving rise to a res judicata estoppel.

UBS sought to have the Federal Court proceedings stayed as an abuse of process. The primary judge acceded to the application, holding that the trust should have brought its claims in the SCNSW proceedings and that it had failed to give a proper explanation for its failure to do so. On appeal, the Full Court of the Federal Court of Australia, by majority, held that there had not been an abuse of process in circumstances in which the trust's claims had not been decided on their merits.

UBS was given special leave to appeal to the High Court. UBS contended that the "overarching purpose" of the conduct of civil litigation in the Federal Court as "quickly, inexpensively and efficiently as possible" is not given effect by allowing one or more of a number of plaintiffs, under the control of the same individual, to discontinue proceedings, stand back and allow those proceedings to continue to final determination, then, depending on the outcome of the earlier proceedings, and without proper explanation, to commence fresh proceedings raising the same sub-stratum of facts

and, in substance, the same claims against the same defendant[47]. A majority accepted those arguments. In so doing, the majority adopted Lord Bingham of Cornhill's account of the scope of abuse of process as requiring[48]:

> "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the processes of the court in seeking to raise before it the issue which could have been raised before."

The corporate trustee was not privy in interest with Telesto, however, in circumstances in which related parties were under common control, the majority accepted that the making a claim which ought reasonably to have been made in the earlier proceeding was an abuse of process. The Trust's claims would not have been met by a plea of res judicata and could have been determined on their merits in the SCNSW proceedings. Mr Tyne's perception of the forensic advantage to the Tyne-related parties in holding back the trust's claim with a view depending on the outcome of the SCNSW proceedings to bringing it in another court was held to be the

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47 *UBS AG v Tyne* (2018) 92 ALJR 968 at 972 [6].

48 *UBS AG v Tyne* (2018) 92 ALJR 968 at 972-973 [7] citing *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

antithesis of discharge of the duty imposed on parties to conduct proceedings consistently with the overarching purpose[49].

The broad merits-based judgment of which Lord Bingham spoke recognises that the fact that an issue *could* have been litigated in an earlier proceeding does not necessitate the conclusion that it *should* have been litigated in that proceeding[50]. Here, notwithstanding unconditional discontinuance of the trust's claim in the SCNSW proceedings, acceptance that the trust's claims were arguable, and that delay had not made their fair trial impossible, the majority's judgment was that the Federal Court proceedings were an abuse of process. The conclusion took into account all of the circumstances, including the absence of adequate explanation for the decision not to pursue the trust's claim in the SCNSW proceedings.

The dissentients in *UBS AG v Tyne* considered that a "right-thinking person" would not look askance at the commercial reasons for the decision made by the previous trustee to discontinue its involvement in the SCNSW proceedings. It had done so without objection, in circumstances in which there had been no determination on the merits of its claims and the delay had not been "inexcusable". In these circumstances their Honours assessed the

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[49] *UBS AG v Tyne* (2018) 92 ALJR 968 at 980 [55].

[50] *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

Federal Court proceedings were not an abuse of process[51]. The majority countered that courts must be astute to protect litigants and the system of justice itself against abuse of process. They reasoned that it harks back to a time before the enactment of statements of overriding/overarching purpose to expect courts to indulge parties who engage in tactical manoeuvring that impedes the "just, quick and efficient" resolution of litigation[52].

The Supreme Court of Canada emphasised the breadth and flexibility of the abuse of process doctrine in *Behn v Moulton Contracting Ltd*[53]. The Court dismissed an appeal against orders striking out a defence. The defence sought to challenge the validity of certain logging licences on constitutional and other grounds. In circumstances in which no challenge had been made at the time the licences were issued, the pleas in the defence were held to amount to an abuse. LeBel J, giving the judgment of the Court, endorsed the earlier statement of McLachlin J (as her Honour then was) in dissent in *R v Scott*, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice"[54]. LeBel J went on to note that unlike the

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[51] *UBS AG v Tyne* (2018) 92 ALJR 968 at 990 [105]-[106] per Nettle and Edelman JJ.

[52] *UBS AG v Tyne* (2018) 92 ALJR 968 at 979 [45] per Kiefel CJ, Bell and Keane JJ, [61] per Gageler J.

[53] *Behn v Moulton Contracting Ltd* [2013] 2 SCR 227.

[54] *Behn v Moulton Contracting Ltd* [2013] 2 SCR 227 at 245, quoting *R v Scott* [1990] 2 SCR 979 at 1007.

concepts of res judicata and issue estoppel, abuse of process is unencumbered by specific requirements. Since the administration of justice and fairness are at its heart, abuse of process may preclude litigation of an issue in circumstances in which the requirements for issue estoppel are not met[55].

The New Zealand Court of Appeal was guarded about the application of the *Securum Finance* proportionality analysis to the High Court Rules (NZ) in *Bank of New Zealand v Savril Contractors Ltd*[56]. Notably, however, the conclusion that the fresh proceedings in that case were an abuse of process took into account not only fairness to the defendant, but the Court's view that continuance of the proceeding would bring the administration of justice into disrepute[57].

In a critique of the impact of the Woolf and Jackson reforms, Dr Sorabji who serves as Principal Legal Advisor to the Lord Chief Justice, praises *Aon* for its embrace of a concept of justice that encompasses "the need to secure all litigants with an effective and equitable share of the court's resources so as to enable them to achieve access to justice as well as maintain public confidence in the

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55 *Behn v Moulton Contracting Ltd* [2013] 2 SCR 227 at 245-246 [40]-[41].

56 [2005] 2 NZLR 475 at 500 [99].

57 *Bank of New Zealand v Savril Contractors Ltd* [2005] 2 NZLR 475 at 501 [105].

courts"[58]. The claim that court managed litigation serves to increase access to justice is not readily susceptible of empirical demonstration. And while maintenance of public confidence in the courts may be a fuzzy concept, the concern to avoid the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public monies[59] is one not to be gainsaid.

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[58] Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (2014) at [232]-[234].

[59] *UBS AG v Tyne* (2018) 92 ALJR 968 at 981 [59] citing *Tyne v UBS AG [No 2]* (2017) 250 FCR 341 at 351 [17].