HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

UBS AG APPELLANT

AND

SCOTT FRANCIS TYNE AS TRUSTEE OF THE ARGOT TRUST RESPONDENT

UBS AG v Tyne
[2018] HCA 45
17 October 2018
B54/2017

ORDER

1. *Appeal allowed with costs.*

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

   (a) the appeal to the Full Court is dismissed; and

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

On appeal from the Federal Court of Australia

Representation

J Stoljar SC with L T Livingston for the appellant (instructed by King & Wood Mallesons)

G O'L Reynolds SC with D P Hume for the respondent (instructed by Russells)

CATCHWORDS

UBS AG v Tyne

Practice and procedure – Permanent stay of proceedings – Abuse of process – Where respondent (in personal capacity) was controlling mind of former trustee and related company – Where respondent (in personal capacity), former trustee and related company commenced proceedings in Supreme Court of New South Wales – Where respondent (in personal capacity) and former trustee discontinued as parties in Supreme Court proceedings – Where Supreme Court proceedings permanently stayed – Where respondent (as trustee) pursued substantially same claims in Federal Court of Australia – Where primary judge permanently stayed proceedings for abuse of process – Whether on appeal Full Court erred in finding no abuse of process and setting aside permanent stay – Whether Full Court failed to consider overarching purpose of conduct of civil litigation.

Words and phrases – "abuse of process", "administration of justice", "conduct of civil litigation", "discontinue", "final determination", "just resolution", "overarching purpose of the conduct of civil litigation", "permanent stay", "related parties", "unconditional discontinuance", "unjustifiably oppressive".

Federal Court of Australia Act 1976 (Cth), ss 23, 37M, 37N.
Federal Court Rules 2011 (Cth), r 26.14.
Uniform Civil Procedure Rules 2005 (NSW), rr 12.3(1), 12.4.

1 KIEFEL CJ, BELL AND KEANE JJ. This appeal is concerned with the power to permanently stay proceedings as an abuse of the process of the court. The varied circumstances in which the use of the court's processes will amount to an abuse, notwithstanding that the use is consistent with the literal application of its rules, do not lend themselves to exhaustive statement. Either of two conditions enlivens the power: where the use of the court's procedures occasions unjustifiable oppression to a party, or where the use serves to bring the administration of justice into disrepute[1]. The issue in this appeal is whether one or both of those conditions is met in circumstances in which the factual merits of the underlying claim have not been determined and any delay in prosecuting the claim has not made its fair trial impossible.

Procedural history

2 Scott Francis Tyne, in his capacity as trustee of the Argot Trust ("the Trust"), and his wife, Clare Marks[2], commenced proceedings against UBS AG ("UBS") in the Federal Court of Australia ("the Federal Court"), 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 include the former trustee of the Trust, ACN 074 971 109 Pty Limited ("ACN 074"), and an investment company incorporated in Jersey, Telesto Investments Limited ("Telesto"). At all material times, Mr Tyne was the controlling mind of ACN 074 (in its capacity as trustee of the Trust) and Telesto. The Trust is a family trust of which Mr Tyne, his wife and their children are the sole beneficiaries. The Trust's claimed loss arises in connection with the pledge of its assets to secure Telesto's liabilities under credit facilities extended by UBS.

3 ACN 074 (in its capacity as trustee of the Trust), Telesto and Mr Tyne, in his personal capacity, had earlier brought proceedings in the Equity Division of the Supreme Court of New South Wales ("the SCNSW proceedings") arising out of the same facts and making essentially the same claims as are made on behalf

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1 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 per Lord Diplock; *Walton v Gardiner* (1993) 177 CLR 378 at 393 per Mason CJ, Deane and Dawson JJ; [1993] HCA 77; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 519 [25] per French CJ, Bell, Gageler and Keane JJ; [2015] HCA 28.

2 On 11 June 2014, Ms Marks became a bankrupt on the making of a sequestration order. Her trustee did not elect to continue the proceedings on behalf of the bankrupt estate. On 15 December 2017, by consent, an order was made that Ms Marks cease to be a party to the proceedings in this Court.

of the Trust in these proceedings. Mr Tyne and the Trust discontinued their claims in the SCNSW proceedings, leaving Telesto as the 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, and which had given rise to a *res judicata* estoppel.

4 UBS applied to have the present proceedings stayed on grounds which include that they are an abuse of the process of the Federal Court. The primary judge held that the Trust could, and should, have brought its claims in the SCNSW proceedings and that it had failed to give a proper explanation of why it had not done so[3]. His Honour permanently stayed the proceedings under s 23 of the *Federal Court of Australia Act* 1976 (Cth) ("the FCA").

5 On appeal to the Full Court of the Federal Court, the majority (Jagot and Farrell JJ) held that it had not been open to the primary judge to find that the proceedings are an abuse of process[4]. The conclusion took into account that the Trust's claims have not been decided on their merits[5]. Dowsett J, in dissent, did not consider that circumstance to be determinative. His Honour inferred that Mr Tyne had identified some forensic advantage to himself and/or the Trust in discontinuing the Trust's claims in the SCNSW proceedings with a view to renewing them in the event the Telesto claim was unsuccessful. The effect of that decision, his Honour said, was to delay the resolution of the dispute between the Trust and UBS by a significant period of time, to increase the costs incurred by UBS, and otherwise to vex UBS. In the circumstances, Dowsett J considered that to allow the proceedings to remain on foot would inflict manifest unfairness on UBS and bring the administration of justice into disrepute[6].

6 On 15 September 2017, Bell and Keane JJ granted UBS special leave to appeal. By its first ground, UBS contends the Full Court majority erred essentially for the reasons given by Dowsett J. Those reasons call in aid the "overarching purpose" of the conduct of civil litigation in the Federal Court[7]: to facilitate the just resolution of disputes according to law as quickly,

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3 *Tyne v UBS AG (No 3)* (2016) 236 FCR 1 at 60-61 [421]-[424].

4 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 379-380 [108].

5 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 374 [90].

6 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 353 [23].

7 FCA, s 37M.

inexpensively and efficiently as possible. UBS submits that this purpose is not given effect by allowing one or more of a number of plaintiffs, controlled by 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 substratum of facts and, in substance, the same claims against the same defendant.

7 Whether conduct of this description rises to the level of an abuse of the processes of the court is a determination that requires consideration of all the circumstances. As Lord Bingham of Cornhill explained, that consideration requires the court to make[8]:

> "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 process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

8 For the reasons to be given, taking into account the public and private interests involved, the primary judge was correct to stay this proceeding as an abuse of the processes of the Federal Court. The conclusion makes it unnecessary to address UBS's second ground of appeal. The appeal must be allowed and, in place of the Full Court's order, the appeal to that Court must be dismissed.

The factual background

9 In about 2007, Telesto opened an investment account with UBS, through which certain credit facilities were extended to it. Under the terms and conditions of the account the facilities were governed by the law of the country in which the account was booked. Telesto's account was "booked in Singapore" and Telesto unconditionally submitted to the non-exclusive jurisdiction of the courts of Singapore.

10 The Trust's claims in the SCNSW proceedings and in these proceedings are founded on allegations that UBS gave negligent advice and/or that UBS engaged in misleading or deceptive conduct (or conduct that was likely to

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

mislead or deceive), in relation to financial services, in the representations made by its officers to Mr Tyne, and, through Mr Tyne, to Telesto and ACN 074 (in its capacity as trustee of the Trust) ("the Trust's TPA claims"). The representations are alleged to have induced Telesto to acquire and retain bonds issued by financial institutions in Kazakhstan, the Bank Turan-Alem and Astana Finance ("the Bonds"), which ultimately proved to be worthless.

11 In September 2008, the value of collateral provided by Telesto under the facilities declined. UBS issued a margin call requiring Telesto to provide additional collateral or to reduce the amount owed under the facilities. At Telesto's and Mr Tyne's request, UBS agreed not to sell the collateral and not to make further margin calls on terms that were contained in a letter dated 14 December 2009. The letter was counter-signed by Telesto on 31 December 2009 ("the Standstill Agreement"). Under the Standstill Agreement, Telesto undertook to have ACN 074 (in its capacity as trustee of the Trust) enter into a letter of undertaking in favour of UBS. On 28 January 2010, ACN 074 (in its capacity as trustee of the Trust) executed the letter of undertaking.

12 On 15 October 2010, UBS purported to terminate the Standstill Agreement. On the same day, UBS commenced proceedings 801 of 2010 in the High Court of Singapore ("the Singapore 801 proceedings") against Telesto, as principal debtor, and Mr Tyne, who had personally guaranteed Telesto's liabilities to UBS, alleging that Telesto's account with UBS was in default.

13 On 2 November 2010, Telesto, Mr Tyne in his personal capacity and ACN 074 (in its capacity as trustee of the Trust) commenced the SCNSW proceedings. In those proceedings, it was claimed that UBS did not have authority to purchase the Bonds on Telesto's behalf. Alternatively, it was claimed that Telesto purchased the Bonds in reliance on UBS's negligent advice and/or on representations made by UBS about the nature and quality of the Bonds, which constituted misleading or deceptive conduct in contravention of Commonwealth and State law. The Trust pleaded that it had entered into sureties on Telesto's behalf in continuing reliance on UBS's negligent advice and misleading or deceptive conduct. It sought to be released from those sureties, or the award of damages or compensation. Telesto also claimed equitable compensation for breach of fiduciary duty owed by UBS to it arising from UBS's alleged acceptance of an engagement to advise the Government of Kazakhstan on a re-structuring of the Kazakh banking industry. The Trust makes a like claim to equitable compensation in these proceedings.

14 On 11 November 2010, UBS commenced proceedings in the High Court of Singapore to restrain the plaintiffs in the SCNSW proceedings from prosecuting their claims in those proceedings ("the Singapore anti-suit proceedings"). Relief was sought against ACN 074 (in its capacity as trustee of

the Trust) notwithstanding that it was not a party to the Singapore 801 proceedings.

15 On 9 December 2010, on UBS's application, consent orders were made temporarily staying the SCNSW proceedings pending the determination of the Singapore anti-suit proceedings. On 21 December 2010, Telesto applied in the High Court of Singapore for a stay of the Singapore 801 proceedings in favour of continuation of the SCNSW proceedings on the ground of *forum non conveniens*. On 10 January 2011, Mr Tyne applied in the High Court of Singapore seeking like orders.

16 On 11 February 2011, the Singapore anti-suit proceedings and Telesto's and Mr Tyne's applications for stays were heard in the High Court of Singapore. On 21 February 2011, an Assistant Registrar made orders restraining Telesto, Mr Tyne in his personal capacity and ACN 074 (in its capacity as trustee of the Trust) from continuing to prosecute their claims in the SCNSW proceedings or in other proceedings in Australia or anywhere else in the world in relation to the subject matter of the Singapore 801 proceedings. Telesto's and Mr Tyne's stay applications were dismissed.

17 On 16 May 2011, Chong J in the High Court of Singapore heard appeals from the grant of the anti-suit injunction and from the dismissal of Telesto's and Mr Tyne's applications to stay the Singapore 801 proceedings. The appeals were conducted as hearings *de novo*. Counsel appearing for Telesto, Mr Tyne and ACN 074 (in its capacity as trustee of the Trust) conceded that their claims based on misleading or deceptive conduct could be mounted as a defence in the Singapore 801 proceedings. Counsel maintained, however, that the prospect of the favourable resolution of these claims was enhanced in the SCNSW proceedings under Commonwealth and State legislation. The appeals were dismissed. An application for leave to appeal from Chong J's orders was dismissed following the failure of Telesto, Mr Tyne and ACN 074 (in its capacity as trustee of the Trust) to appear on the day fixed for the hearing of the application.

18 By the time Chong J's judgment was delivered, UBS had realised the collateral securing Telesto's liability under the terms and conditions of the account and had applied the proceeds to reduce the liability to nil. UBS's claims in the Singapore 801 proceedings were confined to claims for declaratory relief and for costs on the indemnity basis.

19 On 24 October 2011, UBS applied in the SCNSW proceedings for a permanent stay of proceedings. The application was heard by Ward J on

21 November 2011. In a judgment delivered on 7 February 2012[9], Ward J held that as the Singapore 801 proceedings were now confined to UBS's claims for declaratory relief and indemnity costs, it was not evident that there would be overlap between the two proceedings. Her Honour observed that the extent of any overlap would depend upon the course taken by "the Telesto parties" with respect to the defence of those proceedings. Her Honour determined that the appropriate relief was to temporarily stay the SCNSW proceedings.

20 On 21 February 2012, Ward J heard submissions on the form of the orders to reflect her earlier judgment. In written submissions filed on behalf of Telesto, Mr Tyne and ACN 074 (in its capacity as trustee of the Trust), it was foreshadowed that the latter two parties would discontinue their claims, that Telesto would not defend the Singapore 801 proceedings, and that it would abandon all claims in the SCNSW proceedings save for its TPA and breach of fiduciary duty claims. Subject to UBS prosecuting the Singapore 801 proceedings expeditiously, Ward J ordered that the SCNSW proceedings be stayed pending their final determination. Notwithstanding the temporary stay, Ward J gave leave, so far as necessary, to the plaintiffs to file and serve an amended summons and amended commercial list statement.

21 On 6 March 2012, Telesto filed a further amended summons and further amended commercial list statement pursuant to Ward J's orders. Mr Tyne and ACN 074 (in its capacity as trustee of the Trust) were no longer named as plaintiffs in the amended pleadings. By the amended pleadings, Telesto abandoned its claim that the Bonds had been purchased on its behalf without authority but maintained its TPA claims, its claims for certain declaratory relief and its claim for equitable compensation.

22 On 27 July 2012, Lai J heard the Singapore 801 proceedings. There was no appearance by Telesto or Mr Tyne. Following a hearing on the merits, Lai J made a number of declarations including that by reason of events of default the Standstill Agreement was terminated and Telesto and Mr Tyne were liable to UBS for a liquidated sum and interest.

23 On 6 September 2012, UBS filed a motion in the SCNSW proceedings seeking the permanent stay or dismissal of the proceedings on the ground that Lai J's judgment gave rise to a *res judicata* or issue estoppel. On 10 September 2012, Telesto filed an application to discharge the temporary stay ordered by Ward J. Both applications were heard by Sackar J on 23 November 2012. On

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9 *Telesto Investments Ltd v UBS AG* (2012) 262 FLR 119.

the hearing each party adduced expert evidence on the law of Singapore. Following the hearing his Honour entertained further submissions in writing.

24 On 9 May 2013, his Honour delivered judgment[10]. Relevantly, his Honour found that the facts underlying each of Telesto's principal claims occurred before the execution of the Standstill Agreement and that Lai J's finding – that all the rights and liabilities arising as the result of those facts were the subject of a compromise or settlement agreement that should not be set aside – "included everything which Telesto pleaded against UBS in the [SCNSW proceedings]"[11]. His Honour held that the Singapore 801 proceedings, as a matter of substance, "covered" the causes of action in the SCNSW proceedings such that Lai J's judgment created a *res judicata*[12]. The SCNSW proceedings were permanently stayed. No appeal was brought from his Honour's decision.

25 On 9 January 2014, Mr Tyne became the trustee of the Trust. Four days later, in that capacity, Mr Tyne commenced the present proceedings. This was some 23 months after the grant of leave to file the amended pleadings in the SCNSW proceedings by which ACN 074, the former trustee, ceased to be a plaintiff in those proceedings.

26 The amended statement of claim filed by Mr Tyne in his capacity as trustee of the Trust pleads: (i) essentially the same representations as to the nature and quality of the Bonds as were relied upon in the SCNSW proceedings; (ii) Mr Tyne's reliance upon those representations in arranging for ACN 074 (in its capacity as trustee of the Trust) to acquiesce in the pledge by Telesto of certain securities and the loan by the Trust of securities to Telesto which were pledged by Telesto as additional collateral; and (iii) that, had UBS advised Mr Tyne of certain undisclosed matters with respect to the stability of Kazakh financial institutions, he would not have caused ACN 074 (in its capacity as trustee of the Trust) to loan the securities to Telesto or acquiesce in them being pledged on its behalf. As the result of the Bonds losing their value, Telesto is said to have been unable to return the "lent securities" to the Trust or to pay the Trust their benchmark value. The Trust claims damages both for contraventions of Commonwealth and State law proscribing misleading or deceptive conduct in the provision of financial services and in negligence, and claims equitable compensation for breach of fiduciary duty arising out of the circumstances to which earlier reference has been made.

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10 *Telesto Investments Ltd v UBS AG* (2013) 94 ACSR 29.

11 *Telesto Investments Ltd v UBS AG* (2013) 94 ACSR 29 at 65 [199].

12 *Telesto Investments Ltd v UBS AG* (2013) 94 ACSR 29 at 65 [201].

The primary judge's analysis

27 UBS's application to permanently stay the present proceedings was brought on grounds of abuse of process, *Anshun* estoppel[13], *res judicata*, or issue estoppel, which were variously asserted to arise from the Singapore 801 proceedings, the Singapore anti-suit proceedings and the SCNSW proceedings. The primary judge rejected UBS's arguments on *res judicata* and estoppel. His Honour's focus with respect to the argument on abuse of process was on the SCNSW proceedings. His Honour found that the essential facts and circumstances relied upon as UBS's conduct in the SCNSW proceedings are reflected in the pleading of UBS's conduct in these proceedings and the essential allegations are the same as the allegations in the SCNSW proceedings[14]. There is no challenge to that finding.

28 His Honour did not accept that ACN 074 (in its capacity as trustee of the Trust) should have been joined in the Singapore 801 proceedings as a cross-claimant because prosecution of the Trust's TPA claims in Singapore would have subjected it to significant juridical disadvantage. There was, however, no juridical disadvantage to the prosecution of the Trust's claims in the SCNSW proceedings. While the trustee was not privy in interest with Telesto (or Mr Tyne), his Honour observed that as the controlling mind of ACN 074 (in its capacity as trustee of the Trust) Mr Tyne made the decision to cause it to discontinue its participation as a plaintiff in the SCNSW proceedings. His Honour said that the Trust did not have an unqualified "right" to a trial of its claims on the merits; the Trust had a right to an opportunity to have its claims determined on the merits and it had chosen not to exercise that opportunity. His Honour concluded that the Trust's claims could and should have been brought in the SCNSW proceedings and that no "proper explanation" had been given for the failure to do so.

29 His Honour considered that the conduct of the SCNSW proceedings was suggestive of the Trust's claims having been held back with a view to them being brought in another court if the outcome of the SCNSW proceedings was adverse to Telesto. The bringing of these proceedings, his Honour said, raised substantial, complex questions of fact and law with which UBS has been vexed, and amounted to an abuse of the processes of the Federal Court.

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13 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; [1981] HCA 45.

14 *Tyne v UBS AG (No 3)* (2016) 236 FCR 1 at 26 [185].

The Full Court's analysis

30 The Full Court majority took into account that Ward J had not imposed conditions on the grant of leave to file the amended pleadings by which the Trust's claim was discontinued. Their Honours also accepted for the purpose of the analysis that if the Trust's claims had been prosecuted in the SCNSW proceedings, UBS may have chosen not to proceed with the application for a permanent stay before Sackar J. Nonetheless, UBS had the benefit of the permanent stay of Telesto's claims and was now being required to do what otherwise it would have had to do in 2013, namely admit or defend the Trust's claims[15].

31 Their Honours concluded[16]:

> "We are unable to accept these circumstances as involving any material unfairness to, or oppression of, UBS. The fact that the primary judge must be inferred to have reached a contrary view indicates error. Again, if 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."

32 Dowsett J, in dissent, considered that focus on the "right" of a litigant to discontinue and later commence fresh proceedings is out of keeping with the conduct of modern litigation, consistently with the overarching purpose stated in s 37M(1) of the FCA[17]. His Honour inferred that Mr Tyne had identified some forensic advantage to himself and/or the Trust in discontinuing the SCNSW proceedings. The effect had been to delay the resolution of the dispute between the Trust and UBS in circumstances in which all of the claims arising out of the allegations as to UBS's conduct could have been resolved in 2013[18].

33 His Honour considered that to permit the Trust's claims to go forward would visit manifest unfairness on UBS by reason of the significant delay in resolving the dispute, increased costs, and the inconvenience of having to deal

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15 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 380 [108].

16 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 380 [108].

17 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 352 [20].

18 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 353 [23].

with the matter again after lengthy litigation[19]. His Honour assessed that these considerations would themselves be likely to bring the administration of justice into disrepute, particularly if the conduct of the Trust's claims were thought to bespeak a general attitude of tolerance by the courts[20].

Section 37M of the FCA

34 The determination of whether the bringing or continuance of proceedings is an abuse of the process of the court must take into account the procedural law administered by the court whose processes are engaged[21]. Relevantly in this respect, s 37M of the FCA provides:

> "(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
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> (a) according to law; and
>
> (b) as quickly, inexpensively and efficiently as possible.
>
> (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
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> (a) the just determination of all proceedings before the Court;
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> (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
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> (c) the efficient disposal of the Court's overall caseload;
>
> (d) the disposal of all proceedings in a timely manner;
>
> (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute."

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19 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 351 [14], 353 [23].

20 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 356 [32].

21 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 280 [65] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2006] HCA 27.

The submissions

35 UBS submits that the Full Court majority reasoned that because the Trust's claims have not been determined on their factual merits it was not open to the primary judge to find that their prosecution is an abuse of process. It argues that in this respect their Honours imposed a wrong limitation on the breadth and flexibility of the doctrine as it is articulated in *Tomlinson v Ramsey Food Processing Pty Ltd*[22] and *Timbercorp Finance Pty Ltd (In liq) v Collins*[23]. It submits that the approach of the Full Court majority fails to give weight to the oppression occasioned by repeated attempts at re-litigation by closely related parties of substantially the same claims based upon a common substratum of facts. UBS embraces Dowsett J's conclusion, that statements in older authorities dealing with the doctrine of abuse of process are to be read in light of the enactment of the "overarching purpose" in s 37M of the FCA and its analogues[24].

36 The submissions made by Mr Tyne, in his capacity as trustee of the Trust, for convenience will be described as those of the Trust. The Trust submits that putting cases of inordinate delay to one side, the authorities are against acceptance of the proposition that proceedings may be stayed as an abuse of process notwithstanding that they have not been determined on their merits. In any event, the Trust submits that the Full Court majority did not rest their conclusion on the circumstance that there has been no hearing of the merits of its claim alone; their Honours separately identified error in the primary judge's failure to identify the unfairness to, or oppression of, UBS occasioned by the conduct of the Trust's claims.

37 While the Trust acknowledges the relevance of the policy reflected in s 37M of the FCA to an inquiry into whether proceedings are an abuse, it lays stress on the object of the policy being "the just resolution of disputes … according to law"[25]. And the Trust submits that the principle of finality –

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22 (2015) 256 CLR 507 at 518-519 [25]-[26] per French CJ, Bell, Gageler and Keane JJ.

23 (2016) 259 CLR 212 at 240 [69] per French CJ, Kiefel, Keane and Nettle JJ; [2016] HCA 44.

24 *Civil Procedure Act* 2005 (NSW), s 56(1); Uniform Civil Procedure Rules 1999 (Q), r 5; *Civil Procedure Act* 2010 (Vic), s 7(1); Supreme Court Civil Rules 2006 (SA), r 3; *Court Procedures Act* 2004 (ACT), s 5A.

25 FCA, s 37M(1)(a); see also s 37M(2)(a).

"controversies, *once resolved*, are not to be reopened"[26] – is not engaged where the issues between the parties have not been decided. More generally, it cautions against open-textured arguments invoking public confidence in the administration of justice. That confidence, it submits, rests ultimately on the availability of courts and tribunals to which citizens may resort for the determination of their disputes.

The just resolution of the dispute

38 The timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute[27]. These wider interests are reflected in s 37M(2) of the FCA. As the joint reasons in *Aon Risk Services Australia Ltd v Australian National University* explain, the "just resolution" of a dispute is to be understood in light of the purposes and objectives of provisions such as s 37M of the FCA. Integral to a "just resolution" is the minimisation of delay and expense[28]. These considerations inform the rejection in *Aon* of the claimed "right" of a party to amend its pleading at a late stage in the litigation in order to raise an arguable claim. The point is made that a party has a right to bring proceedings but that choices are made respecting what claims are made and how they are framed. Their Honours speak of the just resolution of the dispute in terms of the parties having a sufficient *opportunity* to identify the issues that they seek to agitate[29]. The respondent's argument in *Aon*, that the proposed amendment to raise the fresh claim was a necessary amendment to avoid multiple actions, did not avail. As their Honours observe, if reasonable

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26 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34], 20 [45]; [2005] HCA 12 (emphasis added).

27 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 266 [14] per Gleeson CJ, Gummow, Hayne and Crennan JJ citing *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75 per Gaudron J; [1995] HCA 66; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 212 [95] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2009] HCA 27.

28 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 213 [98] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

29 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 217 [112] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

diligence would have led to the bringing of the claim in the existing proceedings, any further proceeding might be met by a stay on *Anshun* grounds[30].

39 In separate reasons in *Aon*, French CJ holds that the institution of fresh proceedings by the Australian National University, raising the claim which could have been raised earlier in the existing proceedings, might be an abuse of process. His Honour observes that abuse of process principles may be invoked to prevent attempts to litigate a claim that should have been litigated in earlier proceedings as well as attempts to re-litigate a claim that has been determined[31]. His Honour points to *Reichel v Magrath* as a longstanding example of a re-litigation case that was decided on the ground of abuse of process and not on the grounds of *res judicata* or issue estoppel[32].

40 *Batistatos v Roads and Traffic Authority (NSW)*[33] makes clear that the just resolution of a controversy may be the permanent stay of the proceeding notwithstanding that the plaintiff is not at fault and that the merits of his or her claim have not been decided. As the joint reasons explain[34]:

> "The plaintiff certainly has a 'right' to institute a proceeding. But the defendant also has 'rights'. One is to plead in defence an available limitation defence. Another distinct 'right' is to seek the exercise of the power of the court to stay its processes in certain circumstances. On its

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30 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 209-210 [86] per Gummow, Hayne, Crennan, Kiefel and Bell JJ citing *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602 per Gibbs CJ, Mason and Aickin JJ.

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

32 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 193 [33] citing (1889) 14 App Cas 665, and at fn (106) noting the suggestion that the case could have been dealt with on the ground of *res judicata*: Handley, *Spencer Bower, Turner and Handley on the Doctrine of Res Judicata*, 3rd ed (1996) at 121 [231], 252 [445]; *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198 at 202 [16] per Handley JA.

33 (2006) 226 CLR 256.

34 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 280 [63] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

> part, the court has an obligation owed to both sides to quell their controversy according to law."

41 The abuse of process in *Batistatos* lay in the very great delay in the commencement of the proceedings on behalf of the incompetent plaintiff; a delay which made the fair trial of his claim impossible. That is not this case. The appeal is to be determined upon acceptance that the Trust's claims are arguable, that UBS has not been called upon to defend them, and that the delay has not made their fair trial impossible. The claimed abuse lies in invoking the processes of the Federal Court to litigate claims that could and should have been litigated in the SCNSW proceedings[35].

42 *Batistatos* was concerned with litigation that was commenced before the enactment of s 56(1) of the *Civil Procedure Act* 2005 (NSW) ("the CPA"), which is in similar terms to s 37M(1) of the FCA. Nonetheless their Honours had regard to the wider scope given to the principles of abuse of process in England under r 1.1 of the Civil Procedure Rules 1998 (UK), on which s 56(1) of the CPA and s 37M(1) of the FCA are broadly modelled[36]. Their Honours instance the decision of the Court of Appeal in *Securum Finance Ltd v Ashton* as exemplifying that wider scope[37]. In that case Chadwick LJ explains the approach of the English courts in this way[38]:

> "The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind – and must consider whether the claimant's wish to have 'a second bite at the cherry' outweighs the need to allot its own limited resources to other cases."

43 This is not to say that in England or here the circumstance that a claim could have been raised in earlier proceedings makes the raising of it in later proceedings an abuse of process[39]. It is to recognise that in some circumstances

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35 *Tyne v UBS AG (No 3)* (2016) 236 FCR 1 at 59 [416], 60 [422], 61 [424].

36 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 281 [68] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

37 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 281 [68] per Gleeson CJ, Gummow, Hayne and Crennan JJ referring to [2001] Ch 291.

38 *Securum Finance Ltd v Ashton* [2001] Ch 291 at 309 [34].

39 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31 per Lord Bingham of Cornhill.

the bringing of a claim which should have been litigated in an earlier proceeding will be an abuse and that that may be so notwithstanding that the later proceeding is not precluded by an estoppel. So much is made plain in *Tomlinson*[40]:

> "[I]t has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel. Similarly, it has been recognised that making such a claim or raising such an issue can constitute an abuse of process where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel." (footnotes omitted)

44 The circumstance that the Trust's claim has not been heard on its merits, and that a fair trial may still be had, cannot be determinative of whether the proceeding is unjustifiably oppressive to UBS or whether its continuance would bring the administration of justice into disrepute.

45 The courts must be astute to protect litigants and the system of justice itself against abuse of process. It is to hark back to a time before this Court's decisions in *Aon* and *Tomlinson* and the enactment of s 37M of the FCA to expect that the courts will indulge parties who engage in tactical manoeuvring that impedes the "just, quick and efficient" resolution of litigation. To insist, for example, on "inexcusable delay" as a precondition of the exercise of the power to stay proceedings as an abuse of process is to fail to appreciate that any substantial delay is apt to occasion an increase in the cost of justice and a decrease in the quality of justice. And other litigants are left in the queue awaiting justice. Further, there is no reason why the courts should tolerate attempts to manipulate other parties and the courts themselves by the deployment, by a single directing mind and will, of different legal entities under common control for such a purpose. The concern is as to whether the processes of the court are being abused. Given that this is the central concern, the circumstance that the abuse is effected by the use of multiple entities orchestrated by a single mind and will is no reason to tolerate it.

46 Nor does the undue vexation which a stay of proceedings is concerned to prevent arise only when proceedings in respect of the same issue have been concluded by a judgment on the merits. Serial proceedings discontinued prior to

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40 (2015) 256 CLR 507 at 519 [26] per French CJ, Bell, Gageler and Keane JJ.

judgment would be an obvious example of an abuse of process. The pursuit of substantially the same claim by serial proceedings conducted by different entities under common control is no less obviously an abuse of process.

Unconditional discontinuance

47 The unconditional discontinuance of the Trust's claims in the SCNSW proceedings is central to the Trust's submissions, which draw attention to the rules of the Supreme Court of New South Wales and the Federal Court that in each case provide that discontinuance of proceedings is no bar to bringing fresh proceedings for the same relief[41]. In light of the rules, the Trust questions that it could ever amount to an abuse of process for a plaintiff to recommence proceedings having been granted unconditional leave to discontinue an earlier proceeding.

48 The Trust points out that, if discontinuance of its claim was perceived to be oppressive or unfair, it was open to UBS to apply to have the grant of leave conditioned on no further proceedings being brought in respect of the claim. As to the interests of the administration of justice, the Trust submits that the rules are structured so as to make it incumbent upon the judge hearing the application for discontinuance to deal with the question of future proceedings; Ward J is to be taken to have considered that it was consistent with the overriding purpose under s 56 of the CPA to grant unconditional leave to discontinue its claims. The submission directs attention to how the application was developed before her Honour.

49 No formal application under the Uniform Civil Procedure Rules 2005 (NSW) to discontinue Mr Tyne's or the Trust's claims was brought. In written submissions filed in advance of the hearing, the Telesto parties foreshadowed their intention to seek leave to file an amended pleading discontinuing the claims of Mr Tyne and ACN 074 (in its capacity as trustee of the Trust) and confining the claims made by Telesto. UBS opposed the grant of leave to file the amended pleading. In written submissions, UBS contended the application should be made formally and supported by evidence.

50 Counsel for the Telesto parties responded to this submission by observing "[w]e can do that if that's pedantically required" and by inviting the Court to grant the leave sought without further formality as the amended pleading would enable UBS "to see precisely what the issues are that we wish to litigate".

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41 Uniform Civil Procedure Rules 2005 (NSW), r 12.3(1); Federal Court Rules 2011 (Cth), r 26.14.

Counsel submitted that the proceedings "could then proceed just, quick and efficiently which is what we are actually working towards". Following these submissions, Ward J commented to counsel for UBS "[i]t seems to me it is not in your client's interests to discourage [Mr Tyne and ACN 074] from discontinuing the proceedings". Counsel for UBS agreed and did not further press the objection to leave.

51 In granting leave to file the amended pleading discontinuing the claims made by the Trust and Mr Tyne, Ward J is to be taken to have accepted counsel's submission that the amendment would identify the issues which the Tyne-related parties wished to litigate against UBS, and thus advance the just, quick and efficient resolution of the dispute between those parties and UBS.

52 Where discontinuance of proceedings brings the proceedings to an end, the later commencement of fresh proceedings may work no unfairness to the defendant. Here, the discontinuance of the Trust's claim did not bring the SCNSW proceedings to an end. Those proceedings were prosecuted to a final determination on the issues before the Court by a plaintiff controlled by Mr Tyne to recover the loss that the Trust claims as its loss in these proceedings. Mr Tyne provided an explanation for the decision not to maintain the Trust's claim in the SCNSW proceedings. The primary judge considered that it was not a "proper" explanation. To explain that finding it is necessary to refer to Mr Tyne's affidavit.

53 Mr Tyne stated that the discontinuance of the Trust's claim in the SCNSW proceedings was precipitated by the fact that Telesto's liabilities to UBS under the facilities had been extinguished, expunging any secondary liability of the Trust. As the primary judge and Dowsett J noted, the account provides no explanation of why the Trust's claim, for recovery of the value of the securities which were loaned to Telesto and pledged as security for the funds advanced to Telesto, was not pursued in the SCNSW proceedings. The explanation for that decision is found in the further "observations" Mr Tyne made concerning the SCNSW proceedings.

54 Mr Tyne assessed that "in dollar terms" this proceeding was likely to be of lesser value than Telesto's claim in the SCNSW proceedings. Had Telesto "been made whole" in the SCNSW proceedings, Mr Tyne said, it was very likely that that outcome would have obviated the need for this proceeding. Mr Tyne considered that the concurrent prosecution of Telesto's and the Trust's claims would have been more burdensome and expensive than prosecuting Telesto's claims in that the Trust would be required to prove all of the matters that Telesto was required to prove in its case and additionally the Trust would have to prove the provenance of the "lent securities".

55 Mr Tyne perceived a forensic advantage to the Tyne-related parties in holding back the Trust's claim. This was a decision that, were Telesto's claim to be stayed, would lead to duplication of resources and increased cost, and would delay the resolution of the dispute between the Tyne-related parties and UBS. Hiving off the Trust's claim, with a view to bringing it in another court after the determination of the SCNSW proceedings, was the antithesis of the discharge of the duty imposed on parties to civil litigation in the Supreme Court of New South Wales[42] and in the Federal Court[43]. That duty is to conduct the proceedings in a way that is consistent with the overriding/overarching purpose.

56 It may be accepted that, under r 12.3(1) of the Uniform Civil Procedure Rules 2005 (NSW), the discontinuance of proceedings does not operate as a release of the claims made by the discontinuing party. But that does not mean that discontinuance is irrelevant when the discontinuing party seeks by new proceedings to pursue a discontinued claim. Nor does the possibility that a party might have sought the protection of conditions upon discontinuance, but did not, mean that the disruption and extra costs incurred by that party when confronted by new proceedings is not relevant to whether an abuse of process is being perpetrated. An abuse of process is no less an abuse because the party adversely affected might have, by greater diligence in its own interests, prevented the abuse. Nor does the circumstance that r 12.4 provides for a discretion to stay proceedings until the costs of another party of discontinued proceedings are paid by the discontinuing party mean that the circumstances of, and after, discontinuance are irrelevant to whether the commencement of fresh proceedings constitutes an abuse of process.

57 The whole of the dispute between the Tyne-related parties and UBS arising out of UBS's conduct in connection with Telesto's investment in the Bonds was before the Supreme Court of New South Wales. No question of *res judicata* or issue estoppel arising from the Singapore 801 proceedings precluded the determination of the factual merits of the Trust's claim in the Supreme Court of New South Wales. Contrary to the way the matter was put to Ward J before UBS withdrew its opposition to the filing of the amended pleading, the issues that the Tyne-related parties wished to litigate against UBS always included the Trust's claims. It is an open question whether UBS would have pursued an application for a permanent stay of the Telesto claim in circumstances in which any stay would not have served to avoid the trial of the common factual issues raised by the Trust's claim. The time to have the trial of

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42 CPA, s 56(3).

43 FCA, s 37N(1).

the factual allegations underlying Telesto's and the Trust's claims was in the SCNSW proceedings.

58 The fact that UBS is a large commercial corporation does not deny that permitting the Trust's claim to proceed will subject it to unjustifiable oppression[44]. That oppression is found not only in the significant delay in the resolution of the dispute and the inevitability of increased costs to UBS. At its core is the vexation of being required to deal again with claims that should have been resolved in the SCNSW proceedings. The fact that UBS has not been required to admit or defend the Trust's claim does not lessen that vexation. Between December 2010 and May 2013, when the SCNSW proceedings were finally determined, UBS was engaged in litigation with a party controlled by Mr Tyne, arising out of its alleged dealings with Mr Tyne in respect of the loss that is claimed by the Trust in these proceedings. On the final determination of the SCNSW proceedings, it was reasonable for UBS to order its affairs upon the understanding that the dispute between it and Mr Tyne, and the entities that he controlled, arising out of those dealings was at an end.

59 For the Federal Court to lend its procedures to the staged conduct of what is factually the one dispute prosecuted by related parties under common control with the attendant duplication of court resources, delay, expense and vexation, as Dowsett J found, is likely to give rise to the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public moneys[45]. The primary judge was right to permanently stay the proceedings as an abuse of the processes of the Federal Court.

Orders

60 For these reasons there should be the following orders:

1. Appeal allowed with costs.

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

   (a) the appeal to the Full Court is dismissed; and

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44 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552 per McHugh J; [1996] HCA 25; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 214 [101] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

45 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 351 [17].

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

61 GAGELER J. The appeal should be allowed and the permanent stay should be reinstated for the reasons given by Kiefel CJ, Bell and Keane JJ. In view of the appeal having given rise to a close division of opinion in the Federal Court and in this Court on an important question of practice and procedure, I add the following reasons of my own.

62 The framework for analysis is that established by the reasoning of the joint judgment in *Tomlinson v Ramsey Food Processing Pty Ltd*[46]. The doctrine of abuse of process, in its application to the assertion of rights or the raising of issues in successive proceedings, was there explained to be informed in part by considerations of finality and fairness similar to those which inform the doctrine of estoppel but to be inherently broader and more flexible than that doctrine[47].

63 By way of illustration, the joint judgment in *Tomlinson* observed that making a claim or raising an issue which ought reasonably to have been made or raised for determination in an earlier proceeding can constitute an abuse of process where the party seeking to make the claim or raise the issue was neither a party nor the privy of a party to the earlier proceeding and therefore could not be precluded by an estoppel[48]. Reference was made in that regard to *Johnson v Gore Wood & Co*[49], as explained in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*[50].

64 *Johnson* is for present purposes instructive. The important statement of principle there made by Lord Bingham of Cornhill is best understood by reference to the factual context in which the principle came to be stated and applied. Mr Johnson was the principal shareholder and controlling mind of a number of companies engaged in property development. Mr Johnson and one of those companies retained solicitors to act in relation to a particular development. The company subsequently brought a negligence action against the solicitors. Mr Johnson decided for financial reasons not to bring a personal negligence action against the solicitors at the same time, but notified the solicitors before the trial of the company's action of his intention to do so in due course. The company's action was settled during the course of the trial on terms which made sense only on the basis that the company and the solicitors were acting on the common assumption that Mr Johnson remained likely to bring a personal

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46 (2015) 256 CLR 507; [2015] HCA 28.

47 (2015) 256 CLR 507 at 518-519 [24]-[25].

48 (2015) 256 CLR 507 at 519 [26].

49 [2002] 2 AC 1.

50 [2014] AC 160.

negligence action which could be separately tried or settled. Mr Johnson in fact commenced his foreshadowed personal negligence action against the solicitors some months after the settlement. Four and a half years later, after pleadings had closed, witness statements had been exchanged and the action had been fixed for trial, the solicitors notified Mr Johnson for the first time of their intention to apply to have the action struck out as an abuse of process. The application was refused at first instance. That decision at first instance was reversed on appeal but ultimately reinstated on further appeal to the House of Lords.

65 As Lord Sumption JSC subsequently explained in *Virgin*[51], the fact that Mr Johnson and his company were separate entities whose privity of interest (although conceded) was doubtful even under English law meant that the focus of the House of Lords in *Johnson* was inevitably on abuse of process rather than estoppel.

66 Lord Bingham in *Johnson* explained the application of the doctrine of abuse of process to the bringing of successive proceedings in terms consistent with the later reasoning of the joint judgment in *Tomlinson*. He identified as the "underlying public interest" that "there should be finality in litigation and that a party should not be twice vexed in the same matter". That public interest, he observed, was "reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole"[52].

67 Lord Bingham then said this[53]:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party."

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51 [2014] AC 160 at 185 [25].

52 [2002] 2 AC 1 at 31.

53 [2002] 2 AC 1 at 31.

His Lordship immediately added[54]:

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be 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 process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim."

68 Lord Bingham's acknowledgement that an abuse of process might be established by nothing more than the bringing of a claim in later proceedings which "should" have been brought in earlier proceedings demonstrates the substantial overlap between abuse of process and the form of estoppel recognised in *Port of Melbourne Authority v Anshun Pty Ltd*[55]. His Lordship's rejection, as "too dogmatic", of the equation of what "should" have been done in earlier proceedings with what "could" have been done in those earlier proceedings accords with the observation in *Anshun* that Lord Kilbrandon went "too far"[56] when he spoke in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*[57] of it becoming "an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings".

69 Lord Bingham's emphasis on the need for a "merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case" correspondingly encompasses, without necessarily being exhausted by, the enquiry mandated by the reasoning in *Anshun* (as a step in determining the existence of an estoppel) as to whether the claim sought to be brought in the later proceedings was so relevant to the subject matter of the

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54 [2002] 2 AC 1 at 31.

55 (1981) 147 CLR 589; [1981] HCA 45.

56 (1981) 147 CLR 589 at 601-602.

57 [1975] AC 581 at 590.

earlier proceedings that it would have been unreasonable not then to have brought the claim so as to have allowed all relevant issues to have been determined in the one proceeding[58]. The ultimate judgment to be made is in each case normative.

70 Finally, and for present purposes no less importantly, Lord Bingham's reference to the need for the requisite normative judgment to take account of "the public and private interests involved" underscores that the question of whether the claim sought to be brought in the later proceedings "should" have been brought in the earlier proceedings cannot be determined solely by reference to interests of the parties to the action. There is a public interest in the timely and efficient administration of civil justice. The importance of that public interest has only increased in the years since Lord Bingham spoke.

71 Dowsett J sought to capture that public interest when he referred in dissent in the decision under appeal to the abusive character of litigious conduct which, if permitted, would lead "the right-thinking person" to perceive the system for the administration of civil justice to be "inefficient, careless about the incurrence of cost by the parties, and profligate in the application of public moneys"[59]. His Honour's anthropomorphic allusion was evidently drawn from the frequently quoted description of the power to prevent an abuse of process in terms of an "inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people"[60].

72 Although undoubtedly capable of application in circumstances in which use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute, the doctrine of abuse of process has repeatedly been recognised to be insusceptible of a formulation which would confine it to closed categories[61]. In the context of the application of the doctrine to the bringing of successive proceedings, consistently with the analysis of Lord Bingham, I think it better in weighing the private and public interests

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58 (1981) 147 CLR 589 at 602.

59 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 351 [17].

60 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536. See eg *Walton v Gardiner* (1993) 177 CLR 378 at 393; [1993] HCA 77.

61 Eg *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 262 [1], 265 [9]; [2006] HCA 27; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [25].

involved to eschew the extremes of private "oppression" and of public "disrepute". The relevant public interest is ordinarily appropriately identified in more general and less emotive terms as the timely and efficient administration of civil justice.

73 The conclusion of the primary judge that Mr Tyne's bringing of the Trust's claims against UBS in the Federal Court proceedings was an abuse of process was expressed in terms borrowed directly from the language of Lord Bingham. His Honour expressed himself satisfied that those claims "should have been raised in the SCNSW proceedings if they were to be raised at all"[62]. That conclusion was based on four key considerations. The first was that Mr Tyne was at all times the controlling mind both of the trustee of the Trust and of Telesto. The second was that the Trust's claims against UBS raised complex questions of fact and law which arose out of the same substratum of facts as those on which Telesto had relied to pursue its claim in the SCNSW proceedings. The third was that there was no juridical disadvantage to the trustee advancing those claims in the SCNSW proceedings. The fourth was that there was "no proper explanation of why it chose not to do so"[63].

74 The majority of the Full Court correctly recognised that the primary judge's conclusion attracted the standard of appellate review articulated in *House v The King*[64], requiring, "in substance, identification of an error of principle or a material error of fact, or, if no specific error can be identified, demonstration that the decision is 'unreasonable or plainly unjust'"[65]. Applying that standard, the majority identified two errors on the part of the primary judge. One was a failure to consider the lack of any unfairness to or oppression of UBS in that UBS would be defending in the Federal Court proceedings what it would have had to defend had the trustee brought the same claims in the SCNSW proceedings. The other, couched in the alternative, was that it was not open on the facts found to characterise the circumstances as involving an abuse of process[66].

75 In my opinion, the majority of the Full Court took too narrow an approach to the application of the doctrine of abuse of process to the bringing of successive

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62 *Tyne v UBS AG (No 3)* (2016) 236 FCR 1 at 61 [424].

63 (2016) 236 FCR 1 at 59-61 [413]-[424].

64 (1936) 55 CLR 499; [1936] HCA 40.

65 (2017) 250 FCR 341 at 362 [54], quoting *Ghosh v Ninemsn Pty Ltd* (2015) 90 NSWLR 595 at 601 [37]. See *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264 [7].

66 (2017) 250 FCR 341 at 380 [108].

proceedings in the importance which the majority placed on what the majority chose to characterise as lack of unfairness or oppression to UBS. It was not necessary for the effect of the Federal Court proceedings on UBS to rise to the level connoted by language such as "unfairness" or "oppression". Rather, UBS's private interest was sufficiently engaged by UBS being compelled by the coercive authority of the Federal Court to respond to a process designed to vindicate a claim which should have been brought in the SCNSW proceedings, which UBS had already gone to the time and expense of bringing to completion. With that private interest was to be weighed the public interest in the timely and efficient resolution of claims within the integrated Australian legal system of which the Supreme Court and the Federal Court each form part.

76 I cannot agree with the view of the majority of the Full Court that it was not open on the facts found by the primary judge to characterise the circumstances as involving an abuse of process. Although the possibility of the trustee of the Trust pursuing the claims of the Trust in later proceedings remained legally open once the trustee had withdrawn from the SCNSW proceedings, there was no intimation to UBS that the trustee was likely to do so. In contrast to the circumstances in *Johnson*, this is not a case in which earlier proceedings were brought to completion against the background of a communicated likelihood of later proceedings being commenced.

77 The first three of the considerations on which the primary judge relied were in my opinion sufficient to justify his Honour's conclusion that bringing the Trust's claims against UBS in the Federal Court proceedings was an abuse of process in the absence of Mr Tyne giving an explanation which justified his conduct as not unduly impacting on the interest of UBS and as not inconsistent with the timely and efficient resolution of the totality of the claims which the entities under his control sought to bring. His Honour was not satisfied that such an explanation had been given.

78 The hearing of the appeal to this Court was hijacked by a contention put forcefully at the forefront of the submissions made orally on behalf of Mr Tyne that discontinuance of the trustee's claims in the SCNSW proceedings constituted no bar to the trustee bringing the same claims in other proceedings. The contention was plainly correct, but beside the point. The primary judge's conclusion that bringing the Trust's claim against UBS in the Federal Court proceedings constituted an abuse of process was based neither in whole nor in part on the consideration that the trustee's claims had been brought in the SCNSW proceedings and had been discontinued. The conclusion was based on the very different assessment that the trustee's claims should have been pursued in the SCNSW proceedings, to which Telesto remained a party, if they were to be pursued at all.

79 Potentially of more significance to the outcome of the appeal were submissions made on behalf of Mr Tyne challenging the primary judge's

conclusion that Mr Tyne had given no proper explanation of why the trustee's claims had not been pursued in the SCNSW proceedings. The submissions pointed to the explanation given by Mr Tyne in an affidavit which was read before the primary judge and on which Mr Tyne was not challenged in cross-examination. The affidavit explains why Mr Tyne considered it in the interests of the Trust not to pursue the claims of the Trust concurrently with those of Telesto. Mr Tyne's reasons, in short, were: that Telesto's success in the SCNSW proceedings would have seen the Trust made whole, thereby obviating the need for the trustee's claims to have been pursued at all; that pursuit of the trustee's claims would have been forensically burdensome, requiring the trustee to prove everything that Telesto needed to prove and more; that pursuit of these claims would have been expensive and time-consuming; and that he was unable to predict on the basis of previous case law that Telesto's claims in the SCNSW proceedings would be permanently stayed by reference to the outcome of the Singapore 801 proceedings.

80 Gauged solely by reference to the interests of the Trust, Mr Tyne's explanation of why the trustee's claims had not been pursued in the SCNSW proceedings was not unreasonable. Having regard to the interests of UBS and the public interest in the timely and efficient administration of civil justice, however, I cannot regard it as providing an explanation as to why it was reasonable for the claims of the Trust to have been held in abeyance rather than to have been brought in the SCNSW proceedings so as to have allowed all relevant issues to have been determined in those proceedings. Were it shown in the context of the SCNSW proceedings to have been consistent with the timely and efficient resolution of the overall matter in dispute for Telesto's claims to have been pursued separately and in advance of those of the trustee, that could have been achieved by appropriate case management orders which could have resulted in the trustee being bound by findings of fact and determinations of law common to both sets of claims. And UBS's application for a permanent stay of Telesto's claims, had it proceeded, would have proceeded on the basis apparent to the parties and the Supreme Court that success on the application would have left the pending claims of the Trust unresolved.

81 What was not reasonable having regard to the totality of the private and public interests involved was for Mr Tyne to take it upon himself to hold the claims of the Trust in abeyance with a view to pursuing them in separate proceedings if it turned out that Telesto's claims were for some reason not successful.

82 The primary judge's conclusion that Mr Tyne had given no proper explanation of why the trustee's claims had not been pursued in the SCNSW proceedings was, in my opinion, not only open but correct.

83 NETTLE AND EDELMAN JJ. Many of the facts of this matter sufficiently appear from the judgment of Kiefel CJ, Bell and Keane JJ and need not be repeated. The issue is whether, in circumstances where the previous trustee of the Argot Trust had discontinued its involvement as plaintiff in proceedings in the Supreme Court of New South Wales ("the Supreme Court proceedings"), it was an abuse of process for the respondent, Scott Francis Tyne, having been substituted for the previous trustee, and thus in his capacity as trustee of the Argot Trust ("the Trustee"), then to institute fresh proceedings in the Federal Court of Australia ("the Federal Court proceedings") alleging the same or substantially the same claims as the previous trustee had alleged in the Supreme Court proceedings but which were not determined before the previous trustee discontinued its participation in those proceedings, without any conditions on the discontinuance. More specifically, should the Trustee's action in commencing the Federal Court proceedings following the previous trustee's discontinuance of its involvement in the Supreme Court proceedings be seen as "unjustifiably oppressive" to the appellant, UBS AG ("UBS"), or as "bring[ing] the administration of justice into disrepute"[67]? Kiefel CJ, Bell and Keane JJ conclude that it should be and Gageler J, writing separately, reaches the same result. With respect, we disagree.

Basis and effect of the previous trustee's discontinuance

84 Determination of whether the Trustee's institution of the Federal Court proceedings should be seen as unjustifiably oppressive to UBS or as bringing the administration of justice into disrepute invites attention, first, to the basis on which the previous trustee discontinued its involvement in the Supreme Court proceedings and the legal effect of its discontinuance.

85 In substance, the previous trustee discontinued its involvement in the Supreme Court proceedings, without objection from UBS, with leave of the Court pursuant to r 12.1 of the Uniform Civil Procedure Rules 2005 (NSW). Rule 12.1 relevantly provides for the discontinuance of civil proceedings in the Supreme Court of New South Wales as follows:

> "**Discontinuance of proceedings**
>
> (1) The plaintiff in any proceedings may, by filing a notice of discontinuance, discontinue the proceedings, either as to all claims for relief or as to all claims for relief so far as they concern a particular defendant:

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67 See *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [25] per French CJ, Bell, Gageler and Keane JJ; [2015] HCA 28.

(a) with the consent of each other active party in the proceedings, or

(b) with the leave of the court.

(2) A notice of discontinuance:

(a) must bear a certificate by the plaintiff, or by his or her solicitor, to the effect that the plaintiff does not represent any other person, and

(b) except where it is filed with the leave of the court, must be accompanied by a notice from each party whose consent is required by subrule (1) to the effect that the party consents to the proceedings being discontinued in accordance with the notice of discontinuance.

(3) *If any such consent is given on terms, those terms are to be incorporated in the notice of consent.*" (emphasis added)

86 Rule 12.3 provides that the effect of discontinuance is as follows:

"**Effect of discontinuance**

(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.*" (emphasis added)

87 Rule 12.4 provides that where a plaintiff discontinues proceedings and commences fresh proceedings for the same or substantially the same cause of action as that on which the discontinued proceedings were commenced, the fresh proceedings may be stayed to secure the costs of the discontinued proceedings:

"**Stay of further proceedings to secure costs of discontinued proceedings**

If:

(a) as a consequence of the discontinuance of proceedings, a plaintiff is liable to pay the costs of another party in relation to those proceedings, and

(b) before payment of the costs, the plaintiff commences further proceedings against that other party on the same or substantially the same cause of action as that on which the former proceedings were commenced,

the court may stay the further proceedings until those costs are paid and may make such consequential orders as it thinks fit."

88 There are three aspects of those rules that warrant specific mention. First, r 12.1 expressly provides that a proceeding may be discontinued with consent on terms, and r 12.3 expressly provides that, if consent is given on terms, the discontinuance is subject to those terms. As has been noticed, in this case the Supreme Court proceedings were discontinued, without objection, without the imposition of terms.

89 Secondly, r 12.3 expressly provides that a discontinuance of proceedings with respect to a plaintiff's claim does *not* prevent the plaintiff from claiming the same relief in fresh proceedings (subject, of course, to any terms of consent to the contrary). Consequently, as has long been recognised, an order for discontinuance does not amount to a release of claims[68]. As the Court of Appeal of England and Wales recently observed in *Spicer v Tuli*[69], with respect to the comparable provisions of Pt 38 of the Civil Procedure Rules 1998 (UK):

> "If an action is discontinued rather than dismissed, it is clear that a second action may be brought even if it arises out of the same facts as the discontinued action".

90 Thirdly, r 12.4 expressly contemplates the possibility of a plaintiff who has discontinued proceedings commencing further proceedings for the same or substantially the same cause of action as that on which the discontinued proceedings were commenced, and the rule provides for the grant of a stay only

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68 See *Owners of Cargo of the "Kronprinz" v Owners of the "Kronprinz" (The "Ardandhu")* (1887) 12 App Cas 256 at 259-260 per Lord Halsbury LC, 260-261 per Lord Bramwell, 262 per Lord Herschell, 263 per Lord Macnaghten. See also *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 at 572-574, 577 per Lord Scarman (Lord Wilberforce, Lord Diplock, Lord Keith of Kinkel and Lord Bridge of Harwich agreeing at 569, 577); *Botany Municipal Council v Secretary, Department of the Arts* (1992) 34 FCR 412 at 414-415; *SZFOG v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 88 ALD 138 at 140 [6].

69 [2012] 1 WLR 3088 at 3091 [2] per Lewison LJ (Toulson LJ and Lord Neuberger of Abbotsbury MR agreeing at 3097 [23], [24]).

until and unless there have been paid any outstanding costs orders in relation to the discontinued proceedings.

91 Here, UBS did not object to the previous trustee discontinuing its involvement in the Supreme Court proceedings and did not seek any condition on the grant of leave to discontinue or the imposition of any terms to the effect that the previous trustee or any subsequent trustee undertake or agree not to bring fresh proceedings for the same or substantially the same claims.

92 In those circumstances, why should the Trustee's subsequent commencement of the Federal Court proceedings be seen as unjustifiably oppressive to UBS or as bringing the administration of justice into disrepute?

UBS not twice or otherwise unduly vexed

93 Counsel for UBS invoked the primary judge's reasoning that, the previous trustee having discontinued its claims in the Supreme Court proceedings, the Trustee's conduct in later bringing the Federal Court proceedings was an abuse of process because the Trustee's claims raised substantial complex questions of fact and law with which UBS had been vexed before.

94 That is not the case. UBS was not vexed with those questions of fact and law in the Supreme Court proceedings. To the contrary, UBS obtained a temporary stay of the proceedings almost immediately after their commencement, which enured until after the determination of proceedings in the High Court of the Republic of Singapore between UBS as plaintiff and Mr Tyne in his personal capacity and Telesto Investments Limited ("Telesto") as defendants ("the Singapore proceedings"), and thence a permanent stay of the Supreme Court proceedings on the basis of what had been decided in the Singapore proceedings. Nor was UBS vexed with such questions of fact and law in the Singapore proceedings. The Trustee was not a party to the Singapore proceedings and, although Telesto was a party, it played no part in the proceedings. Consequently, as counsel for UBS acknowledged in this Court, the Federal Court proceedings would be the first occasion on which UBS would have to deal with the Trustee's claims.

95 Counsel for UBS contended that the fact that there has been no prior adjudication of the Trustee's claims, including its claims under the federal and State legislation corresponding to the *Trade Practices Act* 1974 (Cth) ("the TPA"[70]), was immaterial because, as was held by a majority of this Court in

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70 Subsequent references to the TPA should be taken as referring to the TPA itself and the corresponding federal and State legislation (including, relevantly, the

(Footnote continues on next page)

Walton v Gardiner[71] and a majority of this Court in *Batistatos v Roads and Traffic Authority (NSW)*[72], a proceeding can be stayed as an abuse of process despite the claim therein not having been previously adjudicated. But, as will be elucidated later in these reasons, *Walton* was a case where the fresh proceedings were stayed solely because they were substantially the same as earlier proceedings which had been stayed on the basis of "appalling" and "inexcusable" delay productive of significant prejudice to the defendants[73]. Similarly, *Batistatos* was a case which involved a 29 year delay resulting in a practical inability to reach a decision based on any real understanding of the facts, and a practical impossibility of giving the defendants any real opportunity to participate in a hearing, to contest the facts or, if it should be right to do so, to admit liability on an informed basis[74]. It was solely because of the almost three decade lapse of time that the majority concluded that a fair trial was not possible and stayed the proceedings as an abuse of process. That is not this case. Here, the delay was relatively insignificant and there was no suggestion that UBS would be compromised by delay in its defence of the Trustee's claims.

No material delay, additional costs or inconvenience

96 Counsel for UBS next embraced Dowsett J's dissenting observation in the Full Court of the Federal Court that[75]:

> "the manifest unfairness to UBS lies in the delay of the final resolution of the matter for a period of, probably, three or more years, the inevitable additional costs which have been, or will be incurred and the

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Australian Securities and Investments Commission Act 2001 (Cth), *Corporations Act* 2001 (Cth), *Fair Trading Act* 1987 (NSW) and *Fair Trading Act* 1989 (Q)).

71 (1993) 177 CLR 378; [1993] HCA 77.

72 (2006) 226 CLR 256; [2006] HCA 27.

73 See *Walton v Gardiner* (1993) 177 CLR 378 at 385, 389, 398-399 per Mason CJ, Deane and Dawson JJ (Brennan J and Toohey J dissenting at 413-414, 417, 421-422).

74 See *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 277-278 [54], 281-282 [69]-[71] per Gleeson CJ, Gummow, Hayne and Crennan JJ (Kirby J, Callinan J and Heydon J dissenting at 306 [170], 325-326 [233]-[234], [238]).

75 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 355-356 [32].

inconvenience of having to deal with the matter *again*, after lengthy litigation." (emphasis added)

97 That is not correct either. The previous trustee's conduct in discontinuing its involvement in the Supreme Court proceedings and the Trustee's later institution of the Federal Court proceedings did not result in a delay of three or more years. The Supreme Court proceedings were instituted on 2 November 2010. On 21 February 2011, UBS obtained from the Singapore High Court an anti-suit injunction restraining Telesto, Mr Tyne in his personal capacity and the previous trustee from prosecuting the Supreme Court proceedings, and thereafter UBS successfully resisted an appeal against the grant of the anti-suit injunction and, later, an application for leave to appeal the orders dismissing the appeal. Then, before any further step was or could be taken in the Supreme Court proceedings, UBS applied by notice of motion dated 24 October 2011 for a permanent stay of the Supreme Court proceedings on four grounds: the continued prosecution of the proceedings would be in defiance of the anti-suit injunction granted by the Singapore High Court; an issue estoppel arose as a result of the *forum conveniens* judgment awarded in favour of UBS in the Singapore proceedings; it was an abuse of process to seek to relitigate in the Supreme Court proceedings the *forum non conveniens* issues which had already been determined in Singapore; and the Supreme Court proceedings would be vexatious and oppressive having regard to the controversy as a whole. On 7 February 2012, Ward J rejected[76] the application for a permanent stay but granted a temporary stay of the proceedings pending the outcome of UBS' claim in the Singapore proceedings. On 6 March 2012, the previous trustee and Mr Tyne in his personal capacity discontinued their participation in the Supreme Court proceedings, with the result that Telesto became the sole remaining plaintiff in the proceedings. Thereafter, the Singapore proceedings continued undefended until, on 27 July 2012, *ex tempore* final judgment was delivered in favour of UBS.

98 Soon after, by notice of motion dated 6 September 2012, UBS applied for a permanent stay or dismissal of the Supreme Court proceedings on grounds that Telesto's claims were barred by cause of action estoppel, issue estoppel or *Anshun* estoppel or, alternatively, as an abuse of process. Telesto replied with a notice of motion dated 10 September 2012 for an order that the temporary stay granted by Ward J be lifted. On 9 May 2013, Sackar J gave judgment[77] in which his Honour held that Telesto's claims were barred either by cause of action

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76 See *Telesto Investments Ltd v UBS AG* (2012) 262 FLR 119.

77 See *Telesto Investments Ltd v UBS AG* (2013) 94 ACSR 29 at 60 [170], 65 [201], 70 [223], 76-78 [247], [259], 84-85 [286].

estoppel or issue estoppel, but that, if that had not been the case, Telesto's claims would *not* have been barred by *Anshun* estoppel or as an abuse of process because there were sound forensic reasons for Telesto to choose to conduct its claims in the Supreme Court proceedings. Had Telesto been permitted to conduct its claims in the Supreme Court proceedings, it would have had a significant juridical advantage by reason of ss 52 and 51A of the TPA and the various remedies available thereunder. In Singapore, it would not. Only eight months later, on 13 January 2014, the Trustee commenced the Federal Court proceedings.

99 Of course, in one sense the final resolution of the Trustee's claims was delayed by "three or more years". But that was not caused by Telesto or the previous trustee or the Trustee. A loss of approximately two and a half years was the result of UBS preventing the claims being heard and determined in the Supreme Court proceedings. Nothing could be done in the Supreme Court proceedings as long as the temporary stay enured or, therefore, until Sackar J gave judgment on UBS' permanent stay application on 9 May 2013. The maximum delay caused by the previous trustee's discontinuance of its participation in the Supreme Court proceedings was the eight months that separated the handing down of Sackar J's judgment on 9 May 2013 and the institution of the Federal Court proceedings on 13 January 2014. Nor would the Federal Court proceedings require UBS to incur "inevitable additional costs ... and the inconvenience of having to deal with the matter *again*". Such was UBS' success in staying the Supreme Court proceedings, in effect *in limine*, that even now UBS has never had to face either Telesto's or the Trustee's claims under the TPA.

No change of position in reliance on discontinuance

100 Counsel for UBS submitted, albeit only faintly, that, if the previous trustee had not first discontinued its participation in the Supreme Court proceedings, UBS might not have made an application for a stay of the proceedings. Thus, it was contended, one consequence of the previous trustee's discontinuance of its participation in the Supreme Court proceedings was that UBS incurred the substantial costs of the permanent stay application which UBS may not otherwise have incurred.

101 Those submissions are unconvincing. There is no evidence that UBS would not have persisted with its stay application if the previous trustee had not discontinued its involvement in the Supreme Court proceedings, and, objectively, there is every reason to suppose that UBS would have persisted – arguing, just as it later argued before the primary judge in the Federal Court proceedings, that the previous trustee was as much barred as Telesto by *res judicata*, issue estoppel and *Anshun* estoppel, or by the doctrine of abuse of process, as a result of the Singapore proceedings. Further, even if it be assumed for the sake of argument

that UBS might not have sought a permanent stay as against Telesto (and, to repeat, there is no reason to make that assumption), UBS has not thereby been prejudiced. As the majority of the Full Court of the Federal Court rightly observed[78], as a consequence of UBS' stay application, UBS has the benefit of the permanent stay as against Telesto and it is in no worse position as against the Trustee than it would have been had the previous trustee persisted in its claim in the Supreme Court proceedings.

Right-thinking person would not regard Federal Court proceedings as abuse of process

102 Counsel for UBS invoked Dowsett J's dissenting reasoning that the Federal Court proceedings should be regarded as an abuse of process because a "right-thinking person" would think them to be so. According to Dowsett J[79]:

> "The right-thinking person would be aware that some or all of these considerations might not apply in a particular case, given the circumstances of that case. However, in general, where previous proceedings have been discontinued, and similar proceedings subsequently commenced, the right-thinking person would infer that there had been a loss of time, an increase in costs, some degree of repetition of process and undue vexation to the other party. Such a person would likely perceive that if the administration of justice allows such conduct, without any explanation, it is inefficient, careless about the incurrence of cost by the parties, and profligate in the application of public moneys.
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> [I]f the [previous trustee] considered that it had a good claim, and did not intend to abandon it, then it should have taken it to judgment in [the Supreme Court] proceedings. There is no suggestion that anything happened unexpectedly thereafter, leading the [previous trustee] to change its mind about its claim, or its intention to prosecute it. I infer that Mr Tyne identified some forensic advantage to himself and/or the [previous trustee] in discontinuing the Supreme Court proceedings. The effect was to delay the resolution of the dispute between the [previous trustee] and UBS by a significant period of time, to increase the costs incurred by UBS in resolving the differences arising out of the relevant transactions and otherwise to vex UBS. To allow the [Trustee's] current

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78 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 379-380 [108] per Jagot and Farrell JJ.

79 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 351 [17], 353 [23].

> proceedings to remain on foot is, in the circumstances, to inflict manifest unfairness upon UBS. Such unfairness is, itself, likely to bring the administration of justice into disrepute, as would the waste of public resources inevitably associated with the duplication of proceedings. On appeal, Mr Tyne invited the Court to speculate about the reason for the discontinuance by the [previous trustee] of the Supreme Court proceedings. I see no reason for going beyond such evidence as is before this Court."

103 With respect, that is not convincing either. Whether or not a "right-thinking person" would question the administration of justice if it permitted a party to cause loss of time, increased costs, repetition of process and undue vexation of another party, neither the previous trustee nor the Trustee has been guilty of any of those infractions.

104 Compared to the loss of time of approximately two and a half years caused by UBS' applications for stays of the Supreme Court proceedings, the loss of the further eight months caused by the previous trustee's discontinuance is effectively *de minimis*, particularly given that there is no suggestion that the eight months has in any respect compromised UBS' ability to defend the Trustee's claims. The only "increase in costs" that counsel for UBS was able precisely to identify was the costs of the permanent stay application before Sackar J. But those costs were not imposed on UBS by the previous trustee or the Trustee or, for that matter, by Telesto. UBS voluntarily incurred them in its very considerable efforts to avoid facing Telesto's claims. Nor has there been any material repetition of process. As has been observed, the Supreme Court proceedings were shut down *in limine* as a result of UBS' application for a stay, with the consequence that UBS has until now not even had to plead to Telesto's or the Trustee's claims. Further, as has been noticed, UBS has not been twice or otherwise unduly vexed. Until now, it has successfully avoided having to face Telesto's claims, including those under the TPA, and the Trustee's claims, by the device of procuring a permanent stay of proceedings in one of the only jurisdictions in which those claims might effectively have been prosecuted.

105 Contrary to Dowsett J's reasoning and the submissions of counsel for UBS, it is not the case either that there is no explanation for why the previous trustee discontinued its involvement in the Supreme Court proceedings or that the Full Court of the Federal Court was left "to speculate" as to the reasons for its doing so. The reasons were set down in an affidavit affirmed by Mr Tyne in support of the Trustee's opposition to UBS' application for a stay of the Federal Court proceedings, which was read and received, apparently unchallenged and without objection. They included that Telesto's claims were considered to be worth more in dollar terms than the previous trustee's claims, with the result that, if Telesto had succeeded in its claims in the Supreme Court proceedings, it would have had sufficient assets to meet its obligations to UBS and that that would have

avoided the need for the previous trustee to pursue its claims. Mr Tyne also considered that the previous trustee's claims would have been more burdensome to establish than Telesto's claims, as the former required detailed examination of more than 1000 pages of account statements which was unnecessary in the Telesto suit. Further, as Mr Tyne deposed, Telesto and the previous trustee were in difficult financial circumstances, and prosecution of the previous trustee's claims would have been more time consuming, and so, more expensive, than prosecution of Telesto's claims alone. And critically, Mr Tyne deposed that he expected that Sackar J would not permanently stay Telesto's claims because no other Australian judge had previously declined jurisdiction in "a TPA style of claim" in the absence of an exclusive foreign jurisdiction clause, and, having researched the law, Mr Tyne believed that a non-exclusive jurisdiction clause of the kind which applied in this case would not be regarded as sufficient reason to decline jurisdiction.

106 In short, the previous trustee, being short of funds and with a reasonable expectation that Telesto's claims (including under the TPA) would be allowed to proceed to judgment, resolved to discontinue its participation in the Supreme Court proceedings and wait and see whether Telesto's claims would be allowed to proceed to judgment in those proceedings. If they were allowed to proceed, the previous trustee's claims could be abandoned, and if they were not allowed to proceed, there would be good reason for the Trustee to begin again. A "right-thinking person" would not look askance at such a decision. She or he would think it to be common sense.

Discontinuance not inconsistent with s 37M of *Federal Court of Australia Act* 1976 (Cth)

107 Counsel for UBS also made much of the importance of s 37M of the *Federal Court of Australia Act* 1976 (Cth) and the "overarching purpose" which it prescribes of facilitating the resolution of disputes as "quickly, inexpensively and efficiently as possible"[80]. He contended that the overarching purpose could not be achieved:

> "by allowing a circumstance in which one or more of a number of plaintiffs, all controlled by the same individual, is permitted to discontinue proceedings, then to stand back and allow those proceedings to continue to a final judicial determination and then, depending on the outcome of those first proceedings and without any explanation, commence fresh proceedings raising the same facts."

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80 *Federal Court of Australia Act* 1976 (Cth), s 37M(1)(b).

108 Generally speaking, that might be so, although, as the decision of the House of Lords in *Johnson v Gore Wood & Co*[81], mentioned later in these reasons, assists us to understand, it is not invariably the case. For present purposes, however, it is beside the point. The previous trustee did not stand back and allow the Supreme Court proceedings to proceed to a "final judicial determination". It stood back after the proceedings had been temporarily stayed to see whether they would be permanently stayed, with the reasonable expectation that they would not be permanently stayed, and thus that it would not be necessary to prosecute the previous trustee's claims. As has been observed, that was not an unreasonable course to adopt in the circumstances of this case. And it was not inconsistent with the statutory shibboleth of making litigation as quick, inexpensive and efficient as possible. As Mr Tyne deposed, he was looking to limit the boundaries of the litigation.

Federal Court proceedings not otherwise abuse of process

109 Counsel for UBS embraced Dowsett J's dissenting conclusion that the Federal Court proceedings amounted to an abuse of process in circumstances where the previous trustee could have participated in the Supreme Court proceedings but chose not to do so[82]. Apparently, that aspect of his Honour's reasoning was informed by the majority's obiter dictum observation in *Tomlinson v Ramsey Food Processing Pty Ltd*[83] that:

> "it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel." (footnote omitted)

110 That dictum, however, ought not to be taken to mean that just because a claim could have been but was not made in an earlier proceeding it is an abuse of process to advance it in a subsequent proceeding. Whether there is an abuse of process in such a case depends on the circumstances of the case. As was observed by the House of Lords in *Johnson*[84], the question is whether in all the

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81 [2002] 2 AC 1.

82 See *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 353 [23], 355-356 [32].

83 (2015) 256 CLR 507 at 519 [26] per French CJ, Bell, Gageler and Keane JJ.

84 [2002] 2 AC 1 at 30-31, 34 per Lord Bingham of Cornhill (Lord Goff of Chieveley, Lord Cooke of Thorndon and Lord Hutton agreeing at 38, 42, 50), 58-60 per Lord Millett.

circumstances a party should be seen as misusing or abusing the process of the court by failing to make a claim in an earlier proceeding or, as here, discontinuing a claim in an earlier proceeding with a view possibly to bringing that claim again in a subsequent fresh proceeding when and if matters do not turn out as expected. Lord Bingham of Cornhill (with whom Lord Goff of Chieveley, Lord Cooke of Thorndon and Lord Hutton agreed) reasoned[85] thus:

> "It is ... wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be 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 process of the court by seeking to raise before it the issue which could have been raised before."

111 Granted, as the majority observed in *Tomlinson*, there are circumstances in which making a claim or raising an issue previously made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in the earlier proceeding, may constitute an abuse of process despite not being barred by estoppel. Their Honours instanced *Walton*[86], *Reichel v Magrath*[87] and *Coffey v Secretary, Department of Social Security*[88]. But the circumstances of those cases were very different from this case.

112 *Walton* concerned earlier proceedings wherein the Court of Appeal of the Supreme Court of New South Wales ordered[89] that disciplinary proceedings instituted in 1986 against two registered medical practitioners in relation to events occurring in 1973, 1976 and 1977 be stayed because of the long delay in instituting the proceedings after the relevant facts had become known. That delay was found to be "appalling" and "inexcusable" and such as significantly to prejudice the medical practitioners in the defence of the complaints. On that

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85 [2002] 2 AC 1 at 31.

86 (1993) 177 CLR 378.

87 (1889) 14 App Cas 665.

88 (1999) 86 FCR 434.

89 See *Herron v McGregor* (1986) 6 NSWLR 246 at 265-271 per McHugh JA (Street CJ and Priestley JA agreeing at 248).

basis, it was held that the continuation of the proceedings would be so unfairly and unjustly oppressive for the medical practitioners as to constitute an abuse of process. An application for special leave to appeal to this Court was refused on the basis that the matters which the Court of Appeal had been required to take into account involved questions of fact and degree which it would not be appropriate for this Court to consider[90]. Concurrent proceedings against another registered medical practitioner were stayed as a result of the Court of Appeal's decision[91].

113 In 1991, after a subsequent Royal Commission in which findings were made bearing upon the propriety of the conduct of a number of medical practitioners, including the three practitioners mentioned in relation to the earlier proceedings, further disciplinary proceedings were instituted against the medical practitioners concerning events commencing in 1970, 1972 and 1973 and ending in 1978[92]. The further proceedings differed from the earlier proceedings only to the extent that the earlier proceedings had focussed on the two medical practitioners' treatment with deep sleep therapy and electric shock therapy of a few designated patients, while the further proceedings were cast in terms of more general allegations of malpractice arising out of the same pattern of professional conduct. A majority of the Court of Appeal held[93] that the further proceedings should be stayed. On appeal to this Court, it was held[94] that no error was shown in the Court of Appeal's reasoning. It was the result of a weighing process which involved a subjective balancing of the various factors and considerations supporting or militating against a conclusion that a continuation of the disciplinary proceedings would be so unfairly and unjustifiably oppressive of the practitioners as to constitute an abuse of the available disciplinary processes. *Walton* was an extreme case.

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90 *Walton v Gardiner* (1993) 177 CLR 378 at 390-391 per Mason CJ, Deane and Dawson JJ.

91 *Walton v Gardiner* (1993) 177 CLR 378 at 385 per Mason CJ, Deane and Dawson JJ.

92 *Walton v Gardiner* (1993) 177 CLR 378 at 382, 386, 388-389 per Mason CJ, Deane and Dawson JJ.

93 *Gill v Walton* (1991) 25 NSWLR 190 at 202 per Gleeson CJ, 206-208 per Kirby P (Mahoney JA dissenting at 209).

94 See *Walton v Gardiner* (1993) 177 CLR 378 at 398-399 per Mason CJ, Deane and Dawson JJ (Brennan J and Toohey J dissenting at 413-414, 417, 421-422).

114 *Reichel*, which was cited in *Walton*[95], was also an extreme case. Reichel, who had ceased to be the vicar of a benefice, failed in an action against the bishop and patrons of the benefice for a declaration that he remained the vicar. In a subsequent proceeding brought by the newly appointed vicar of the benefice, Magrath, for a declaration of due appointment and for an injunction to restrain Reichel from depriving him of the use and occupation of the vicarage, Reichel pleaded by way of defence the same claim to be the vicar that had been rejected in his earlier proceeding against the bishop and patrons of the benefice. The House of Lords struck out[96] the defence as an abuse of process on the basis that it would be a scandal to the administration of justice if a claim having been disposed of in one proceeding could be set up again by the same party in another proceeding. The ratio of the case was that it was an abuse of process for a claimant to attempt to raise a claim in a fresh proceeding where that claim had already been determined adversely to the claimant in a previous proceeding to which she or he was party.

115 *Coffey* was in material respects like *Reichel* in that it concerned an abuse of process the result of a claimant seeking to advance a claim which had already been determined adversely to the claimant in previous proceedings. Specifically, Coffey claimed an entitlement to withheld social security benefits which was rejected. The rejection was then thrice reviewed and determined adversely to him in three separate reviews of his social security entitlements under a comprehensive multi-level process for review of decisions under Ch 6 of the *Social Security Act* 1991 (Cth). In those circumstances, the Full Court of the Federal Court of Australia held[97] that it was an abuse of process for Coffey later to bring common law proceedings for recovery of what he claimed to be the underpayment of his social security entitlements. As the Court observed, to allow Coffey to relitigate what had already been determined in the multi-level review process which Coffey had pursued to its completion would be to permit curial process to be employed in a manner unfair to a defendant who had already been thrice vexed with and thrice defeated the same claim in the earlier review proceedings.

116 In sum, *Walton* was a case where the fresh disciplinary proceedings were stayed because they were in substance substantially the same as the earlier

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95 (1993) 177 CLR 378 at 393 per Mason CJ, Deane and Dawson JJ.

96 See *Reichel v Magrath* (1889) 14 App Cas 665 at 668 per Lord Halsbury LC, 668 per Lord Watson, 669 per Lord Herschell (Lord Fitzgerald and Lord Macnaghten agreeing at 668, 669).

97 See *Coffey v Secretary, Department of Social Security* (1999) 86 FCR 434 at 443 [24]-[25].

proceedings which had been stayed by reason of "appalling" and "inexcusable" delay productive of significant prejudice to the medical practitioners in the defence of the complaints. And *Reichel* and *Coffey* were cases where the fresh proceedings were stayed as an abuse of process because the claims sought to be advanced in the fresh proceedings were claims which had been previously litigated to judgment, at least once, by the same claimant.

117 By contrast here, the delay has not been "appalling" or "inexcusable". And, as has been observed, there is no evidence or other reason to suppose that such delay as there has been would significantly prejudice UBS in the defence of the Trustee's claims. Further, the Trustee's claims, including those under the TPA, have not been determined in any previous proceedings. Nor have Telesto's claims under the TPA been determined in any other proceedings. UBS prevented such claims from being litigated in the Supreme Court proceedings by having those proceedings stayed. Relevantly, all that has happened is that the previous trustee made its claims in the Supreme Court proceedings and then discontinued its involvement in those proceedings even before UBS filed a defence.

118 One case not mentioned by the majority in *Tomlinson* but which arguably comes closer to the present case is the decision of the Court of Appeal of England and Wales in *Talbot v Berkshire County Council*[98]. The case concerned a personal injury action arising from a motor vehicle accident in which the plaintiff and Talbot, the driver of the vehicle, sustained serious injuries. Talbot had been a defendant in the action and in that capacity was apportioned two-thirds of the blame and obtained judgment in the interest of his insurer for a one-third contribution from the Berkshire County Council. When Talbot subsequently brought a separate proceeding in his own interest against the Berkshire County Council to recover damages for his own injuries, the primary judge held that Talbot was not estopped from bringing the proceeding but that it was nonetheless statute-barred. An appeal to the Court of Appeal was dismissed by Stuart-Smith LJ[99] on the basis that, because Talbot had not deployed his full case in the earlier proceeding, the subsequent proceeding was estopped by reason of the principle expounded by Wigram V-C in *Henderson v Henderson*[100]; and by Mann LJ (with whom Nourse LJ agreed)[101] on the basis that the claim was barred by cause of action estoppel "in the wide sense identified by Wigram V-C" in *Henderson* and also by reason of the "Kilbrandon principle", enunciated by

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98 [1994] QB 290.

99 See *Talbot v Berkshire County Council* [1994] QB 290 at 297-300.

100 (1843) 3 Hare 100 at 114-115 [67 ER 313 at 319].

101 See *Talbot v Berkshire County Council* [1994] QB 290 at 300-301.

Lord Kilbrandon in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*[102], that a proceeding should be dismissed as an abuse of process if it raises matters that could and therefore should have been litigated in earlier proceedings.

119 *Talbot* should not be followed. As was observed in *Port of Melbourne Authority v Anshun Pty Ltd*[103], *Henderson* did not hold that it is an abuse of process for a claimant to fail to deploy her or his full case in an earlier proceeding. It held that a claim which was within the pleadings in an earlier action and was not brought forward for adjudication was barred by estoppel *per rem judicatam*. In *Talbot*, the cause of action for personal injuries was different from the cause of action, and therefore outside the pleadings, in the earlier proceeding. Equally, the so-called "Kilbrandon principle" from *Yat Tung* proceeded from the Privy Council's misconception of what had been determined in *Henderson*. As was later recognised by the House of Lords in *Johnson*, it is not the case that, just because a claim could have been litigated in earlier proceedings, it should have been. The crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court. And the determination of that question calls for a "broad merits-based approach" of which one relevant factor is reasonable diligence[104].

120 This Court had earlier come to a similar conclusion in *Anshun*, to the effect that the question of whether a claim that could have been made in an earlier proceeding can be brought in a subsequent fresh proceeding turns on whether the failure to advance it in the earlier proceeding was unreasonable. There the plurality held[105] that there will be no estoppel in relation to a fresh proceeding unless the matter relied upon in the fresh proceeding was so relevant

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102 [1975] AC 581 at 590.

103 (1981) 147 CLR 589 at 601-603 per Gibbs CJ, Mason and Aickin JJ, 614 per Brennan J (Murphy J not deciding at 605); [1981] HCA 45. See also Handley, "A Closer Look at *Henderson v Henderson*", (2002) 118 *Law Quarterly Review* 397 at 402.

104 See Handley, "A Closer Look at *Henderson v Henderson*", (2002) 118 *Law Quarterly Review* 397 at 407. See also *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31, 33-34 per Lord Bingham of Cornhill (Lord Goff of Chieveley, Lord Cooke of Thorndon and Lord Hutton agreeing at 38, 42, 50), 60 per Lord Millett.

105 See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-603 per Gibbs CJ, Mason and Aickin JJ. See also *Timbercorp Finance Pty Ltd (In liq) v Collins* (2016) 259 CLR 212 at 229 [27] per French CJ, Kiefel, Keane and Nettle JJ, 245 [97] per Gordon J; [2016] HCA 44.

to the subject matter of the earlier proceeding that it was unreasonable not to rely upon it in the earlier proceeding. And, generally speaking, it is not unreasonable not to rely on a matter in an earlier proceeding unless, having regard to the nature of the claim in the earlier proceeding, it would be expected that the party seeking to rely on the matter in the new proceeding would have raised the matter in the earlier proceeding and thereby enabled the relevant issues to be determined at that time. Further, as was observed in *Anshun*, it is necessary to bear in mind that there are a variety of reasons why a party may justifiably refrain from litigating an issue in an earlier proceeding yet wish to litigate the issue in another proceeding, including expense, importance of the particular issue, and motives extraneous to the litigation[106]. And here, as has been seen, the previous trustee had good reason for discontinuing its involvement in the Supreme Court proceedings.

121 Of course, as the majority observed in *Tomlinson*[107], it is because the doctrine of abuse of process is an inherently broader and more flexible doctrine than estoppel that it is available to relieve against injustice to a party or impairment to the system of administration of justice and so to provide the basis for staying a claim that may not be barred by cause of action, issue or *Anshun* estoppel. It will be recalled that their Honours instanced *Walton*, *Reichel* and *Coffey* as exemplifying circumstances where, because so much time had gone by since the earlier proceedings in which the claim could have been but was not advanced, or because the claim had already been determined adversely to the claimant in earlier proceedings (albeit not necessarily directly as against the putative defendant), it would be unjustifiably oppressive to the putative defendant or otherwise bring the administration of justice into disrepute to allow the claim to proceed. To those examples may be added the circumstance of where a claim is an abuse of process because it is brought for a collateral purpose[108].

122 But where, as here, the delay since the earlier proceedings in which the claims could have been prosecuted has not been inordinate or inexcusable, there has been no previous determination of the Trustee's claims, the prosecution of the claims would not be unjustifiably oppressive to UBS, and the claims are not brought for a collateral purpose or otherwise in circumstances or in a manner

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106 See and compare *Ako v Rothschild Asset Management Ltd* [2002] ICR 899 at 907-909 [34], [41] per Dyson LJ (Jonathan Parker LJ agreeing at 909 [42]).

107 (2015) 256 CLR 507 at 518-519 [25] per French CJ, Bell, Gageler and Keane JJ.

108 See for example *Williams v Spautz* (1992) 174 CLR 509 at 518-521 per Mason CJ, Dawson, Toohey and McHugh JJ (Gaudron J relevantly agreeing at 552-553), 532 per Brennan J (Deane J dissenting at 546-551); [1992] HCA 34.

which would bring the administration of justice into disrepute, the only issue is whether it was unreasonable of the previous trustee not to prosecute the claims to judgment in the earlier proceedings. In effect, that means whether the claims are barred by *Anshun* estoppel, and, for the reasons already given, and as was held by the primary judge[109], they are not.

Judicial restraint

123 This appeal was conducted on the assumption that the principles of judicial restraint described in *House v The King*[110] apply to an appeal from a decision concerning whether an abuse of process has occurred[111]. On that assumption, our conclusion, like that of the majority of the Full Court of the Federal Court, is that the primary judge's reasoning involved errors of principle that necessitate reconsideration of whether an abuse of process occurred. Thus, for present purposes, it is unnecessary to consider whether questions of abuse of process should be conceived of as subject to a level of judicial restraint where comparable questions, such as, for instance, procedural fairness and abuse of powers, are not[112].

Conclusion and orders

124 The majority of the Full Court of the Federal Court was right to hold that it was not an abuse of process for the Trustee to institute the Federal Court proceedings after the previous trustee had discontinued its participation in the Supreme Court proceedings. The appeal to this Court should be dismissed with costs.

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109 See *Tyne v UBS AG (No 3)* (2016) 236 FCR 1 at 57 [399], 59 [411].

110 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40.

111 See *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264 [7] per Gleeson CJ, Gummow, Hayne and Crennan JJ; cf at 321-322 [223] per Callinan J, 326 [238] per Heydon J.

112 See *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at 721 [18] per Kiefel CJ, 727 [49], 728-729 [55]-[56] per Gageler J, 733-734 [85]-[87] per Nettle and Gordon JJ, 741-742 [145], 744 [154]-[155] per Edelman J; 357 ALR 408 at 412, 421, 422-423, 429, 440, 443-444; [2018] HCA 30. See also *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 per Lord Diplock.

125 GORDON J. This appeal raises important issues about the way in which litigation is conducted in the 21st century. Over the last 20 years, there has been a "culture shift"[113] in the conduct of civil litigation. The legal system has faced, and continues to face, great challenges in providing appropriate mechanisms for the resolution of civil disputes. Cost and delay are long-standing challenges. The courts and the wider legal profession have an obligation to face and meet these and other challenges. Failure to respond creates (or at least exacerbates) hardship for litigants and potentially results in long-term risks to the development, if not the maintenance, of the rule of law.

126 The power to grant a stay of proceedings exists to enable a court to "protect itself from abuse of its process thereby safeguarding the administration of justice"[114]. The doctrine of abuse of process is not limited to defined and closed categories of conduct[115]. It is *capable* of being applied to "any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute"[116]. If a proceeding would amount to an abuse of jurisdiction, or would clearly inflict unnecessary injustice upon the opposite party, the proceeding should be stayed or dismissed[117]. Or, put another way, where "the processes and procedures of the court, which exist to administer justice with fairness and

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113 See, eg, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 at 1436; [1998] 2 All ER 181 at 191; *Securum Finance Ltd v Ashton* [2001] Ch 291 at 306-309 [28]-[34]; *Bank of New Zealand v Savril Contractors Ltd* [2005] 2 NZLR 475 at 496 [85]-[87], 500 [99]; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 217 [112]-[113]; [2009] HCA 27.

114 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 266 [12]; [2006] HCA 27 quoted in *Rozenblit v Vainer* (2018) 92 ALJR 600 at 612 [65]; 356 ALR 26 at 41; [2018] HCA 23.

115 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [25]; [2015] HCA 28 citing *Batistatos* (2006) 226 CLR 256 at 262 [1], 265 [9]; see also at 267 [14]. See also *Rozenblit* (2018) 92 ALJR 600 at 611 [63] fn 68 and the authorities cited therein; 356 ALR 26 at 40.

116 *Tomlinson* (2015) 256 CLR 507 at 518-519 [25] citing *PNJ v The Queen* (2009) 83 ALJR 384 at 385-386 [3]; 252 ALR 612 at 613; [2009] HCA 6. See also *Walton v Gardiner* (1993) 177 CLR 378 at 392-393; [1993] HCA 77.

117 *Batistatos* (2006) 226 CLR 256 at 277 [53], 281 [71] citing *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720; [1935] HCA 48. See also *Rozenblit* (2018) 92 ALJR 600 at 611-612 [63], 612 [66]-[67], 616 [97]; 356 ALR 26 at 40-41, 41, 46.

impartiality, may be converted into instruments of injustice or unfairness"[118], a proceeding should be stayed or dismissed.

127 But the fact that a proceeding is discontinued and then a second proceeding, raising the same factual or legal matters, is commenced is not *prima facie* evidence of abuse of process. Nor is the fact that a proceeding raising particular legal claims is filed, and possibly determined, and then a subsequent proceeding is filed raising a separate claim arising out of the same or similar factual matters, *prima facie* evidence of abuse of process.

128 It is now trite that courts and participants in civil proceedings must, in terms, "facilitate the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible"[119]. But that obligation, like the doctrine of abuse of process, must take into account and deal with the facts and circumstances of the particular proceedings and the identity and conduct of the particular participants.

129 These proceedings, and related proceedings, have a complex litigation history[120] which began in Singapore in 2010 when UBS AG ("UBS") sought recovery from Telesto Investments Ltd ("Telesto"), and Mr Tyne as guarantor, of monies owing under credit facilities UBS had provided to Telesto ("the Singapore Proceedings"[121]).

130 Thereafter, Mr Tyne (in his personal capacity), Telesto, and the trustee of the Argot Trust (then ACN 074 971 109 Pty Ltd) commenced proceedings in the Supreme Court of New South Wales against UBS ("the NSW Proceedings"). After the NSW Proceedings were temporarily stayed as a consequence of the Singapore Proceedings, Mr Tyne (in his personal capacity) and the trustee of the Argot Trust discontinued their involvement in the NSW Proceedings, without any conditions being imposed on the discontinuance, by filing amended

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118 *Walton* (1993) 177 CLR 378 at 393.

119 s 37M(1) of the *Federal Court of Australia Act* 1976 (Cth). See also s 56 of the *Civil Procedure Act* 2005 (NSW); s 7 of the *Civil Procedure Act* 2010 (Vic); r 3 of the Supreme Court Civil Rules 2006 (SA); r 5 of the Uniform Civil Procedure Rules 1999 (Q); r 4B of the Rules of the Supreme Court 1971 (WA); r 414A of the Supreme Court Rules 2000 (Tas); s 5A of the *Court Procedures Act* 2004 (ACT).

120 I gratefully adopt the facts and procedural history set out in the reasons of the other judges.

121 There were two proceedings in Singapore, which I refer to collectively as the Singapore Proceedings: the proceedings for the recovery of funds ("the Singapore 801 Proceedings") and a subsequent anti-suit application brought by UBS.

pleadings pursuant to leave granted by Ward J, leaving Telesto as the remaining plaintiff. In May 2013, the NSW Proceedings were permanently stayed as a consequence of the Singapore Proceedings.

131 Eight months later, in January 2014, Mr Tyne, having by then been appointed as the trustee of the Argot Trust, commenced proceedings in the Federal Court of Australia against UBS in relation to the credit facilities ("the Federal Court Proceedings"). The trustee of the Argot Trust alleges that UBS gave negligent advice, or engaged in misleading or deceptive conduct contrary to legislation corresponding to the *Trade Practices Act* 1974 (Cth). The trustee of the Argot Trust also alleges that UBS breached fiduciary duties owed to the trustee and that the allegedly misleading conduct of UBS induced Mr Tyne *and*, through him, the trustee of the Argot Trust to take steps to their detriment.

132 After the Federal Court Proceedings were filed, UBS applied to have those proceedings dismissed or permanently stayed on four grounds: abuse of process; *Anshun* estoppel[122]; *res judicata*; or issue estoppel, each arising from the claims advanced and orders made in the Singapore Proceedings and, or alternatively, the NSW Proceedings.

133 The primary judge granted the interlocutory application and permanently stayed the Federal Court Proceedings on the ground that those proceedings were an abuse of process. This was the only basis for the order, his Honour having concluded that no *res judicata*, *Anshun* estoppel or issue estoppel arose.

134 On appeal, a majority of the Full Court of the Federal Court found that there was no abuse of process that could justify permanently staying the Federal Court Proceedings. I agree.

135 There is no duplication of proceedings. The principle of finality is not engaged. UBS has never had to meet, or plead to, the claims the trustee of the Argot Trust raises in the Federal Court Proceedings, including under legislation corresponding to the Trade Practices Act. UBS has not been "twice vexed". Not only were Mr Tyne (in his personal capacity) and the trustee of the Argot Trust permitted under the Uniform Civil Procedure Rules 2005 (NSW) to discontinue their involvement in the NSW Proceedings but the unchallenged reasons given by Mr Tyne for the discontinuance and then, after the NSW Proceedings were permanently stayed, for filing the Federal Court Proceedings do not provide a basis for a finding of abuse of process in relation to the Federal Court Proceedings. The appeal should be dismissed.

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122 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; [1981] HCA 45.

Abuse of process: principles

136 The onus of satisfying the court that a proceeding is an abuse of process is "a heavy one"[123]. Although the power to grant a permanent stay is one to be exercised "only in the most exceptional circumstances"[124], the exercise of the power can be justified by considerations which may include finality[125], fairness[126], and the maintenance of public confidence in the administration of justice[127].

137 This appeal is concerned with an alleged attempt to raise or re-litigate issues that were said to have been the subject of earlier proceedings. Where a party attempts to raise issues in successive proceedings, that conduct may be assessed as an abuse of process if it is contrary to the principle of finality[128]: that is, that "controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances"[129]. This fundamental principle protects "parties to litigation from attempts to re-agitate what has been decided"[130].

138 Where there are attempts to raise substantially similar claims in successive proceedings, the doctrine of abuse of process overlaps with the doctrine of estoppel. The raising of issues in successive proceedings can be simultaneously the subject of an estoppel which has arisen as a consequence of the earlier,

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123 *Williams v Spautz* (1992) 174 CLR 509 at 529; [1992] HCA 34 quoting *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 498; [1977] 2 All ER 566 at 582.

124 *Williams* (1992) 174 CLR 509 at 529 citing *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34; [1989] HCA 46.

125 *Tomlinson* (2015) 256 CLR 507 at 518 [24]. See also *Aon* (2009) 239 CLR 175 at 194 [34] citing *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

126 *Walton* (1993) 177 CLR 378 at 393; *Tomlinson* (2015) 256 CLR 507 at 518 [24]. See also *Rozenblit* (2018) 92 ALJR 600 at 612 [66]; 356 ALR 26 at 41.

127 *Batistatos* (2006) 226 CLR 256 at 267 [14]. See generally *Walton* (1993) 177 CLR 378 at 393-394 and the authorities cited therein.

128 *Tomlinson* (2015) 256 CLR 507 at 518 [24]. See also *Aon* (2009) 239 CLR 175 at 194 [34] citing *Johnson* [2002] 2 AC 1 at 31.

129 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at 21 [34]; [2016] HCA 16 quoting *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 20-21 [45]; [2005] HCA 12.

130 *Achurch v The Queen* (2014) 253 CLR 141 at 153 [15]; [2014] HCA 10.

final judgment, and conduct which constitutes an abuse of process[131]. However, such issues may also be considered an abuse of process in circumstances where they do not give rise to an estoppel because the doctrine of abuse of process is "inherently broader and more flexible than estoppel"[132]. By way of example, estoppel would *not* preclude a person who was neither a party nor the privy of a party to earlier proceedings from raising similar or related claims in successive proceedings, whereas abuse of process might *in appropriate circumstances*.

139 Not only is there the overlap with estoppel, but the principles relevant to the exercise of power to stay a proceeding as an abuse of process need to be interpreted and applied in light of the overarching purpose set out in s 37M of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). Section 37M provides that the overarching purpose of "the civil practice and procedure provisions" is to "facilitate the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible"[133].

No abuse of process

140 UBS's primary complaint in this Court is that the majority of the Full Court erred in finding that the Federal Court Proceedings were *not* an abuse of process. Three interrelated factors are said to support that complaint: first, the delay, increased costs, vexation to UBS and waste of public resources arising from dealing with the same matter twice; second, the fact that the delay, cost, vexation and waste would cause the administration of justice to fall into disrepute; and, third, that the majority failed to have regard to the overarching purpose in s 37M of the Federal Court Act.

No duplication

141 Before considering the issue of delay or cost, it is necessary to address the premise on which the UBS submissions are based: that the Federal Court Proceedings are, in effect, a duplication of earlier proceedings.

142 UBS contends that the Federal Court Proceedings raise "in substance the same factual matters" as those alleged in the NSW Proceedings. The trustee of the Argot Trust accepts that the "factual matrix" in the Singapore 801

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131 *Tomlinson* (2015) 256 CLR 507 at 518 [24].

132 *Tomlinson* (2015) 256 CLR 507 at 518 [25]. See also *Timbercorp Finance Pty Ltd (In liq) v Collins* (2016) 259 CLR 212 at 240 [69]; [2016] HCA 44.

133 s 37M(1) of the Federal Court Act.

Proceedings might be "substantially similar to that which was asserted in the [NSW Proceedings] and … the Federal Court [P]roceedings". However, the trustee of the Argot Trust contends that "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)".

143 The trustee's contention should be accepted. UBS has not been "twice vexed". None of the issues pleaded in the Federal Court Proceedings has ever been the subject of a decision on the merits. Indeed, none of the allegations has ever been responded to by UBS by way of a pleaded defence.

144 In the Singapore Proceedings, no relief was sought against the trustee of the Argot Trust, it was never a party, and no relief was ordered or granted against it. Moreover, the significant advantages to that trustee of claims under the Trade Practices Act were not available in Singapore. The principle of finality is not engaged.

145 In the NSW Proceedings, there were no findings about the fact or substance of Telesto's claims other than that they were barred by reason of the doctrine of *res judicata*. And there were certainly no findings in respect of the claims of Mr Tyne and the trustee of the Argot Trust under the Trade Practices Act: they discontinued as parties to those proceedings, as they were authorised to do under the Uniform Civil Procedure Rules and without conditions being imposed on the discontinuance.

146 UBS contends that the lack of a decision on the merits was not conclusive. UBS points to this Court's decisions in *Walton v Gardiner*[134] and *Batistatos v Roads and Traffic Authority (NSW)*[135] as supporting the proposition that a proceeding can be stayed as an abuse of process despite the proceeding addressing a claim that has not previously been adjudicated. I agree with Nettle and Edelman JJ, for the reasons their Honours give, that this contention must be rejected.

147 Having removed the premise on which the UBS submissions are based, it is necessary to consider whether cost, vexation and delay, and the alleged effect on the administration of justice to which UBS points, nonetheless would support a finding of abuse of process.

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134 (1993) 177 CLR 378.

135 (2006) 226 CLR 256.

No issue of cost, vexation or delay

148 I agree with Nettle and Edelman JJ, for the reasons their Honours give, that none of these considerations, individually or collectively, would support a finding of abuse of process. The first two considerations – cost and vexation – may be put to one side. In the NSW Proceedings, UBS has had the benefit of a stay as against Telesto and, as a result, UBS has never faced Telesto's claims under the Trade Practices Act. No less significantly, UBS has never faced the claims of the trustee of the Argot Trust under the Trade Practices Act or otherwise; it cannot be said that UBS would be required to face these allegations again.

149 As for the alleged delay, there were eight months between the granting of the permanent stay of the NSW Proceedings and the trustee of the Argot Trust commencing the Federal Court Proceedings. In the circumstances, that period is not so long as to constitute an abuse of process.

No effect on the administration of justice

150 UBS contends that "the combination of delay, increased costs, vexation and waste of public resources" would lead to the administration of justice falling into disrepute and that the majority of the Full Court failed to have regard to the risk that continuation of the proceedings would have that effect on the administration of justice.

151 The administration of justice may be brought into disrepute, in such a way as to amount to an abuse of process[136], if the public perception is that the legal system is unfair, inefficient, ineffective, expensive (both for the parties and in terms of the use of public monies) or contrary to the rule of law. Permitting a proceeding to continue in such circumstances might suggest tolerance of behaviour that is contrary to the just, efficient and timely resolution of disputes, including attempts to re-litigate questions already resolved.

152 But, in this case, the majority of the Full Court did not consider UBS's position to be so severely affected by the continuation of the proceedings as to amount to the kind of exceptional circumstance[137] necessary to establish an abuse of process warranting the grant of a permanent stay. Their Honours concluded

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136 *Tomlinson* (2015) 256 CLR 507 at 518-519 [25] citing *PNJ* (2009) 83 ALJR 384 at 385-386 [3]; 252 ALR 612 at 613. See also *Walton* (1993) 177 CLR 378 at 392-393.

137 *Williams* (1992) 174 CLR 509 at 529 citing *Jago* (1989) 168 CLR 23 at 34.

that in all of the circumstances of the case, there was no material unfairness to, or unjustified oppression of[138], UBS.

153 That conclusion, with which I agree, was unsurprising. It was unsurprising not only because the Uniform Civil Procedure Rules permitted Mr Tyne and the trustee of the Argot Trust to discontinue their involvement in the NSW Proceedings, but because of the unchallenged sworn evidence given by Mr Tyne as to what occurred in relation to the NSW Proceedings and the reasons why he and the trustee of the Argot Trust discontinued their involvement in those proceedings.

154 In his evidence, Mr Tyne explained that the decision to discontinue involvement in the NSW Proceedings, with the consent of UBS, was "precipitated" by the following facts and matters:

(1) the total liabilities which had been owing by Telesto under the credit facilities, recovery of which had been sought in the Singapore Proceedings, had been wholly discharged and extinguished, "thereby expunging any secondary liability that could accrue" to the trustee of the Argot Trust or to Mr Tyne;

(2) in dollar terms, the NSW Proceedings would likely prove to be of lesser value to the trustee than the value of the case that Telesto sought to prosecute because Telesto had lost the securities advanced to it by the trustee, as well as other cash and securities. As a result, if Telesto had been "made whole" through the NSW Proceedings, Telesto would very likely have had assets sufficient to meet its obligations to the trustee, obviating the requirement for the Federal Court Proceedings;

(3) in terms of the elements to be established and the evidence required to establish them, the Federal Court Proceedings are more burdensome than the case Telesto sought to make in the NSW Proceedings. In particular, the trustee of the Argot Trust has to prove everything that Telesto would have been obliged to prove as well as the provenance of the securities that trustee lent to Telesto. That last aspect, a significant exercise requiring the detailed examination of more than one thousand pages of account statements, was not necessary in the NSW Proceedings;

(4) the concurrent prosecution of the Telesto action and the action on behalf of the trustee of the Argot Trust would have been more time consuming and more expensive than the prosecution of the Telesto action on its own.

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138 See *Tomlinson* (2015) 256 CLR 507 at 519 [25] citing *PNJ* (2009) 83 ALJR 384 at 385-386 [3]; 252 ALR 612 at 613. See also *Walton* (1993) 177 CLR 378 at 392-393.

Given the financial circumstances of Mr Tyne, Telesto, and the Argot Trust, Mr Tyne was looking to limit the boundaries of the litigation;

(5) it was not at all predictable (and so not unreasonable to fail to predict) that Sackar J would permanently stay the NSW Proceedings when, in doing so, he "became the first Australian judge to decline jurisdiction over [a claim under the Trade Practices Act], absent an exclusive foreign jurisdiction or arbitration clause". The view held by Mr Tyne at the time, founded on his own research, was that a non-exclusive jurisdiction clause would not provide a basis for an Australian court to refuse jurisdiction over Telesto's trade practices claim where that claim could not be litigated in Singapore.

155 As noted, that evidence was unchallenged. It was never contended by UBS that the facts and matters referred to and relied upon were factually or legally inaccurate in any respect. In those circumstances, it cannot be said that the "staged conduct" of these proceedings was wrong or the circumstances so exceptional[139] that a permanent stay of the proceedings can be justified by reference to considerations of finality[140], fairness[141], or the maintenance of public confidence in the administration of justice[142].

156 In the circumstances of the current appeal, that last statement needs further unpacking. Where it can properly be said that a claim "should have been raised in the earlier proceedings"[143], were it to be raised at all, that conclusion *may* lead to a finding that the later proceedings are an abuse of process. But that is not this case.

157 As the majority of the Full Court observed, if Mr Tyne and the trustee of the Argot Trust had continued their claims in the NSW Proceedings, UBS would have been required to admit or defend those claims[144]. That is the position in which UBS now finds itself.

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139 *Williams* (1992) 174 CLR 509 at 529 citing *Jago* (1989) 168 CLR 23 at 34.

140 *Tomlinson* (2015) 256 CLR 507 at 518 [24]. See also *Aon* (2009) 239 CLR 175 at 194 [34] citing *Johnson* [2002] 2 AC 1 at 31.

141 *Walton* (1993) 177 CLR 378 at 393; *Tomlinson* (2015) 256 CLR 507 at 518 [24]. See also *Rozenblit* (2018) 92 ALJR 600 at 612 [66]; 356 ALR 26 at 41.

142 *Batistatos* (2006) 226 CLR 256 at 267 [14]. See generally *Walton* (1993) 177 CLR 378 at 393-394 and the authorities cited therein.

143 *Johnson* [2002] 2 AC 1 at 31.

144 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 379 [107].

158 And it is not the case that the trustee of the Argot Trust has unreasonably held its claims in abeyance. The trustee provided an explanation for its conduct and that explanation was not unreasonable. After the NSW Proceedings were temporarily stayed, the trustee of the Argot Trust discontinued its involvement in the NSW Proceedings. It did so, at least in part, because if the principal claimant's claim, that of Telesto, had been successful, the claim by the trustee would have been unnecessary. Indeed, the claim by the trustee would have been not only unnecessary but arguably not maintainable and potentially in breach of trustees' duties because, without damage, there can be no action for misleading or deceptive conduct under the Trade Practices Act[145]. And then, once Telesto was unsuccessful in the NSW Proceedings (as it was once the NSW Proceedings were permanently stayed), the trustee had an obligation to consider and determine what action the trustee should take to seek recovery of the property of the trust. The step taken was to institute the Federal Court Proceedings.

159 It is clear from Mr Tyne's evidence that he expected the NSW Proceedings to proceed to judgment and believed that the outcome in those proceedings would sufficiently deal with any outstanding liability to the trustee of the Argot Trust; Mr Tyne did not expect a permanent stay. The other party – UBS – is a sophisticated and well-resourced litigant. UBS ultimately took no objection to Telesto filing an amended pleading in the NSW Proceedings which removed Mr Tyne and the trustee of the Argot Trust as parties to those proceedings. It did not seek the imposition of any conditions on the discontinuance. UBS could have done so, but it did not. The fact that UBS believed that neither Mr Tyne, nor the trustee of the Argot Trust, continued to assert any rights against it does not detract from the conclusion reached. As in any litigation, each participant had a view of the merits of the various claims. That one or more of the participants was wrong in their view is not *prima facie* evidence of abuse of process. More is required.

160 Having regard to the facts and circumstances – including the identity of the particular participants – the Federal Court Proceedings should not be stayed or dismissed for abuse of process.

Full Court's approach not contrary to s 37M

161 UBS further contends that the approach taken by the majority of the Full Court was inconsistent with the overarching purpose of the civil procedure

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145 By the combined effect of ss 52 and 82 of the Trade Practices Act: see generally *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 at 286; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525; [1992] HCA 55; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 639 [30]; [2005] HCA 69.

provisions set out in s 37M of the Federal Court Act and observes that the authorities on which the majority relied did not refer to s 37M. That contention should be rejected.

162 Section 37N of the Federal Court Act imposes a duty on parties to civil proceedings to act consistently with the overarching purpose set out in s 37M – to facilitate the *just resolution* of disputes according to law as quickly, inexpensively and efficiently as possible – as well as imposing an obligation on the parties' lawyers to assist the parties to comply with that obligation. As has been recently observed by members of this Court in the context of similar obligations applicable to proceedings in Victorian courts, this kind of overarching purpose does not displace the need for a court to safeguard the administration of justice in the context of ordering a stay for abuse of process[146].

163 Vexation, oppression and unfairness, by their very nature, encompass considerations of delay, cost and inefficiency which are antithetical to the overarching purpose. And considerations of vexation, oppression, unfairness and delay were central to the majority's conclusion that the Federal Court Proceedings were not an abuse of process. The fact that the authorities to which the majority had regard did not consider s 37M is not, and cannot be, determinative.

164 Moreover, despite the importance of the considerations and the obligations which s 37M identifies (and they are important), those considerations and obligations are directed at facilitating the *just resolution* of disputes according to law "as quickly, inexpensively and efficiently as possible"[147]. It cannot be said that, in the circumstances of this appeal, there is any vexation, oppression or unfairness visited on UBS that would warrant the Federal Court Proceedings being permanently stayed.

"Relevance" of the Singapore Proceedings

165 In its second ground of appeal in this Court, UBS identifies three alleged errors in relation to the treatment of the Singapore Proceedings by the majority of the Full Court. Those alleged errors are said to be the majority's conclusions that:

(1) the primary judge's reasons for deciding that the Federal Court Proceedings constituted an abuse of process did not include the Singapore Proceedings;

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146 See *Rozenblit* (2018) 92 ALJR 600 at 614 [76]; 356 ALR 26 at 43.

147 s 37M(1)(b) of the Federal Court Act.

(2) it was "not open" to UBS to rely upon the Singapore Proceedings in the appeal without having filed a notice of contention before the primary judge; and

(3) the existence and outcome of the Singapore Proceedings "could not found any claim that the current proceedings ... constituted an abuse of process".

166 That challenge centres on the following paragraph of the majority's reasons[148]:

> "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 … constituted an abuse of process."

167 UBS's challenge to this part of the majority's reasons should be rejected. Although the primary judge expressly referred to the Singapore 801 Proceedings[149], it is clear from the terms of his Honour's reasons that these were passing references to, rather than reliance on, the Singapore Proceedings.

168 The appropriate approach to assessing the effect of the Singapore Proceedings was their effect on the NSW Proceedings. As already stated, the trustee of the Argot Trust was not a party to the Singapore Proceedings. If the Singapore Proceedings had affected the ability of the trustee to litigate its claims through the NSW Proceedings (had it remained a party), there would have been a finding of *res judicata*, preventing the trustee of the Argot Trust from bringing the Federal Court Proceedings. However, that was not the majority's conclusion. Their Honours considered that if the trustee had continued its claims

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148 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 362 [53].

149 See *Tyne v UBS AG (No 3)* (2016) 236 FCR 1 at 60 [418], [422].

in the NSW Proceedings, "UBS would have been required to admit or defend those claims"[150] – the position in which UBS now finds itself.

169 That is not to say that in every case where there is alleged duplication of issues, but no finding of *res judicata* or estoppel, a finding of abuse of process will be foreclosed: for reasons already explained, that is not the law. But, on the facts of this appeal, that would have been the consequence. The corollary is that there is no basis on which the Singapore Proceedings could have been used to found a conclusion of an abuse of process. There is simply no factual basis for such an allegation, and the majority of the Full Court was correct to reach that conclusion.

170 For those reasons, the appeal should be dismissed with costs.

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150 *Tyne v UBS AG (No 2)* (2017) 250 FCR 341 at 379 [107].