FEDERAL COURT OF AUSTRALIA

Tyne (Trustee) v UBS AG (No 2) [2017] FCAFC 5

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| Appeal from: | *Tyne v UBS AG (No 3)* [2016] FCA 5; (2016) 236 FCR 1 |
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| File number: | QUD 46 of 2016 |
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| Judges: | **DOWSETT, JAGOT AND FARRELL JJ** |
|  |  |
| Date of judgment: | 20 January 2017 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - abuse of process - unconditional discontinuance proceedings in different court involving same substratum of fact - whether abuse of process operates against person not party to earlier proceeding - where earlier proceeding not decided upon merits - opportunity to make claims in earlier proceedings - oppression or unfairness |
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| Legislation: | *Trade Practices Act 1974* (Cth)  *Federal Court of Australia Act* *1976* (Cth) s 37M |
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| Cases cited: | *Angeleska (Known as Slaveska) v State of Victoria* [2015] VSCA 140  *Ann Street Mezzanine Pty Ltd (in liq) v Beck* [2009] FCA 333; (2009) 175 FCR 532  *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256  *DA Christie Pty Ltd v Baker* [1996] 2 VR 582  *Director, Fair Work Building Industry Inspectorate v Ingham* [2016] FCA 328  *Ghosh v NineMSN Pty Ltd* [2015] NSWCA 334  *Haines v Australian Broadcasting Corporation* [1995] NSWSC 136; (1995) 43 NSWLR 404  *Henderson v Henderson* (1843) 3 Hare 100; (1843) 67 ER 313  *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529  *In re Thomas Christy Ltd (in liquidation)* (1994) 2 BCLC 527  *Kermani v Westpac Banking Corporation* [2012] VSCA 42; (2012) 36 VR 130  *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95  *O’Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315; (2013) 85 NSWLR 698  *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589  *Re HIH Insurance Ltd (in liq; De Bortoli Wines (Superannuation) Pty Ltd v McGrath* [2014] NSWSC 774; (2014) 101 ACSR 1  *Reichel v Magrath* (1889) 14 App Cas 665  *Running Pigmy Productions Pty Ltd v AMP General Insurance Co Ltd* [2001] NSWSC 431  *South Australian Housing Trust v State Government Insurance Commission* (1989) 51 SASR 1  *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Rep ¶81-423 (64,077)  *SZFOG v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1374; (2005) 88 ALD 138  *Telesto Investments Limited v UBS AG* [2012] NSWSC 44; (2012) 262 FLR 119  *Telesto Investments Limited v UBS AG* [2013] NSWSC 503  *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; (2015) 256 CLR 507; (2015) 89 ALJR 750  *Tyne (Trustee) v UBS AG* [2016] FCA 241  *Tyne (Trustee) v UBS AG (No 3)* [2016] FCA 5; (2016) 236 FCR 1  *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160  *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378  *Williams v Spautz* [1992] HCA 34; 174 CLR 509  *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] 146 FCR 10 |
|  |  |
| Date of hearing: | 26 May 2016 |
|  |  |
| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
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| Number of paragraphs: | 110 |
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| Counsel for the First Appellant: | The First Appellant appeared in person |
|  |  |
| Counsel for the Second Appellant: | The Second Appellant did not appear The First Appellant made submissions on her behalf |
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| Counsel for the Respondent: | Mr J Stoljar SC with Mr L Livingston |
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| Solicitor for the Respondent: | King & Wood Mallesons |

ORDERS

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|  | | QUD 46 of 2016 |
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| BETWEEN: | SCOTT FRANCIS TYNE AS TRUSTEE OF THE ARGOT TRUST  First Appellant  CLARE ELIZABETH MARKS  Second Appellant | |
| AND: | UBS AG  Respondent | |

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| JUDGES: | DOWSETT, JAGOT AND FARRELL JJ |
| DATE OF ORDER: | 20 January 2017 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 1 and 2 made on 8 January 2016 be set aside.
3. In lieu thereof, it be ordered that:
   1. The interlocutory application dated 15 December 2014 be dismissed.
   2. The respondent pay the appellants’ costs of the appeal, the application for leave to appeal and the interlocutory application, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DOWSETT J:

# ABUSE OF PROCESS

1. I have read the reasons prepared by Jagot and Farrell JJ. I am grateful to their Honours for their close examination of the cases and the facts. In particular, I note the following propositions:

* abuse of process may arise in 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;
* a court has inherent power to prevent misuse of its procedures in a way which, although not inconsistent with the literal application of its procedural rules, would nonetheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right‑thinking people; and
* making a claim or raising an issue which was made, or raised and determined in earlier proceedings, or which ought reasonably to have been so raised for determination in those earlier proceedings, may constitute an abuse of process, even where the party seeking to make the claim or to raise the issue in the later proceedings was neither a party to the earlier proceedings, nor the privy of a party.

1. Any doubts as to the correctness of the third proposition were resolved by the High Court in *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [25] and [26] where the majority said:

25 Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in 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. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.

26 Accordingly, 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. 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.)

1. For present purposes the earlier decision of the High Court in *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256 is also helpful. In that case the High Court upheld a decision of the Court of Appeal, staying proceedings in which an incompetent plaintiff had sought damages for personal injuries. Because of the plaintiff’s incompetence, the relevant limitation period had not expired, so that the case was not statute‑barred. However the proceedings were commenced 29 years after the injury. At [9]‑[15] the majority (Gleeson CJ, Gummow, Hayne and Crennan JJ) identified the wide variety of circumstances in which an abuse of process might arise. Their Honours said:

9 What amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues. One example is the line of authority dealing with the stay of proceedings instituted in a second forum where there are pending proceedings in another forum and the continuance of the second proceedings would be an abuse of the process of the first forum. Again, in *Cardile v LED Builders Pty Ltd*, Gaudron, McHugh, Gummow and Callinan JJ referred to the passage in the joint judgment in *CSR Ltd v Cigna Insurance Australia Ltd* where it was said of the grant of an anti‑suit injunction that the counterpart of the power of a court to prevent the abuse of its processes was the power of the court to protect the integrity of those processes once set in motion. Their Honours in *Cardile* were dealing with the doctrinal foundation of asset preservation orders, and continued:

"The integrity of those processes extends to preserving the efficacy of the execution which would lie against the actual or prospective judgment debtor. The protection of the administration of justice which this involves may, in a proper case, extend to asset preservation orders against third parties to the principal litigation."

10 A convenient starting point for consideration of the development that has occurred is the statement made by Lord Blackburn in 1885, in a case frequently cited in Australian courts. The causes of action at stake in *Metropolitan Bank Ltd v Pooley* were in tort. Lord Blackburn said:

"[F]rom early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action."

11 The references by Lord Blackburn to "power" rather than to "jurisdiction" and to the summary procedure whereby the court informed its conscience upon affidavits are significant.

12 Several other points are to be made respecting that statement in *Metropolitan Bank*. The first is that Lord Blackburn treated vexatious process as synonymous with, or at least an instance of, abuse of process. Secondly, the issues to be considered go beyond a question as to whether the claim or defence in question is bad in law; the demurrer was developed to deal with that situation. Thirdly, and as later emphasised in this Court in authorities to which reference has already been made in these reasons, Lord Blackburn indicated that the power existed to enable the court to protect itself from abuse of its process thereby safeguarding the administration of justice. That purpose may transcend the interest of any particular party to the litigation.

13 It should be added that, in this Court, it has yet to be determined whether the inherent power identified by Lord Blackburn is, like the power to punish contempt, an attribute of the judicial power of the Commonwealth provided in Ch III of the Constitution. However, in this Court much attention has been given to the nature and extent of the inherent power to deal with abuse of process.

14 In *Ridgeway v The Queen*, Gaudron J explained:

"The powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose, as well as proceedings that are 'frivolous, vexatious or oppressive'. This notwithstanding, there is no very precise notion of what is vexatious or oppressive or what otherwise constitutes an abuse of process. Indeed, the courts have resisted, and even warned against, laying down hard and fast definitions in that regard. That is necessarily so. Abuse of process cannot be restricted to 'defined and closed categories' because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case. That is not to say that the concept of 'abuse of process' is at large or, indeed, without meaning. As already indicated, it extends to proceedings that are instituted for an improper purpose and it is clear that it extends to proceedings that are 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment'."

15 Earlier, in *Rogers v The Queen*, McHugh J observed:

"Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute."

His Honour added:

"Many, perhaps the majority of, cases of abuse of procedure arise from the institution of proceedings. But any procedural step in the course of proceedings that have been properly instituted is capable of being an abuse of the court's process."

To that it should be added that the power to deal with procedural abuse extends to the exclusion of particular issues which are frivolous and vexatious. Further, the failure to take, as well as the taking of, procedural steps and other delay in the conduct of proceedings are capable of constituting an abuse of the process of the court.

(Footnotes omitted.)

1. At [61] the majority identified a submission to the effect that:

* proceedings commenced within the relevant limitation period would not be stayed other than in exceptional circumstances;
* the requirement that there be such circumstances would not be satisfied by demonstrating prejudice incurred by the defendant as the result of delay, unless the plaintiff had engaged in “oppressive conduct”; and
* “oppressive” conduct was any conduct which was burdensome, harsh or wrongful.

1. At [62]‑[65] their Honours said, concerning that submission:

62 There is no substance in the negative implication which the plaintiff seeks to draw from an unexpired statutory limitation period. As Bryson JA pointed out, periods of statutory limitation operate indifferently to the existence of what might be classified as delay on the part of a plaintiff. Section 63 of the Limitation Act provides for the extinction of causes of action "to recover any debt damages or other money". But s 68A requires a party claiming the benefit of extinction to plead that extinguishment. To say that a limitation period has not run is to say that the potential defendant, if now sued, has no accrued defence to the action.

63 In that setting it is unsatisfactory to speak of a common law "right" which may be exercised within the applicable statutory limitation period, and of the enacting legislature as having "manifested its intention that a plaintiff should have a legal right to commence proceeding with his action". The words are those of Lord Diplock in *Birkett v James*. The difficulty is in the expression "a legal right". 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 part, the court has an obligation owed to both sides to quell their controversy according to law.

64 It is a long, and impermissible, step to deny the existence of what may be the countervailing right of a defendant by imputation to the legislature of an intent, not manifested in the statutory text, to require the court to give absolute priority to the exercise by the plaintiff within the limitation period of the right to initiate proceedings. The truth is that limitation periods operate by reference to temporal limits which are indifferent to the presence or absence of lapses of time which may merit the term "delay".

65 The "right" of the plaintiff with a common law claim to institute an action is not at large. It is subject to the operation of the whole of the applicable procedural and substantive law administered by the court, whose processes are enlivened in the particular circumstances. This includes the principles respecting abuse of process.

(Footnotes omitted.)

1. Finally, at [69] and [70] their Honours said:

69 The descriptions, rather than definitions, given in this Court and set out earlier in these reasons post‑date *Birkett v James* and do not provide any ground for a requirement of oppressive conduct by the plaintiff. Rather, as in the circumstances of the present case, attention must be directed to the burdensome effect upon the defendants of the situation that has arisen by lapse of time. The Court of Appeal held that this was so serious that a fair trial was not possible. The result was that to permit the plaintiff's case to proceed would clearly inflict unnecessary injustice upon the defendants.

70 What Deane J said in *Oceanic Sun Line Special Shipping Company Inc v Fay*, with respect to the staying of local proceedings, is applicable also to a case such as the present one. His Honour emphasised that there was no "requirement that the continuance of the action would involve moral delinquency on the part of the plaintiff"; what was decisive was the objective effect of the continuation of the action.

(Footnotes omitted.)

1. So understood, abuse of process is to be found in the effect of conduct, rather than in the conduct itself. Where an issue has been determined in earlier proceedings, it may be relatively easy to demonstrate that an attempt by a party to those proceedings again to litigate that issue in later proceedings, constitutes an abuse of process. However it does not follow that conduct such as that in the present case cannot also constitute an abuse. As the majority demonstrated in *Batistatos*, a party’s right to institute proceedings is not at large, and does not permit an abuse of process. In other words, to assert that a plaintiff’s right to commence proceedings is an answer to a demonstrated abuse of process is to beg the question.

# THE CLAIMS

1. As I understand it, the appellants accept that the claim which the first appellant (“Mr Tyne”) seeks to prosecute as trustee of the Argot Trust (the “Trust”) is substantially the same case as that raised by the Trust against the respondent (“UBS”) in the New South Wales Supreme Court (the “Supreme Court proceedings”). Mr Tyne and another company, Telesto Investments Ltd (“Telesto”), were also parties. The relief sought by the Trust and Mr Tyne arose out of the same factual matrix as did Telesto’s claim. Mr Tyne effectively controlled the company which was then trustee of the Trust, and Telesto. He subsequently became trustee of the Trust and is conducting these proceedings on its behalf. Before final resolution of the Supreme Court proceedings, the Trust and Mr Tyne effectively discontinued their proceedings. UBS eventually succeeded in having the proceedings permanently stayed on the ground that the prior proceedings in Singapore resulted in a finding of res judicata as against Telesto. Mr Tyne was also party to the Singapore proceedings. However neither the Trust nor the second appellant (“Ms Marks”) was party to those proceedings. Whilst it seems likely that Mr Tyne would also have been subject to a finding of res judicata in the Supreme Court proceedings, the Trust’s claim could not have been disposed of on that basis. At first instance and on appeal, the current proceedings seem to have been conducted on the basis that Mr Tyne controlled the conduct of both Telesto and the Trust in the Supreme Court proceedings. Ms Marks’s claim is also effectively based upon the same factual matrix as was Telesto’s case in the Supreme Court proceedings. As with the Trust the resolution of the proceedings in Singapore could not have led to a finding of res judicata against her. Proceedings before the primary Judge proceeded on that basis.
2. The basis for the assertion of abuse of process against the Trust necessarily differs from that of such assertion against Ms Marks. The Trust was, at one stage, party to the Supreme Court proceedings but discontinued them. The alleged abuse lies in not having had its claim resolved in conjunction with that of Telesto in the Supreme Court proceedings, and now seeking to do so in fresh proceedings. At one level, it might be thought that the fact of the prior discontinuance had no relationship to any unfairness suffered by UBS as a result of the commencement and prosecution of these proceedings. However UBS explains the significance of the discontinuance at para 21 of its outline of argument on appeal as follows:

In a typical case of discontinuance, such as in the SZFOG litigation referred to in ... , the subsequent commencement of fresh proceedings advancing the same or similar claims by the original plaintiff against the original defendant may not constitute an abuse. In a case of that kind, the defendant's costs incurred prior to, and wasted by, the discontinuance, are ameliorated by the presumptive costs order made upon the discontinuance. Further, in such a case, all litigation between the parties ceased between the discontinuance and the commencement of fresh proceedings, such that the original defendant was not vexed by additional expense or inconvenience. However, the situation is entirely different where one or more of several related co‑ plaintiffs discontinue proceedings which thereafter proceed unsuccessfully to final determination, and the discontinuing parties (or controlled or related parties) then commence new proceedings against the same defendant advancing, in substance, the same claim seeking to recover loss which the unsuccessful party had previously asserted was loss suffered by it. In substance, that is the present case.

(Footnotes omitted.)

1. I accept UBS’s propositions. The reference to the “SZFOG litigation” is to the decision in *SZFOG* *v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1374 and the subsequent decision in the same matter ([2006] FCA 1170). The appellants submit that those decisions support the proposition that proceedings concerning the subject matter of previous proceedings can only be an abuse of process if the earlier proceedings were disposed of on the merits. To the extent that those decisions support that proposition, they are inconsistent with the decisions of the High Court in *Batistatos* and *Tomlinson*. Further, both decisions in *SZFOG* seem to be based on the decision of the Full Court in *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] 146 FCR 10 at [36]‑[38]. That decision concerned *Anshun* estoppel, not abuse of process. If a party is to be generally estopped from raising an issue which, “properly belonged to the subject of earlier proceedings”, then that issue, by definition, will not have been resolved on its merits. Hence, in any case of *Anshun* estoppel, the issue in question will, by definition, not have been previously resolved on the merits.
2. The doctrine of *Anshun* estoppel was developed to deal with circumstances in which there had been a resolution of a dispute without regard to a particular issue. However the gravamen of the estoppel is the failure to litigate the issue at a time when it ought reasonably to have been raised and determined. The historical context in which *Anshun* estoppel was developed may limit its operation to cases in which other issues have been resolved on the merits, but it offers no basis for treating the conduct in this case as other than an abuse of process. I see no reason why failure to litigate one issue in earlier proceedings should only be a basis for a finding of abuse of process if other issues in those proceedings were disposed of on the merits.
3. The basis for the assertion of abuse of process against Ms Marks is that her claim was so closely associated with that of Telesto that it ought to have been prosecuted in the Supreme Court proceedings, particularly having regard to her personal relationship to Mr Tyne.

# DISCONTINUANCE OF PROCEEDINGS

1. An applicant in legal proceedings should not expect that he or she may, as a general rule, discontinue, and then recommence proceedings, without any significant risk that such conduct will be characterized as an abuse of process. Whilst a person, who has previously discontinued a claim, may not be barred from seeking to pursue that claim in subsequent proceedings, it does not follow that such conduct is desirable, at least where there is no reasonable explanation for it. In considering whether conduct amounts to an abuse of process, the focus must be on the identification of manifest unfairness to the respondent, and/or upon any likelihood that the administration of justice will be brought into disrepute amongst right‑thinking people. Where either of these effects is demonstrated, the conduct may be an abuse of process, even if a reasonable explanation is proffered. In principle, an explanation should only assist if it leads to the conclusion that neither likely effect has been proven.

# MANIFEST UNFAIRNESS

1. The adjective “manifest” does not denote the quantum of the unfairness, but rather the extent to which it may be discerned. As an adjective the word “manifest” means: “[c]learly revealed to the eye, mind, or judgment; open to view or comprehension, obvious”. See the *New Shorter Oxford English Dictionary* (4th ed, Oxford University Press, 1993). Manifest unfairness is, itself, likely to have the effect of bringing the administration of justice into disrepute, but such effect may arise in a wide variety of other circumstances. Manifest unfairness may often lie in exposure to the risk of additional costs, undue delay or simply the vexation or inconvenience of having again to address an issue which should have been resolved in earlier proceedings.

# BRINGING THE ADMINISTRATION OF JUSTICE INTO DISREPUTE

1. In considering whether conduct is likely to bring the administration of justice into disrepute, the Court will bring to the task its own experience as to the effect upon the right‑thinking person of particular conduct in the course of legal proceedings. Without wishing to be prescriptive or exhaustive, I suggest that the right‑thinking person would know that:

* litigation is expensive, for the parties and for the public purse;
* to engage in litigation is a serious business, causing stress and inconvenience, as well as cost;
* there are delays in the legal system, and time spent on one case cannot be spent on other cases; and
* a democratic society depends heavily upon the existence of a fair, efficient, effective and economical process for resolving disputes.

1. Such a person would expect that:

* a party would only resort to the courts if he or she genuinely believed that he or she had a good case and intended to prosecute it to resolution, by judgment or agreement;
* a party who has elected to go to court concerning a matter, would seek to resolve the whole dispute, not merely an aspect of it; and
* where two or more persons claim to have suffered loss as the result of the same conduct, and those claimants are closely associated, personally or in business, they would generally seek to resolve their claims in the same proceedings, rather than in separate proceedings.

1. 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.
2. The decision in *Batistatos* demonstrates that even the prosecution of a meritorious claim may create manifest unfairness, or be likely to bring the administration of justice into disrepute. Hence it must be accepted that even a meritorious case may be dismissed as an abuse of process. In the present case the primary Judge proceeded upon the basis that the appellants’ case might well have merits. See his Honour’s remarks at [423] and [424].

# RELEVANT CONSIDERATIONS

1. It would be unwise to seek to identify limits to the circumstances in which proceedings may be characterized as an abuse of process, or to seek to identify factors as being more or less likely to lead to such a conclusion. Hence I doubt the utility of seeking to identify limits beyond which the cases have not previously gone. For example, it may not help to say that there is no case in which, absent an earlier determination on the merits, a stay has been granted. After all, *Batistatos* was such a case. The abuse in that case was brought about by delay, causing unfairness to the defendant. Although the present case is complicated by the prior proceedings it is also, in part, about delay. In failing to participate in the Supreme Court proceedings, both the Trust and Ms Marks have delayed the resolution of their claims against UBS. In *Batistatos*, the delay was brought about by the plaintiff’s incompetence. In both cases, the focus is on the effect of such conduct upon the other party.
2. The focus in some of the cases upon the “right” of a litigant to discontinue, and later commence fresh proceedings is inconsistent with modern views as to case management. The courts are now more inclined to infer prejudice to one party where conduct by the other has unnecessarily extended the time taken to resolve a dispute, or necessitated the duplication of process. Section 37M of the *Federal Court of Australia Act* *1976* (Cth) (the “Federal Court Act”) now requires that disputes be resolved as quickly, inexpensively and efficiently as possible. To allow a party to discontinue, and then re‑commence proceedings will not generally be conducive to the achievement of that goal. The older cases must be seen in light of that provision.
3. As I have said, it seems to be accepted that Mr Tyne directed the conduct of the Supreme Court proceedings. The primary Judge inferred that it was he who caused the amendment of the relevant summons, by virtue of which he and the Trust were effectively removed as parties to those proceedings. There is no doubt that as trustee of the Trust, he now controls the conduct of its proceedings in this Court. There is reason to infer that Mr Tyne also has the carriage of this matter on behalf of Ms Marks. The affidavits at first instance, and on the application for leave to appeal were filed on behalf of both the Trust and Ms Marks. It seems that he, but not she appeared at first instance. In this appeal, the appellants have filed joint submissions. Further, Ms Marks wrote to the Court as follows:

I am unable to attend court in person this morning. My attendance would hardly be of assistance. I have no legal training. However, I should like to be represented by Mr. Tyne as my “McKenzies friend”, should the court be inclined to grant leave to that end. Failing that, I rely upon my written submissions and ask that the Court determine this matter having regard to them.

1. Although no such “leave” was granted, I infer that Mr Tyne, in effect, made submissions on appeal on behalf of the Trust and Ms Marks. It may be that Ms Marks’s letter and Mr Tyne’s conduct of the appeal are not relevant to the correctness or otherwise of the decision at first instance. However, should this appeal succeed, such matters would be relevant to this Court’s consideration of the orders to be made.

# ABUSE OF PROCESS – THE TRUST

1. Mr Tyne suggests that he and the Trust had discontinued their claims in the earlier proceedings because UBS no longer had monetary claims against them. I understand that statement to have meant that Mr Tyne and the Trust had commenced the Supreme Court proceedings with a view to establishing a monetary claim against UBS, which claim might be “set off” in some way against any monetary judgment recovered by UBS, and that the proceedings had been discontinued because UBS no longer made a claim against which there could be any set off. However, if the Trust considered that it had a good claim, and did not intend to abandon it, then it should have taken it to judgment in those proceedings. There is no suggestion that anything happened unexpectedly thereafter, leading the Trust 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 Trust in discontinuing the Supreme Court proceedings. The effect 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 in resolving the differences arising out of the relevant transactions and otherwise to vex UBS. To allow the Trust’s current 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 Trust of the Supreme Court proceedings. I see no reason for going beyond such evidence as is before this Court.
2. If the Trust were the sole appellant in these proceedings, the abuse of process would be clear. However, there would be little point in staying the Trust’s proceedings if Ms Marks’s proceedings were to remain on foot. In either case, UBS would have to face the prospect of re‑litigation. However, for the reasons which appear below, I consider that the primary Judge did not err in finding that her proceedings also constituted an abuse of process.

# ABUSE OF PROCESS – MS MARKS

1. Ms Marks was not a party to any of the earlier litigation. However her commencement and conduct of these proceedings may nonetheless constitute an abuse of process. There are good reasons for concluding that Ms Marks ought to have brought her proceedings in, or in conjunction with the Supreme Court proceedings. In particular, her claim is very closely related to the subject matter of the Supreme Court proceedings. Were that not the case, her personal relationship with Mr Tyne would certainly not have led to any such expectation. However Ms Marks cannot have been unaware of her own claim. After all she had incurred substantial liability, leading to the loss of her block of land. Given the close connection between her claim, the Trust’s claim and Mr Tyne’s claim, and his having the conduct of the Supreme Court proceedings, their personal relationship tends to re‑inforce inferences which might be drawn from the common subject matter of their claims. In the absence of any suggestion that Ms Marks and Mr Tyne were not cohabiting, I infer that there would have been numerous opportunities and reasons for discussion of the Supreme Court proceedings and of Ms Marks’s claim. Mr Tyne must have been aware of her loss and concerned about it. It cannot sensibly be inferred that she did not know that he was litigating his own claim, and that of the Trust, arising out of the same factual matrix as brought about her claim. She must surely have worried about the fate of her own claim. It would be surprising if Mr Tyne had not considered the possibility of joining her claim with the other claims. After all, he acted as her agent in all things related to the proposed construction of the house, including the financing of such construction. That fact, and that she apparently left the conduct of the current proceedings to him, invite the inference that he made the decision not to prosecute her claim in the Supreme Court proceedings. Whether he or she made the decision, she must bear the consequences of it.
2. Mr Tyne asserted, both at first instance and on appeal, that Ms Marks’s cause of action did not accrue until after the commencement of the Supreme Court proceedings. There is no sworn evidence to that effect. However it seems that Ms Marks had guaranteed the obligations of Telesto. Performance of her obligations as guarantor was secured by a mortgage over the property to which I have referred. The guarantee was called upon, resulting in exercise of the power of sale in the mortgage. Her claim apparently comprises or includes some amount for the loss of her property.
3. Although Ms Marks may not have been liable to discharge her obligations under the guarantee until called upon, it does not follow that she did not incur any loss until demand was made upon her. Indeed, at para 106 of the statement of claim it seems to be pleaded that her loss was to be measured by the diminution in the value of Telesto’s assets, leading to the incurrence by her of a contingent liability under the guarantee, the extent of which may not then have been quantified. I am, by no means, persuaded that, prior to her being called upon under the guarantee, Ms Marks could not have commenced proceedings to establish any claim which she might have against UBS, arising out of liability or contingent liability incurred by or as the result of its conduct. In any event, as I have said, there appears to have been no evidence as to the date upon which Ms Marks was called upon pursuant to the guarantee. No such date is alleged in the statement of claim. Further, Ms Marks could have joined in the Supreme Court proceedings at any time after they were commenced.
4. The effect of her conduct upon UBS is obvious: delay, probable further expense and vexation. The right‑thinking person would surely be at least surprised that Ms Marks’s claim was not prosecuted in conjunction with the Supreme Court proceedings, and probably as part of those proceedings, assuming that she considered that the claim had merit. The right‑thinking person would assume that separate proceedings would involve additional cost and, in all likelihood, further delay. That she did not seek to prosecute her claim in conjunction with the Supreme Court proceedings would lead the right‑thinking person to infer either that the claim lacked merit, or that there was some perceived tactical advantage in not prosecuting her claim at that stage. Such concerns might easily be dispelled by an explanation, but in this case there has been no explanation.
5. Mr Tyne filed an affidavit in which he stated that:

* Ms Marks is his spouse;
* Ms Marks has no relationship with any of the relevant “entities” other than capital units in the Trust, which units are held jointly by Ms Marks and Mr Tyne;
* each of the Trust and Ms Marks sues in its/her own right;
* neither Ms Marks nor the Trust sues on behalf of Telesto;
* in the event that either of them recovers anything in the proceedings, neither will account to Telesto for the amount in question;
* none of the Trust, Ms Marks or Mr Tyne has any meaningful connection to Singapore;
* neither Ms Marks nor Mr Tyne has ever lived there;
* none of the Trust, Ms Marks or Mr Tyne has ever conducted a trade or business in Singapore; and
* Ms Marks was never a party to the Supreme Court proceedings, nor to the proceedings commenced by UBS in Singapore.

1. Mr Tyne’s affidavits were filed on behalf of himself and Ms Marks. They were presumably prepared by Mr Tyne. The right‑thinking person would expect him to have offered some explanation for the fact that Ms Marks had not previously pursued her claim. The right‑thinking person would probably be surprised that Ms Marks did not provide her own affidavit. He or she would consider it to be most unlikely that Ms Marks would have been unaware of the fact that Mr Tyne was suing UBS in the Supreme Court proceedings. If she were looking after her own affairs, she would surely have made it her business to be aware of these matters. If she was not managing her own affairs, then Mr Tyne was probably doing so. In either case, the right‑thinking person would expect that her claim would have been prosecuted in conjunction with the Telesto claim. In these proceedings Mr Tyne and Ms Marks could easily have identified such propositions and answered them, but they chose not to do so. One can only infer that they had no answers.

# BURDEN OF PROOF

1. The Trust and Ms Marks assert correctly that UBS bears the onus of showing an abuse of process. They also submit that it has not discharged that onus. However, when the available inferences are identified and considered, and in the absence of any explanation from either Mr Tyne, Ms Marks or the Trust, there is little difficulty in inferring that both the Trust and Ms Marks decided not to prosecute its or her claim in the Supreme Court proceedings, notwithstanding the shared factual bases of their respective claims and that of Telesto, and their close relationships. The effect of this conduct has been that UBS resisted Telesto’s claim to the point where it was permanently stayed, but now is asked to address closely associated matters. Ms Marks may be in a slightly different position, in that Mr Tyne was not conducting the Supreme Court proceedings on her behalf. However it seems probable that she was aware of the proceedings and of her associated claim. It also seems probable that either Ms Marks or Mr Tyne decided that it was in her, his or their interest or shared interest that she not pursue her case at that time, and that Mr Tyne made a similar decision concerning the Trust’s claim. Whether Mr Tyne or Ms Marks made the decision concerning her claim, she is responsible for the consequences.

# THE NECESSARY EFFECTS

1. All of the claims arising out of UBS’s conduct could have been resolved in 2013. However a decision was taken by the Trust, Ms Marks, and/or Mr Tyne not to permit such resolution. The only real questions are as to whether UBS has suffered, or will suffer manifest unfairness, and whether the administration of justice will be brought into disrepute. There is little difficulty in inferring affirmative answers to both questions. In each case, 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 inconvenience of having to deal with the matter again, after lengthy litigation. Those matters, by themselves, would be likely to bring the administration of justice into disrepute, particularly if the right‑thinking person were to form the view that toleration of the relevant conduct in this case bespoke the general attitude of the courts.

# FINDINGS AT FIRST INSTANCE

1. The primary Judge did not make express findings concerning Ms Marks’s knowledge of the facts constituting her claim, or of the fact that the Supreme Court proceedings were in train. It seems that at first instance, questions concerning her knowledge were not raised. Nor were they raised in the notice of appeal, or in the outline of argument on appeal. It seems that Mr Tyne was content to allow the matter to be decided without reference to such questions. They were, however, raised by this Court in the course of oral submissions on appeal. Had Mr Tyne or Ms Marks wished to assert, at first instance, that she had no such knowledge, it was for him or her to raise the matter. As I have demonstrated, such knowledge is readily inferred from the circumstances to which I have referred. Both Mr Tyne and Ms Marks have refrained from asserting that Ms Marks knew nothing about her case or about the Supreme Court proceedings. I infer that they could say nothing about that subject which would be helpful to Ms Marks’s case or that of the Trust.

# VEXATION

1. There is a tendency for those of us who are regularly engaged in litigation to assume that the parties should find nothing particularly threatening or discomfiting about such engagement. That tendency may be exacerbated where the party in question is a commercial corporation. However there can be no doubt that all litigants must be protected from abuse of process, and that the public’s respect for the judicial process must be maintained. The identity or juridical nature of an affected party must not lead to the toleration of conduct which will bring the administration of justice into disrepute.

# GROUNDS OF APPEAL

1. I turn to the grounds of appeal. Ground 1 is based upon a misunderstanding of the concept of abuse of process. A party may be entitled to commence proceedings, but such commencement and prosecution of the proceedings may still be an abuse of process. In any event, the primary Judge did not find that there was a “bar” to the proceedings. His Honour found that the appellants’ conduct constituted an abuse of process.
2. As to ground 2, the proposition seems to be that proceedings concerning the subject matter of previous proceedings can only be an abuse of process, for that reason, if the earlier proceedings were disposed of on the merits. I have dealt with that proposition.
3. Ground 3 is worded in such a way as to suggest that the primary Judge erred in law by mistaking the burden of proof. However, in effect, the appellants must be saying that having regard to the appropriate standard of proof, there was insufficient evidence to support his Honour’s findings. There is no suggestion that his Honour made any express error in this regard. In my view there was ample evidence to support a finding of abuse of process. Ground 4 seems to be a restatement of grounds 1, 2 and possibly 3.
4. His Honour’s reasons must be seen in the context of the issues raised by the parties for his determination. His Honour spent much time in explaining the history of the litigation. It may be that he has said less about his reasoning than I have inferred. However it seems that the issues raised by the appellants at first instance were very narrow, in the end effectively limited to the assertion that both appellants were entitled to commence proceedings, and that to do so could not be an abuse of process, coupled with reliance on the “heavy” burden of proof borne by UBS and the assertion that it had not been discharged. There is no substance in any of these propositions.
5. I find no error in his Honour’s reasons or orders.

# ORDERS

1. The appeal should be dismissed with costs, including the costs of the application for leave to appeal.

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| --- |
| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett. |

Associate:

Dated: 20 January 2017

REASONS FOR JUDGMENT

JAGOT AND FARRELL JJ:

1. These reasons for judgment explain our conclusion that the appellants should succeed in the appeal, with the consequence that orders the primary judge made on 8 January 2016 permanently staying the proceedings as an abuse of process and requiring the first appellant, Scott Tyne as trustee of the Argot Trust, to pay the costs of the respondent on an indemnity basis, must be set aside.
2. The primary judge’s reasons for making the orders in dispute are to be found in *Tyne (Trustee) v UBS AG (No 3)* [2016] FCA 5; (2016) 236 FCR 1. The reasons of Edelman J for granting leave to appeal from the primary judge’s orders are to be found in *Tyne (Trustee) v UBS AG* [2016] FCA 241.
3. The underlying facts are complex but are not in dispute. Justice Edelman’s summary in respect of the leave application is sufficient for present purposes. Justice Edelman said:

[1] The first applicant is Mr Tyne in his capacity as the sole trustee of the Argot Trust. The previous trustee was ACN 074 971 109 Pty Limited (**ACN 074**). The second applicant is Ms Marks, the spouse of Mr Tyne…

[2] The underlying facts in the Federal Court proceedings have been the subject of litigation across courts in Singapore and New South Wales as well as in this Court. The various pleaded cases involved the same underlying facts. Those pleaded facts, and the findings in Singapore, are meticulously described in the primary judge’s judgment (especially at J [26]–[155], [171]–[180], [262]–[284]). The basic allegations before the primary judge are summarised in very broad terms below…

[3] The pleaded claim before the primary judge involved an investment account held by an entity incorporated in Jersey called Telesto Investments Limited (**Telesto**). Telesto held the investment account with UBS. The applicants alleged that in 2007 and 2008, UBS made representations or gave misleading or negligent advice to Mr Tyne, and breached fiduciary duties owed to the trustee of the Argot Trust, concerning Telesto’s acquisition and retention of Kazakhstan bank bonds. UBS was alleged to have made numerous different representations. These included “expertise representations”, representations concerning bond and market parameters, representations concerning Kazakhstan’s financial regulatory regime, and creditworthiness and attractiveness of those institutions, and representations concerning financial ratios. Some of these representations concerned future matters, which were governed by a regime in the *Trade Practices Act 1974* which is not present in Singapore. The applicants plead that the trustee of the Argot trust acted in reliance upon the representations. They also plead that the estate of the Argot Trust was “diminished and the beneficiaries suffered loss and damage”. Ms Marks also suffered loss as a result of a call upon a guarantee that she gave.

[4] The first of the proceedings were commenced by UBS in Singapore including against Mr Tyne (as guarantor), ACN 074 (as trustee of the Argot trust) and Telesto. [sic – ACN 074, in fact, was not a party to this proceeding]. Mr Tyne and the other defendants unsuccessfully sought a stay of the proceedings. They unsuccessfully appealed. They unsuccessfully sought further leave to appeal. Then they terminated their solicitors’ retainer and elected not to contest the proceedings in Singapore. The proceedings in Singapore were decided against them.

[5] The second of the proceedings were commenced in the Supreme Court of New South Wales by Mr Tyne, ACN 074 (as trustee of the Argot trust) and Telesto. Those proceedings were stayed pending the decision of the High Court of Singapore [see *Telesto Investments Limited v UBS AG* [2012] NSWSC 44; (2012) 262 FLR 119]. The Singaporean court had concluded that there were “no differences of sufficient materiality between the laws of Australia and Singapore on the issues in dispute” and that there was “no legitimate reason for the defendants to pursue the Australian Proceedings” (J [219]). After the temporary stay, Mr Tyne and ACN 074 (as trustee of the Argot trust) discontinued their proceedings in the Supreme Court of New South Wales, leaving only Telesto as plaintiff. After the decision of the High Court of Singapore, the New South Wales proceedings were permanently stayed [see *Telesto Investments Limited v UBS AG* [2013] NSWSC 503].

[6] Subsequently, this proceeding was commenced in the Federal Court. It is common ground that this Federal Court proceeding sought to litigate the same or substantially the same cause of action as ventilated in the New South Wales proceeding…

1. To the extent greater detail than this is required, it may be confined to the following observations.
2. Mr Tyne and ACN 074 (as trustee of the Argot Trust) discontinued the proceedings in the Supreme Court of New South Wales not by filing a notice of discontinuance but, rather, by seeking leave to rely upon a Further Amended Summons which omitted reference to Mr Tyne and ACN 074 (as trustee of the Argot Trust) as parties and their claims. The application for leave was heard on 21 February 2012. On that day, the Court was informed in written submissions of senior counsel for Mr Tyne, Telesto, ACN 074 (as trustee of the Argot Trust) that:

Telesto and Mr Tyne instruct that:

(a) Neither Mr Tyne nor ACN [074 (as trustee of the Argot trust)] continue the New South Wales proceedings;

(b) Telesto will not defend the proceedings in Singapore; and

(c) Telesto will abandon all claims in New South Wales, save for the Trade Practices Act and equivalent statutory claims and the breach of fiduciary duty claims (the Continuing Claims).

1. The respondent, UBS AG (**UBS**), (at least ultimately) did not object to the grant of leave in respect of the Further Amended Summons. In the Supreme Court of New South Wales, Ward J, made this order:

2…I give leave, so far as necessary, to the plaintiffs in these proceedings (the Telesto parties) to file and serve an amended summons…

1. UBS did not seek, and Ward J did not impose, any condition on the grant of leave. On 6 March 2012, pursuant to the grant of leave, a Further Amended Summons was filed which omitted Mr Tyne and ACN 074 (as trustee of the Argot Trust) as parties and deleted all claims by them and by Telesto other than Telesto’s claims for breach of the *Trade Practices Act 1974* (Cth), equivalent alternative statutory claims and the breach of fiduciary duty claims.
2. It follows that, as at 6 March 2012, Mr Tyne and ACN 074 (as trustee of the Argot Trust), were not parties to the proceedings before the Supreme Court of New South Wales.
3. Having dealt with the facts and the applicable principles in a manner which attracts no complaint by the parties, the primary judge set out his consideration of the matter at [376]-[434] of his reasons. He dealt first with the reasons why the doctrines of *res judicata*, issue estoppel and *Anshun* estoppel (*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589) could not lead to the grant of a permanent stay of the present proceedings by Mr Tyne as trustee of the Argot Trust (and by Ms Marks), holding:
4. The trustee of the Argot Trust was not a party to the Singapore 801 proceedings (at [384]). As such, the trustee is not bound by orders made in those proceedings and claims by the trustee could not be defeated by UBS on the grounds of *res judicata* and issue estoppel based on the Singapore proceedings (at [386]). In contrast, claims of Mr Tyne and Telesto against UBS could be defeated by the doctrines of *res judicata* and issue estoppel based on the Singapore proceedings if Telesto or Mr Tyne tried to assert rights of a similar kind to those resolved in the Singapore proceedings (at [387]), but this issue does not arise in the present matter (at [388]), we interpose, because the claims in the current proceedings are by Mr Tyne in his capacity as the trustee of the Argot Trust and by Ms Marks, not by Telesto or Mr Tyne in his personal capacity.
5. Nor can the trustee of the Argot Trust be prevented from making claims against UBS on the ground of issue estoppel merely by reason of findings of waiver, compromise or abandonment of rights by Mr Tyne and Telesto in the Singapore proceedings, given that the trust was not a party to those proceedings (at [389]).
6. “Mr Tyne as the controlling mind of ACN 074 as the trustee of the Argot Trust could have also caused the trustee of the trust to join the Singapore 801 proceedings as a cross-claimant and assert the factual matrix now asserted in the Federal Court proceedings (out of which the claims of Telesto and Mr Tyne also emerge)” (at [394]), but if this had been done those parties would have been subject to some disadvantage in Singapore compared with their position under Australian law (at [395]).
7. The trustee of the Argot Trust is not precluded by the doctrines of “*res judicata* or issue estoppel or an *Anshun* estoppel from maintaining its claims as formulated in the Federal Court proceedings by reason of a final judgment on the merits by Lai J in the proceedings commenced and prosecuted in Singapore to a final hearing against Telesto and Mr Tyne” (at [399]), given that the trustee is not privy in interest with Telesto or Mr Tyne (at [400]).
8. While Mr Tyne as the trustee of the Argot Trust, by this proceeding, is acting in breach of an injunction granted by the High Court of Singapore, that fact is not determinative of the trustee’s “right to engage the relevant jurisdiction of an Australian Court on a justiciable question within that Court’s jurisdiction; agitate a particular controversy of fact and law in that Court; and seek a remedy in resolution of a particular controversy which would quell that controversy” (at [404]).
9. Given that the injunction was made in aid of the integrity of the Singapore 801 proceedings by UBS against Mr Tyne and Telesto, to which the trustee of the Argot Trust was not a party, it is not the case that “the trustee of the Argot Trust is to be forever deprived of the opportunity to make its claim, assert its legal interests, and have a hearing on the merits before a court of competent jurisdiction in Australia” (at [407]). Apart from the fact that the trustee was not a party to the Singapore 801 proceedings, the trustee, on behalf of the trust, was “asserting a different legal interest to that of Telesto and Mr Tyne, the parties to the Singapore 801 proceedings” (at [408]). These circumstances do not operate to “deprive the trustee of an opportunity to commence and prosecute a claim properly engaging the jurisdiction of a relevant Australian Court if it is proper to do so” (at [409]).
10. As the trustee of the Argot Trust is not privy in interest with Telesto, the permanent stay of the proceedings in the Supreme Court of New South Wales cannot give rise to a *res judicata* or issue estoppel against the trustee (at [410]). Nor, for the same reason, can any *Anshun* estoppel arise against the trustee (at [411] and [412]).
11. UBS does not contend that the primary judge erred in rejecting its arguments to the contrary.
12. The primary judge then said at [413] that the position is different in respect of the doctrine of abuse of process. He continued:
13. Mr Tyne is and was the directing mind of ACN 074 as trustee of the Argot Trust and is now the trustee of the Argot Trust. Mr Tyne caused ACN 074 as trustee of the Argot Trust to discontinue its claims against UBS in the proceedings in the Supreme Court of New South Wales (at [414]). The trustee of the Argot Trust chose not to bring, agitate or maintain its claims in those proceedings in circumstances where the Supreme Court of New South Wales had jurisdiction to determine those claims and when it “could have done so and should have done so” (at [416]). Before the discontinuance of the claims ACN 074 as trustee of the Argot Trust (and Mr Tyne and Telesto) had:

asserted that UBS had contravened Federal and State legislation giving rise to causes of action in the trustee of the Argot Trust and had breached common law duties owed to the trustee and breached fiduciary duties owed to the trustee. All of those claims arose out of a common substratum of fact and the formulation of the proceedings in the Federal Court of Australia is very substantially in the same terms as the factual contentions asserted in the SCNSW proceedings.

(at [417]).

1. Had ACN 074 as trustee of the Argot Trust brought its claims in the Supreme Court of New South Wales proceedings, its claims could not have been defeated by *res judicata*, issue estoppel or *Anshun* estoppel (at [418]). The trustee also would not have suffered any of the kind of juridical disadvantage that it would have suffered by joining the Singapore 801 proceedings if it had made those claims in the Supreme Court proceedings. “The trustee would, of course, have had to “rejoin” those proceedings having earlier elected, without objection from UBS, to discontinue its participation in those proceedings” (at [419]).
2. As such:

There is no doubt that the trustee of the Argot Trust could and should have brought its claims in the SCNSW proceedings. It had every opportunity to do so. There is no proper explanation of why it chose not to do so.

(at [421]).

1. “The entire factual matrix was before the Supreme Court of New South Wales and three parties had chosen to invoke the jurisdiction of the Supreme Court to agitate claims” (at [422]).
2. The trustee of the Argot Trust “does not have an unqualified and absolute right to a trial of its claims on the merits, regardless of any other considerations. It has, without any doubt, a right to an opportunity to have a hearing on the merits on which it can present evidence and arguments to establish the factual foundation for its claims and the legal framework within which those claims are to be made good” (at [423]). Further [at [424]):

The trustee had that opportunity and it chose not to exercise that opportunity, no doubt according to decisions made by the guiding mind of the trustee, Mr Tyne. I am satisfied that the claims now made by the trustee in these Federal Court proceedings should have been raised in the SCNSW [Supreme Court of New South Wales] proceedings if they were to be raised at all. Bringing the proceedings now, raising as they do, substantial complex questions of fact and law with which UBS has been vexed before, is an abuse of the processes of the Federal Court of Australia. I am satisfied that the proceedings commenced by the trustee should be permanently stayed.

1. Ms Marks’ claim is “in every sense a derivative claim in that it is entirely reliant for its foundation of fact and its related reliance loss formulations upon the events which occurred by reason of the entire portfolio of misrepresentations said to have been made by UBS to Mr Tyne” (at [426]). Ms Marks is the partner of Mr Tyne (at [427]). Therefore:

[427] …I am satisfied that the claims made by Ms Marks as formulated in the amended statement of claim in these proceedings is a claim which could and should have been brought along with the claim by the trustee in the SCNSW proceedings. That Court had jurisdiction to hear the claims, was seized with the proceeding and was seized with all of the foundation factual matters which were required to be ventilated and ultimately made the subject of findings in that proceeding.

[428] I am satisfied that the claims by Ms Marks could have and should have been brought in the SCNSW proceedings.

[429] I am satisfied that the joinder of the claims by Ms Marks in the Federal Court proceedings is an abuse of this Court’s processes and that the proceedings commenced by Ms Marks must also be stayed.

1. The appellants, Mr Tyne as trustee of the Argot Trust and Ms Marks, contend that the primary judge erred in reaching his conclusions that their bringing of this proceeding constitutes an abuse of process. UBS does not contend that the primary judge’s decision is supportable on grounds other than those identified by the primary judge.
2. We do not agree with UBS that the primary judge gave weight to the Singapore proceedings in deciding that the current proceeding constituted an abuse of process. In our view, the primary judge’s reasons for deciding that the current proceeding constituted an abuse of process are confined to the circumstances of the proceedings in the Supreme Court of New South Wales. UBS did not file a notice of contention. Accordingly, it was not open to UBS to rely on the Singapore proceedings as a relevant matter to support the decision of the primary judge. In any event, we consider it clear from the primary judge’s reasons that the existence and outcome of the Singapore proceedings which were taken by UBS against Mr Tyne and Telesto could not found any claim that the current proceedings by Mr Tyne as the trustee of the Argot Trust and Ms Marks constituted an abuse of process.
3. We accept UBS’s submission that the relevant principles to be applied on appeal are identified in *Ghosh v NineMSN Pty Ltd* [2015] NSWCA 334 at [37] in these terms:

A determination that an abuse of process has occurred is not strictly a discretionary decision. Rather, it is an evaluative decision of a subjective nature, regarding an issue upon which minds may differ (*Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; 226 CLR 256 at [7]). Nevertheless, appellate court intervention depends upon satisfaction of the same principles that apply in respect of discretionary decisions (ibid, *Singer v Berghouse* [1994] HCA 40; 181 CLR 201 at 212). These are the principles stated in *House v R* [[1936] HCA 40; 55 CLR 499], which require, 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” (at 505).

1. These observations reflect the statement in *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378 at 398-399 that:

…the different conclusions reached by Gleeson CJ and Kirby P on the one hand and Mahoney JA on the other indicate, the comparative weight to be given to particular considerations and factors in that weighing process and the ultimate outcome of it involved a substantial element of individual judgment. In our view, the conclusion reached by the majority of the Court of Appeal was clearly open in all the circumstances of this quite exceptional case. That being so, and in the absence of identified error of law or fact, it is no part of the function of this Court to repeat that weighing process for the purpose of determining whether it would reach the same conclusion as that reached by the majority of the Court of Appeal.

1. We note that in the present case the primary judge’s conclusion did not depend on the weighing of a multiplicity of potentially conflicting factors. As explained above, the primary judge’s conclusions depended on six key matters.
2. **First**, Mr Tyne was and is the controlling mind of the trustee of the Argot Trust.
3. **Second**, Ms Marks is married to Mr Tyne.
4. **Third**, there were proceedings in the Supreme Court of New South Wales in which the trustee of the Argot Trust and Telesto, a company Mr Tyne also controlled, made allegations against UBS.
5. **Fourth**, the claims now sought to be advanced by the trust and Ms Marks arise from the same facts as pleaded in the Supreme Court proceedings.
6. **Fifth**, insofar as the trust is concerned, it was a party to the Supreme Court proceedings but discontinued its claims.
7. **Sixth**, the trust and Ms Marks could have made the claims they now seek to advance in the Supreme Court proceedings without being at risk of those proceedings being stayed (in contrast to the position of Telesto in those proceedings) and without suffering any juridical disadvantage compared to making those claims in new proceedings in this Court.
8. UBS submitted that the claims now sought to be made by Mr Tyne as trustee of the Argot Trust are inconsistent with the claims made by Telesto in Supreme Court proceedings. UBS said that it prosecuted its application for a permanent stay of Telesto’s claims in the Supreme Court proceedings on the basis Telesto then pleaded that Telesto had suffered loss as a result of its purchase of the disputed bonds (being the purchase price and related expenses of purchase), and as a result of margin calls by UBS requiring reduction of a debt facility by which Telesto had purchased the bonds. In the proceeding in this Court, however, Mr Tyne as trustee of the Argot Trust alleges that the Argot Trust lent securities (for example, shares in BHP) to Telesto and acquiesced in those securities being pledged to UBS in support of arrangements between the Zurich and Singapore branches of UBS, resulting in the Singapore branch making the debt facility available to purchase the bonds and subsequently in those securities being used to support margin calls on the debt facility.
9. This contention, however, does not feature as a relevant factor in the primary judge’s conclusions. The primary judge’s conclusion, insofar as relevant to this point, is based on the circumstance that all of the claims, of Telesto and the trust (before they were discontinued) in the Supreme Court proceedings, and of the trust and Ms Marks in the current proceeding, “arose out of a common substratum of fact” (at [417]). Far from finding inconsistency, the primary judge considered that “the formulation of the proceedings in the Federal Court of Australia is very substantially in the same terms as the factual contentions asserted in the SCNSW proceedings” (also at [417]). It is not unorthodox for the one set of facts to give rise to the potential for multiple separate claims.
10. As noted, UBS did not seek to rely on a notice of contention to rely on inconsistency between the case as pleaded in the Supreme Court of New South Wales and in this Court as a matter in support of the finding of abuse of process. In any event, we are not persuaded that there is inconsistency. Rather, there are additional matters pleaded in this Court. The loss is not said to be Telesto’s loss of the purchase price and related costs of acquiring the bonds, but the trust’s loss of Telesto’s capacity to satisfy Telesto’s obligations under the securities lending arrangement. Ms Marks’ loss is said to arise from Telesto being unable to satisfy its indebtedness to the ANZ Bank for a loan and under a guarantee so that Ms Marks was called upon as guarantor of the obligations of Telesto to the bank.
11. What is apparent is that the claims in the Federal Court arise from the same substratum of fact as pleaded in the Supreme Court of New South Wales and could have been pleaded in those proceedings.
12. What we do not accept is UBS’s submission that the reasoning of the primary judge represented nothing more than an orthodox application of the principles in *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; (2015) 89 ALJR 750 (***Tomlinson***). The High Court said this in *Tomlinson* about abuse of process:

[25] Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in 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. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.

[26] Accordingly, 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. 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.

1. The propositions in [26] are supported by references to *Walton v Gardiner* (1993) 177 CLR 378 at 393, *O’Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315; (2013) 85 NSWLR 698 at [99]–[111], *Reichel v Magrath* (1889) 14 App Cas 665 and *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [25].
2. There is no suggestion in [25] and [26] of the High Court’s reasons that it was doing more than summarising the effect of the decisions which it cited. We turn now to this issue – the effect of the cited decisions.
3. In *Reichel v Magrath,* Mr Reichel was the plaintiff in a suit against the Bishop of Oxford in which he sought a declaration that he was the vicar of a certain vicarage. Mr Reichel’s suit was dismissed on the ground that he had resigned as vicar with the Bishop’s consent. In the subsequent proceedings, Mr Magrath, having been appointed vicar of the vicarage, brought a suit claiming a declaration that he was the vicar and an injunction to restrain Mr Reichel from depriving him of the use of the house and lands of the vicarage. Mr Reichel sought to defend that suit on the same basis on which he had instituted, and failed, in his own initial suit. The House of Lords characterised Mr Reichel’s defence as an abuse of process, with the consequence that the defence was struck out.
4. In *Walton v Gardiner* at 392-393, the High Court said:

The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness…

Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings [See, e.g., *Reichel v Magrath* (1889) 14 App Cas 665, at 668; *Connelly v DPP* [1964] AC 1254, at 1361-1362]. The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [[1982] AC 529, at 536] as “the 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”.

1. In *O’Shane v Harbour Radio*,Beazley P, with whom McColl JA and Tobias AJA agreed, referred to *Walton v Gardiner* and *Reichel v Magrath* as authority for the proposition that an attempt to “litigate anew a case which has already been disposed of by earlier proceedings” may be an abuse of process even if the circumstances do not give rise to an estoppel. President Beazley’s summary of the relevant principles continued:

[101] It is apparent from the judgments of Mason CJ, Deane and Gaudron JJ in *Jago v District Court of New South Wales* [[1989] HCA 46; 168 CLR 23] that central to the question of abuse of process is the “public interest in the due administration of justice” and the public interest “in the maintenance of public confidence in the administration of justice”: see Mason J at 30, citing the New Zealand Court of Appeal in *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481. Gaudron J, at 74, referred to the court’s inherent power to control its own processes, noting that the classes of case where the court should do so was not closed and that the court may exercise its inherent powers “as and when the administration of justice demands”.

[102] The High Court in *D’Orta-Ekenaike* [*D’Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12; (1992) 223 CLR 1], at [74], in the context of advocate’s immunity, also referred to the circumstances where an abuse of process may arise:

Questions of abuse of process can be relevant to the present issue only if it is accepted that there are, or may be, circumstances in which the result reached in earlier litigation should not be impugned. The circumstances in which proceedings might be classified as an abuse of process have been described in various ways. In *Hunter v Chief Constable of the West Midlands Police* [[1982] AC 529], to which extensive reference was made in the speeches in *Arthur J S Hall v Simons* [[2002] 1 AC 615], Lord Diplock spoke of abuse of process as a misuse of a court’s procedure which would “be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people”. In *Rogers v R* [[1994] HCA 42; (1992) 181 CLR 251], Mason CJ observed of Lord Diplock’s speech that, with what had been said in this Court, it indicated:

that there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute. (citations omitted).

[103] In *Batistatos v Roads and Traffic Authority of New South Wales; Batistatos v Newcastle City Council* [2006] HCA 27; 226 CLR 256, the plurality (Gleeson CJ, Gummow, Hayne and Crennan JJ) at [15] accepted as correct the statement of McHugh J in *Rogers v R* [1994] HCA 42 ; 181 CLR 251, at 286, that:

Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court’s procedures are invoked for an illegitimate purpose; (2) the use of the court’s procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court’s procedures would bring the administration of justice into disrepute.

[104] Their Honours, at [15], also quoted with approval McHugh J’s further comment in *Rogers*, at 286, that whilst in most cases an abuse of process involved the commencement of proceedings, there could be an abuse of process in relation to any procedural step taken in the course of proceedings that had been properly commenced. See also *PNJ v R* [2009] HCA 6; 83 ALJR 384, at [3].

[105] The relevance, for present purposes, of an abuse of process not being dependent upon the existence of an estoppel, is that a court may intervene to prevent an abuse, notwithstanding that the subsequent proceedings are not between the same parties or their privies. As the authorities state, the court will act upon an abuse of process where the use of the court’s procedures would bring the administration of justice into disrepute.

[106] *State Bank of New South Wales Ltd v Stenhouse Ltd* (1997) Aust Torts Rep 81-423 (64,077) [(***Stenhouse***)]involved an attempted re-litigation of an issue that had already been decided between the plaintiff and a third party in an earlier proceeding. Factors considered, at 64,089, by Giles CJ Comm D in determining whether there was an abuse relevantly included: the importance of the issue in and to the earlier proceedings; the terms and finality of the finding as to the issue sought to be relitigated; the identity between the relevant issues in the two proceedings; the extent of the oppression and unfairness to the other party if the issue is relitigated, the impact of the re-litigation upon the principle of finality and on the public confidence in the administration of justice; as well as the overall balance of justice between the parties.

[107] The abuse was not made out in *Stenhouse*. However, the approach of Giles CJ Comm D was approved by this court in *Rippon v Chilcotin* [2001] NSWCA 142; 53 NSWLR 198 per Handley JA at [32] (Mason P and Heydon JA agreeing). See also *Haines v Australian Broadcasting Commission* (1995) 43 NSWLR 404. The importance that there be an identity of issues was emphasised in *R v O’Halloran* [2000] NSWCCA 528; 159 FLR 260 at 293 per Heydon JA (Spigelman CJ and Mason P agreeing).

[108] United Kingdom authority is to the same effect, as is apparent from the High Court’s references to such decisions dating back to *Reichel v Magrath*. The position is the same in Canada. In *Toronto (City) v CUPE Local 79* [2003] 3 SCR 77; SCC 63, Arbour J (all members of the court concurring) stressed that the motives of a party in seeking re-litigation of an issue are irrelevant. Rather, the emphasis must be upon the integrity of the adjudicative process. As her Honour stated, at [46]:

… [motive in bringing proceedings] is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not, in itself, an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms, such as appeals or judicial review. Indeed, reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum.

Her Honour added that there was no reason to constrain the doctrine of abuse of process to cases where a plaintiff had initiated the re-litigation.

[109] The cases discussed above involved either the same parties to the earlier litigation or at least one of the parties who had been involved in the earlier litigation and who, in those earlier proceedings, had lost the issue to be relitigated in the subsequent proceedings. This particular aspect of the authorities was reviewed by Heydon JA in *O’Halloran*, especially at [101] ff. His Honour observed, at [103], that “[t]here cannot be ‘re-litigation’ if there has not been litigation”. Insofar as that was relevant to the circumstances in *O’Halloran*, his Honour stated that a non-party to civil proceedings, such as the DPP, was not necessarily precluded from bringing criminal proceedings in which an issue, litigated in earlier civil proceedings, was also in issue. Earlier, at [98], his Honour, having noted that the identity of the parties in the proceedings before the court and the earlier proceedings was different, stated:

Though the position in relation to parties is not by itself the reason why I would reject the appellant’s argument, it does create certain difficulties for the appellants.

[110] The point in the two observations, as I would understand it, was in the distinction between the parties, not being the same, which may not be a disqualification to finding an abuse, as compared to a requirement that there be a relevant earlier proceeding to which one party, said to be the author of the abuse in the later proceedings, was also a party. It is apparent, however, that his Honour did not have in contemplation the circumstance which has arisen here, where one party seeks to rely upon findings made by a judicial officer in particular proceedings to prove a defence of truth.

[111] The authorities also state that the power to stay proceedings permanently on the ground that they are an abuse of process should be exercised with caution: *Moore v Inglis* (1976) 50 ALJR 589, at 593 and only in the most exceptional or extreme case: *Walton v Gardiner* [1993] HCA 77 ; 177 CLR 378, at 392, per Mason CJ, Deane and Dawson JJ (approving the Court of Appeal’s formulation of the test in *Gill v Walton* (1991) 25 NSWLR 190). The onus of satisfying the court that there is an abuse of process lies upon the party alleging it and that the onus is “a heavy one”: *Williams v Spautz* [1992] HCA 34; 174 CLR 509, at 529, per Mason CJ, Dawson, Toohey and McHugh JJ.

1. The circumstances in *Stenhouse* were that Swiss Bank had sued State Bank for moneys transferred by Swiss Bank to State Bank and thence by State Bank to the purported customer, the transaction having been infected by fraud. State Bank brought proceedings against its insurer and broker claiming that its liability to Swiss Bank was covered by its policy of insurance. The insurer (CE Heath) and broker (Stenhouse) sought to strike out that part of the proceedings on the ground that it had been determined against State Bank in the proceedings with Swiss Bank. Relevantly, State Bank had notified Swiss Bank’s claim to its insurers and thus there arose an issue “whether the insurers would assume the conduct of State Bank’s defence, whether the insurers would in some other way be bound by what occurred in the Swiss Bank proceedings, and in particular whether the insurers should be joined as cross-defendants in those proceedings” (at 64,081). In the event, “[t]hroughout the hearing of the Swiss Bank proceedings before Rogers J proceedings 50645 of 1990 [State Bank’s proceedings against Stenhouse] were treated as before the Court for directions. The insurers only attended, by Mr Hill (who seems to have come to act for all the insurers), for a small part of the hearing, but Stenhouse attended, by counsel or solicitor, on a large number of hearing days. So far as appears neither the insurers nor Stenhouse became involved in the presentation of evidence” (at 64,084).
2. Following the judgment, in which Swiss Bank succeeded on a claim of unjust enrichment but not negligence (which was not decided), the insurer notified State Bank that it denied indemnity under the policy. State Bank appealed. Swiss Bank filed a cross-appeal and a notice of contention to the effect that it also ought to have succeeded in negligence. The insurer and Stenhouse, the broker, sought leave to be joined to the appeal. Their applications were not decided. The Court of Appeal upheld the conclusion of unjust enrichment and did not decide the negligence issue. State Bank sought special leave to appeal to the High Court, which was refused. Thereafter, State Bank commenced the proceedings against the insurer and revived the proceedings against Stenhouse, the broker. Giles JA noted that “there may be abuse of process warranting a stay where a party seeks to relitigate an issue decided between himself and a third party”, referring to *Reichel v Magrath* amongst other cases. One of the other cases referred to by Giles JA is *In re Thomas Christy Ltd (in liquidation)* (1994) 2 BCLC 527. As Giles JA explained at 64,087:

Manson, the former managing director of a company in liquidation, sought to prove in the liquidation for a sum representing his claim for wrongful dismissal. In earlier proceedings, on an application by the Secretary of State for his disqualification as a director he had been found unfit to be concerned in the management of a company by reason of particular conduct. The conduct as found would have justified his summary dismissal. It was held that Manson could not relitigate his conduct: Jacob J said (at 537) – “... I formed the clear view that to allow re-litigation of the service contract issue would be an abuse of process. It would in the words of Lord Diplock ‘bring the administration of justice into disrepute amongst right-thinking people’. The Companies Court of the Chancery Division of the High Court has found, after a full trial, Mr Manson guilty of the five wrongful acts specified above. To allow re-litigation of those before the self-same court would seem absurd to Joe Citizen who through his taxes pays for the courts and whose own access to justice is impeded by court congestion. Doing a case twice over would make no sense to him: all the more so if he was told that the costs of this would in all likelihood be borne by innocent creditors of the company which Mr Manson ran.”

1. Another case to which Giles JA referred at 64,088 is *Haines v Australian Broadcasting Corporation* [1995] NSWSC 136; (1995) 43 NSWLR 404 in which:

Haines sued three defendants for defamation. Two of the defendants were not served. On the separate decision of the question pursuant to Pt31 r2 of the Rules, it was held that the matter complained of could not convey the defamatory imputations alleged. Haines then amended to continue against only one of the unserved defendants and a new party, no longer for defamation but for injurious falsehood and misleading or deceptive conduct. The representation on which he relied for these purposes was no different in substance from the imputation which had earlier been rejected. On application by the new party, it was held that the proceedings against the new party would have been struck out as an abuse of process but for the proffering of a changed and substantially different representation. Hunt CJ at CL said – “There are obviously limitations to striking out pleadings or causes of action as an abuse of process upon the basis in *Riechel v Magrath* and elaborated in the cases to which I have referred. The issue determined in the earlier case which is sought to be litigated in the later case must be one which the party propounding it in the latter lost in the former. The principle does not work in reverse to enable the party who won the issue in the earlier case to prevent it being litigated in the later proceedings by someone who was not a party in the former. It must be an issue which was necessarily determined in the earlier case, and one of importance to the final result. It must have been properly argued - by which I mean that it is readily apparent from whatever records there are of the earlier case that the tribunal which decided it was an appropriate one to do so, that the parties were appropriate contradictors and that the issue was regarded by them as one of importance in that case. In normal circumstances, the decision disposing of the issue must have been a final one - by which I mean that it is not subject to appeal. There may also be circumstances in which, notwithstanding the absence of an appeal, it is clear that the earlier decision has overlooked some binding authority, or that it has caused the unsuccessful party a manifest injustice. As most of the cases have emphasized, all the circumstances of the determination in the earlier case may be considered, and there can be no definitive statement of the circumstances which will inevitably lead to a finding of abuse of process.”

1. Giles JA at 64,088 said that he had:

…some difficulty with the statement that the issue determined in the earlier case must be one which the party propounding it in the latter lost in the former. In *Rogers v The Queen* Rogers won in the earlier case, and the rationale for finding abuse of process in relitigation of an issue already decided is not dependent - although its relevance and significance may be affected by - whether the alleged abuser won or lost in the earlier litigation. His Honour may have meant, as the sentence following the statement suggests, that there will not be abuse of process if someone not a party to the earlier case wishes to re-litigate an issue decided in that case in favour of the opposite party.

1. Giles JA also referred at 64,088 to *South Australian Housing Trust v State Government Insurance Commission* (1989) 51 SASR 1 in which:

the insured had been found liable to a child injured as a result of a defective gas stove. It had been found that the insured was notified of the dangerous nature of the defect prior to the injury being sustained. The insured then sued the insurer for indemnity. The insurer alleged that the insured had breached a condition of the policy requiring that it take reasonable precautions to prevent injury and maintain appliances. Lunn AJ held that the insured was bound by essential findings of fact in the earlier proceedings, that it would be an abuse of process to depart from them, and so that the insured could not contest knowledge of the dangerous nature of the defect: together with other evidence, that meant breach of the condition. On appeal, it was accepted that the jurisdiction to prevent abuse of process could be invoked to preclude a party from relitigating matters previously decided against him (*Reichel v Magrath*, *Hunter v Chief Constable of the West Midlands Police*, and *R v Balfour, ex parte Parkes Rural Distributions Pty Ltd* (1987) 76 ALR 256 were cited), but it was held that there was no abuse of process. Three reasons were given. First, the issues in the two cases were different: in one the issue was the duty of care owed to the child, in the other the issue was the different area of reasonableness as between insured and insurer (see *Fraser v BN Furman (Productions) Ltd* (1967) 1 WLR 898 at 905). Secondly, the relevant findings were of intermediate facts, not an ultimate issue. Thirdly, applying the doctrine of abuse of process would, for reasons given, produce an artificial and capricious result, such that there were “strong considerations of reason and justice” in favour of permitting the insured to depart from the earlier findings.

1. Giles JA concluded at 64,089 in these terms:

It is apparent from this brief review of the decisions that whether proceedings are, or an aspect of proceedings is, an abuse of process because a party seeks to relitigate an issue already decided depends very much on the particular circumstances. The guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the system of administration of justice, and amongst the matters to which regard may be had are - (a) the importance of the issue in and to the earlier proceedings, including whether it is an evidentiary issue or an ultimate issue; (b) the opportunity available and taken to fully litigate the issue; (c) the terms and finality of the finding as to the issue; (d) the identity between the relevant issues in the two proceedings; (e) any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceedings; all part of - (f) the extent of the oppression and unfairness to the other party if the issue is relitigated and the impact of the relitigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and (g) an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process.

1. Two matters should be noted.
2. **First**, the cases discussed above do not involve a finding of an abuse of process against a person who was not a party to an earlier proceeding. There are such cases. In *Angeleska (Known as Slaveska) v State of Victoria* [2015] VSCA 140 the plaintiff, Ms Slaveska, was prevented from litigating her claims by reason of the doctrine of abuse of process. Ms Slaveska had been appointed as her husband’s litigation guardian. In that capacity she prosecuted a claim on her husband’s behalf. Relevantly, it was said (at [175]) that:

Mrs Slaveska was deeply involved in her husband’s proceeding, first as his McKenzie friend and later as his litigation guardian. In his proceeding, among other tasks, she gave evidence as a witness, cross-examined other witnesses and drafted submissions. Much of what she said and did is now proposed to be repeated. Although Mrs Slaveska was not a party to her husband’s proceeding, she had a detailed knowledge of his case, and was better acquainted with it than almost any other person, as Kyrou J found. We consider that the extent of her involvement in her husband’s proceeding is a special factor enabling her claims to be characterised as an attempt to re-litigate issues determined in that proceeding notwithstanding that she was not a party to it.

1. It will be apparent from this that the husband’s claim was heard and determined on its merits. Indeed, the length of the hearing, at 115 days, was found to be in part a result of Ms Slaveska’s lack of legal training and unreasonable conduct. The Victorian Court of Appeal said (at [170]):

As Kyrou J observed in the passage set out earlier, the very great length of the trial in Mr Slaveski’s proceeding was due at least in part to Mrs Slaveska’s conduct and her lack of legal training. His Honour found that Mr Slaveski’s trial considerably exceeded the time that was reasonably required to deal with the issues in the proceeding. As his Honour also made clear, Mr Slaveski’s proceeding was not only inefficient, but it repeatedly descended into farce, with both Mr Slaveski and Mrs Slaveska behaving improperly towards witnesses and towards the Court. His Honour made significant allowances in favour of both Mr Slaveski and Mrs Slaveska in the interests of advancing the proceeding as efficiently as possible. Nevertheless, aspects of Mr Slaveski’s conduct at trial resulted in a contempt of court conviction.

1. In addition, at [172], the Court noted that:

Even leaving Mr Slaveski’s conduct to one side, it is clear that the way in which Mrs Slaveska conducted her husband’s proceeding added to the inherent strain of that proceeding on the defendants. In view of this history, it may be fairly assumed that her proceeding, too, will be considerably more burdensome on the respondents than ordinary litigation.

1. Having regard to these (and other) circumstances, the Court considered the circumstances to be “extraordinary” (at [174]) and was satisfied that to permit Ms Slaveska to maintain her proceedings, involving claims against the same defendants arising from the same facts as her husband’s claims which had been heard and dismissed on the merits, would involve unfair oppression of the defendants and thus be an abuse of process (at [173]-[175]).
2. In *Kermani v Westpac Banking Corporation* [2012] VSCA 42; (2012) 36 VR 130, the earlier proceedings were between the bank and a company. The proceedings were heard and determined on the merits; the bank was successful. Dr Kermani, who controlled the company with her husband, then brought her own proceedings which were the same as those disposed in their earlier litigation involving the company. Dr Kermani’s proceedings were stayed as an abuse of process. On the appeal Robson AJA (with whom Neave and Harper JJA agreed) observed as follows:

[112] In considering abuse of process where second proceedings are taken raising the same or similar issues, it is not necessary that the plaintiffs or claimants be the same, if they are otherwise connected. In *Johnson v Gore Wood & Co* [[2002] 2 AC 1] Lord Bingham said [at 32]:

Two subsidiary arguments were advanced … in the courts below and rejected by each. The first was that the rule in *Henderson v Henderson* … did not apply to Mr Johnson since he had not been the plaintiff in the first action … In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. [The company] was the corporate embodiment of Mr Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company’s action, or to issue proceedings in tandem with those of the company, he had power to do so.

[113] This principle was cited with approval by Handley AJA in *Champerslife Pty Ltd v Manojlovski* [[2010] NSWCA 33; (2010) 75 NSWLR 245]. Handley AJA went on to say [at [114]]:

That decision is hardly surprising. Earlier proceedings by one litigant could not make later proceedings by another an abuse of process unless there was a relevant connection between the litigants. Since the issue was abuse of process realities must be relevant. The ‘broad merits-based judgment’ excluded any narrow or artificial approach.

[114] The “broad, merits-based judgment” is a reference to the approach adopted by Lord Bingham in *Johnson v Gore Wood & Co* that was also referred to by her Honour in this case. His Lordship said [at 31]:

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 … 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 would 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. 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 … 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.

1. In *Ann Street Mezzanine Pty Ltd (in liq) v Beck* [2009] FCA 333; (2009) 175 FCR 532 Finkelstein J said:

[33]…if a person stands by and waits to see the outcome of a case in which he has a distinct interest without making himself a party, he is be bound by the result and is not allowed to re-open the issue in another piece of litigation. This principle is derived from the speech of Lord Penzance in *Wytcherley v Andrews* (1871) LR 2 P&M 327 at 328; cited with approval in *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95 at 102.

[34] More generally, it may be accepted that any attempt to re-litigate an issue may be an abuse. But there must be some “special reason” that prevents a person raising an issue that has been decided by another court but by which he is not strictly bound: *Bragg v Oceanus Mutual Underwriting Assn (Bermuda) Ltd and CE Health & Co (Marine) Ltd* [1982] 2 Lloyd’s Rep 132, 138. Hence, *in Bradford & Bingley Building Society v Seddon Hancock* [1999] 1 WLR 1482 at 1492 Auld LJ said the mere attempt to re-litigate does not necessarily give rise to an abuse of process. Some additional element is required, such as a collateral attack on a previous decision as in Hunter, some dishonesty, or successive actions amounting into unjust harassment: Bradford at 1493.

1. Some care must be taken in respect of the notion that merely standing by and waiting to see the outcome of a case in which the non-party has an interest, without more, involves an abuse of process. *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95 involved title to land in West Africa. Title to the same land had been determined in an earlier proceeding. Lord Denning (at 101 – 103) said:

English law recognizes that the conduct of a person may be such that he is estopped from litigating the issue all over again. This conduct sometimes consists of active participation in the previous proceedings, as, for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. If the tenant loses the action, the landlord would not be allowed to litigate the title all over again by bringing an action in his own name. On other occasions the conduct consists of taking an actual benefit from the judgment in the previous proceedings, such as happened in *In re Lart, Wilkinson v. Blades* [[1896] 2 Ch 788]*.* Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley v. Andrews* [(1871) LR 2 P&M 327, 328]. The full passage is in these words:

"There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened."

Mr. Phineas Quass argued before their Lordships that the principle stated by Lord Penzance was confined to wills and representative actions and has never been extended further.

…

[The principle] may have been found appropriate in England only in special conditions. But there is no reason why in West Africa it should not be applied to conditions which are found appropriate for it there, but which have no parallel in England. It seems to be the recognized thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties. On other occasions they regard the named party as their champion and support him by giving evidence. If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences. It is now 25 years ago that the Chief Justice drew attention to this way of looking at litigation: see *Yode Kwao v. Kwasi Coker* [(1931) 1 WACA 162, 167], *Appoh Ababio v. Doku Kanga* [(1932) 1 WACA 253]. It has led the Court of Appeal in West Africa to look for a principle to meet the situation and they have found it in the principle stated by Lord Penzance: see *Akwei v. Cofie* [(1952) 14 WACA 143].

1. Having reviewed these and other decisions in *Re HIH Insurance Ltd (in liq; De Bortoli Wines (Superannuation) Pty Ltd v McGrath* [2014] NSWSC 774; (2014) 101 ACSR 1 Brereton J identified the relevant principle in these terms at [78]:

…a person who was not party to earlier proceedings may nonetheless also be precluded from maintaining later proceedings in respect of substantially the same subject matter, even though not in privity in the strict sense with the unsuccessful party in the earlier proceedings, if the person is sufficiently identified with a party to the earlier proceedings, and it was unreasonable to stand by and allow the earlier proceedings to be determined without intervening. This is a form of *Anshun* estoppel; so that where a given matter becomes the subject of litigation and adjudication, the court requires not only that the parties bring forward their whole case, but also that other persons with notice of the claim who have a sufficient interest in the subject matter and a sufficient identification with a party, to do so. One relevant type of identification with a party is where the party controls, or is controlled by, the other person. Consistent with *Anshun*, proceedings will be precluded only where it was unreasonable for the other person not to intervene in the earlier proceedings.

1. In that case, the earlier proceedings said to found an abuse of process had been brought by a company known as DBWines. Brereton J distinguished between the positions of the two plaintiffs who were seeking to re-litigate an issue determined against DBWines in these terms:

[79] DBSuper was not controlled by, and did not control, DBWines; nor is it established that the underlying beneficial interests in them were the same. Neither had any legal, or even financial, interest in the success or failure of the other’s claim. Moreover, given that DBSuper’s claim against HIH had been admitted, and that the accessorial liability of the subsidiaries was not in issue in the DBWines case, there was no occasion for DBSuper to intervene in the DBWines proceedings; in other words, it was not unreasonable for DBSuper to refrain from intervening in the DBWines case. In the light of the contemporaneous exchanges between the solicitors, it cannot be said that there was acquiescence in the DBWines case being treated as a vehicle for the determination of the DBSuper claim against the subsidiaries, or any aspect of it. DBSuper is not precluded by estoppel from maintaining its claim in these proceedings and it is not an abuse of process for it to do so.

[80] Aabrofay, on the other hand, is controlled by DBWines. DBWines as a shareholder has a financial interest in Aabrofay’s claim. Aabrofay’s principal claim, which had not been adjudicated, was against HIH, which corresponded with the DBWines claim. DBWines had included Aabrofay’s claim in its original proof. Aabrofay had been reinstated, and its claim lodged in its own name, prior to the hearing of the DBWines proceedings. Evidence pertaining to the Aabrofay acquisitions of HIH shares was given in the DBWines proceedings. There appears to have been no such agitation on the part of Aabrofay for early adjudication prior to determination of the DBWines proceedings as there was in the case of DBSuper. DBWines could have caused Aabrofay to seek leave to proceed against HIH in tandem with the DBWines proceedings, but instead tacitly acquiesced in the utilisation of the DBWines case as the vehicle for determining the issue of causation. In those circumstances, it would bring the administration of justice — particularly in the context of the HIH liquidation and scheme administration — into disrepute to permit the causation issue to be relitigated by Aabrofay, albeit on a different basis. It was unreasonable for Aabrofay not to raise the issue, if it was ever to raise it, by intervening in the DBWines proceedings.

[81] It follows that the Aabrofay proceedings, but not the DBSuper proceedings, should be dismissed.

1. In other words, one plaintiff was engaged in an abuse of process because it was sufficiently identified with the unsuccessful plaintiff in the earlier proceedings and, in the circumstances, it was unreasonable for that party to have not brought its claim by intervening in the earlier proceedings. The other plaintiff was not because it was not sufficiently identified with the unsuccessful plaintiff and could not have been expected to agitate its claim in the earlier proceedings.
2. **Second**, the parties have not identified any case involving a finding of an abuse of process where the issue sought to be raised in the subsequent proceeding was not decided on its merits in the earlier proceeding. In this regard, UBS’s characterisation of the case in the Supreme Court of New South Wales having been decided on its merits is accurate only to the extent that UBS’s application for a permanent stay of those proceedings based on the Singapore proceedings was decided on its merits; Telesto’s claims were permanently stayed as a result of the doctrine of *res judicata*. There was no finding of fact or law about the substance of Telesto’s claims, other than that they were barred by reason of the doctrine of *res judicata*.
3. The present case thus extends the circumstances in which an abuse of process has been found in that:
4. Ms Marks was never a party to the Supreme Court of New South Wales proceedings and the trustee of the Argot Trust ceased to be a party on 6 March 2012; and
5. the claims of the party to the Supreme Court of New South Wales proceedings, Telesto, were permanently stayed and were not decided on their merits. Accordingly, no findings were made in the earlier proceeding other than findings underlying the grant of the permanent stay.
6. To explain why we are concerned by the conclusion of an abuse of process, consider the position of Ms Marks. Ms Marks is Mr Tyne’s spouse. By describing Ms Marks’ claim as “derivative” (at [426]) the primary judge must be understood as saying no more than that the facts on which Ms Marks relied in her claims against UBS included all of the facts on which the trust relied because Ms Marks had appointed Mr Tyne as her agent in respect of all dealings with UBS. It is not the case, however, that Ms Marks’ claims derived from her position as Mr Tyne’s spouse.
7. Ms Marks was never a party to the Supreme Court proceedings. There is also no suggestion that Mr Tyne was acting as her agent in bringing and prosecuting the Supreme Court proceedings. In fact, nothing is known about Ms Marks’ position in respect of the Supreme Court proceedings other than that she was and is Mr Tyne’s spouse and she owned shares in the trust jointly with Mr Tyne. This is in stark contrast to the “extraordinary” circumstances in which it was found that Ms Slaveska could not litigate the same issues that she, as litigation guardian, had litigated on behalf of her husband (see [80] to [83] above). Nor can it even be said that Ms Marks stood by and waited to see the outcome in the Supreme Court proceedings; apart from her ownership of shares in the trust and status as Mr Tyne’s spouse, her knowledge of and role in the Supreme Court proceedings remains unknown.
8. UBS submitted that the primary judge must be understood to have found that Ms Marks was aware of the Supreme Court proceedings; otherwise the primary judge’s conclusion that she could and should have made her claims in those proceedings makes no sense. We consider it is necessary to go further than this. Unless the primary judge inferred not only that Ms Marks knew about the Supreme Court proceedings, but also that she knew the facts alleged against UBS in those proceedings and the circumstances in which the trust discontinued its claims, how can it be said that she “should” have made her claims in those proceedings? Yet there is no finding by the primary judge to this effect. Nor do the primary judge’s reasons disclose any basis for a possible inference that Ms Marks had this knowledge. As noted, what Ms Marks may or may not have known about the Supreme Court of New South Wales proceedings remains unknown and unstated by the primary judge.
9. UBS might be right. The primary judge might well have inferred, without stating it, that Ms Marks knew of the Supreme Court proceedings. The fact that no express finding is made, however, suggests error. If the position of Ms Marks is considered consistently with the principles identified above, it would be necessary to identify, at the least, the opportunity Ms Marks had to bring her claims in the Supreme Court proceedings. The primary judge’s reasons recognise the essentiality of this principle at [423] in which the primary judge said, in respect of the trust, that “as a matter of principle, the Argot Trust does not have an *unqualified* and *absolute* right to a trial of its claims on the merits, regardless of any other considerations. It has, without any doubt, a right to have an **opportunity** to have a hearing on the merits”. At [424] the primary judge concluded that the trust had had the necessary opportunity in the Supreme Court proceedings, yet had not taken it.
10. What then of Ms Marks’ opportunity to have her claim decided on its merits? The primary judge says only that she is Mr Tyne’s partner, her claims are derivative, and the Supreme Court was seized of the relevant factual matrix. Even if the primary judge also inferred, as UBS contends, that Ms Marks was aware of the Supreme Court proceedings, the opportunity she had to make her claims necessarily depends on the quality of her knowledge at the time.
11. Four matters indicate that it is no answer to this that Ms Marks alone could have given evidence about her state of knowledge in defence of UBS’s application for her claims to be summarily dismissed as an abuse of process, and chose not to do so. The first is that the onus of proof was UBS’s and, consistent with the authorities it was a heavy one (*Williams v Spautz* [1992] HCA 34; 174 CLR 509 at 529). The second is that the question whether it would have been appropriate to draw any inference against Ms Marks (that her evidence would not have assisted her) would have to be considered before any inference was drawn. The third is that, in considering the propriety of drawing any adverse inference, it would be necessary to consider Mr Tyne’s evidence in his affidavit before the primary judge of 8 January 2015 that Ms Marks was Mr Tyne’s spouse but had no relationship with any of the relevant entities other than that she held some units in the Argot Trust jointly with Mr Tyne. The fourth, and most important factor indicative of error of principle, is that the primary judge does not refer to any of these matters when concluding that Ms Marks could and should have brought her claims in the Supreme Court proceedings.
12. One way to identify the error, if precise identification is required, is that the primary judge did not consider the nature of the opportunity Ms Marks had to make her claims in the earlier proceedings. As such, it was not possible to weigh that against the vexation to UBS which the primary judge found, with the consequence that the evaluative exercise necessarily miscarried. Another way of putting it is this: on the facts as found, we do not consider it was reasonably open to conclude that Ms Marks was engaged in an abuse of process by bringing this proceeding. She had never been a party to any earlier proceeding, her state of knowledge of any earlier proceeding was unknown (apart from what might be inferred by the mere fact that she was married to Mr Tyne and held some units in the Argot Trust jointly with him), and her claim depended on the same facts (and more) as had been pleaded in the Supreme Court proceedings but her claim concerned loss personal to her. In these circumstances, we do not consider it open to have found that Ms Marks’ conduct was “manifestly unfair” to UBS or would bring the administration of justice “into disrepute among right thinking people” (*Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536).
13. The difficulty with the conclusion the primary judge reached in respect of the Argot Trust is of a different kind. There is no doubt that the Argot Trust, through its trustee (a company controlled by Mr Tyne then Mr Tyne himself) had an opportunity to make its claims in the Supreme Court proceedings. Before 6 March 2012, the Argot Trust was a party to those proceedings. It discontinued its claims. UBS contends that it assumed that the trust had abandoned its claims, but there was no condition sought by UBS or placed on the discontinuance of the trust’s claims. It is also apparent from the primary judge’s reasons at [419] that the fact of discontinuance was not seen as the source of the abuse of process. The source of the abuse of process was that the trust did not “re-join” those proceedings to agitate its claims, but instead chose to commence fresh proceedings in this Court (at [419]). In truth, it does not matter which way it is put given that the primary judge saw the source of the abuse as the trust not having made its claims, one way or another, in the Supreme Court proceedings.
14. Two concerns arise, however. The first is that the primary judge at [424] refers to but does not consider the vexation, oppression or unfairness to UBS. The second is that the primary judge, in carrying out the evaluative task, does not refer to and, in our view, must be inferred to have given no weight to the fact that the substantive claims of the trust were not decided on their merits in the Supreme Court proceedings. As explained below, these two issues are related.
15. The primary judge said at [424] that for the trust to bring this proceeding, raising as it does, “substantial complex questions of fact and law with which UBS has been vexed before, is an abuse of the processes of the Federal Court of Australia”. As the cases disclose, a relevant consideration in determining where the interests of justice lie in a particular case is whether it would be unfair and oppressive for a party to have to deal with an issue which has been previously litigated. As noted, however, no case of abuse of process has been identified in which the earlier proceedings were not decided on the merits but, as in the present case, were themselves stayed as a result of the operation of the doctrine of *res judicata* (the basis for the permanent stay of Telesto’s proceedings in the Supreme Court against UBS – *Telesto Investments Limited v UBS AG* [2013] NSWSC 503).
16. A determination of a relevant issue in the earlier case is required for a *res judicata*, issue estoppel or *Anshun* estoppel to arise (and by “relevant issue”, we mean relevant to the subsequent proceedings said to be the subject of the *res judicata*, issue estoppel or *Anshun* estoppel). In *DA Christie Pty Ltd v Baker* [1996] 2 VR 582, the plaintiff had applied for an extension of the limitation period to enable him to bring a claim against the defendant for his injuries. The application was dismissed on the grounds of the unexplained delay in bringing the proceedings. The plaintiff did not appeal against the dismissal of his application. Instead, he made a further application for an extension of the limitation period relying on additional evidence explaining the delay in bringing the proceedings. The defendant claimed that the further application was barred by a *res judicata*, issue estoppel or an *Anshun* estoppel. Hayne JA at 599 expressed the conventional principle that “to determine whether there is a *res judicata*, or any issue estoppel, it is necessary to identify whether there has been a final determination as between the parties in the one case of a cause of action and in the other of a particular issue”. At 602, Hayne JA also said “once it is accepted that the decision in the first application is not final and that a second application can be made, neither *Henderson’s Case* [*Henderson v Henderson* (1843) 3 Hare 100; (1843) 67 ER 313] nor *Anshun’s Case* can apply. Each of those cases presupposes that there has been an earlier final decision of some matter”. Nevertheless, as the further evidence was available at the time of the original application, the plaintiff was held to be barred from bringing the second application on the ground of abuse of process because the plaintiff was attempting to re-litigate an issue – the extension of time – that had already been decided.
17. What is the position where the earlier application has been merely discontinued unconditionally? It may be accepted that the fact of discontinuance might be relevant to characterising circumstances as an abuse of process (see, for example, *Director, Fair Work Building Industry Inspectorate v Ingham* [2016] FCA 328 at [75]). However, if nothing more than discontinuance by consent is involved, it is difficult to see how there might be unfairness or oppression. Contrary to UBS’s submissions, we do not see this as the result of any presumptive costs order made upon discontinuance. If leave is required to discontinue, costs may or may not be a condition of the leave. The making (or not) of a costs order does not determine whether the subsequent proceedings might constitute an abuse of process.
18. In *Running Pigmy Productions Pty Ltd v AMP General Insurance Co Ltd* [2001] NSWSC 431, Palmer J described the principles which apply to a grant of leave to discontinue proceedings (at [29]). He said:

[33] It is not an abuse of process for a plaintiff to discontinue a proceeding merely in order to be able to bring the same proceeding later in circumstances in which the plaintiff believes there will be a greater prospect of success or a more substantial recovery: see eg *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, at 576. These circumstances may legitimately include the possibility of a subsequent increase in the limit of recoverable damages due to legislative amendment (see *Brown v Parker* [1961] WAR 194) and the enhanced prospect of enforcing a verdict by commencing proceedings in another jurisdiction (eg *Castanho v Brown & Root (UK) Ltd* (supra)). I would include amongst such circumstances the prospect of the plaintiff being able to conduct the second proceedings more effectively than the first by reason of an improvement in the plaintiff's financial position enabling the plaintiff to procure expert evidence which would have been prohibitively expensive at the time of the first proceedings.

…

[36] It is clear, in my opinion, that the category of abuse of process represented by “*Anshun* estoppel”, in so far as it is applicable to a plaintiff, is concerned with the situation which arises when that plaintiff prosecutes a cause of action to its conclusion by judgment or settlement and later that plaintiff, or that plaintiff's privy, seeks to prosecute against the same defendant another cause of action which should reasonably have been prosecuted in the first proceedings. The rationale for the doctrine in *Henderson v Henderson*, as developed by *Anshun*, has no application to the case where the plaintiff, or the plaintiff's privy, has commenced earlier litigation against the defendant, but has, with the Court's leave, discontinued that litigation rather than prosecuting it to a conclusion by judgment or settlement.

1. In *SZFOG v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1374; (2005) 88 ALD 138, where an applicant brought proceedings having discontinued earlier proceedings about the same matter by consent of the respondent, Edmonds J at [6] decided that leave should be granted to challenge a decision striking out proceedings as an abuse of process noting that:

the respondent had the opportunity to condition her consent upon such terms as she thought appropriate. Alternatively, she could have withheld her consent and opposed the grant of leave or made submissions as to any terms which ought to attend any grant of leave: see *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 at 572, 577; *Botany Municipal Council v Department of Arts, Sport and Environment* (1992) 34 FCR 412; and O 22 r 7 of the Federal Court Rules, *infra*. There is even authority to the effect that the Court may dismiss the application rather than grant leave to file a notice of discontinuance: *FAIRA Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Affairs* [2002] FCA 9. The respondent chose not to take any of these courses; on the contrary, the respondent chose to give her consent to the discontinuance.

1. Further, at [38], Edmonds J made these points:

Returning to the proposition put by the respondent that the principles in *Reichel v Magrath* [(1889) 14 App Cas 665] and *Connelly* [*Connelly v Director of Public Prosecutions* [1964] AC 1254] must nevertheless be applicable in the present case ‘otherwise parties to court proceedings could frustrate the process by simply withdrawing from proceedings and recommencing at any time in the future’. There are two answers to this complaint. The first is that, in the present case, the respondent chose to give her consent to the discontinuance, with the usual order as to costs, rather than to ask for any terms which might protect her from precisely the position in which she now finds herself.

1. In circumstances where the Argot Trust, without objection from UBS, obtained unconditional leave from the Supreme Court of New South Wales to discontinue its claims against UBS, what unfairness to or oppression of UBS is involved in the trust bringing of the present proceeding in this Court? As noted, Telesto makes no claim in the present proceeding. It is bound by the finding of *res judicata* based on the Singapore proceedings. As also noted, Ms Marks never made a claim in the Supreme Court proceedings. The Argot Trust had made a claim which, with Mr Tyne’s claim, was discontinued on 6 March 2012, so that Telesto alone remained in the Supreme Court proceedings. UBS never filed a defence in the Supreme Court proceedings. It applied for, and obtained, the permanent stay of the Supreme Court proceedings as a result of the Singapore proceedings. Importantly, and as discussed, the primary judge found that had the trust or Ms Marks made their claims in the Supreme Court proceedings, UBS could not have obtained a permanent stay of their claims based on *res judicata*, issue estoppel or, necessarily, abuse of process. In other words, if the trust or Ms Marks had made their claims in the Supreme Court proceedings, UBS would have been required to admit or defend those claims. That is the same position as UBS would now be in but for the grant of the permanent stay by the primary judge.
2. The only possible different position that UBS identified is that it might not have sought a permanent stay of Telesto’s proceedings in the Supreme Court if the claims of the trust and Ms Marks had also been made in those proceedings. Unlikely as this seems, we accept it for the purposes of this discussion. What then is the position? It is that UBS has sought and obtained a permanent stay against Telesto which it might not otherwise have done and would have had to defend the claims of the trust and Ms Marks in 2013 rather than now. As to the former, UBS has the benefit of the permanent stay of Telesto’s claims against it based on a *res judicata*. As to the latter, UBS must do now what it otherwise would have had to do in 2013. 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.
3. It follows that we consider that the conclusion of the primary judge was affected by error of principle of the kind which requires appellate intervention. As a result, the orders of the primary judge, including for costs must be set aside. In lieu thereof, UBS’s interlocutory application, at least insofar as it sought summary dismissal on the grounds of *res judicata*, issue estoppel, *Anshun* estoppel and/or abuse of process must be dismissed. UBS also sought summary dismissal on the basis that the proceeding has no reasonable prospect of success or discloses no reasonable cause of action. As the primary judge did not determine the matter on that basis and no notice of contention was filed by UBS to support the primary judge’s orders, it might be concluded that the interlocutory application as a whole should be dismissed. Nevertheless, in the circumstances of this case, it is preferable to leave that matter to be dealt with as part of the remitted proceeding.
4. It is also necessary that the primary judge’s order that the appellants pay UBS’s costs on an indemnity basis be set aside. We can see no reason why UBS ought not to pay the appellants’ costs of this appeal, as well as the leave application, and the costs of the interlocutory application, albeit on the usual, not an indemnity, basis. Although the appellants had no legal representation, and thus cannot recover legal costs, the usual order for costs will enable them to be compensated for the out-of-pocket expenses which they have incurred, which is appropriate.

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| I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Jagot and Farrell. |

Associate:

Dated: 20 January 2017