

The civil practice and procedure provisions strike again in the High Court

Jeremy L Harrison reports on *UBS AG v Tyne* [2018] HCA 45 (17 October 2018)

This appeal concerned whether the continuance of proceedings constituted an abuse of process in circumstances where prior proceedings which concerned substantially the same matters were discontinued, the merits of the matter had not been determined, and delay had not made a fair trial impossible.

The majority of the High Court of Australia (4:3) allowed the appeal, concluding that there was an abuse of process particularly because the ‘tactical manoeuvring’ by Mr Tyne to ‘hold back’ a claim represented the ‘antithesis’ of the overarching purpose of the civil practice and procedure provisions.

The judgments of the majority (Kiefel CJ, Bell and Keane JJ, Gageler J agreeing, with additional reasons) differed from those of the dissenting judges (Nettle and Edelman JJ; Gordon J) with respect to multiple inter-related issues including whether there was a contravention of the overarching purpose of the civil practice and procedure provisions, whether the explanation for the discontinuance was reasonable, whether the prior proceedings had been ‘determined’ (and the consequences which followed), whether there was a material delay, whether costs had increased significantly, whether UBS would be oppressed, and whether the administration of justice would be brought into disrepute.

Background

Mr Tyne was the ‘controlling mind’ of the former trustee of a family trust (the Trust) and an investment company (the Company). The Company opened an investment account with UBS in Singapore and UBS provided the Company with credit facilities. UBS allegedly advised the Company to acquire certain bonds which became worthless. UBS and the Company agreed that the Trust would loan assets to the Company in order for the Company to satisfy its liability to UBS.

UBS commenced proceedings in Singapore in 2010 against the Company alleging that the Company’s account with UBS was in default.

Two weeks later, the Company, Mr Tyne and the former trustee commenced proceed-



ings in the Supreme Court of New South Wales alleging that UBS provided negligent advice and made misleading and deceptive representations. The Supreme Court proceedings were temporarily stayed in February 2012 pending the determination of the Singaporean proceedings.

Relevantly, Mr Tyne and the former trustee discontinued their claims in March 2012. This left the Company as the sole remaining plaintiff in the Supreme Court proceedings. The Singaporean proceedings were determined in favour of UBS in July 2012. The Supreme Court proceedings were permanently stayed in May 2013 on the basis that the Singaporean judgement created a *res judicata*.

Mr Tyne took over as the trustee of the Trust and commenced the proceedings the subject of this decision in the Federal Court of Australia in January 2014 claiming damages as a result of the advice and representations made by UBS. The Trust alleged that the Company was unable to return the assets to the Trust because the bonds lost their value.

UBS applied to permanently stay the proceedings. The primary judge concluded that the proceedings amounted to an abuse of process. Mr Tyne appealed and the majority (2:1) of the Full Court of the Federal Court of Australia concluded that there was no abuse of process.

Explanation for the discontinuance

Mr Tyne had explained that he discontinued the Trust’s claim because (a) there would likely be no need for the trustee to commence the present proceedings if the Company was successful in the Supreme Court, (b) the trustee’s claim would be more difficult,

expensive and time-consuming to prove than the Company’s claim and Mr Tyne was short of money, and (c) it was not predictable that the Supreme Court proceedings would be permanently stayed.

The majority of the High Court concluded that, having regard to the totality of the private and public interests involved, it was not reasonable for Mr Tyne to take it upon himself to hold the Trust’s claim in abeyance with a view to pursuing that claim in separate proceedings if it turned out that the Company’s claim was not successful.

The dissenting judges concluded that the Trust had ‘good reason’ for discontinuing and that the explanation was ‘reasonable’.

The majority stated at the outset that the determination of whether the present proceedings constituted an abuse of the process must take into account the overarching purpose of the civil practice and procedure provisions (see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 213 [98]) such as s 37M(1) of the *Federal Court of Australia Act 1976* (Cth).

The majority placed significant importance on the notion that Mr Tyne planned to ‘hold back’ the Trust’s claim and prosecute that claim in subsequent proceedings should the Company’s claim in the Supreme Court be unsuccessful, and that this plan contravened the heart of the overarching purpose. The Court found that this plan would lead to duplication of resources, increased cost and delay if what remained of the Supreme Court proceedings were to be stayed, holding at [55]:

Hiving off the Trust’s claim, with a view to bringing it in another court after the determination of the SCNSW proceedings, was the antithesis of the discharge of the duty imposed on the parties to civil litigation ...

The majority emphasised that the whole of the dispute between the Tyne-related parties and UBS was before the Supreme Court and that the time to have the trial of the factual allegations underlying the Company’s and

the Trust's claims was during the Supreme Court proceedings.

The majority stated that since the decisions in *Aon and Tomlinson v Ramsey Food Processing Pty Ltd* ((2015) 256 CLR 509) and the enactment of the civil practice and procedure provisions the courts will not indulge parties who engage in 'tactical manoeuvring' which impedes the just, quick and efficient resolution of litigation.

The dissenting judges concluded that there was no breach of the overarching purpose because Mr Tyne's explanation for discontinuing the Trust's claim was reasonable.

Discontinuance with no imposed conditions

The dissenting judges began their analysis by focussing on the effect of the discontinuance under r 12.3(1) of the Uniform Civil Procedure Rules 2005 (NSW) including the express provision that a discontinuance of proceedings did not prevent the plaintiff from claiming the same relief in fresh proceedings.

The majority stated that focussing on the 'right' of a litigant to discontinue and later commence fresh proceedings was out of keeping with the conduct of modern litigation and the overarching purpose. Their Honours stated that a discontinuance is not irrelevant to the determination of whether an abuse of process has taken place regardless of UCPR 12.3. Gageler J observed that, when the Trust discontinued its claim, Mr Tyne did not indicate to UBS that the Trust would likely commence later proceedings.

Were the claims determined on their merits?

The majority stated that *Batistatos v Roads and Traffic Authority* (NSW) makes it clear that the 'just resolution' of a controversy may be the permanent stay of the proceedings notwithstanding that the merits of the claim have not been decided ((2006) 226 CLR 256 at 280 [63]).

The dissenting judges indicated that the Supreme Court proceedings did not proceed

to a 'final determination' and that 'there has been no previous determination of the Trustee's claims' noting that UBS obtained a temporary stay and then a permanent stay of the Supreme Court proceedings.

Can an abuse of process occur if claims have not been determined on their merits?

In any case, the majority stated that the fact that the Trust's claim had not been heard on its merits and the fact that a fair trial of the claim could occur 'cannot be determinative of whether the proceeding is unjustifiably oppressive to UBS or whether its continuance would bring the administration of justice into disrepute' (at [44]).

By contrast, the dissenting judges rejected the suggestion that the lack of a decision on the merits was not conclusive as to whether there was an abuse of process.

Delay and increased costs

The majority stated that 'inexcusable delay' is not required for there to be an abuse of process. Any substantial delay increases costs, decreases the quality of justice and leaves other litigants in the queue awaiting justice.

The dissenting judges emphasised that only eight months elapsed between UBS achieving a permanent stay of the Supreme Court proceedings and Mr Tyne commencing the present proceedings. Their Honours concluded that this was not an 'appalling' or 'inexcusable' delay.

Their Honours were not convinced that Mr Tyne had increased UBS's costs other than possibly with respect to the application by UBS for a permanent stay, which was not significant. Their Honours concluded that there was no material duplication of process and reiterated that UBS had never even pleaded a defence with respect to the Trust's claim.

Oppression

The majority considered that permitting the Trust's claim to proceed would subject UBS to unjustifiable oppression due to the signifi-

cant delay, increased costs and being required to deal 'again' with the claims that should have been resolved in the Supreme Court.

The dissenting judges stated that UBS had not actually been vexed with the relevant matters in the Supreme Court and so it was 'not correct' to say that Mr Tyne had made UBS deal with the matter 'again'.

Whether the claims would bring the administration of justice into disrepute

The majority concluded that allowing the 'staged conduct' of one dispute prosecuted by related parties with duplication of resources, delay, expense and vexation would likely give rise to the perception that the administration of justice is inefficient.

The dissenting judges concluded that the present proceedings would not bring the administration of justice into disrepute, noting that the delay was not inordinate or inexcusable, there had been no previous determination of the Trust's claim, the prosecution of the claim would not be unjustifiably oppressive to UBS, and the claim was not brought for a collateral purpose. In all of the circumstances, there was no material unfairness to, or unjustified oppression of, UBS particularly given that the UCPR permitted the discontinuance and the reasonable explanation for the discontinuance.