Supreme Court

New South Wales

Case Name:	Macarthur Projects Pty Ltd v Cottage Developers Pty Ltd
Medium Neutral Citation:	[2019] NSWSC 1149
Hearing Date(s):	28 August 2019; 2 September 2019
Date of Orders:	3 September 2019
Decision Date:	3 September 2019
Jurisdiction:	Equity
Before:	Ward CJ in Eq
Decision:	1. Order the plaintiff to provide security for the defendants' costs in the following tranches: (a) the sum of $75,000 within seven days; (b) the sum of $75,000 within 28 days of directions being made specifying the timetable for the filing of evidence; and (c) the sum of $100,000 within 42 days of the matter being set down for hearing. 2. Order that security be provided by payment into Court or by unconditional bank guarantee in a form acceptable to the defendants or, in the event of dispute, acceptable to the Court. 3. Order that the proceedings be stayed in the event of failure by the plaintiff to make any of the payments for security provided for under Order 1 (or the payment provided for under Order 4) within the time specified. 4. Order that the plaintiff provide security in the sum of $130,000 (in accordance with Order 2 above) for the costs incurred in proceedings 2018/00152494 in this Court (which costs are the subject of costs orders made by Parker J in those proceedings and of an application for costs assessment lodged by the first defendant on 15 August 2019); and order that the defendants be

entitled to draw down on so much of that security as necessary to satisfy any judgment obtained as a result of the costs assessment process.
5. Note that the orders made for the provision of security (Orders 1 and 4 above) are without prejudice to the defendants making any further application for security for the costs of these proceedings or the costs incurred in the previous proceedings, in the event that the security so ordered is insufficient to secure the costs actually incurred in the present proceedings (or the subject of the final costs assessment in the 2018 proceedings).
6. Order that the costs of the defendants' notice of motion filed 29 July 2019 be costs in the cause.
7. Transfer the proceedings to the Technology and Construction List.

Catchwords: CIVIL PROCEDURE— Summary disposal — Dismissal of proceedings — Abuse of process – application for dismissal of proceedings or the striking out of the statement of claim or orders in respect of costs incurred in earlier proceedings – whether an abuse of process to bring fresh proceedings in circumstances where the first proceedings were dismissed for their failure to provide security for costs

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 56-59, 67, 91
Uniform Civil Procedure Rules 2005 (NSW), rr 13.4(1)(c), 14.28(1), 36.16
Victorian Supreme Court Rules (2015), r 60.03(3)(a)

Cases Cited: Andrew v Baradom Holdings Pty Ltd (in liq) (1995) 36 NSWLR 700 at
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27
Batistatos v Roads and Traffic Authority (NSW) 226 CLR 256; [2006] HCA 27
Cannuli v Cannuli [2018] NSWSC 937
Hamod v State of New South Wales [2011] NSWCA 375
Johnson v Gore Wood & Co [2002] 2 AC 1
Rozenblit v Vainer (2018) 262 CLR 478; [2018] HCA 23
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28
UBS AG v Tyne [2018] HCA 45; (2018) ALJR 968

	Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160
Category:	Procedural and other rulings
Parties:	Macarthur Projects Pty Ltd (Plaintiff) Cottage Developers Pty Ltd (First Defendant) John James Cowin (Second Defendant)
Representation:	Counsel: Mr MR Pesman SC (Plaintiff) Mr TD Castle (Defendants) Solicitors: Beazley Lawyers (Plaintiff) HWL Ebsworth Lawyers (Defendants)
File Number(s):	2019/00178617
Publication Restriction:	Nil

JUDGMENT

1 **HER HONOUR**: Before me for hearing on 28 August 2019 was an application, by notice of motion filed 29 July 2019 by the defendants (Cottage Developers Pty Ltd and Mr John James Cowin) seeking, among other relief, orders for the summary dismissal of the proceedings (pursuant to r 13.4(1)(c) of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR)) or for the striking out (pursuant to r 14.28(1) of the UCPR) of the statement of claim or for the permanent stay of the proceedings (pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) (*Civil Procedure Act*)). In the alternative to the principal relief sought (which is, by one means or another, for the summary disposal of the proceedings without any final hearing on the merits), the defendants seek orders in respect of costs incurred by them in earlier proceedings in this Court (2018/00152494) and for the provision by the plaintiff of the amount ordered to be provided by way of security for costs in those earlier proceedings (the non-provision of which led, as I explain below, to the summary dismissal of those proceedings); essentially on the basis that such orders are necessary to cure any prejudice suffered by the defendants as a consequence of the prior defaults of the plaintiff (Macarthur Projects Pty Ltd) in the earlier proceedings.

2 The defendants' notice of motion also seeks an order for the transfer of these proceedings to the Technology and Construction List, although that was not the focus of the submissions made on 28 August 2019.

3 Supplementary submissions and evidence were relied upon by both parties (pursuant to directions made on 28 August 2019); and were the subject of brief oral submissions on 2 September 2019. On that occasion, I reserved judgment, indicating that I would publish my reasons on 3 September 2019. These are those reasons.

Background

4 As adverted to above, the dispute between the parties has already been the subject of proceedings in this Court and the circumstances in which those proceedings were dismissed is relevant to the relief now sought by the defendants in the present proceedings. Some of the evidence in those proceedings was tendered in the present proceedings and is referred to in the following summary of the background to the dispute between the parties.

5 There was a range of agreements entered into between the plaintiff and the first defendant in relation to the development of a property at Bayview, one of which was a Professional Services Agreement. On 10 March 2017, prior to the completion of the development, the first defendant had terminated the services of the plaintiff under that Professional Services Agreement (on the basis of various alleged defaults by the plaintiff and its principal, Mr Walker, who it is said was an undischarged bankrupt at the time of entry into the Professional Services Agreement and related agreements).

6 Proceedings were commenced initially in the Real Property List by the plaintiff by summons filed 15 May 2018, seeking, among other relief, an order for a caveat registered over the title to a particular unit in a residential unit at Bayview in Sydney (which was part of a 10 unit residential development that had been completed in March 2018) to remain on the title until further order; and an order for specific performance by the first defendant of an alleged contract for the purchase of the said property in a specified amount. Apart from the first defendant, the defendants there named were Mikaroo Pty Ltd

(Mikaroo), as the second defendant, and Mr Cowin as the third defendant. A statement of claim was filed on 22 May 2018.

7 By agreement between the parties, a regime was put in place whereby the property in question was to be sold and the proceeds of sale held pending the resolution of the substantive dispute between them. (Orders were made by consent by Robb J on 28 May 2018 in that regard.)

8 On 14 August 2018, an amended statement of claim was filed, removing Mikaroo as a party to the proceedings (see Exhibit 1; and Annexure D as part of Exhibit D on the present application).

9 On 14 September 2018, the proceedings were transferred to the Technology and Construction List.

10 On the same date, the defendants also filed a notice of motion seeking security for the costs of the proceedings. That application came before Ball J on 30 November 2018. It appears that by that time, an affidavit had been sworn by Mr Walker (on behalf of his wife as the sole director of the plaintiff) deposing to the assets of the plaintiff (see Exhibit C on the present application).

11 By consent, on 30 November 2018, his Honour made orders (contingent on the plaintiff providing security for costs in the sum of $20,000 by way of payment into Court on or before 7 December 2018) providing for the matter to proceed to mediation in the week of 17 December 2018 and stood the defendants' application for security for costs over to 8 February 2019. His Honour noted in those consent orders that the provision of security for costs as so ordered was without admission and without prejudice to the plaintiff apposite to the defendants' notice of motion. There had been no contested hearing of the security for costs motion on that occasion.

12 The amount required to be paid into Court ($20,000) by 7 December 2018 in order to trigger the order for mediation made by Ball J on 30 November 2018 was not provided by the plaintiff and hence the matter was not referred for mediation in accordance with his Honour's orders.

13 The matter then came before Parker J on 8 February 2019. On that occasion, his Honour heard the defendants' contested application for security for costs.

His Honour (for reasons given orally *ex tempore*, which the parties did not seek to have published in writing) made orders for the provision of security for costs (including the costs of the said security for costs application) in the following tranches: $100,000 to be paid within 28 days; a further $75,000 to be paid within 28 days of directions being made specifying the timetabling for the filing of evidence; and a further $100,000 to be paid within 42 days of the court setting the matter down for trial.

14 His Honour ordered that the proceedings be stayed in the event of failure by the plaintiff to make any of the payments for security provided under the said order; and made certain other consequential orders and directions. His Honour, relevantly, also directed that, within 28 days of the provision of the first tranche of security, the first defendant file and serve a statement setting out certain matters (its calculation of the profit and the share of such profit to which the plaintiff is entitled under the terms of a Memorandum of Agreement dated 12 June 2015; its claim for damages, if any, consequent upon alleged breaches by the plaintiff of the Professional Services Agreement dated 12 June 2015; and its calculation of the damages allegedly attributable to conduct of the plaintiff which is contended to have contravened the Australian Consumer Law and to have resulted in the plaintiff entering into the Memorandum of Agreement and transactions contemplated thereby). Within a further six weeks, the plaintiff was to file and serve a statement of surcharges and falsifications responding to the first defendant's statement of profit calculation.

15 His Honour ordered that the plaintiff pay the defendants' costs of the notice of motion dated 18 September 2018 [sic] ("such costs not to be assessable until final costs orders are made in the proceedings").

16 The plaintiff did not pay the first tranche of security the subject of the orders made on 8 February 2019 within the 28 day time period stipulated (i.e., by 8 March 2019). In accordance with Parker J's orders, the proceedings were therefore stayed from that date.

17 On 21 March 2019, the defendants filed a notice of motion in the 2018 proceedings seeking orders for the dismissal of the proceedings (and a lump

sum costs order). That notice of motion came before Hammerschlag J on 5 April 2019.

18 On 5 April 2019, Hammerschlag J ordered that the proceedings be dismissed but his Honour stayed the order for dismissal and ordered that, in the event that security was provided in accordance with the order previously made on or before 23 April 2019, the order for dismissal of the proceedings would be vacated. His Honour stood the proceedings over to 3 May 2019.

19 The first tranche of security ordered by Parker J (i.e., the sum of $100,000) was not paid by 23 April 2019. Accordingly, Hammerschlag J's order for the dismissal of the proceedings remained operative. The first defendant's application for a lump sum costs order (prayer 3 of the orders sought in its 21 March 2019 notice of motion) in respect of the proceedings was heard by Parker J on 17 May 2019.

20 In support of that application, the first defendant relied on an affidavit sworn 28 March 2019 by its solicitor (Mr David Jury) (a copy of which affidavit was tendered in evidence by the plaintiff, as respondent to the present application as Exhibit 3). In that affidavit, Mr Jury itemised the costs incurred in the proceedings between April 2018 and March 2019 totalling $128,573.22 (exclusive of GST). Mr Jury deposed that, based on his experience, on an assessment of costs on the ordinary basis the defendants would recover between 75% to 80% of the actual solicitors' costs and 100% of Court fees and disbursements and Counsel's costs. In submissions put to his Honour on that occasion (see Exhibit 3), the first defendant submitted that the appropriate discount when assessing costs on a lump sum basis in this case (referring to *Hamod v State of New South Wales* [2011] NSWCA 375 at [814]) was in the range of 10% to 30%. Assuming a mid-point between the 75% to 80% recovery for solicitors' costs, the submissions set out a calculation of the lump sum costs sought depending on the discount to be applied. Assuming a 30% discount, the amount there sought was $79,990.40.

21 Parker J did not make a lump sum order on that occasion; rather, his Honour ordered that the plaintiff pay the first defendant's costs of the proceedings.

(Those costs have not yet been paid – see Mr Jury's affidavit sworn 26 July 2019 at [28].)

22 The first defendant has since lodged an application for assessment of those costs orders (on 15 August 2019) (see Exhibit D in the present proceedings), serving a bill of costs in assessable form totalling $176,945.84.

23 Meanwhile, by statement of claim filed 7 June 2019, the plaintiff commenced fresh proceedings (in the Real Property List) against the first defendant and Mr Cowin, seeking relief in the same terms as that sought in the amended statement of claim filed in the (by then dismissed) 2018 proceedings. The filing of that statement of claim is what has led to the present application (for summary dismissal and other relief), which first came before me in the Applications List on 27 August 2019.

Defendants' submissions

24 The defendants' application for summary dismissal in essence is based on the contention that the commencement of the present proceedings is an abuse of process. Complaint is made that there has been no satisfactory explanation advanced for any of the defaults by the plaintiff in compliance with the security for costs orders (and an earlier failure to attend at a mediation in the 2018 proceedings which had been scheduled in July 2017). It is submitted that the fresh proceedings have been commenced without any proper explanation "as if all of that past history was just irrelevant" (see T 2.36); and that this is inconsistent with ss 56-59 of the *Civil Procedure Act*.

25 The defendants say that the closest one finds to an explanation for non-compliance with prior orders of the Court is the affidavit of Mr Walker of 2 May 2019 deposing to the existence of certain agreements in place which a second mortgagee refused to allow in respect of a property at Palm Beach, and also that his solicitor was on holidays for two weeks in April 2019 (and says that, having regard to the complexity of the inter-company arrangements and property financing of the group of companies apparently controlled by Mr Walker and his wife, the defendants would seek to have the opportunity to test the veracity of the explanations of Mr Walker about his reasons for non-

compliance, *cf* what was said in *Andrew v Baradom Holdings Pty Ltd (in liq)* (1995) 36 NSWLR 700 at 707G).

26 Reliance is placed on the principles articulated by the High Court in *Rozenblit v Vainer* (2018) 262 CLR 478; [2018] HCA 23 (*Rozenblit)* in relation to stay orders generally (referring to what was said at [11] per Kiefel CJ and Bell J and at [75] per Gordon and Edelman JJ) and in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 (*Aon*) in relation to the role of case management principles generally. Reference was also made to the decision of the High Court in *UBS AG v Tyne* [2018] HCA 45; (2018) ALJR 968 (*UBS v Tyne*). I consider those authorities in due course.

27 The defendants submit, in the alternative, that if the proceedings are permitted to continue this should only be on the basis of a condition that the past costs orders in the 2018 proceedings be paid and that security for costs of the proceedings going forward be provided (see T 2.26). In that regard, the defendants point to the following matters as relevant to take into account.

28 First, the need to secure or remove the financial prejudice suffered by the defendants (namely, "[s]quare your debt from the 2018 proceedings and pay the security for the proceedings for the go-forward on the 2019 proceedings". It is submitted that this is consistent with what the High Court said in *Rozenblit* (see below) and with what also happens when there is a discontinuance of proceedings.

29 Second, the need to recognise the rights of a party not to be oppressed by continuing proceedings which cannot be compensated by costs orders (referring to what was said in *Aon* and to the concern expressed in *UBS v Tyne* as to balancing the rights of the parties).

30 Third, the question of the administration of justice and, in particular, the need for litigants to have confidence in the administration of the justice in circumstances where (here) there has been non-compliance with orders of the Court followed by the commencement of proceedings in which the same issues are raised, leaving unanswered what had happened beforehand (referring to what was said by Gageler J in *UBS v Tyne*).

31 As to the alternative submission, the defendants argue that the plaintiff should be required to pay their costs of the 2018 proceedings (and, pending assessment, provide security therefor) before the defendants are required to spend any further money by way of costs in these proceedings. Those costs are explained in the further affidavit sworn by Mr Jury on 30 August 2019 and it is submitted that they are reasonable both as to rate and quantum having regard to the history of the litigation between the parties (there having been multiple hearings and applications (and preparation therefor) from the time the proceedings were commenced on 15 May 2018, following a lapsing notice served by the first defendant on 1 May 2018 in respect of the caveat that had been lodged by the first defendant).

32 Although recognising that on an application such as this the Court is not concerned with a consideration of the merits of the claim, the defendants submit that the claim by the plaintiff is without substance. They say that they have no prospect of recovering any costs of these proceedings from the first defendant or its principals, including Mr Walker (an issue already explored in the contested security for costs application in the 2018 proceedings); and that there has never been any proper explanation as to why Mr Cowin has been joined as a defendant to these or the prior proceedings.

33 In oral submissions on 2 September 2019, the defendants indicated a willingness to take a pragmatic approach to the question of security for past costs and costs going forward. In essence, it appeared to be accepted that, of the $100,000 first tranche of security ordered by Parker J, some $25,000 could be treated as referable to costs incurred in the previous proceedings. The calculations prepared for the defendants are to the effect that: some $114,272 is the estimate of costs of the previous proceedings on a party/party basis; assuming a 30% deduction as a lump sum discount (said to be generous), the recoverable costs would be $79,990; the costs incurred in the prior proceedings since the orders made by Parker J (referable to the lump sum costs application and lodgement of the costs assessment application) amount to $17,500; and the estimate of costs going forward on a party/party basis is $142,507 (see Mr Jury's affidavit of 30 August 2019).

34 Thus, it is submitted that the costs of the previous proceedings could be treated as roughly $130,000 ($114,000 plus around $15,000 for costs incurred after the order for security in the previous proceedings, referred to in Mr Jury's affidavit at [21]) and it was said that the security to be provided going forward should be the amounts ordered by Parker J (less an amount of say $25,000 as against the original $100,000). After some debate, the defendants argued that the difference between their position and that of the plaintiff as to the amount of security going forward was between an amount of $80,000 submitted by the plaintiff and an amount of $105,000 submitted by the defendants. (Both sides accused the other of double counting in this exercise.)

Plaintiff's submissions

35 The plaintiff argues that it was in a position to pay the first tranche of the required security ($100,000) on 1 May 2019 (and there is evidence that its solicitor is holding those funds in his trust account – see the affidavit of Mr Philip Beazley sworn 26 August 2019 at [5] and Annexure "A" at [9]).

36 The plaintiff's position is that where, as here, there has been no hearing on the merits, s 91 of the *Civil Procedure Act* expressly provides that the dismissal of proceedings does not prevent the bringing of fresh proceedings for the same relief; and it is noted that there were no additional terms or conditions annexed to the dismissal order made by Hammerschlag J in this regard. Reliance is placed on the reasoning and review of authority carried out by Darke J as to the operation of s 91 (*Cannuli v Cannuli* [2018] NSWSC 937 at [21]-[30]), although there in a different context, namely where there was a dismissal by consent.

37 It is submitted that the defendants have not suffered any particular prejudice by reference to the commencement of the fresh proceedings ("[i]ndeed, they are in a better position than most defendants in that they have obtained an order for their costs to date with no determination on the merits"); whereas, conversely, the plaintiff would not only have lost the opportunity to bring a substantial claim (which the plaintiff says it has not been suggested is brought other than in good faith or without a reasonable basis) but also faces a

substantial costs order. It is submitted that it would be unjust to terminate the proceedings in those circumstances.

38 So far as the alternative relief sought is concerned, the plaintiff does not resist an order in terms that it provide security for the defendants' costs in the tranches and amounts previously ordered by Parker J and notes that it had already circulated short minutes to that effect (a copy of which was handed up on 29 August 2019). However, it submits that the balance of the defendants' notice of motion should be dismissed with costs.

39 As to the quantum sought, it is argued that there is an element of double counting. The plaintiff argues, in this regard, that the first tranche of security ordered by Parker J must now logically incorporate much of the amounts now sought by the first defendant in respect of the costs already incurred in the previous proceedings. (I was told that a commercial list response has been filed in relation to this). As I understand it, the complaint is that what the defendants are seeking is both security for the costs already incurred (and the subject of the costs assessment process), and for the costs of the proceedings going forward.

Determination

40 As to the principal relief claimed (i.e., summary dismissal, striking out of the pleading or a permanent stay of the proceedings), I do not consider that the defendants have established that the commencement of fresh proceedings (in the circumstances where the first proceedings were dismissed for their failure to provide security for costs) is an abuse of process, even accepting the criticism that there was no explanation proffered at the time for the defendants not pursuing this matter in the 2018 proceedings (see the complaint made at T 10.43). In that regard, that criticism, and the related complaint that Mr Walker's affidavit of 2 May 2019 was some days after the date on which the dismissal order made by Hammerschlag J took effect (or, perhaps more accurately, the date on which the self-executing vacation of the dismissal order ceased to be able to be triggered), were in practical terms answered in oral submissions for the plaintiff on the basis that, by the time the difficulty in relation to the raising of funds for the provision of security was resolved, it was too late to do

anything in the 2018 proceedings because the fourteen day period in which an application to vary the dismissal order (see r 36.16 of the UCPR) had expired (see T 15.1).

41 As noted earlier, reliance was placed by the defendants, in their abuse of process argument, on the decision in *UBS v Tyne*. It is not necessary here to set out the facts of that case (or the tortuous litigious saga between the various parties involved in that and related litigation both in this country, in various jurisdictions, and Singapore).

42 As the plaintiff notes, there was a divergence on the High Court in that case, both as to the result and as to the reasoning by which that result was reached (the majority in terms of the outcome of the appeal was comprised of Kiefel CJ, Bell and Keane JJ in a joint judgment and Gageler J in a separate judgment; the minority comprised of Nettle and Edelman JJ, in a joint judgment, and Gordon J, writing separately).

43 Kiefel CJ, Bell and Keane JJ said at [1] that:

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

44 Their Honours said (at [38]):

> The timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute. These wider interests are reflected in s 37M(2) of the FCA. As the joint reasons in *Aon Risk Services Australia Ltd v Australian National University* explain, the "just resolution" of a dispute is to be understood in light of the purposes and objectives of provisions such as s 37M of the FCA. Integral to a "just resolution" is the minimisation of delay and expense. These considerations inform the rejection in *Aon* of the claimed "right" of a party to amend its pleading at a late stage in the litigation in order to raise an arguable claim. The point is made that a party has a right to bring proceedings but that choices are made respecting what claims are made and how they are framed. Their Honours speak of the just resolution of the dispute in terms of the parties having a sufficient *opportunity* to identify the issues that they seek to agitate. The respondent's argument in *Aon*, that the proposed amendment to raise the

> fresh claim was a necessary amendment to avoid multiple actions, did not avail. As their Honours observe, if reasonable diligence would have led to the bringing of the claim in the existing proceedings, any further proceeding might be met by a stay on *Anshun* grounds. [footnotes omitted]

45 Then, at [40]-[41], their Honours refer to the decision in *Batistatos v Roads and Traffic Authority (NSW)* 226 CLR 256; [2006] HCA 27 and say:

> *Batistatos v Roads and Traffic Authority (NSW)* makes clear that the just resolution of a controversy may be the permanent stay of the proceeding notwithstanding that the plaintiff is not at fault and that the merits of his or her claim have not been decided. As the joint reasons explain:
>
> > "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."
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> The abuse of process in *Batistatos* lay in the very great delay in the commencement of the proceedings on behalf of the incompetent plaintiff; a delay which made the fair trial of his claim impossible. That is not this case. The appeal is to be determined upon acceptance that the Trust's claims are arguable, that UBS has not been called upon to defend them, and that the delay has not made their fair trial impossible. The claimed abuse lies in invoking the processes of the Federal Court to litigate claims that could and should have been litigated in the SCNSW proceedings. [footnotes omitted]

46 Their Honours noted that the submission made for the respondent that, in light of the relevant court rules, it could never amount to an abuse of process for a plaintiff to recommence proceedings having been granted unconditional leave to discontinue an earlier proceeding (see at [47]) but considered that the discontinuance was not irrelevant when the discontinuing party sought by new proceedings to pursue a discontinued claim (see at [56]).

47 At [58], their Honours referred to the oppression occasioned to the appellant, not only in the significant delay in the resolution of the dispute and the inevitability of increased costs but "[a]t its core … the vexation of being required to deal again with claims that should have been resolved in the SCNSW proceedings". Their Honours concluded (at [59]) that:

> For the Federal Court to lend its procedures to the staged conduct of what is factually the one dispute prosecuted by related parties under common control with the attendant duplication of court resources, delay, expense and vexation … is likely to give rise to the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public moneys. [footnote omitted]

48 Pausing here, the circumstances of the present case are far different to that in *UBS v Tyne*. Not least is the fact that, here, the fact that the plaintiff's claim was not prosecuted in the first set of proceedings was not due to a consensual discontinuance of proceedings (which was the case in *UBS v Tyne*, after some period of time in which the proceedings in this court had been temporarily stayed by order of this Court pending the determination of the proceedings then on foot in Singapore); but, rather, was due to the effect of non-compliance with the timetable ordered for the provision of security for costs (the explanation for which was provided in Mr Walker's 2 May 2019 affidavit). Nor can it be said that the present case involves the same duplication of court resources, delay, vexation and expense as that likely to be occasioned in the *UBS v Tyne* matter (where the litigation had been pursued in Singapore, New South Wales and then in the Federal Court).

49 Gageler J approached the matter by reference to the framework for analysis established by the reasoning of the joint judgment in *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 (*Tomlinson*) (see at [62]). His Honour said:

> The doctrine of abuse of process, in its application to the assertion of rights or the raising of issues in successive proceedings, was there explained to be informed in part by considerations of finality and fairness similar to those which inform the doctrine of estoppel but to be inherently broader and more flexible than that doctrine. [footnotes omitted]

50 His Honour considered that the decision in the United Kingdom in the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 (*Johnson*), as explained by the Supreme Court of the United Kingdom in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 was instructive, noting (at [66]) that Lord Bingham in *Johnson* had explained the application of the doctrine of abuse of process to the bringing of successive proceedings in terms consistent with the later reasoning of the joint judgment in *Tomlinson* and had identified as the "underlying public interest" that "there should be finality in litigation and that a party should not be twice vexed in the same matter"; that public interest being "reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole" (see *Johnson* at 31).

51 Gageler J considered that there was substantial overlap between abuse of process and *Anshun* estoppel (demonstrated in Lord Bingham's acknowledgement that an abuse of process might be established by nothing more than the bringing of a claim in later proceedings which "should" have been brought in earlier proceedings (see at [68] of *UBS v Tyne*).

52 Gageler J considered that the first three of the considerations on which the primary judge had relied (namely, that Mr Tyne was at all times the controlling mind both of the trustee of the Trust and of Telesto; that the Trust's claims against UBS raised complex questions of fact and law which arose out of the same substratum of facts as those on which Telesto had relied to pursue its claim in the proceedings in this Court; and that there was no juridical disadvantage to the trustee advancing those claims in this Court) were sufficient to justify the conclusion that bringing the claims in the Federal Court proceedings was an abuse of process "in the absence of Mr Tyne giving an explanation which justified his conduct as not unduly impacting on the interest of UBS and as not inconsistent with the timely and efficient resolution of the totality of the claims which the entities under his control sought to bring" (see at [77] of *UBS v Tyne*).

53 His Honour considered that the fact that discontinuance of the trustee's claims in the proceedings in this Court constituted no bar to the trustee bringing the same claims in other proceedings was beside the point; the primary judge's conclusion as to abuse of process being based on the "very different assessment that the trustee's claims should have been pursued in the SCNSW proceedings, to which Telesto remained a party, if they were to be pursued at all".

54 At [80]-[81], his Honour said:

> Gauged solely by reference to the interests of the Trust, Mr Tyne's explanation of why the trustee's claims had not been pursued in the SCNSW proceedings [as summarised by his Honour at [79] of the judgment] was not unreasonable. Having regard to the interests of UBS and the public interest in the timely and efficient administration of civil justice, however, I cannot regard it as providing an explanation as to why it was reasonable for the claims of the Trust to have been held in abeyance rather than to have been brought in the SCNSW proceedings so as to have allowed all relevant issues to have been determined in those proceedings. Were it shown in the context of the SCNSW proceedings to have been consistent with the timely and efficient resolution of

> the overall matter in dispute for Telesto's claims to have been pursued separately and in advance of those of the trustee, that could have been achieved by appropriate case management orders which could have resulted in the trustee being bound by findings of fact and determinations of law common to both sets of claims. And UBS's application for a permanent stay of Telesto's claims, had it proceeded, would have proceeded on the basis apparent to the parties and the Supreme Court that success on the application would have left the pending claims of the Trust unresolved.
>
> What was not reasonable having regard to the totality of the private and public interests involved was for Mr Tyne to take it upon himself to hold the claims of the Trust in abeyance with a view to pursuing them in separate proceedings if it turned out that Telesto's claims were for some reason not successful.

55 Thus, Gageler J held that the primary judge's conclusion that Mr Tyne had given no proper explanation of why the trustee's claims had not been pursued in the proceedings in this Court was "not only open but correct" (see at [82]).

56 In the present case, what the defendants draw from *UBS v Tyne* is, first, that it is not sufficient to say that there has not been a hearing on the merits and that it is not oppressive for the commencement of fresh proceedings; rather, that it is necessary for there to be a further level of analysis mandated by s 56 of the *Civil Procedure Act*, and, second (this being the point emphasised by the defendants), that one must look for a proper explanation for not pursuing this matter in the 2018 proceedings (and that no such explanation has here been given).

57 I will return to the first of those matters shortly. As to the second, it is answered in my opinion (as explained above) by the fact that, as a result of the circumstances in which the proceedings were dismissed but then the order for dismissal was stayed for a period beyond fourteen days, it was no longer open to the plaintiff to pursue its claim in the 2018 proceedings. In other words, there is no element of the plaintiff acting to obtain some forensic or procedural advantage in the plaintiff having commenced the fresh proceedings (and I do not infer that the circumstances in which the security for costs was not provided in the requisite time establish anything to the contrary).

58 The defendants maintain that the proper course to have been followed in the present case would have been that before the stay of the dismissal order expired, the plaintiff should have made an application to Hammerschlag J for an extension of the period for the operation of the stay "and to have dealt with

the matter within those proceedings rather than allowing the proceedings simply to lapse and start again with a fresh approach … In other words, … to take this up with was Hammerschlag J at the time rather than to let it lapse and then commence proceedings again". Certainly, that would have been one way in which to approach the matter and it would presumably have avoided at least some of the costs of commencement of fresh proceedings. However, I am not persuaded that, of itself, the course taken by the plaintiff amounts to an abuse of process.

59 The authority on which the defendants place more weight as being more closely analogous to the present case is *Rozenblit*. There, proceedings in the Supreme Court of Victoria were stayed in circumstances where the plaintiff had made various amendment applications, costs orders were made against that plaintiff and those orders had not been met. What was before the High Court was the question as to whether or not the stay that had been imposed in respect of the proceedings was appropriate in the circumstances of that case. In the course of deciding that issue, the High Court examined the relevant principles for a stay or dismissal on the basis of an abuse of process. Their Honours agreed that the stay should be set aside but that leave to make the amendments was to be conditional upon the payment of outstanding costs orders.

60 Kiefel CJ and Bell J said (at [11]):

> It does not follow from the continuing acceptance of this fundamental principle [being the principle referred to in *Cox v Journeaux (No 2)* (1935) 52 CLR 712, that, generally speaking, a person is entitled to submit a bona fide claim for determination by the courts], that the right or entitlement of a person to initiate an action is to be understood to be at large. In *Batistatos v Roads and Traffic Authority (NSW)* it was pointed out that any such entitlement is subject to the operation of the applicable procedural and substantive law administered by the courts. In *Aon Risk Services Australia Ltd v Australian National University* it was observed that it is more accurate to say that parties have the right to invoke the jurisdiction and the powers of the courts in order to seek a resolution of their dispute. [footnotes omitted]

and (at [34]) that:

> If a stay order is contemplated and its effect may be to bring the proceedings to an end it is necessary that all reasonable alternatives to such an order be investigated. As the reasons of Keane J and of Gordon and Edelman JJ show, there was an alternative course open, to grant leave to amend conditioned on payment of the costs orders. In the event, as seems likely, that they were not

> paid the respondents would be protected from the further expenses associated with the new claim, but the appellant would not be denied a determination on his existing claims. But in our view this point was not reached. There was no sufficient basis to consider the making of a stay order.

61 Keane J pointed out at [42] that:

> Litigation is sufficiently stressful and expensive for all concerned without the unnecessary aggravations of additional cost, stress, distraction and delay occasioned by inefficiency, incompetence or sheer disregard of the rules. To the extent that the contention advanced on behalf of Mr Rozenblit reflects an assumption that inefficiently or incompetently conducted litigation, and the waste in terms of time and money inflicted upon the other party or parties, is nevertheless consistent with the promotion of access to justice because the end may ultimately justify the means, that assumption must be rejected. Inefficient or incompetent conduct of litigation may cause injustice even if it is not intended to do so. Litigation that is conducted inefficiently, incompetently or in disregard of the rules by one party is no less oppressive to the other party because it is not intended to be oppressive. And it is no less oppressive because the litigant who engages in such conduct is impecunious.

62 Gordon and Edelman JJ, in their joint judgment concluded that the discretion under r 63.03(3)(a) of the Victorian Supreme Court Rules (2015) (the Victorian Rules) (to stay the proceedings until the costs were paid) had miscarried, on the basis that the court could not be satisfied that granting a stay of the proceedings pending payment of the costs was the "only practical way to ensure justice between the parties" ([53]), their Honours having noted that in the particular circumstances of the proceeding, it was open for the court to permit Mr Rozenblit to amend his claim but on condition that the proceedings were stayed until he paid the costs. At [76], their Honours said:

> The overarching obligations [of the Victorian Rules, similar to the overriding purpose and like provisions mandated by the *Civil Procedure Act* in this State] do not displace the need for the court to safeguard the administration of justice in the context of ordering a stay for abuse of process. Rather, the obligations recognise that passive participation in litigation is no longer an option. There has been a "culture shift". It is therefore not surprising that in the conduct of modern litigation, there may well be circumstances where the granting of a stay is the only practical way to ensure justice between the parties even though the conduct was not intended to be oppressive. This does not displace or alter the primary consideration of the courts to safeguard the administration of justice. Rather, it underscores that considerations of efficiency and cost are relevant aspects of the inquiry. With those considerations in mind, it is necessary to assess what occurred in this litigation and, especially, to address the particular disputed issue that was before the Court – the third application for leave to amend the statement of claim.

63 Their Honours concluded that conduct justifying the grant of a stay would necessarily be more worthy of condemnation than conduct justifying the

making of an interlocutory costs order to be paid forthwith (and that in the case in question there were insufficient grounds for an order preventing the plaintiff from pursuing a claim honestly made; that result not being the only fair and practical way to ensure justice between the parties) (see at [112]-[113]).

64 To my mind, the relevance of this decision in the circumstances of the present case is that it supports the defendants' application for alternative relief in terms of orders to secure both the costs orders made in the previous proceedings and the costs likely to be incurred in the present proceedings going forward. While orders of that kind cannot be characterised as the imposition of a condition on the grant of leave (as was the case in *Rozenblit*) (it not strictly being necessary for leave to be obtained for the commencement of the fresh proceedings *per se*, unlike the position where it would be necessary to seek leave to amend an existing pleading), it was not suggested that there was no power to make such orders; and they would in my view be within the inherent jurisdiction of the court to control its own processes.

65 The plaintiff, sensibly having regard to the just, quick and cheap resolution of the real issues in dispute, does not oppose an order that they provide security for the costs of the proceedings going forward. (I say "sensibly" because that was an issue contested before Parker J and on which they did not succeed.) It has not been suggested that there has been any material change in circumstance which would warrant that issue here being revisited. The real dispute is as to whether the plaintiff should be required to secure the costs orders that have already been made pending the assessment of those costs in accordance with the usual costs assessment processes (and as to whether there is an element of double counting, and if so how much, if such an order were to be made).

66 I am of the view that there is force to the defendants' argument that they should not be vexed (and that the administration of justice is not properly seen to be served) by the commencement of fresh proceedings seeking the same relief as the 2018 proceedings in circumstances where costs orders have been made in those proceedings and remain unsatisfied. Although an explanation has been proffered as to the circumstances in which that has occurred, I nevertheless

accept that there is force in the submission for the defendants that the costs orders should be satisfied or secured as the price, in effect, for the proceedings now being revived (see T 14.40). Against that, is the complaint by the plaintiff that it has been (or, perhaps, will be) "very extravagantly sanctioned" for taking "a few days longer than the order required for provision of security" (see T 14.49) if such an order is made (and that the only offence to the proper administration of justice would be if the plaintiff were to be shut out from the court with no hearing on the merits). The plaintiff also complains that the amount claimed for the costs is extravagant and "an argument for another day" and that the proceedings should not be held up for another six months while that assessment process is played out (noting that the present pleading is more or less identical to that filed last year in the 2018 proceedings and to which there was a commercial list response; such that it is said that the defendants will not be incurring any costs that have not already been incurred and that are not already the subject of a costs order for some considerable time, since the next step in the proceedings will be for the filing of the plaintiff's evidence – see T 16).

67 The plaintiff, again quite properly in light of the overriding mandate for the conduct of litigation in this Court, concedes that the defendants should not be put to further costs before those past costs are paid but said that that stage "should not come into operation until such time as they start incurring costs and we know what that quantum is" (see T 16.16).

68 Accepting that the defendants may not be likely to incur substantial costs in the present proceedings until such time as the plaintiff has filed its evidence (and assuming that there is no fresh requirement at this stage for orders of the kind made by Parker J in the present proceedings for the accounting process to commence in advance of the plaintiff's evidence) but taking into account that the costs assessment process may take some little time and bearing in mind the comprehensive exercise that has clearly taken place in relation to the compilation of the material lodged with the costs assessment application and the evidence of Mr Jury both as to the likely percentage of actual costs ordinarily expected on a costs assessment and as to the kind of discount that

might be made if a lump sum costs order were to have been made, I have concluded as follows.

69 I am not persuaded that the commencement (or continuation) of the fresh proceedings is an abuse of process. I consider that security for the ongoing costs of the proceedings should be provided in the amounts set out below, totalling $250,000 (which reflects the fact that some of the security ordered as the first tranche of the security ordered by Parker J will represent costs that have now been incurred and will be the subject of the existing costs orders – as was in effect conceded on the present application). I also consider that the plaintiff should provide security for an amount that secures a reasonable proportion of the past costs the subject of the costs orders (those now having been referred to the costs assessment process) and that the defendants should be permitted to have access to that sum on the conclusion of the costs assessment process. I accept that the outcome of that process is not presently known and that the amount I propose to order in this regard may not equate to the amount ultimately ordered in the costs assessment process (which might lead to a further application at that stage) but at this stage, on a broad brush assessment of the likely recoverable costs, I consider that the appropriate sum to order in this regard is $130,000 (being the midpoint estimated for costs already incurred on a party/party basis prior to 28 March 2019 and around $15,000 for costs since then).

70 As to the application for an order transferring the proceedings to the Technology and Construction List, which was not the focus of any real argument before me, such an order is not resisted by the plaintiff and I will make that order (although it is noted by the defendants that the proceedings have been transferred between various lists to date and I have no doubt that the matter could equally be case managed with expedition by me in the general list).

71 As to the question of costs of the present application, in circumstances where the parties have had mixed success, I consider that the appropriate order is that the costs of the defendants' notice of motion filed 29 July 2019 be costs in the cause.

Orders

72 For the above reasons, I make the following orders:

(1) Order the plaintiff to provide security for the defendants' costs in the following tranches:

(a) the sum of $75,000 within seven days;

(b) the sum of $75,000 within 28 days of directions being made specifying the timetable for the filing of evidence; and

(c) the sum of $100,000 within 42 days of the matter being set down for hearing.

(2) Order that security be provided by payment into Court or by unconditional bank guarantee in a form acceptable to the defendants or, in the event of dispute, acceptable to the Court.

(3) Order that the proceedings be stayed in the event of failure by the plaintiff to make any of the payments for security provided for under Order 1 (or the payment provided for under Order 4) within the time specified.

(4) Order that the plaintiff provide security in the sum of $130,000 (in accordance with Order 2 above) for the costs incurred in proceedings 2018/00152494 in this Court (which costs are the subject of costs orders made by Parker J in those proceedings and of an application for costs assessment lodged by the first defendant on 15 August 2019); and order that the defendants be entitled to draw down on so much of that security as necessary to satisfy any judgment obtained as a result of the costs assessment process.

(5) Note that the orders made for the provision of security (Orders 1 and 4 above) are without prejudice to the defendants making any further application for security for the costs of these proceedings or the costs incurred in the previous proceedings, in the event that the security so ordered is insufficient to secure the costs actually incurred in the present proceedings (or the subject of the final costs assessment in the 2018 proceedings).

(6) Order that the costs of the defendants' notice of motion filed 29 July 2019 be costs in the cause.

(7) Transfer the proceedings to the Technology and Construction List.

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