

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

BAILEY v BOTTRILL (Appeal) [2021] ACAT 103

AA 1/2021 (XD 562/2020)

Catchwords: **APPEAL** – civil dispute – previous litigation for defamation – concerns notice – claim for negligence and breach of duty of care – claim arising from previous litigation – reagitating issues in the previous proceedings – preclusionary principles – *res judicata* – claim estoppel – issue estoppel – *Anshun* estoppel – abuse of process – general and specific findings in previous litigation – alleged breaches of privacy – alleged bullying and intimidation – sweeping and unsubstantiated allegations of surveillance, falsifying evidence and documentation, and lying – appeal dismissed

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 7, 32, 79, 82
Civil Law (Wrongs) Act 2002 Ch 4
Court Procedures Act 2004 s 5A

Subordinate Legislation cited: ACT Civil and Administrative Tribunal Procedures Rules 2020 r 91

Cases cited: *ACN 120 452 744 Pty Ltd v Newham Business Brokers Pty Ltd & Anor* [2021] ACAT 37
Bailey v Bottrill [2018] ACAT 120
Bailey v Bottrill [2019] ACTSC 45
Bailey v Bottrill (No 2) [2019] ACTSC 167
Barlow & Bergin [2012] ACAT 17
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591
Blair v Curran [1939] HCA 23
Bottrill v Bailey [2018] ACAT 45
B & T Constructions (ACT) Pty Ltd v Construction Occupations Registrar and the Owners – Units Plan 3324 [2013] ACTSC 219
Clayton v Bant [2020] HCA 44
Donoghue v Stevenson [1932] AC 562

Excel Intelligent Pty Ltd v Thomson [2018] ACAT 4
Giusida Pty Ltd v Commissioner for ACT Revenue [2016] ACTSC 275
Hammer Waste Pty Ltd v QBE Mercantile Mutual Ltd [2002] NSWSC 1006
In the Matter of AB [2018] ACAT 18
Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1
Kalabakas v Chubb Insurance Company of Australia Ltd [2015] VSC 705
Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45
Secure Parking (WA) Pty Ltd v Wilson [2012] WASCA 230
Tam v Du [2019] ACAT 94
Timbercorp Finance Pty Ltd (in liquidation) v Collins [2016] HCA 44
Tomlinson v Ramsey Food Processing Pty Ltd [2015] HCA 28
UBS AG v Tyne [2018] HCA 45
Walton v Gardiner [1993] HCA 77
Wright v The Owners – Units Plan No 14 [2021] ACAT 77

List of

Texts/Papers cited: James O’Hara, ‘Litigation Preclusion: To What Extent Could (or Should) a Litigant Be Barred by Prior Litigation to Which It Was Not a Party?’ (2018) 46(3) *Australian Bar Review* 286
 Stuart Cobbett, ‘The Sacred Cows of Henderson v Henderson and Anshun Estoppel — Abuse of Process by Another Name?’ (2021) 50 *Australian Bar Review* 100

Tribunal: Acting Presidential Member Prof. P Spender

Date of Orders: 27 October 2021

Date of Reasons for Decision: 27 October 2021

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AA 1/2021

BETWEEN:

KATRINA BAILEY
Appellant

AND:

DAVID BOTTRILL
Respondent

APPEAL TRIBUNAL: Acting Presidential Member Prof. P Spender

DATE: 27 October 2021

ORDER

The Tribunal orders that:

1. The appeal is dismissed.

.....
Acting Presidential Member Prof. P Spender

REASONS FOR DECISION

1. The reasons below explain why the Tribunal has made the orders set out above. In the reasons below, a reference to 'ACAT' or 'tribunal' refers to the ACT Civil and Administrative Tribunal generally, whereas 'Tribunal' or 'Appeal Tribunal' refers to the current member. When referring to the first instance decision, the Tribunal uses the expression 'original decision', 'original tribunal', 'Senior Member' 'or the 'first instance' proceedings/decision. From time to time, the appellant is referred to as 'Ms Bailey' by the Tribunal and 'Miss Bailey' when she refers to herself in the third person in submissions and in the transcript of the first instance proceedings. The respondent is referred to from time to time as 'Mr Bottrill'.

Summary of decision

2. The Appeal Tribunal has concluded that the appellant has not established an error of fact, law or discretion made by the original tribunal in the first instance proceedings. The Appeal Tribunal has upheld the conclusion reached by the original tribunal that no duty of care arose between the appellant and the respondent and the preclusionary principles such as issue estoppel, *Anshun* estoppel and abuse of process operated to preclude the claim instituted by the appellant in the first instance proceedings. The appeal is therefore dismissed.

What must be established on the appeal?

3. This matter concerns an appeal from the original decision that was filed on 4 January 2021.
4. Orders were made on 1 February 2021 in the appellate proceedings which state that the appeal was to be conducted by way of review of the original decision pursuant to section 82 of the *ACT Civil and Administrative Tribunal Act 2008* (**the ACAT Act**). Pursuant to section 79(3) of the ACAT Act, a party to the original application may, by application, appeal the decision to the tribunal on a question of fact or law.

5. The case law on section 79(3) of the ACAT Act was set out by the tribunal in *ACN 120 452 744 Pty Ltd v Newham Business Brokers Pty Ltd*¹ and the present Tribunal relies on this statement for the purpose of consistency.

The case law has interpreted section 79(3) of the ACAT Act to mean that the appellant must show an error of fact or law in the decision under appeal and that the error affected the result.² In Excel Intelligent Pty Ltd v Thomson,³ the tribunal distilled some important principles⁴ that were discussed by Burns J in B & T Constructions (ACT) Pty Ltd v Construction Occupations Registrar and the Owners – Units Plan 3324.⁵ ... The principles are stated as follows (with some paraphrasing to apply the principles to the present context):

- (a) An appeal tribunal must determine whether the decision appealed against is wrong because ... an original tribunal fell into an error of law, made a finding of fact that is clearly wrong or exercised a discretion on a wrong principle or in a way that is clearly wrong.*
- (b) Ordinarily, if there has been no further evidence admitted or no relevant change in law, an appella[te] tribunal in entertaining an appeal ... can exercise its appellate powers only if satisfied that there was an error on the part of the original tribunal below.*
- (c) The appeal tribunal will give proper allowance to the advantage of the original tribunal who saw and heard the witnesses, so that, ordinarily, facts found based on the assessment of witnesses will not lightly be overturned.*
- (d) The appeal tribunal is obliged to conduct a real review of the reasons of the original tribunal.*
- (e) Once error below has been found (after making proper allowance for the advantages of the original tribunal), the appeal tribunal can substitute its own decision based on the facts and the law as they now stand.⁶*

6. These principles have guided the Appeal Tribunal when reviewing the first instance decision and reaching its conclusion. The Appeal Tribunal has concluded that the appeal should be dismissed because the appellant did not demonstrate an error of fact or law in the reasoning of the original tribunal or that the original

¹ [2021] ACAT 37 at [4], cited by *Oliver v Registrar, Domestic Animals Act 2000* [2021] ACAT 93 at [17]

² *Tam v Du* [2019] ACAT 94 at [22], citing *Giusida Pty Ltd v Commissioner for ACT Revenue* [2016] ACTSC 275 at [29]-[39]; *Excel Intelligent Pty Ltd v Thomson* [2018] ACAT 4 at [46]-[55]; *In the Matter of AB* [2018] ACAT 18 at [41]

³ [2018] ACAT 4

⁴ [2018] ACAT 4 at [53]

⁵ [2013] ACTSC 219 at [13] ff

⁶ *Excel Intelligent Pty Ltd v Thomson* [2018] ACAT 4 at [53]

tribunal exercised a discretion on a wrong principle or in a way that is clearly wrong.

Background

7. There is a history of litigation between the parties and this has resulted in several proceedings in ACAT and the ACT Supreme Court. They are as follows:
 - (1) *Bottrill v Bailey* [2018] ACAT 45 (20 April 2018) (**the original defamation proceedings or the original defamation tribunal**);
 - (2) *Bailey v Bottrill* [2018] ACAT 120 (30 November 2018) (**the defamation appeal proceedings or the defamation appeal tribunal**);
 - (3) *Bailey v Bottrill* [2019] ACTSC 45 (28 February 2019) (**the ACT Supreme Court proceedings No 1**);
 - (4) *Bailey v Bottrill (No 2)* [2019] ACTSC 167 (27 June 2019) (**the ACT Supreme Court proceedings No 2**).
8. These proceedings shall be referred to collectively as ‘the previous litigation’. In the previous litigation Mr Bottrill made a claim against Ms Bailey for defamation. Mr Bottrill sent a document on 16 August 2017 which was found to be a concerns notice by the original defamation tribunal⁷ and filed an amended civil dispute application⁸ in the tribunal on 3 November 2017.⁹ The background to the previous litigation was described by the Senior Member in the present first instance proceedings as follows:

Ms Bailey placed certain text and a hyperlink on her Facebook page linking to a video on another website, YouTube. Facebook contained certain text which included:

David Bottrill, Ordo Templi Orientis, (OTO, Australia). The former national treasurer, now confessed life member of the Ordo Templi Orientis (OTO), Grand Lodge of Australia.

This text was accompanied by a hyperlink directing the browser to a specific video on a YouTube website referring to Mr Bottrill. The video had two components, a video and accompanying text, collectively referred to as Van Lieshout material. The video was a recording of a person speaking; that person was Ms Teresa Van Lieshout. The accompanying text was

⁷ *Bottrill v Bailey* [2018] ACAT 45 (**ACAT original defamation decision**) at [121]-[127]

⁸ XD 1023/2017

⁹ *ACAT original defamation decision* at [17]

approximately 300 words. The Van Lieshout material referred to Mr Bottrill as a life member of the organisation of the OTO.

At first instance, [the original defamation tribunal] ... found that the Van Lieshout material was defamatory in containing the following imputations: that Mr Bottrill was a member of a paedophile group which kills and tortures victims; that he uses his employment to facilitate the entry into Australia of minors for paedophilia by Muslim men.¹⁰

9. The original defamation tribunal awarded Mr Bottrill \$18,750 in damages. The defamatory nature of the material was confirmed by the defamation appeal tribunal but the damages were reduced to \$400. The Senior Member's description of the previous litigation in the present first instance proceedings continues:

Ms Bailey having succeeded in large part in her appeal in the tribunal, again appealed to the Supreme Court. She sought to challenge the payment of the \$400 and she raised a number of issues of principle. The court granted leave on one ground only and refused leave on various other grounds.

The Supreme Court found that in all the circumstances, Ms Bailey participated in the publication of the defamatory content on her Facebook page. The combination of the publication being a personal Facebook page, having the character of a noticeboard, the direct access hyperlink and the existence of a brief description of what the hyperlink related to ... constituted 'an incorporation of the defamatory material into the reference,' and that is a quote from the Supreme Court. Accordingly, the Supreme Court found there was no error in the appeal tribunal finding the conduct was a positive act of participation in the publication and the defamatory material and the Supreme Court dismissed the appeal.¹¹

10. The present matter concerns a civil dispute application¹² filed by the appellant on 8 May 2020 seeking damages in negligence against the respondent due to his acts in commencing proceedings for defamation in the previous litigation. The applicant claimed the sum of \$25,000 and also sought a published apology. The details of the alleged negligence were set out in the civil dispute application as follows:

Civil Law (Wrongs) Act 2002

CHAPTER 4 – Negligence

¹⁰ Transcript of proceedings 3 December 2020 page 4

¹¹ Transcript of proceedings 3 December 2020 pages 4-5

¹² XD 562/2020

Sometime before the evening of 27/06/2017 and throughout the following period to May 2019, David Bottrill did engage in &/or engaged others in the surveillance of Miss Bailey's person and social media.

Sometime before the evening of 27/06/2017 and throughout the following period, David Bottrill did engage in &/or engaged others in the creation of false documents to dishonestly advance a civil cause of action (Bottrill vs Bailey XD1023/2017).

Sometime before 8am 26/06/2017 and throughout the following period David Bottrill approached "a lot of people in Canberra" and made false statements to persons known and unknown with the express purpose of damaging her professional & social reputation - these included claims that Miss Bailey believed and was calling him a paedophile and imputations Miss Bailey is a racist, religious intolerant, has violent friends in Canberra and is a homophobe.

Sometime prior to the 9/08/2017 David Bottrill did unnecessarily approach "a lot of people in Canberra" in an attempt to obtain Miss Bailey's personal details[.]

On the 9/08/2017 did unnecessarily engage Australia Post to deliver a Notice of Concern to the residence of Miss Bailey with the express purpose of intimidation.

On 24/08/2017 David Bottrill did submit false & misleading documents to the ACAT in a Dispute Form for the aforementioned civil cause of action. This was also done contrary to the purpose and processes for Concerns Notices as provided by the Civil Law (Wrongs) Act 2002.

From 24/08/2017 David Bottrill did make false statements and submit false documents throughout a public civil cause of action this including denying the use of false documents and statements.

Mr Bottrill would have been rewarded over \$18000 for these actions if not for Miss Bailey's persistence despite her exhausted resources and inexperience.

Mr Bottrill appealed to the authority of his Commonwealth Government employment in an attempt to further discredit Miss Bailey's truthful claims about his documents and statements compounding the damage. This resulted in significant costs to both Miss Bailey and the ACT government through wasted time and resources.

These deliberate & unnecessary actions have caused significant damage to Miss Bailey's professional, commercial & social reputation & further caused Miss Bailey and her daughter significant emotional distress through fear for their safety in their own home and urban surrounds and significant online harassment.

These actions were openly undertaken, stated &/or published & witnessed within the ACT.¹³

¹³ Civil Dispute Application filed 8 May 2020 page 5

11. In his response to the civil dispute application, Mr Bottrill made the following points in Attachment A:

Previously Ms Bailey published materials which contained the imputations that I was a member of a paedophile group which killed and tortured it's [sic] victims and that I facilitated the entry into Australia of minors for paedophilia by Muslim men. ... In response I filed a Civil Dispute Application in ACAT.

The initiation of legitimate litigation cannot be complained of but here Ms Bailey seems primarily to be complaining about being identified (after she had published pseudonymously), being correctly served legal documents, that her openly published content on social media platforms [was] observed and acted on (by the filing of the defamation action), that she was ultimately found by the ACT Supreme Court to be a publisher of defamatory material and that others have expressed disapproval of her public views and public actions.

Ms Bailey is also seeking to revisit a number of issues raised and addressed in previous ACAT proceedings. Those elements, and any counterclaims ... should have been raised in the initial proceedings – more than 2 years ago, should be dismissed.¹⁴

12. Mr Bottrill referred to the decisions in the previous litigation that are set out above.
13. The first instance proceedings were heard on 5 November 2020.

The first instance proceedings

The case that was presented at the first instance hearing

14. During the first instance hearing, the Senior Member asked Ms Bailey what duty of care was alleged to operate between Mr Bottrill and herself. The transcript of the hearing states as follows:

As I understand it, the only connection between you both arises from some Facebook posts and the court proceedings that ran after that. Am I correct? There is no other relationship between you?¹⁵

15. The appellant responded that Mr Bottrill's interest in her had:

begun when that video was posted, as he stated in the hearing, then he would not have screenshots... That were taken prior to that ... video link being shared to Facebook.¹⁶

¹⁴ Response – civil dispute filed on 16 September 2020, Attachment A

¹⁵ Transcript of proceeding 5 November 2020 pages 4-5

¹⁶ Transcript of proceedings 5 November 2020 page 5

16. The appellant then referred to various incidents that she alleged to have occurred during the previous litigation.
17. The Senior Member asked again about the relationship between the appellant and Mr Bottrill:

*You are both just ... members of the ACT community? There is no other connection between you except that you both have friends and lives in the ACT?*¹⁷

18. The appellant argued that although Mr Bottrill denied having heard her name, another person at a hearing in March-June 2017 did “say her name” in what appears to have been in a matter that Mr Bottrill had against another party.¹⁸ The appellant said that she travelled in the elevator with Mr Bottrill after one of the ACAT events and she thinks she might have made a comment along the lines, “it’s quite an interesting situation you’ve got here”. Then “on 4 [sic] August” she received a letter from Mr Bottrill.¹⁹
19. The appellant alleged that either Mr Bottrill or associates on his behalf had been taking screenshots of her material. She alleged that Mr Bottrill had actively approached a lot of people in Canberra to get information about her prior to asking her to remove the item from Facebook. The Senior Member asked Ms Bailey whether she alleged that Mr Bottrill had made enquiries to find out who she was.²⁰ The Senior Member then asked Ms Bailey whether she considered Mr Bottrill had made those enquiries to find out who it was that was going to the tribunal and to ask them to stop – to remove the document. The Senior Member continued by querying:

*Or do you say he had some other motive to do that?*²¹

20. Ms Bailey answered as follows:

¹⁷ Transcript of proceedings 5 November 2020 pages 5-6

¹⁸ Transcript of proceedings 5 November 2020 page 6

¹⁹ Transcript of proceedings 5 November 2020 page 7

²⁰ Transcript of proceedings 5 November 2020 page 7-8

²¹ Transcript of proceedings 5 November 2020 page 8

MS BAILEY: I say he had some other motive to do that because I had not uploaded - I had not clicked share on the video when he started surveilling and looking for information on me. I can't say what that motivation was.

*SENIOR MEMBER: No. So - - -*²²

*MS BAILEY: But apart from perhaps he didn't like that someone was taking an interest in the case - the public case he had at ACAT. But I can't - that is speculation on my part. I can't make that claim.*²³

*SENIOR MEMBER ... All right. So what I am trying to do though is just to ask you - to get from you the information that I need as to whether the duty of care that he owed you is the same as all the other members of the community who may never meet, or who may just have a passing meeting.*²⁴

*MS BAILEY: But it's just that - it's just in using the tribunal system ... [he] has a responsibility to act in a way that is not going to cause foreseeable harm. I never argued against his right to sue for defamation, but would argue he does not have the right to lie, omit, slander or fudge to advance his case and one item does not just cancel out the other or excuse any wrongdoing that he has done in doing that to gain that information. In this case ... some of his actions predate any wrong I may have committed. [T]he only actions that were intentional in causing careless harm were Mr Bottrill's.*²⁵

...

MS BAILEY: This has damaged my ability to actually get a job. When you apply for jobs they want to know your civil and criminal history. ...

SENIOR MEMBER: So some of the things that you are saying Mr Bottrill has done are - - -

MS BAILEY: But they are done in a public forum both within the tribunal and outside the tribunal.

*SENIOR MEMBER: All right. So just tell me very quickly, as quickly as you can, what are the top five things that you say he has done that were negligent; that he shouldn't have done and that they were negligent.*²⁶

...

MS BAILEY: Mr Bottrill actively sought out people who dislike me to gain information about me. ... And these were deliberate negligent actions that were almost profitable to the tune of \$20,000. ...

[I]t is negligent of him to deliberately misuse the processes that are available to him ... to intimidate - ...

²² Transcript of proceedings 5 November 2020 page 8

²³ Transcript of proceedings 5 November 2020 page 8

²⁴ Transcript of proceedings 5 November 2020 page 8

²⁵ Transcript of proceedings 5 November 2020 page 8

²⁶ Transcript of proceedings 5 November 2020 pages 8-9

*MS BAILEY: - - - someone in their personal life and in their professional life ...*²⁷

MS BAILEY: On every level. He had a right ... to make his claim, as I have said several times. ... I could ... prove the fact that he used false documents and made false statements ... But many of his actions didn't make it into the defamation matter because they weren't actually relevant, as I have said, by the member who said that I had a cause of action there simply from the fact that he had been making those statements. ...

SENIOR MEMBER ... All right. Well, thank you for telling me that.

MS BAILEY: He's defaming my person and taking actions against my person before I had done anything to him and, as a citizen, that is ... irresponsible and he does have a duty to act - even if I am a stranger. ... [Y]ou can't just call them things that are going to impact their work and impact their reputation and impact their social life and impact their relationships.

SENIOR MEMBER: All right. And - - -

*MS BAILEY: Target ads, or ways to approach a lot of people and have these discussions before you ever put anything to the person you are doing this about, or to the tribunal, or [t]ake any actions to have the item that you are ... upset about removed.*²⁸

...

MS BAILEY: ... [T]he ... accounts used to take those screenshots - none of those people have put in a proper witness statement. Only one has been acknowledged. ...

SENIOR MEMBER: So ... your Facebook account was public at that time though. Is that not so?

MS BAILEY: He was entering evidence into the tribunal, making a claim of defamation. There were issues with the document and issues with his claim. It was a full year after being first challenged about his document almost that he admitted he had not taken the screenshots after all but they were made by a friend.

SENIOR MEMBER: Yes. But the question I asked you was, ... when the screenshots were taken was your Facebook a public - was it open, was it available to the public?

*MS BAILEY: Yes. ...*²⁹

21. In response to these submissions made by Ms Bailey the Senior Member sought the views of Mr Bottrill as follows:

SENIOR MEMBER: All right. And, Mr Bottrill, what would you like to say?

²⁷ Transcript of proceedings 5 November 2020 pages 9-10

²⁸ Transcript of proceedings 5 November 2020 page 10

²⁹ Transcript of proceedings 5 November 2020 pages 10-11

MR BOTTRILL: ... Pretty much that Ms Bailey seems to be trying to revisit a lot of issues that were raised in the course of the previous ACAT and Supreme Court hearing, ... that I have committed perjury, which I didn't. She [also] claimed defamation ... she is characterising comments made in the tribunal and Supreme Court proceedings as constituting defamation, but they were just ... comments made in proceedings. ...

MR BOTTRILL: [S]he is claiming that I have defamed her somewhere else and in fact she admitted that she has ... no idea who I spoke to in order to determine her identity. There is clearly no other nexus between us other than the court case.³⁰

The reasons of the original tribunal

22. The original tribunal handed down a decision and provided oral reasons on 3 December 2020. The original tribunal dismissed the application. The grounds upon which the original tribunal dismissed the application may be summarised as follows:

- (1) The respondent did not owe the appellant a duty of care in negligence when he commenced proceedings against the appellant, therefore the claim in negligence could not succeed (**duty of care**).
- (2) In addition, certain rules of law apply to the previous litigation that operate to preclude the appellant from relitigating the issues that have been disposed of in the earlier proceedings (**preclusionary rules**). These principles of law include issue estoppel, *Anshun* estoppel, *res judicata*, abuse of process and the operation of section 32 of the ACAT Act which deals with frivolous and vexatious applications.
- (3) The preclusionary rules also operated to exclude reconsideration of various improprieties that were alleged by Ms Bailey (**alleged improprieties**).

23. The original tribunal concluded that the application was futile and should be dismissed.

Duty of care

24. The relevant parts of the transcript of original tribunal's reasons for decision are set out below.

There is no duty of care in commencing civil proceedings. The common law has developed a number of protections against improper commencement of

³⁰ Transcript of proceedings 5 November 2020 page 12

*proceedings in defamation or in other civil matters. For instance, there is the inherent power of the court to prevent an abuse of its own process; there is the statutory and inherent powers to dismiss proceedings that are frivolous, vexatious and cannot succeed... .*³¹

...

... [T]he laws of defamation exist to protect the reputation of an individual in circumstances where another person has published a defamatory matter. Mr Bottrill had a right to commence the previous proceedings. He commenced the proceedings to protect his interest and to assert his right not to be defamed. ...

Mr Bottrill's right to commence the proceedings is confirmed by the fact in each of the previous proceedings, the decision-maker found that the material published by Ms Bailey was defamatory of Mr Bottrill.

*The tribunal today finds that Mr Bottrill did not have a duty of care to consider the effects of his commencing proceedings on Ms Bailey in negligence. It follows that in all the circumstances, Mr Bottrill was not negligent in commencing the proceedings against Ms Bailey.*³²

Preclusionary rules

25. The original tribunal thereafter discussed the preclusionary rules where a party commences proceedings and previous proceedings have been determined between the relevant parties. The Senior Member noted that Ms Bailey had raised a number of matters other than negligence and these grounds and submissions related to alleged improprieties by Mr Bottrill before or during the previous proceedings. The Senior Member noted the conduct complained of by Ms Bailey as follows:

*The conduct complained [of] includes surveilling or watching her before and during the proceedings; causing his associate to surveil or watch her; sending the notice of concern during the proceedings; creating false statements, false documents and providing false evidence by himself and others; and other conduct that Ms Bailey said amounted to a lack of procedural fairness, including refusing to provide information, bullying and intimidation. This is only a summary of the various matters that Ms Bailey has raised.*³³

26. The Senior Member then discussed the various issues other than negligence that had been raised by Ms Bailey. The relevant part of the transcript is extracted as follows:

³¹ Transcript of proceedings on 3 December 2020 page 6

³² Transcript of proceedings 3 December 2020 pages 6-7

³³ Transcript of proceedings 3 December 2020 page 9

Issue estoppel: Ms Bailey raises various issues which were raised in the previous proceedings and were considered and determined in those proceedings. Those issues cannot be raised again in these proceedings against Mr Bottrill; issue estoppel applies. The tribunal is satisfied that the tribunal is precluded from hearing such issues on grounds of issue estoppel.

Anshun estoppel: also in these proceedings, Ms Bailey has raised various issues and concerns which, if they were not raised in the previous proceedings, they could have and should have been raised in the previous proceedings. The tribunal is satisfied that the tribunal is precluded from hearing such issues on grounds of Anshun estoppel.

Res judicata: in her present application, Ms Bailey raises various issues of fact and law which were decided necessarily in the previous proceedings. The tribunal is satisfied that the tribunal is precluded from hearing in the present application those issues on the grounds of res judicata.

Abuse of process: Ms Bailey also raises a number of submissions that amount to seeking to re-litigate some of the issues that have been disposed of in earlier proceedings. The tribunal is satisfied that the tribunal is precluded from hearing such issues on the grounds of an abuse of process. The tribunal is satisfied that the claims in negligence disclose no reasonable cause of action. The application is futile and should be dismissed.

The tribunal is satisfied that in relation to the other grounds and issues raised by Ms Bailey that the tribunal is precluded from hearing the other matters raised by Ms Bailey on the grounds of issue estoppel, Anshun estoppel, res judicata or abuse of process. All of these matters were either relevant to the various previous proceedings, raised in the proceedings and determined in those proceedings, or should have been raised in the various proceedings. The principles of issue estoppel, Anshun estoppel, abuse of process and res judicata are applicable to those matters.³⁴

Application for appeal

27. The appellant lodged an application for appeal on 4 January 2021 and on 16 February 2021 filed written submissions stating the alleged errors of fact or law. The respondent, Mr Bottrill, responded to the list of alleged errors on 24 February 2021. The matter was listed for hearing on 1 April 2021 but a further refining of the issues was needed so the Appeal Tribunal made orders requiring the provision of the particulars of the claim by the appellant in the first instance proceedings. The appellant provided these particulars of claim on 19 April 2021. The respondent was thereafter required to give particulars of the relevant facts supporting the conclusions arrived at by the original tribunal on 3 December 2020

³⁴ Transcript of proceedings 3 December 2020 pages 9-10

regarding the operation of preclusionary rules.³⁵ This material was provided by the respondent on 3 May 2021. The appellant provided material in reply on 13 May 2021.

28. The Tribunal reserved its decision at the conclusion of a resumed hearing held on 19 May 2021.

Grounds of appeal

29. Doing the best that it can with the material that was filed by the appellant, the Tribunal summarises the grounds of appeal as follows:

- (1) The original tribunal erred in finding that the respondent did not owe the appellant a duty of care when he commenced proceedings against the appellant.
- (2) The original tribunal erred in concluding that the preclusionary rules operate. These rules do not operate because the underlying conduct that formed the cause of action in the first instance proceedings was not examined by the tribunal or the ACT Supreme Court in the previous litigation, either generally or because it predated the commencement of the defamation proceedings.

30. The facts that constitute the cause of action are set out in the particulars of claim that were filed by the appellant on 19 April 2021.

Appellant's submissions

31. In the various documents filed in the appeal, the appellant raised many issues. In this decision, the Tribunal has referred to submissions that are relevant to the appeal. The Tribunal has not summarised submissions that are clearly irrelevant to the appeal e.g. judicial estoppel or collateral estoppel³⁶ or arguments such as deceit and “malicious negligence” that were not raised by the appellant in the first instance proceedings and cannot be linked to the claim made in the first instance proceedings. Broadly speaking this was a claim in negligence although, as

³⁵ In particular, the reasons stated at transcript of proceedings on 3 December 2020 page 7 line 19 to page 10 line 10, regarding the preclusionary rules.

³⁶ Application for appeal filed 4 January 2021 page 5

discussed above, she raised a number of additional grounds related to alleged improprieties by Mr Bottrill before or during the previous litigation.

Duty of care/negligence

32. The appellant alleged that the respondent owed her a duty of care under the general law duty in *Donoghue v Stevenson*³⁷ and under the *Civil Law (Wrongs) Act 2002 (Civil Law (Wrongs) Act)* – chapter 4 ‘Negligence’.³⁸ She continued, referring to herself in the third person as “Miss Bailey”: “Miss Bailey has attempted to stress his negligent actions PREDATE any litigation contract brought about by Mr Bottrill for defamation”.³⁹

Preclusionary rules

33. Regarding the findings about issue estoppel, *Anshun* estoppel and *res judicata* the primary ground raised by Ms Bailey is that none of the issues that were raised subsequently in the first instance proceedings were considered as part of the defamation proceedings.⁴⁰
34. Regarding *res judicata*, the appellant argued that this does not apply to her claim because the claim is not based on the same transaction as the previous litigation and she did not initiate the previous actions. The appellant argued that the previous transaction pertained to a post by Ms Bailey whereas this current proceeding relates to evidence, statements and claims by Mr Bottrill that caused harm to herself and her family.⁴¹
35. Regarding *Anshun* estoppel, the appellant relied on the decision of *Kalabakas v Chubb Insurance Company of Australia Ltd*⁴² (*Kalabakas*) and argued that McMillan J in that case determined that:

The obligation to disclose something “known” can only attach to something that a person actually has in his or her consciousness or else something

³⁷ [1932] AC 562

³⁸ Appellant’s submission filed 16 February 2021 pages 3-4

³⁹ Application for appeal filed 4 January 2021 page 7

⁴⁰ Appellant’s submission filed 16 February 2021 page 10

⁴¹ Appellant’s submissions filed 16 February 2021 page 12

⁴² [2015] VSC 705

*that exists in some record or other source of information that the person actually knows about and to which that person has access.*⁴³

36. However, it is not clear what type of knowledge is being relied upon by the appellant in this argument, as discussed below.
37. The appellant argued that she did not abuse process. She stated as follows:

*Miss Bailey did not abuse process. If she had the knowledge to raise the matter previously she would have, she did not misrepresent herself or Mr Bottrill, she is not raising issues previously used in a determination. ... Miss Bailey's claim Mr Bottrill had used false documents was not upheld in the first instance and she was PREVENTED by the Tribunal from pursuing it at Appeal even after a member acknowledged Mr Bottrill's wrongdoing at the Appeal Application hearing and verbally ORDERED him to explain himself at appeal. However it was decided by the Appeal members to hear the Appeal as simply a review. The extent of Mr Bottrill's misrepresentations were just becoming known to Miss Bailey at this stage. Miss Bailey was told several times throughout the previously litigated defamation matter she would need to make a separate claim on these issues. ... I was refused the right to remedy for previously on the grounds it wasn't relevant to the then matters at hand. [Estoppels] do not apply to matters not previously heard and considered as part of a decision.*⁴⁴

Alleged improprieties by the respondent in the previous litigation

38. The appellant alleged the use of false documents and misrepresentation in the previous litigation. She referred to the transcript in what appears to be a directions hearing in the previous litigation where a presidential member discussed the preparation of a witness statement by one of Mr Bottrill's proposed witnesses.⁴⁵ She continued: "by committing [f]raud upon making his dispute application he showed malice and contempt for Miss Bailey and the desire to cause some harm".⁴⁶
39. As stated above, the appeal was first listed for hearing on 1 April 2021. At that hearing the Tribunal ordered the appellant to provide particulars of the claim that had been made in the first instance proceedings.

⁴³ [2015] VSC 705 at [32], citing *Hammer Waste Pty Ltd v QBE Mercantile Mutual Ltd* [2002] NSWSC 1006 at [56] (Palmer J)

⁴⁴ Appellant's submission filed 16 February 2021 page 13

⁴⁵ Appellant's submission filed 16 February 2021 pages 4-7

⁴⁶ Appellant's submission filed 16 February 21 page 11

40. In the particulars of claim filed on 19 April 2021 the appellant provided the following particulars, with some reference to the transcripts of the previous litigation. The appellant made various arguments as follows. The particulars of claim are set out in full for the sake of completeness:

- (1) Conspiring to advance a civil cause of action.
- (2) Conspiring to create documents to mislead the tribunal and other party and/or intimidate the other party.
- (3) Lying about the documents and their sources.
- (4) Lying under oath or affirmation about the circumstances under which Mr Bottrill first viewed Miss Bailey's Facebook.
- (5) Mr Bottrill did not acknowledge any of the creative documents until at the ACAT Appeal Application hearing.
- (6) Misrepresenting Miss Bailey's post in the attempt to obtain financial or other advantage.
- (7) Engaging in and encouraging slander of Miss Bailey.
- (8) Initial flawed decision used in harassment and further misrepresentation of Miss Bailey.
- (9) Further claim of lying under oath/affirmation.
- (10) Attempting to use valid claims by Miss Bailey about his documents as a reason for aggravated damages.
- (11) Lying about when Mr Bottrill first viewed Miss Bailey's Facebook or lying about how supposedly he obtained a screenshot.
- (12) Use of dishonest witnesses.⁴⁷

41. In summary, the appellant argued that the previous litigation did not give her "justice or compensation for Mr Bottrill's dishonest dealings which amount to Malicious Prosecution in the Initial Hearings".⁴⁸

⁴⁷ Appellant's particulars of claim dated 19 April 2021

⁴⁸ Appellant's particulars of claim dated 19 April 2021 page 12

Respondent's submissions

42. In his response filed 24 February 2021, the respondent argued that the appellant's interpretation of chapter 4 of the *Civil Law (Wrongs) Act* is misconceived because it amounts to a "universal duty of care".⁴⁹ On the issue of estoppel, the respondent stated that the appellant located her grievances at particular times in the previous litigation. As such, she has exhausted her review avenues in the ACAT. The respondent quoted from *Barlow & Bergin*⁵⁰ where the Acting Presidential Member observed:

*It is not for this tribunal, even its appeal division, to so extend the common law as to open the opportunity for unsuccessful parties in civil cases where they have not exercised the right of appeal nor sought to counter claim for damages, to then at a later date institute proceedings for recovery of money for damages alleged to be flowing out of those legal actions... .*⁵¹

43. The respondent argued that the appellant's submissions did not disclose any compelling argument that the decision of the Senior Member was in error and therefore the appeal should be denied.⁵²
44. Mr Bottrill made the following points on 3 May 2021 in his response to the appellant's particulars of claim.⁵³ He argued that in considering her decision the Senior Member at first instance examined the four previous decisions constituting the previous litigation and the respondent provided extracts of the decisions in the previous litigation where the issues raised by Ms Bailey had been dealt with. These extracts are discussed below under the heading 'Consideration'. The respondent asserted that the conclusions arrived at by the Senior Member that the principles of estoppel applied in this case were correct.⁵⁴
45. In summary, the respondent argued that the appellant situated almost all of her complaints in the time period of the original defamation proceedings at first instance, the ACAT appeal, and the ACT Supreme Court processes. The respondent argued that the extracts demonstrate that she has raised her issues in

⁴⁹ Respondent's submission filed 24 February 2021 page 1

⁵⁰ [2012] ACAT 17

⁵¹ *Barlow & Bergin* [2012] ACAT 17 at [16], cited in the respondent's submission filed 24 February 2021 page 1

⁵² Respondent's submission filed 24 February 2021 page 1

⁵³ Respondent's response to the appellant's particulars of claim filed 3 May 2021

⁵⁴ Respondent's response to the appellant's particulars of claim filed 3 May 2021 page 3

previous proceedings and having used up the appeal options available to her in those fora she is seeking to relitigate matters already dealt with in those previous proceedings.⁵⁵ The respondent quoted Ms Bailey in the transcript of 3 December 2020 where the Senior Member delivered her decision as saying “I’m wanting to mitigate his actions” which he argued reinforces the contention this latest application is inextricably linked to the previous proceedings.⁵⁶ Further, he stated:

As far back as 31 August 2017 in response to the Notice of Concerns delivered to her, Ms Bailey was claiming the delivery of the Concerns Notice was causing “emotional distress” and advised she would be “considering my legal options in regard to a counter claim ...” Ms Bailey did not however lodge a counter claim application at that time nor did she do so in the period leading to the initial decision, review and appeal.⁵⁷

Appellant’s reply

46. In her reply dated 13 May 2021, the appellant repeated the allegations made in her previous submissions but did not provide any material to countermand the points that had been made by the respondent in his response to the appellant’s particulars of claim.

Consideration

47. As stated above, pursuant to the orders made on 1 February 2021, the appeal is to be conducted by way of review of the original decision pursuant to section 82 of the ACAT Act. If the Appeal Tribunal was to consider further evidence, leave must be sought and granted pursuant to section 91(c) of the ACT Civil and Administrative Tribunal Procedures Rules 2020. No application was made by the appellant to adduce further evidence. Further, the grounds of the appeal are wide ranging and are often not effectively linked to the arguments made and evidence provided in the proceedings at first instance. To emphasise the point, this appeal is being conducted as a review of that material.

The duty of care ground

48. The claim that was made by the appellant in the original proceedings was a claim in negligence. The remedy that was sought was the sum of \$25,000 and a

⁵⁵ Respondent’s response to the appellant’s particulars of claim filed 3 May 2021 page 3

⁵⁶ Respondent’s response to the appellant’s particulars of claim filed 3 May 2021 page 3

⁵⁷ Respondent’s response to the appellant’s particulars of claim filed 3 May 2021 page 3

published apology. In the material discussed above, the Appeal Tribunal has set out the discussions between the appellant and the Senior Member at first instance so the case that was being argued by the appellant during that hearing is obvious. It is clear from that exchange that the conduct complained of was conduct that came within the purview of the previous litigation. Therefore, although the appellant argued during this appeal that the cause of action related to conduct that occurred prior to the commencement of proceedings, that conduct still formed part of the matrix of facts that was scrutinised by the tribunal and the ACT Supreme Court during the previous litigation. For example, the appellant argued that there was some wrongdoing by Mr Bottrill in obtaining information about her and material from her Facebook page. This is demonstrated by the exchange between Ms Bailey and the Senior Member where Ms Bailey conceded that her Facebook page was public, as quoted above. The sweeping additional allegations of improprieties that were made by Ms Bailey both at first instance and in this appeal were unsubstantiated and were also dealt with in the previous litigation, as discussed below.

49. However, insofar as the appellant purports to bring an action in negligence for the conduct of Mr Bottrill that occurred prior to the commencement of the previous litigation, the original tribunal was correct in finding that Mr Bottrill did not have a duty of care to consider the effects of his commencing proceedings on Ms Bailey in negligence. This would have been sufficient to dispose of the proceedings at first instance because the original tribunal accurately stated that the claims in negligence disclosed no reasonable cause of action. Accordingly, the Senior Member found that the application was futile and should be dismissed.
50. However, Ms Bailey has made broader allegations in the material filed in the appeal including intentional torts such as defamation, fraud and perjury. These broader allegations are captured by the preclusionary rules and abuse of process which are discussed below. As stated above, the appeal proceeded by way of review of the first instance proceeding, therefore no further evidence was adduced and it would have been inappropriate to do so given that the proceedings were a repetition of the previous litigation.

Conclusion on the duty of care ground

51. The Appeal Tribunal concludes that no errors of fact, law or discretion are demonstrated by this ground.

The preclusionary rules and alleged improprieties grounds

52. The Tribunal will deal with these two grounds together because they were intermingled in the appellant's submissions.
53. As stated above, the original tribunal found that the proceeding should be dismissed on the additional ground of the operation of preclusionary rules. The original tribunal based its reasoning upon certain allegations made by Ms Bailey that were in addition to the negligence ground such as surveilling or watching her before and during the proceedings; causing his associate to surveil or watch her; sending the concerns notice during the proceedings, creating false statements and documents and providing false evidence by himself and others, and other conduct that Ms Bailey said amounted to a lack of procedural fairness such as refusing to provide information, bullying and intimidation. As stated above, the appellant continues to make sweeping claims about the respondent's conduct. Some of these claims can be dispatched by the conventional application of the preclusionary doctrines such as *Anshun* estoppel.
54. The original tribunal's reasoning on this ground is general. The Senior Member stated the relevant principles of law but did not apply them to the previous litigation. The Appeal Tribunal will provide examples of general and specific findings made by the tribunal and the ACT Supreme Court in the previous litigation which attract the operation of the preclusionary rules.

Examples of general and specific findings in the previous litigation

General findings

55. It is clear from the records available about the previous litigation that Ms Bailey frequently raised grievances about the processes that were addressed as the litigation progressed. Regarding the conduct of the previous litigation in the tribunal generally, the Appeal Tribunal notes the comments of the Senior Member in the original defamation proceedings who stated:

23. *The respondent made a number of procedural and other complaints regarding, inter alia, the service of documents, notice, the applicant's conduct, his alleged procedural shortcomings and the management generally of this application by Tribunal members and staff. The litigation was the subject of numerous directions hearings, which, amongst other things, attempted to address these issues of concern and complaint.*
24. *The respondent sought interim relief. She sought to strike out or to have the applicant's claim summarily dismissed. That application was heard on 31 January 2018 and, after hearing submissions from both parties, her interim application was dismissed by a differently constituted tribunal.*⁵⁸

Specific findings

56. Insofar as the Tribunal is able to identify specific allegations that were dealt with in the present proceedings at first instance, the Tribunal notes the following by way of example of procedural and substantive findings that were made by the various fora that would allow the preclusionary rules to operate.

Specific findings – breach of privacy and security

57. The original tribunal in the defamation proceedings in April 2018 dealt with the allegation that Mr Bottrill had obtained Ms Bailey's residential address which was a breach of privacy and security.⁵⁹ The tribunal on that occasion noted the allegation but did not further deal with it. It was not necessary for the tribunal to do so in order to make the findings that the cause of action in defamation had been proved and Mr Bottrill was entitled to compensation accordingly. The concerns notice forms part of the necessary preparation for a defamation proceeding and this was discussed by the original defamation tribunal.⁶⁰ No adverse comment was made about potential breaches of privacy that have been alleged by the appellant in the present proceedings.

Specific findings – evidence tampering and perjury

58. Regarding this allegation, the original defamation tribunal stated as follows:

207. The applicant led evidence as to the audience. Mr Edwards gave evidence of having viewed the Van Lieshout Material. While his evidence of what he in fact saw was unsatisfactory in a number of respects, inasmuch as it is tendered for the purposes of proving that

⁵⁸ *ACAT original defamation decision* at [23]-[24]

⁵⁹ *ACAT original defamation decision* at [49]

⁶⁰ *ACAT original defamation decision* at [121]-[129]

he saw and heard something containing defamatory matter, it is accepted on that basis. [footnote omitted]

208. *He was cross-examined. The thrust of that attack was that he could not have viewed the Van Lieshout Material because the respondent's Facebook page was set to private. The respondent spent some time developing this argument. Again, she made some very serious allegations. She asserted that the evidence of viewing the Van Lieshout Material was false and that Mr Edwards and the applicant had perjured themselves.*
209. *The Tribunal rejects those allegations. There was no credible evidence to support them. The evidence of Mr Edwards in this respect was not impeached and his evidence of having viewed the Van Lieshout Video is accepted.*⁶¹

59. This finding was challenged by Ms Bailey in the Supreme Court. McWilliam AsJ found the following:

*During the hearing before this Court, the applicant was requested to point to any transcript references or evidence that would demonstrate that her factual challenge [to the findings set out above of the original defamation tribunal at [208]-[209]] had substance. She requested an opportunity to forward to the Court such material. What was received by the Court was a series of attachments that did not in any way establish any foundation for the applicant's challenge to the Tribunal's finding either at first instance or on appeal. I do not consider there to be sufficient cause to permit the grant of leave on a finding of fact made by a tribunal member at first instance who had formed and articulated clear views on the credibility of Mr Edwards based on his perception of him in the witness box and the nature of the evidence he gave.*⁶²

60. Similarly, the defamation appeal tribunal held that no further evidence should be adduced on the appeal even though Ms Bailey sought leave to introduce voluminous documents that, she said, demonstrated "fraudulent/problematic/misleading actions by [Mr Bottrill]".⁶³ The defamation appeal tribunal continued as follows:

10. *Both parties accepted that the material they wished to introduce by way of fresh evidence was available to them at the time of the original hearing. The transcript does not record any concern that they were prevented from introducing it at the time. ...*
11. *We concluded that there were no exceptional or special circumstances warranting the grant of leave to either party to admit the proposed further evidence. To do so would have amounted to*

⁶¹ *ACAT original defamation decision* at [207]-[209]

⁶² *Bailey v Bottrill* [2019] ACTSC 45 at [52]

⁶³ *Bailey v Bottrill* [2018] ACAT 120 (***ACAT appeal defamation decision***) at [8]

*permitting each party to re-litigate the case that they could have been presented at the original hearing. Each application for leave to lead further evidence was therefore dismissed.*⁶⁴

Specific findings – publication of the defamatory matter

61. The question of publication of the defamatory matter was dealt with in at least three of the four previous decisions. This culminated in the decision of McWilliam AsJ in the ACT Supreme Court proceedings No 2 – *Bailey v Bottrill* (No 2).⁶⁵ As stated by the respondent in his submissions:

*The Court ... made comment on the issue of what was published by Ms Bailey on her Facebook page (see [11]-[18]) and concluded (at [16]); “ ... it does not matter whether the remaining words were visible or obscured.” The Court concluded, at [51], that the precise wording of the snippet displayed “... does not matter...” as “The only reason the words were on her Facebook page was because the appellant shared the link.”*⁶⁶

The operation of the preclusionary rules

62. The preclusionary doctrines operate in order to implement the public interest in the finality of litigation.⁶⁷ They broadly include *res judicata*, claim estoppel, issue estoppel and *Anshun* estoppel. The High Court has recently clarified the operation of these rules in *Clayton v Bant*⁶⁸ (**Clayton**) and the Tribunal will rely upon the High Court judgments in that case to set out the relevant principles. The High Court stated that the rules are:

*[f]ounded on the twin policies of ensuring finality in litigation (thereby promoting respect for and efficient use of courts as well as avoiding inconsistent judgments) and of ensuring fairness to litigants (by sparing them the stress and expense of duplicative proceedings), the focus of the common law doctrine of estoppel is on “substance rather than form”. The doctrine looks not for absolute identity between the sources and incidents of rights asserted or capable of being asserted in consecutive proceedings. [footnotes omitted]*⁶⁹

⁶⁴ *ACAT appeal defamation decision* at [10]-[11]

⁶⁵ [2019] ACTSC 167

⁶⁶ Respondent’s response to the appellant’s particulars of claim dated 3 May 2021, page 2

⁶⁷ Stuart Cobbett, ‘The Sacred Cows of Henderson v Henderson and Anshun Estoppel — Abuse of Process by Another Name?’ (2021) 50 *Australian Bar Review* 100, 101

⁶⁸ [2020] HCA 44; (2020) 385 ALR 41. The judgment in this case was handed down on 2 December 2020, shortly before the original tribunal handed down its decision on 3 December 2020.

⁶⁹ *Clayton* at [34] (Kiefel CJ, Bell and Gageler JJ)

63. Since the High Court decision in *Tomlinson v Ramsey Food Processing Pty Ltd*⁷⁰ in 2015, it may be asserted that these doctrines form part of a broader category of rules that operate to prevent an abuse of process. This will be discussed below.
64. Each of the rules operates in particular ways.

***Res judicata* and claim estoppel**

65. For example, the doctrine of *res judicata* operates to preclude the assertion of a right or obligation that was asserted in a previous proceeding which was determined by a judgment. The result in the previous proceeding is said to merge in the judgment.⁷¹ The estoppel that may have had operation in the present proceedings would be more accurately described as a ‘cause of action’ or ‘claim estoppel’ which is independent of the doctrine of merger. It encompasses “both the legal right claimed and decided and the pleaded or asserted facts”⁷² because “cause of action normally means a right alleged to flow from the facts pleaded”.⁷³ The focus is upon the whole claim, including the right and the essential facts upon which the right depends, and the focus is upon substance rather than form.⁷⁴
66. The appellant argued that *res judicata* would not operate in the present case because the original claim was for defamation. The Appeal Tribunal accepts this argument. Whatever claims that might be made by Ms Bailey as a respondent in the original defamation proceedings would not necessarily merge in the judgment in favour of Mr Bottrill for damages for defamation. Similarly, for claim estoppel the parameters of the right and the essential facts that underpinned the ‘judgment’ in favour of Mr Bottrill for damages for defamation are based on defamation law. Both the aforementioned estoppels may preclude further assertion of the defences argued by Ms Bailey in the previous litigation but would not necessarily capture an alleged cause of action in negligence and the allegations asserted by the appellant that are presently under consideration.

⁷⁰ [2015] HCA 28; (2015) 256 CLR 507 (*Tomlinson*)

⁷¹ *Tomlinson* at [22]

⁷² *Clayton* at [68] (Edelman J)

⁷³ *Clayton* at [68] per Edelman J quoting *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 618; [1975] 1 All ER 810

⁷⁴ *Clayton* at [68] (Edelman J)

Issue estoppel

67. Issue estoppel attaches to an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in a judgement.⁷⁵ The consequence of the operation of issue estoppel is that “a judicial determination directly involving an issue of fact or law disposes once and for all the issue, so that it cannot afterwards be raised between the same parties”.⁷⁶
68. There are certain findings made in the previous litigation that give rise to an issue estoppel, for example the finding about the publication on the Facebook page. The issue about the appellant’s privacy was considered by the original defamation tribunal. The Senior Member in the original defamation proceedings made the following comment referring to the concerns notice:

*Finally, there was no dispute that, prior to commencing these proceedings, besides this Notice, the applicant did not contact or attempt to contact the respondent by any means regarding the link to the Van Lieshout Material.*⁷⁷

69. This comment appears to have been based on a concession made by Ms Bailey. This may constitute a finding on this issue.

Anshun estoppel

70. The third form of estoppel is now commonly referred to as *Anshun* estoppel. This estoppel operates to preclude the assertion of a claim or the raising of an issue of fact or law if that claim or issue is so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding.⁷⁸ Importantly, the High Court has stated that “[c]onsiderations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument”.⁷⁹
71. The Tribunal notes the argument made by the respondent that the *Anshun* estoppel doctrine would operate to preclude the appellant from relitigating the issues in the present case because the allegations could form part of a counterclaim that

⁷⁵ *Tomlinson* at [22]

⁷⁶ *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464, 531

⁷⁷ *ACAT original defamation decision* at [131]

⁷⁸ *Tomlinson* at [22]

⁷⁹ *Tomlinson* at [22]

might have been made by the appellant in the defamation proceedings. The touchstone of the *Anshun* estoppel is the question of unreasonableness.⁸⁰ Therefore, the matters relied upon must be so relevant to the subject matter of the first action that it would have been unreasonable not to rely upon it.⁸¹ To emphasise the point, the test is whether the claim or issue is so connected with the subject matter of the first proceedings so as to make it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to be raised in that proceeding.⁸² In the present case, although some of the conduct that the appellant complains of occurred prior to the commencement of the proceedings for defamation, it arises from the same substratum of facts. It is plausible that failure to make a counterclaim in these circumstances is unreasonable on the *Anshun* principle.

72. As stated above, the appellant asserted that she did not have the requisite knowledge to bring the counterclaim in the previous litigation, relying on the *Kalabakas* case to support this proposition. She argued that she did not have all the information to hand to be able to make a counterclaim in the previous litigation. However:

[o]n preparing her Application for Appeal Miss Bailey came upon further evidence of negligent misrepresentation and fraudulent documents &/or fraudulent copies of documents.⁸³

73. The Tribunal notes that *Kalabakas* concerns the knowledge of a party who is subject to certain obligations of disclosure under an insurance contract, so the case must be treated with caution when applied in this context. However, even if the Tribunal accepts the proposition about knowledge which is relied upon by the appellant, it is still not clear if any additional knowledge was acquired by the appellant; if so what constituted the ‘additional knowledge’ and if so, when she acquired that ‘additional knowledge’. It is certainly not apparent that any

⁸⁰ *Secure Parking (WA) Pty Ltd v Wilson* [2012] WASCA 230 at [58]

⁸¹ *Timbercorp Finance Pty Ltd (in liquidation) v Collins* [2016] HCA 44 at [60] (*Timbercorp*); (2016) 259 CLR 212, 237

⁸² James O’Hara, ‘Litigation Preclusion: To What Extent Could (or Should) a Litigant Be Barred by Prior Litigation to Which It Was Not a Party?’ (2018) 46(3) *Australian Bar Review* 286 at 289, citing *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45 at [37]; (1981) 147 CLR 589, 598; *Tomlinson* at [22]; *Timbercorp* at [97]

⁸³ Appellant’s submission filed 16 February 2021 page 2

additional knowledge was presented by way of evidence in the first instance proceedings.

74. As stated above, it is plausible that *Anshun* estoppel operates to preclude the appellant bringing the first instance proceedings and they should have been dismissed on that basis.

Abuse of process

75. The doctrine of abuse of process is informed by similar considerations of finality and fairness. When applied to the assertion of a right or obligation or the raising of an issue in subsequent proceedings this assertion can be simultaneously the subject of an estoppel (as discussed above) and conduct which constitutes an abuse of process in the subsequent proceedings.⁸⁴ The High Court tells us that the doctrine of abuse of process may be invoked in areas in which estoppels also apply and is inherently broader and more flexible than estoppel.
76. Broadly speaking, abuse of process principles may operate where the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute.⁸⁵ It can operate in circumstances where a party to a subsequent proceeding is not bound by an estoppel.⁸⁶ Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in the earlier proceedings, 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.⁸⁷ This was contemplated by the High Court in *Clayton* in the quote set out above which refers to one aspect of the policy that underpins the preclusionary rules as “ensuring fairness to litigants (by sparing them the stress and expense of duplicative proceedings)”.⁸⁸

⁸⁴ *Tomlinson* at [24]

⁸⁵ *UBS AG v Tyne* (2018) 265 CLR 77; [2018] HCA 45 at [1] (Kiefel CJ, Bell and Keane JJ)

⁸⁶ *Tomlinson* at [25]

⁸⁷ *Tomlinson* at [26], citing *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378, 393

⁸⁸ *Clayton* at [34] (Kiefel CJ, Bell and Gageler JJ)

77. In *UBS AG v Tyne*⁸⁹ (***UBS AG v Tyne***), the High Court had regard to the need to protect litigants and the system of justice itself against the abuse of process, referring to the pursuit of substantially the same claim by serial proceedings as a potential abuse of process, quoting the statement made by Lord Bingham in *Johnson v Gore Wood & Co (a firm)*⁹⁰ whereby the recipient of the conduct was “twice vexed”⁹¹ or “unduly vexed”.⁹² The High Court explained this in *UBS AG v Tyne* as follows:

Lord Bingham in Johnson explained the application of the doctrine of abuse of process to the bringing of successive proceedings in terms consistent with the later reasoning of the joint judgment in Tomlinson. He identified as the “underlying public interest” that “there should be finality in litigation and that a party should not be twice vexed in the same matter”. That public interest, he observed, was “reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole”.⁹³

78. The High Court in *UBS AG v Tyne* recognised the question of abuse of process needs to be determined by reference to the overriding purpose articulated in provisions such as section 5A of the *Court Procedures Act* to facilitate the just resolution of disputes according to law; and as “quickly, inexpensively and efficiently” as possible. This contemplates proportionality.⁹⁴ This aspect was mentioned by McWilliam AsJ in the previous litigation in the ACT Supreme Court proceedings No 1.⁹⁵ Her Honour commented:

*... as the position stands, it gives rise to a concern about the proportionality between the issue in dispute between these two individuals and the judicial resources that will be devoted to resolving it.*⁹⁶

79. The Tribunal considers that the abuse of process doctrine operates to preclude the proceedings brought at first instance because the issues raised by the appellant have

⁸⁹ (2018) 265 CLR 77; [2018] HCA 45

⁹⁰ [2002] 2 AC 1

⁹¹ *UBS AG v Tyne* at [1] (Kiefel CJ, Bell and Keane JJ)

⁹² *UBS AG v Tyne* at [66] (Gageler J)

⁹³ *UBS AG v Tyne* at [66] (Gageler J)

⁹⁴ As stated in *Wright v The Owners – Units Plan No 14* [2021] ACAT 77 at [37], considerations of proportionality are now expressly stated in section 5A of the *Court Procedures Act 2004*. Similarly, there is now an express provision in section 7(a)(ii) of the *ACAT Act*. However, this provision was notified on 9 June 2021, becoming effective on 16 June 2021, therefore it was not operative during the hearing of the appeal in the current case.

⁹⁵ *Bailey v Bottrill* [2019] ACTSC 45

⁹⁶ *Bailey v Bottrill* [2019] ACTSC 45 at [55]

been dealt with by the tribunal and the ACT Supreme Court in many and various ways and to allow further proceedings to continue brings the administration of justice into disrepute as well as unduly vexing the respondent.

Conclusion on the preclusionary rules and alleged improprieties grounds

80. The original tribunal found that all the preclusionary doctrines operated. While there may be some questions about the operation of some of the preclusionary doctrines such as *res judicata* or claim estoppel, the Tribunal is satisfied that the doctrine of *Anshun* estoppel operates to preclude the claim instituted by the appellant in the first instance proceedings. Other claims or issues raised by the appellant have been considered by the tribunal but may not be sufficiently formalised to give rise to an estoppel. These allegations/claims/issues e.g. the allegation that the respondent interfered with the privacy of the appellant, would nevertheless be precluded by the broad doctrine of abuse of process recently articulated by the High Court in *UBS AG v Tyne*.
81. The Appeal Tribunal concludes that no errors of fact, law or discretion are demonstrated by this ground.

Conclusion

82. The appellant has not demonstrated an error of fact, law or discretion pursuant to section 79 of the ACAT Act, therefore the appeal is dismissed.

.....
Acting Presidential Member Prof. P Spender

Date(s) of hearing	1 April 2021, 19 May 2021
Appellant:	In person
Respondent:	In person