

Abusive Collateral Attack in a civil context: The Test

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The Court of Appeal's recent decision in *Terry Allsop-v-Banner Jones Ltd, Rae Cohen* has clarified the test to apply in cases where a party seeks to strike out a claim as an abuse of process on the basis that it forms a collateral attack on an earlier civil judgment.

Mr Allsop pursued a professional negligence claim against his solicitor and barrister after an unfavourable judgment in a matrimonial financial remedies hearing. Both Defendants denied liability and applied to strike out a number of the allegations as an abuse of process as they were collateral attacks on the earlier judgment. The applications were based on the test in *Phosphate Sewage (Phosphate Sewage Co Ltd v Molleson (1879) 4 App Cas 801)*, which suggested that a previous decision could only be challenged on the basis of new evidence that "entirely changes the aspect of the case". The applications both succeeded in the first instance, but Mr Allsop appealed this decision on the basis that the incorrect test had been applied, and that the *Phosphate Sewage* test was only applicable in criminal proceedings.

In the lead judgment, Mr Justice Smith emphasised the fact that the jurisdiction for abuse of process should not be tightly circumscribed by rules or formal categories. Whilst accepting that re-litigating issues from an earlier civil case *may* be an abuse of process, he said this is not to be applied rigidly and does not form even *prima facie* evidence of abuse.

Smith J stated the correct test is formulated in *Secretary of State for Trade and Industry-v-Bairstow*, which he summarised as:

"If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if (a) it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or (b) to permit such re-litigation would bring the administration of justice into disrepute."

Expanding on this test, Smith J made the following observations:

- Whilst there is a public interest in ensuring that criminal cases can only be challenged by way of an appeal, this consideration is not present in civil cases;
- The doctrine of *res judicata* is available in civil cases but typically not in criminal ones - creating a greater need for the collateral attack doctrine to operate in criminal cases;
- Where an earlier decision is challenged in a case between a party and a stranger to the first claim this will "typically be permissible and not abusive", even when there is no new evidence that would meet the *Phosphate Sewage* test;
- The *Phosphate Sewage* test is not a factor in determining if a case challenges the findings in an anterior civil proceeding - cases that meet it can still be abusive, whilst cases that do not may not be;
- A case against one's legal advisor will not usually challenge the finality of litigation unless it should properly be seen as an appeal of that previous decision.

Consequently, and whilst the Court of Appeal did uphold the lower Court's decision in dismissing a number of Mr Allsop's allegations, in applying the above test it reinstated a number of allegations and the matter is set to proceed to a final hearing on the substantive issues in due course.

The Court's decision re-focuses this area of law on the principles underpinning the abuse of process doctrine. Where a case against a third party challenges an anterior civil case, Smith J has made it clear that these will typically be permitted - even where there is no new evidence in front of the court - and specifically in cases brought against a party's legal advisors. As a result, the scope for applications of this type has narrowed. Parties will likely need to spend less time analysing the novelty and impact of any new evidence. They will likely need to focus more on the effect or justice of the conclusions being challenged, and whether the allegations disclose a reasonably arguable case.

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