Abuse of Process Where the Parties Differ

9 February 2021

On 11 January 2021, the Court of Appeal handed down judgment in *PricewaterhouseCoopers LLP v BTI 2014 LLC* [2021] EWCA Civ 9, considering the circumstances in which an abuse of process may arise in cases where there is no estoppel.

The underlying claim is brought by BTI 2014 LLC ("BTI") against PwC in relation to its audits of the 2007 and 2008 annual accounts of a company then known as Arjo Wiggins Appleton Ltd, since renamed Windward Prospects Ltd ("Windward"), a nominal defendant in the proceedings, having assigned its claim to BTI, a wholly owned subsidiary of BAT Industries plc ("BAT"). BTI claims that PwC carried out the audits in question negligently and that, in reliance on those audits, Windward's directors paid out two very large dividends to its parent company, Sequana S.A: one of €443 million in December 2008 and one of €135 million in May 2009. The payment of those dividends ultimately left Windward unable to satisfy its liabilities to BAT pursuant to an indemnity agreement relating to environmental pollution in the United States.

The dividends had been the subject of earlier proceedings brought by BTI against Windward's directors and Sequana (the "Sequana Claim"). The Court had, in the Sequana Claim, found that the accounts relied upon by the directors in their decision to pay the dividends were proper accounts for the purposes of Part 23 of the Companies Act 2006 and that they therefore could not be recovered on that basis. The Court did, however, find in relation to BAT's claim, as creditor, against Sequana that the May dividend was a transaction defrauding creditors pursuant to s423 of the Insolvency Act 1986 (the "S423 Claim"). Shortly after, however, recovery of those sums was hampered by Sequana's entry into an insolvency process in France.

The PwC Claim was issued in October 2014, five months after issuance of the Sequana Claim. In May 2015, BTI wrote to PwC identifying the overlap between the claims and raising the possibility of a joint trial. The possibility of a joint trial was rejected by both Sequana and PwC and, ultimately, BTI decided not to pursue its joint trial application. PwC's objections to the joint trial were on the basis that it intended to apply for strike out and/or summary judgment on the claim, and that joinder would therefore be premature. BTI and PwC then agreed that its strike out application should be stayed

until determination of the Sequana Claim and the S423 Claim. Once the first instance judgment had been handed down in those proceedings, the parties agreed a further stay until resolution of the appeals arising therefrom.

The Court of Appeal handed down its judgment upholding the High Court's decision in relation to the Sequana Claim and the S423 Claim on 6 February 2019. At that point, PwC applied for strike out and/or summary judgment on four grounds:

- that the allegations in the PwC proceedings involved a collateral attack on the findings of Rose J in the Sequana claim;
- that the PwC claim had no real prospect of success, and there was no other compelling reason for the claim to go to trial;
- that the losses claimed by BTI fell outside of the scope of the duty which PwC owed to Windward; and that
- Windward had not in fact suffered any loss as a result of payment of the dividends.

At first instance, Fancourt J dismissed the application but granted permission to appeal on the first and second grounds.

Judgment was handed down on that appeal on 11 January 2021, with the Court of Appeal dismissing PwC's application. The Court, in reaching its decision, provided a comprehensive overview of the law as it stands:

- *"where the parties to the second proceedings are not the same as those to the first proceedings…no question arises as to the applications of the doctrines of issue estoppel or res judicata"*, such that the parties are not bound in the latter proceedings by the findings in the first, though an abuse of process may still be found;[1]
- *"the mere fact that the second proceedings involve the relitigation of issues decided in the first proceedings or a challenge to findings made by the judge in the first proceedings… does not without more amount to an abuse of process"*;[2]
- the circumstances in which a collateral attack will be an abuse are where *"(i) it would be manifestly unfair to a party to the later proceedings that the same issues should be*

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1 *Michael Wilson & Partners* [2017] EWCA Civ 3 [48(4)]

2 *Michael Wilson & Partners* [63]

relitigated, or (ii) to permit such relitigation would bring the administration of justice into disrepute";[3] and

- where the parties to the second proceedings are not the same as the parties to the first proceedings, it will only be in a *"rare or exceptional case"* that the Court will find an abuse of process in respect of the second set of proceedings.[4]

Since there was *"no question"* of it being said that relitigation of the same issues would be manifestly unfair to PwC, the relitigation of the same issues could only amount to an abuse of process if to do so would bring the administration of justice into disrepute. This, the Court said, would encompass situations where *"the purpose of the attempt to have [the issue] retried is not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose."*[5] This was not, however, a submission that had been advanced by PwC.

In the circumstances, the Court found that, despite the PwC Claim involving to a considerable extent relitigation of the same issues, it did not bring the administration of justice into disrepute. That decision was based to a large extent on the procedural and case management history of the two sets of proceedings and, specifically, to BTI's attempts to procure the agreement of PwC and Sequana to a joint trial. It was the case management position, the Court found, that distinguished the instant case from the decisions in *Taylor Laing v Walton*[6] and *Arts & Antiques*[7], both of which had been referred to in the course of the parties' submissions.

The Court also rejected PwC's submissions that there was no realistic prospect of a second judge reaching a different conclusion to the judge in the Sequana Claim. This was on the basis that there was likely to be fresh evidence before the judge in the PwC Claim which may *"cast a different light"* on the issues decided in the Sequana Claim. In any event, the findings from the Sequana Claim would be neither binding nor admissible in evidence at the trial of the PwC Claim. The Court therefore found that it could not *"be concluded at this early stage of these proceedings that any part of the claim has no real prospect of success."*

PwC has applied to the Supreme Court for permission to appeal the decision.

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[3] *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 at [38(d)]

[4] *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132 at 138-9

[5] *Bragg v Oceanus* at 139

[6] [2007] EWCA Civ 1146

[7] [2013] EWHC 3361 (Comm)

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