PricewaterhouseCoopers LLP v BTI 2014 – allegations of abuse of process by collateral attack

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On 11 January 2021, the Court of Appeal handed down judgment in *PwC v BTI*. Lord Justice Flaux gave the leading judgment. Lord Justice Coulson supported Flaux LJ's decision and added some further analysis. Lord Justice Henderson agreed with both judgments. The case was an appeal by PwC from the first instance decision of Mr Justice Fancourt, who dismissed PwC's application to strike out BTI's professional negligence claim against it and/or for summary judgment. The appeal raised two issues:

(1) Did Fancourt J err in concluding that the claim against PwC is not an abuse of process by reason of collateral attack?
(2) Did Fancourt J err in concluding that the claim was not bound to fail?

This case note will explore the first issue on abuse of process.

The CA held that there was no abuse of process and, therefore, the claim against PwC was not bound to fail and should proceed to trial.

Factual Background (in brief)

In October 2014, BTI issued a professional negligence claim against PwC in respect of its audit of accounts of a company known as Arjo Wiggins Appleton Ltd or "AWA".

Prior to the claim against PwC, in May 2014, BTI sued AWA's former parent company, Sequana SA

and the directors of AWA (the 'Sequana claim') claiming the recovery of large dividend payments by AWA to Sequana, paid against the background of the PwC audits.

BTI's parent company, BAT Industries plc, also brought a claim against Sequana under s.423 of the Insolvency Act 1986 seeking repayment of the dividends (the 's.423 claim').

In May 2015, BTI's solicitors wrote to PwC's solicitors stating that they wanted to apply to have the claim against PwC tried with the Sequana claim and s.423 claim due to the degree of overlap. The legal, factual and accounting issues were very similar and otherwise there was a very serious risk of inconsistent findings of fact and law. That application was made by BTI in June 2015.

PwC opposed the joint trial application as it intended to apply to strike out the claim against

it or apply for summary judgment, so it argued that an order for a joint trial would be premature. PwC acknowledged the overlap in the claims.

Before BTI's joint trial application was heard, BTI reached agreement with Sequana and the directors of AWA that its trial of the Sequana claim and s.423 claim would not be adjourned (it was already fixed for February 2016) and that BTI's application to amend its pleadings and to submit expert evidence would be granted. BTI told PwC that it would not therefore be pursuing the joint trial application against PwC. The parties entered into a consent order dismissing the application for a joint trial. By further consent order, BTI and PwC agreed that PwC's strike-out application would be stayed until after the conclusion of the Sequana and s.423 claims.

The Sequana claim and s.423 claim was heard by Mrs Justice Rose in February-April 2016. In her judgment on 11 July 2016, Rose J found that BTI's Sequana claim failed and the accounts relied upon by the directors of AWA for the payment of the dividends were proper accounts. The s.423 claim partially succeeded.

At the conclusion of the Sequana and s.423 claims (after an appeal), PwC issued its strike out and summary judgment application in March 2019.

In the first instance hearing, Fancourt J noted that there was significant overlap between the issues decided by Rose J and the issues raised against PwC by BTI, but he identified new issues raised in the PwC claim. He concluded that the PwC claim was not a collateral challenge to Rose J's decision, and that BTI's claim against PwC was not an abuse of process which would bring the administration of justice into disrepute. Fancourt J also found that the claim was not doomed to fail given Rose J's judgment.

The CA on abuse of process

The CA held that there was no issue estoppel or *res judicata* because the parties to the second proceedings (BTI v PwC) were not the same as the parties to the first proceedings (the Sequana and s.423 claims) (paras [82] and [124] of the CA judgment).

The CA recognised that if the parties to the second proceedings are not the same as the parties to the first proceedings, it will only be in the very rare or exceptional case that the court will find that the second proceedings are an abuse of process (para [86]).

The CA reasoned that a collateral attack on the first proceedings, such as a challenge to the findings made by the judge in the first proceedings, does not without more amount to an abuse of process (para [83]). There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case (para [125]).

Flaux LJ applied the statement of Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; [2004] Ch 1 at [38(d)]:

"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 or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

Flaux LJ held that the first limb of this *Bairstow* test did not apply as PwC was not a party to the Rose J proceedings. Therefore, there would only be an abuse of process in relitigating issues decided by Rose J if it would bring the administration of justice into disrepute (para [87]).

Flaux LJ elaborated on what is meant by "bringing the administration of justice into disrupt" at paragraph [87]:

"The concept of bringing the administration of justice into disrepute encompasses 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" (per Sir David Cairns in *Bragg v Oceanus* at 139). This is what Lord Hobhouse described in the *Arthur Hall* case at 751 as "the use of litigation for an improper purpose" and in *In re Norris* at [26] as "misuse of the litigational process." He continued: "Clear cases of litigating without any honest belief in any basis for doing so or litigating without having any legitimate interest in the litigation are simple cases of abuse."

PwC did not contend that BTI was not pursuing the proceedings other than for a genuine purpose. PwC relied on *Laing v Taylor Walton [2007] EWCA Civ 1146; [2008] PNLR 11* and *Arts & Antiques Ltd v Richards [2013] EWHC 3361 (Comm); [2014] PNLR 10* to argue that BTI was committing an abuse of process by making a collateral attack on the decision of Rose J.

Flaux LJ held that BTI's claim did not bring the administration of justice into disrepute due to the procedural and case management history of the proceedings and attempts by BTI to procure a joint trial (paras [89] and [105]). Flaux LJ relied upon the following points in particular:

a. The claim against PwC was not 'late' (para [90]);
b. PwC did not engage in timely, constructive correspondence with BTI about the joint trial (para [91]).
c. In PwC's skeleton responding to BTI's application for a joint trial, it did not say that BTI will suffer prejudice if the actions are tried separately. [Coulson LJ said in argument that it was to be inferred that at the time of the joint trial application, it had not occurred to the parties that if there were separate trials, BTI would not be able to challenge the findings made at the first trial (para [92]).]
d. By consent, BTI's application for a joint trial was not pursued (para [93]).
e. PwC must have known that in the absence of a joint trial, in certain circumstances, BTI intended to pursue the second claim against PwC. BTI had made its position clear (para [94]).
f. PwC should have raised its points on abuse of process before the judge hearing the application for a joint trial (paras [95] and [96]).
g. Since PwC consented to the joint trial application being dismissed, there is no basis to criticise BTI's conduct (para [97]).
h. PwC's agreement to the consent orders constituted an implicit agreement that, in certain circumstances, the second proceedings against it would be pursued (para [98]). There was therefore "no question of the Court being affronted by the pursuit of these proceedings or of their pursuit being an abuse of process." (para [99]).
i. Given that BTI sought a joint trial to avoid the risk of inconsistent findings, but its application was resisted by both sets of defendants, leading to a perfectly reasonable compromise, there was no question of abuse of process (relying on the dictum of Kerr LJ in *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132 at 138) (para [100]).
j. The case management position, culminating in the consent orders, is the critical ground of distinction between this case and *Laing* and *Arts & Antiques* (paras [101] and [102]).
k. PwC's position lacks mutuality, was unattractive and opportunistic. PwC argued that BTI is effectively bound in the proceedings against PwC by the findings made by Rose J, because any challenge to them is an abuse, whereas PwC is not bound by those findings, since it was not a party (para [103]).
l. PwC's argument that the court should look at the question whether, in the first proceedings, the common issues were determined between the appropriate parties, and conclude that because they were and the second issues were "downstream" they were abusive is novel and irrelevant and inconsistent with *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1

WLR 2646 (para [104]).

Coulson LJ relied on the HL decision in *Hunter v.Chief Constable* [1982] AC 529, to say:
"an abuse will occur if the second set of proceedings would be manifestly unfair to a party to those proceedings or would otherwise bring the administration of justice into disrepute." (para [126]).

Coulson LJ looked at the question of 'fairness' and said (para [127]):

m. It is common ground that unfairness to PwC does not arise because it had no involvement in the first set of proceedings.
n. It would be unfair to prevent BTI from pursuing its claim against PwC as:
    i. PwC would not have been bound by any adverse findings made by Rose J. Therefore it would be curious, and potentially unfair, to find that BTI were effectively bound as against PwC by adverse findings made by Rose J.
    ii. BTI expressly warned the other parties and the court that, if there were to be separate trials, there was a risk of inconsistent findings. Nobody demurred from that. It would be unfair now to conclude that BTI should be prevented from pursuing PwC due to the very risk it originally identified.

Coulson LJ concluded that there was no abuse of process for the reasons given by Flaux LJ (para [131]).

Concluding thoughts
Some practical points can be taken from the CA's judgment:

o. The case management stage is key. Think about the drafting of any correspondence on procedure and case management carefully and consider how any procedural issues will play out in any future proceedings. The fact that BTI's solicitors corresponded with PwC's solicitors before bringing a joint trial application, and highlighted the risk of inconsistent findings, and that PwC did not engage with this correspondence, was a significant factor in BTI's favour in this appeal.
p. Linked to the above point - make your litigation intentions clear to all parties. This helped BTI – it was clear that it was going to pursue second proceedings against PwC.
q. If a party wishes to raise an abuse of process allegation, it should do so at the first opportunity. PwC did not. This might have helped PwC avoid costly skirmishes before Fancourt J and the CA.
r. Consider the advantages of asking defendants in professional negligence proceedings to be bound to any earlier, related proceedings, or consider an application for a joint trial with the professional negligence proceedings if there is a lot of overlap between issues and evidence. This may help to flush out abuse of process arguments by defendants in professional negligence proceedings.

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