

# PROCEEDINGS NOT ABUSE OF PROCEEDINGS DESPITE PRIOR ADVERSE ARBITRATION DECISION

Graeme Hall & Hugo Snell

In *Michael Wilson & Partners Ltd v Sinclair and Another* [2017] EWCA Civ 3, the Court of Appeal for England and Wales considered whether it was an abuse of process to bring proceedings in relation to issues that had previously been decided in an arbitration involving the plaintiff (but not the defendant).



The appellant company, Michael Wilson & Partners Ltd (MWP), sought to recover assets, which, it said, a former partner (Mr Emmott) acquired in breach of his contractual and fiduciary obligations in the names of the respondents (Sinclair). There had been an arbitration hearing between MWP and Mr Emmott, which MWP had lost.

In the High Court, the Judge noted that Sinclair, who was seeking to take a benefit of the arbitration award by claiming abuse of process, had not been a party to the earlier arbitration, and so would not have been bound by any detriment had the arbitration been decided differently. Nonetheless, the High Court found that it was an abuse of process for MWP to pursue Sinclair now, due to a number of 'special circumstances', which included:

- The intent for the arbitration to have effect between the parties involved, including Sinclair

- MWP being estopped from being able to make out its central allegation and necessary pre-condition of the claim (that Mr Emmott had received the shares in breach of his fiduciary duty)

- The "unusual unfairness" in permitting MWP to have a second opportunity to make the same allegations against Mr Emmott, who had successfully defended himself in the arbitration.

On appeal, the Court considered there was indeed a jurisdiction for a court to take account of an earlier arbitration (as opposed to a court) award, when considering whether proceedings were an abuse.

In particular, the Court noted that under the 'special circumstances' test, the Judge placed too much weight on:

- The intent of arbitration and award, to which Sinclair was not a party

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- His view that, because MWP was inviting the Court to come to a different view to the arbitrators in relation to the nature and discharge of Mr Emmott's obligations, MWP was mounting an illegitimate collateral attack on the award
- The position of Mr Emmott in the Court proceedings. It would not be manifestly unfair for Mr Emmott to face MWP's allegations for a second time, as MWP was not seeking any relief against Mr Emmott and he would be treated no more than a potential witness.

The Court also noted that the party making an application of abuse had the burden of proof in establishing that an order should be made. Consequently, the Court of Appeal overturned the decision to strike out the action.

(The same parties are also litigating issues in New Zealand: see *Michael Wilson & Partners Ltd v Thomas Ian Sinclair* [2016] NZCA 376.)

See the Court's decision here: <http://www.bailii.org/ew/cases/EWCA/Civ/2017/3.html>

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