Neutral Citation Number: [2022] EWHC 1208 (Ch)

Case No: BL-2021-000183

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5th April 2022

Before :

Deputy Master Arkush

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Between :

Muhammad Asif	**Claimant**
- and -	
(1) Freers Askew Bunting Solicitors Limited	**Defendant**
(2) Askew Bunting Solicitors LLP	

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Helen Evans (instructed by **DAC Beachcroft**) for the **Defendants**
Alastair Panton (instructed by **Handslaw Solicitors**) for the **Claimant**

Hearing dates: 14th March 2022

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JUDGMENT

DEPUTY MASTER ARKUSH:

The Application

1. By Application Notice dated 31 October 2021 the Defendants apply to strike out the Claimant's claim under CPR 3.4.2(a), (b) or (c), on the grounds that:

   1.1 It would be an abuse of the court's process, as it would bring the administration of justice into disrepute, or is manifestly unfair to the Defendants to defend, because the Claimant does not have a legitimate interest in bringing the claim

   1.2 There are no reasonable grounds for bringing the claim, as the Claimant has no or no reasonable prospect of showing that he is the right person to bring this claim

   1.3 The Claimant has failed to comply with rules, practice directions or orders under CPR 3.4(2)(c) and there has been a history of non-compliance.

2. The first two grounds give indications that the circumstances surrounding this claim are unusual, as indeed they are.

3. The application came before me for hearing remotely on 14 March 2022, when I heard submissions from Ms Evans of counsel on behalf of the Applicants/Defendants and Mr Panton of counsel on behalf of the Respondent/Claimant. I am grateful to counsel for their detailed skeleton arguments and their focussed submissions. The hearing concluded just before 4 pm and I reserved judgment.

4. At the outset of her submissions Ms Evans indicated that she wished to advance the application on the alternative ground that the claim has no reasonable prospect of success, so that the Defendants should be entitled to summary judgment under CPR 24.2. She referred to the fact that both parties had put in evidence as to the merits of the claim and that the second ground of the application echoes the language of Part 24, so that no prejudice would be caused to the Claimant if the application was to be treated as one for summary judgment in addition to strike out. Mr Panton for the Claimant agreed that both sides had dealt with the facts so that the court could in principle hold that the claim was susceptible either to strike out or summary judgment if the relevant tests were met. He did not object to the application being treated as one for summary judgment in the alternative to strike out. I shall therefore approach the application as if it included an alternative claim for summary judgment.

Background

5. The claim is for damages for professional negligence against solicitors. It arises from the registration and subsequent removal of a charge over Chilton House, Low Worsall, Yarm, Stockton on Tees TS15 9PJ. The Third Defendant acted for the owner of that property, Ms Noreen Riaz and her husband Mr Adil Ditta on these transactions. The charge was registered in 2009 and was removed in 2013. The Claimant's case is that in 2007 he had advanced £450,000 to Mr Ditta for the purposes of a property development. The money was not however directly advanced to Mr Ditta. It was actually paid to Mr Ditta by James Bloomer Solicitors on the instructions of a Mr Zahid Iqbal who owed money to Mr Asif. The £450,000 was therefore sent to Mr Ditta in lieu of the money that

Mr Iqbal owed to Mr Asif. The Claimant says, as put in paragraphs 5 and 6 of Mr Panton's skeleton argument, that it transpired however that no land was purchased and actually Mr Ditta used the money advanced by Mr Asif for different purposes. As a result of this, and recognising that he had taken £450,000 of Mr Asif's money and had had it for 2 years, Mr Ditta (through his wife) in May 2009 granted a charge of £500,000 to Mr Asif over Chilton House, the property that was registered in the name of Mr Ditta's wife Ms Riaz.

6. The Claimant says further, adopting the language of paragraphs 7 and 8 of Mr Panton's skeleton argument, that £500,000 of Mr Asif's money therefore remained protected by this charge on the register. However, by DS1 dated 31 January 2013 this charge was removed. The form is purportedly signed by Mr Asif and is purportedly witnessed by Mr Ditta. This form was however a forgery. Mr Asif never signed this form or even knew about it. There is an expert report from a well-known handwriting expert Margaret Webb that concludes that there is "strong evidence" that the signature is a forgery.

7. The DS1 form effects the cancellation of entries relating to a registered charge. The DS1 was sent to the Land Registry by Mr Andrew Bunting who was a member of the Defendant firms of solicitors[1]. The Claimant says that Mr Bunting confirmed to the Land Registry that he was acting for the Claimant, although he was not so acting, and that the Land Registry relies heavily on solicitors completing the forms correctly and giving accurate confirmations. The Land Registry removed the charge on receiving the forms completed by or

[1] Mr Bunting was initially joined to the claim as Second Defendant but the claim against him personally was subsequently dismissed in November 2019 because of a failure to serve him. It was also Mr Bunting's case that he should never have been sued in a personal capacity.

on behalf of Mr Bunting and subsequently Chilton House was charged to someone else. The Claimant's claim is put in considerably more detail but its essence is that by these events he therefore lost the benefit of the charge that protected £500,000 of his money.

8. In July 2019 the Defendants filed their Defence. At paragraph 7 they put the Claimant to proof of what, if any, money he had loaned to Mr Ditta and the alleged involvements of James Bloomer Solicitors and Mr Iqbal. They did not contend that they had had any direct dealings with the Claimant. They annexed the core documents which they had relied on, namely a letter of 8 November 2012 instructing them to discharge the charge which they believed (incorrectly) had come from the Claimant and a copy of the Claimant's passport.

9. From this summary of the issues it can be seen that for the Claimant's claim to succeed, he will have to prove that he was the lender of the money to Mr Ditta, and the Defendants owed him a duty of care as such, and that it was his money that was protected by the charge.

<u>The criminal prosecution begun by the Claimant against Mr Ditta and Ms Riaz</u>

10. Alongside the issue of this claim, the Claimant embarked on a private criminal prosecution against Mr Ditta and Ms Riaz. Charges 1 and 2 of the criminal prosecution related to representations about the charge and/or the lifting of the charge over Chilton House:

Count 1 alleged fraud against Mr Ditta in that between 15 January 2007 and 31st December 2013 he falsely represented that he had invested £450,000 belonging to the Claimant in some land.

Count 2 alleged fraud against Mr Ditta and Ms Riaz by abuse of position on or about 31 January 2013 by causing the Claimant's name to be removed from the Land Registry.

11. Mr Ditta and Ms Riaz applied to strike out the prosecution as an abuse of process. Among the grounds was that the Claimant was acting as a proxy or front for a convicted fraudster, Mohammed Saffdar Gohir (referred to throughout and in the course of this judgment as "Saff"), and that if anyone was the true loser from fraud, it was Saff and not the Claimant, as the Claimant had never made a loan to Mr Ditta. This issue replicates a key issue in the Defence and lies at the heart of this application to strike out the claim or for summary judgment to be awarded to the Defendant.

12. On 2 August 2019 the private prosecution was held by HHJ Tomlinson to be an abuse of process and was stayed accordingly. In July 2021 the Court of Appeal Criminal Division upheld his decision. I shall refer further to the course of the criminal proceedings later in this judgment.

13. The conclusions reached by HHJ Tomlinson are set out in his judgment and in the Sixth Witness Statement of Amy Harris in support of the application. They can be summarised as follows:

13.1 the documents came nowhere close to showing either that Mr Ditta obtained large sums of money in the first place or that it was indeed the Claimant's money that he obtained (paragraph 19 of the judgment);

13.2 there was no evidence from Mr Iqbal or James Bloomer Solicitors about their involvement in the transaction by which it was said they played a part in

the transfer of £450,000 to Mr Ditta. There was no evidence showing that money was transferred to Mr Ditta. All there was consisted of an apparent extract from a completion statement making reference to the sum of £450,000 adjacent to an entry stating 'Paid Abid Ditta'. The document was a poorly produced scan or photocopy with no date (paragraph 23 of the judgment);

13.3 There was a dearth of any contemporary documentation evidencing a business relationship between the Claimant and Mr Ditta (paragraph 28 of the judgment);

13.4 The Claimant had been so wholly excluded from communications between the parties that the Judge had to examine the possibility that the reality was that the business relationship was between Saff and Mr Ditta (paragraph 29 of the judgment);

13.5 there would be one exceptionally good reason why if it was simply Mr. Gohir who had advanced monies to D1, he would want a proxy to have a charge over the property rather than register it in his own name. In 2009 M. Safdar Gohir started to actively engage in fraud again, for which he was sentenced to a term of imprisonment in Germany. At paragraph 29 of his judgment the Judge continued: *"*Taken in conjunction with the contemporary communications involving M. Safdar Gohir, D1 and others in which Muhammed Asif plays no role and where he is not mentioned in any context of being the party who is the real loser, a theory that Mr. Asif's name had been deployed back in 2009 to enable M. Safdar Gohir to maintain a hidden asset charge on the Chilton House address is not at all fanciful. It seems to me to be the much more logical explanation as to what was really going on here*".*

13.6 At paragraph 31 of his judgment the Judge said: "Having formed a very clear view of who really had an interest in these investments together with his motive for keeping his financial interests below the radar, the inclusion and exclusion of Muhammed Asif's name from records of shareholdings in a business that is now in liquidation becomes a relatively minor part of the case. Satisfied as I am by the submissions on behalf of the defendants that Muhammed Asif has indeed been a front man for M. Safdar Gohir and has played a leading role in these proceedings, so that Mr. Asif is indeed the proxy prosecutor. ….. I remain satisfied that the person who in reality has most interest in this prosecution proceeding is a serial tax fraudster, I am satisfied that there is ample material here to enable me to say that this prosecution is an abuse of the process of this Court."

14. On 14 November 2019 Davis LJ refused permission to appeal against the order of HHJ Tomlinson. He endorsed the judge's decision that on the available evidence, the judge was entitled to conclude that Claimant "was in truth a front or proxy" for Saff and the proceedings were "designed to mask his true involvement".

15. In July 2021 the Claimant's renewed application for permission to appeal came before the Court of Appeal Criminal Division (CACD). In upholding the refusal of permission to appeal the CACD, consisting of the President of the Queen's Bench Division, Dame Victoria Sharp P. gave a detailed judgment. The CACD concluded that the Claimant was being used as a 'front' for Saff. It found that it had "no hesitation in concluding that the judge was entitled to consider on the evidence before him that Mr Gohir [i.e. Saff] was the moving force behind this

prosecution and Mr Asif was no more than a proxy prosecutor." The Court of Appeal held that this "was a matter going to conduct", and an attempt to "pull the wool over the Court's eyes".

16. The CACD also made orders for costs against both Saff and the Claimant. It considered that Saff was guilty of serious misconduct in trying to pull the wool over the court's eyes by hiding that he was the real prosecutor. In relation to the Claimant the CACD stated that "the conclusion reached by this Court, that he [the Claimant] was a proxy prosecutor, is a finding which itself denotes abuse".

Evidence in the criminal proceedings and this claim

17. It is relevant to consider whether the evidence that will be available to this court if the claim went to trial will be different to that which was before the criminal court. If new evidence has been found that could cast a different light on events, this court may consider that there is justification to reach a different conclusion than that reached by HHJ Tomlinson and the CACD. However, that is not the case. The evidential position is addressed in some detail in paragraphs 17 to 32 of Ms Harris' 6th statement and is also analysed in Ms Walker's skeleton argument. In summary:

17.1 The witness statements in the criminal prosecution and this claim are so similar that Ms Harris refers to the Claimant 'recycling' the statements from the criminal court;

17.2 The disclosure given by the Claimant is almost identical to that given in the criminal prosecution;

17.3 In April 2021 the Defendants were granted a specific disclosure order against the Claimant, requiring him to provide copies of documents going to a number of issues, including the relationship between the Claimant and Mr Iqbal, the involvement of James Bloomer Solicitors and what if any sums the Claimant had lent Mr Ditta. If the Claimant was not able to produce further documentation in these categories, he was required to make a witness statement to explain why.

17.4 The Claimant produced no further documentation following the specific disclosure order. The Claimant's explanation for the lack of additional material in his 2nd witness statement dated 14 June 2021 is that his dealings with Mr Iqbal were via Saff as intermediary and were based on trust.

18. Ms Evans therefore submits that the court can be confident that there are no further materials in the Claimant's hands which support his case but were not before the court in the criminal prosecution. Mr Panton did not seek to challenge her analysis of the similarity of the documents and statements in the criminal proceedings and this claim either in his written or oral submissions. I therefore conclude that Ms Evans' submission that the Claimant will have no additional materials to support his case but which were not before the criminal court is well founded.

19. Ms Evans makes the further point that there is a striking dearth of documents to support the alleged loan from the Claimant to Mr Ditta. There are no documents showing how the charge documents came into his possession in 2009. It is noteworthy that the Land Registry CH1 charge contains Saff's address as that of the lender, not the address of the Claimant. Even after the alleged loan, on

the Claimant's case, became a cause for concern on his part, there are no documents showing that he chased Mr Ditta. Instead, there are emails from Mr Ditta to Saff which are suggestive of Mr Ditta owing money to Saff, not the Claimant. Ms Evans submits further that there is striking lack of the sort of documents that could be expected to have been produced if there had been a genuine loan by the Claimant to Mr Ditta, such as written agreements or arrangements reflecting a business arrangement. However, no such documents exist. Again, this is not challenged on behalf of the Claimant.

Defendants' submissions – abuse of process

20. The Defendants submit that it can be an abuse of process to bring proceedings which conflict with the findings of another court, even if the parties to both sets of proceedings are not identical.

21. In a case where the litigant is trying to reopen a judgment involving the same parties, and is trying to circumvent or augment the usual appeal process, the principle of res judicata estoppel applies. In such a case it is necessary for the litigant to show that he had evidence that "entirely changed the aspect of the case" that he placed before the court: see ***Phosphate Sewage v Molleson*** [1879] 4 App Case 801.

22. In a case not involving res judicata estoppel, such as where the parties to both sets of proceedings are not identical, it is not necessary to adduce evidence meeting the ***Phosphate Sewage*** test: see the recent decision of the Court of Appeal in ***Allsop v Banner Jones*** [2021] 3 WLR 1317. ***Allsop*** concerned the question whether it was an abuse of process for a husband who was subject to strong criticism by a judge in his divorce proceedings to sue his solicitors for

negligence over those findings. The Court of Appeal held that the husband did not need to show that he had evidence meeting the ***Phosphate Sewage*** test in order to be allowed to sue his solicitors. However, this was not to say that a litigant could go before two courts on the same evidence (or legal arguments) and ask two courts to reach inconsistent judgments. The core question is whether the second claim is (i) manifestly unfair to the defendant or (ii) would bring the administration of justice into disrepute, per the test laid down in ***Secretary of State for Trade & Industry v Bairstow*** [2004] Ch 1, endorsed as the key test in ***Allsop*** at p. 1346D-E.

23. The Defendants cite ***Laing v Taylor Walton*** [2008] PNLR 11 as an example of when it would bring the administration of justice into disrepute to allow a second claim to proceed. The outcome of this case was endorsed in ***Allsop*** even if the route taken by the court was doubted (in that the court had applied the ***Phosphate Sewage*** test). In ***Allsop*** the Court of Appeal (at p. 1348E-F) described ***Laing v Taylor Walton*** as a case where: "the earlier decision of [the judge] was being revisited in later and distinct proceedings on the basis of no new evidence at all. It was easy to see how the existence of or potential for divergent judgments of courts of co-ordinate jurisdiction does amount to potential abuse of the court's processes ….in reality…. The subsequent proceedings were no more than an (improper) attempt to appeal the decision of [the judge]".

24. The Defendants submit that the same criticism that applied to ***Laing v Taylor Walton*** applies here. In the words of paragraph 51 of Ms Evans' skeleton argument:

24.1 In the criminal proceedings, the judge and then the CACD found on the basis of the evidence before them that the Claimant was acting improperly as Saff's proxy. This conclusion was based on the paucity of evidence showing that the Claimant had advanced any money to Mr Ditta, and notwithstanding the Claimant's (and Saff's) evidence in their witness statements that the Claimant had in fact advanced the loans;

24.2 There is no new evidence in this case to cast doubt on what the judge and CACD found. The Claimant has not identified any new disclosure that would realistically support his case:

24.3 The only piece of evidence going to the question of whether he was the source of the funds is the same as it was in the criminal prosecution- namely, the James Bloomer Completion Statement. This document is patently inadequate;

24.4 The witness evidence repeats (often word for word) what was said in the statements before the court in the criminal case. In any event, nothing new of any persuasive effect is added;

24.5 The present case is therefore on all fours with ***Laing v Taylor Walton*** as understood by the Court of Appeal in ***Allsop***. It would therefore bring the administration of justice into disrepute to allow the Claimant to proceed with a claim in which he is inviting the civil court to reach a conclusion at odds with HHJ Tomlinson and the CACD on the basis of the same evidence. Furthermore, it is manifestly unfair to require the Defendants to fund a trial where the criminal courts have reached the conclusion that they have, and

the contemporaneous evidence supporting the Claimant's case is so threadbare.

Claimant's submissions – abuse of process

25. The Claimant submits:

25.1 no abuse of process can arise here because there was no criminal judgment;

25.2 the parties to the criminal claim (the Claimant as private prosecutor and Mr Ditta and Ms Riaz as defendants) are different to those in this civil claim, the Defendants in this claim being solicitors;

25.3 the causes of action in the criminal and civil claims are different, being fraud in the criminal claim and professional negligence in this claim

25.4 the criminal proceedings also involved other matters concerning fraud relating to the ownership of a company called Advance Systems Training Limited, which do not feature in this civil claim;

25.5 even if fraud could not be proved in the criminal proceedings, this does not mean that a claim against the Defendants for negligence in this civil claim could not succeed;

25.6 it would be illogical to strike out the civil claim as the Claimant, having had his private prosecution struck out, would be left without a remedy;

25.7 the fact that the private prosecution did not meet the evidential threshold necessary in criminal proceedings does not bind a civil court;

25.8 taking the decisions in the criminal proceedings at their highest, the only matter that could be said to be binding on any other court is that in the criminal prosecution Mr Asif was acting as proxy prosecutor for Mr Gohir, and there was no finding as to who owned the £450,000 that was made available to Mr Ditta.

Discussion – abuse of process

26. I now return to the decisions made in the criminal proceedings in a little more detail.

27. In his written judgment dated 2 August 2019 His Honour Judge Tomlinson, sitting at Southwark Crown Court, set out his reasons for allowing a pre-arraignment application to stay the private criminal prosecution brought by Mr Asif against Mr Ditta and Ms Riaz. He also decided that Ms Riaz had no case to answer. In paragraph 1 of his judgment he stated that he had "come to the very firm conclusion that to permit this prosecution to proceed would be an abuse of the process of the court".

28. The Judge then dealt in some detail with the background to the prosecution, the evidence and the arguments advanced to him. The following extracts are sufficient to give a flavour of the Judge's analysis of the evidence and his conclusions:

"29. There is however material in the form of communications between the parties from which Muhammed Asif has been so wholly excluded that I have to examine the probability that the reality here is that the business relationship in the UK was between M. Safdar Gohir and D1, and that there would be one exceptionally good reason why if it was simply Mr. Gohir who had advanced monies to D1, he would want a proxy to have a charge over the property rather than register it in his own name. In 2009 M Safdar Gohir started to actively engage in fraud again, this time it would seem in Germany, as that was certainly where he was punished …… Taken in conjunction with the contemporary communications involving M. Safdar Gohir, D1 and others in which Muhammed Asif plays no role and where he is not mentioned in any context of being the party who is the real loser, a theory that Mr. Asif's name had been deployed back in 2009 to enable M. Safdar Gohir to maintain a hidden asset charge on the Chilton House address is not at all fanciful. It seems to me to be the much more logical explanation as to what was really going on here."

"31. Counts one and four make up the major part of what is said to have been the sums misappropriated by D1. Having formed a very clear view of who really had an interest in these investments together with his motive for keeping his financial interests below the radar, the inclusion and exclusion of Muhammed Asif's name from records of shareholdings in a business that is now in liquidation becomes a relatively minor part of the case. Satisfied as I am by the submissions on behalf of the defendants that Muhammed Asif has indeed been a front man for M. Safdar Gohir and has played a leading role in these proceedings, so that Mr. Asif is indeed the proxy prosecutor ……. That said I remain satisfied that the person who in reality has most interest in this prosecution proceeding is a serial tax fraudster. I am satisfied that there is ample material here to enable me to say that this prosecution is an abuse of the process of this court."

"CONCLUSION

"34. That sets out in relatively short order why in my judgment there is no conceivable public interest in any of these issues being litigated in this Crown Court. A civil remedy ought to be available to whichever party most truly has the appearance of the aggrieved loser. It seems to me that the one practical action would indeed be to take steps to secure the equivalent of a restraint order over what appears to be the defendants' identifiable asset of 27 Collingham Drive. If no cause of action in fact exists, it is an abuse of the process of this Crown Court to litigate matters here which a court of civil jurisdiction would not realistically entertain."

29. In a written ruling dated 14 November 2019 Davis LJ refused permission to appeal. In paragraph 6 of his ruling Davis LJ noted that it is well established that the jurisdiction to stay on such a basis [abuse of process] is only rarely and

exceptionally to be exercised. At paragraph 9 he held that Judge Tomlinson was entitled to conclude that on the available evidence that the ostensible prosecutor Mr Asif – the Claimant in this civil claim – was in truth a front or proxy for Mr Gohir. He concluded, at paragraph 14, that the prosecution was being pursued, in reality, on behalf of Mr Gohir. A further finding, not directly germane for purposes of the application before me, was that the prosecution was being used for a collateral and improper purpose of leverage to achieve recovery of money from the defendants said to be due to him.

30. Mr Asif then renewed his application for permission to appeal to the full Court of Appeal, comprising Dame Victoria Sharp P., Jay J. and Cockerill J. Their ruling is in a written and reasoned judgment dated 15 July 2021 with Neutral Citation Number [2021] EWCA Crim 1091. The Court of Appeal, in agreement with Davis LJ, refused the renewed application for permission to appeal.

31. The following extracts from the judgment are sufficient to convey the rationale and conclusions for the decision:

> "79. The overarching question for us is whether the judge erred in law or in principle in his analysis, or whether his conclusion - judged against the overarching question of whether a stay is required to protect the integrity of the criminal justice system – was unreasonable. Having carefully considered the submissions made we conclude that the judge did not so err, that his decision is not unreasonable and should be upheld. In reaching that conclusion we agree with the reasons given by Davis LJ in refusing permission, which we have set out above."

Paragraphs 80-89 set out the Court of Appeal's reasons for concluding that the primary motive for the prosecution was to obtain for Asif from the defendants the recovery of money which he said they owed him. This constituted an abuse or misuse of a criminal prosecution.

> "90. To this however can be added a number of further factors. The most significant of these is the question of proxy prosecutor. We have no hesitation in concluding that the judge was entitled to consider on the evidence before

him that Mr Gohir was the moving force behind this prosecution and Mr Asif was no more than a proxy prosecutor. This was a matter going to conduct, and the attempt to "pull the wool over the Court's eyes". As the judge noted, having reviewed Mr Gohir's criminal background:

> "taken in conjunction with the contemporary communications involving [Mr Gohir], D1 and others in which [Mr Asif] plays no role and where he is not mentioned in any context of being the party who is the real loser, a theory that Mr Asif's name had been deployed back in 2009 to enable [Mr Gohir] to maintain a hidden asset charge … is not at all fanciful. It seems to me to be the much more logical explanation as to what was really going on here."

91. He concluded that he was *"*satisfied …. that [Mr Asif] has indeed been a front man for [Mr Gohir] and he has played a leading role in these proceedings; Mr Asif is indeed the proxy prosecutor".

"92. This would itself provide a valid reason for the conclusion which the judge reached …"

32. Turning to the authorities, in ***Allsop*** the claimant brought proceedings against the solicitors and barrister who had acted for him in matrimonial proceedings alleging that they had acted in breach of contract and/or negligently. The defendants applied to strike out the claim on the basis, among other matters, that it constituted a collateral attack on the judgment which awarded financial remedies in favour of the claimant's former wife in the matrimonial proceedings.

33. At first instance the judge struck out certain of the allegations pleaded, applying the ***Phosphate Sewage*** test, namely that only new evidence which entirely changed the aspect of the case could justify relitigation. On appeal the Court of Appeal allowed the appeal in part, holding that the ***Phosphate Sewage*** test was of no application and that in the context of a collateral attack on a prior civil decision, if the parties were not the same as in the earlier proceedings, it would

only be an abuse of process to challenge the factual findings and conclusions of the judge 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.

34. The decision in ***Allsop*** was reached after a detailed review of authority. The lead judgment was given by Marcus Smith J, with whom Arnold and Lewison LJJ agreed. Paragraph 44 of his judgment contained a synthesis of his conclusions, of which the following seem to me to be the most relevant for present purposes:

34.1 The jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation. It is an *exceptional* jurisdiction, enabling a court to protect its procedures from misuse. Thus a court is able to – indeed, has a duty to – control proceedings which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.

34.2 Relitigation should not be regarded even as prima facie amounting to an abuse of process. There is a need to consider each case on its own facts.

34.3 There is a clear distinction to be drawn between the collateral challenge of an anterior *criminal* decision when compared to the collateral challenge of an anterior *civil* decision. There is a public

interest in criminal convictions only being challenged by way of appeal, and for them not otherwise to be called into question.

34.4 A further, important distinction between collateral challenge to criminal rather than civil decisions is that criminal decisions do not give rise to res judicata estoppels in the way that civil decisions do. That is, at least in part, because there is no meaningful identity of parties between the earlier (criminal) and later (civil) decisions. That in turn means that the abuse doctrine has an inevitably greater role where the anterior proceedings the subject of collateral challenge are criminal rather than civil.

34.5 It is necessary to be very clear what is meant by "relitigation". Relitigation means arguing the same issue, that has already been determined in earlier proceedings, all over again in later proceedings. In civil proceedings, generally speaking, for an issue to be the same, it will arise between the same parties (or their privies). The role of the doctrine of abuse of process is, correspondingly, much more limited. The abuse doctrine will only arise where one of the parties to the earlier litigation sues a stranger to that litigation. In such a case the claim will typically be permissible and not abusive, and that will generally be because the case is not one of relitigation at all. Rather, the stranger to the earlier litigation will be the subject of the later claim because that person has done or failed to do something which (had that person behaved as he or she should) affected the terms or nature of the anterior decision. The focus is therefore on the

impugned conduct of the lawyer (for example) which is independent of the conclusions of the court.

34.6 The abuse doctrine as referred to in paragraph 34.1 above, involves two stated circumstances. The first involves manifest unfairness to a party to litigation, and the example given is of a party who is forced to rebut an allegation for the second time, when he has been successful in the earlier case. That is not the present case.

34.7 The second circumstance involves an earlier decision being revisited in later and distinct proceedings on the basis of no new evidence at all. Such a case was ***Laing***. In the words of Marcus Smith J: "In those circumstances, it is easy to see how the existence of or potential for divergent judgments of courts of co-ordinate jurisdiction *does* amount to a potential abuse of the court's processes (as the Court of Appeal found in ***Laing***). In reality (as the Court of Appeal also found in ***Laing***), the subsequent proceedings were no more than an (improper) attempt to appeal the decision of Judge Thornton."

35. ***Laing*** concerned a claimant property developer who entered into a loan agreement with a lender. A dispute later arose over the effect of the agreement which was decided by HH Judge Thornton QC in favour of the lender (or its associated company). There was no appeal against that decision. Subsequently the claimant commenced a second action in which he claimed against the defendant solicitors for negligence, alleging that in preparing the written agreement they had failed to make it accurately reflect the actual agreement between the claimant and the lender. The defendant solicitors applied to strike

out the second action as an abuse of process on the basis that it was an attempt to relitigate the findings of Judge Thornton in the first action. They succeeded in the Court of Appeal, reversing the judge at first instance. The Court of Appeal found that on the facts the second claim amounted to an attempt to impeach the findings in the first action. This was not a case of alleging that the solicitors had done or failed to do something, which if they had done so, would have affected the terms of the earlier decision. Rather it was a relitigation of the earlier case on the basis of exactly the same material which was or could have been before the judge there. If that judgment were to be challenged, it should be done by way of appeal and not collateral challenge in an action for negligence against solicitors.

36. Buxton LJ referred to the speech of Lord Diplock in ***Hunter v Chief Constable of the West Midlands*** [1982] AC 529 which foreshadowed the citation in ***Allsop*** set out at paragraph 34.1 above which described the two stated circumstances which were capable of amounting to abuse of process, namely unfairness or the bringing of the administration of justice into disrepute. At paragraph 12 of the judgment he said:

"The court therefore has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute."

37. Buxton LJ, after analysing Judge Thornton's judgment, held that he found the written agreements entered into by the parties reflected what they had agreed.

It followed that the second claim against the solicitors involved relitigating the same issues and hence amounted to a collateral attack on Judge Thornton's decision. He concluded, at paragraph 25:

"I therefore conclude that it would bring the administration of justice into disrepute if Mr Laing were to be permitted in the second claim to advance exactly the same case as was tried and rejected by HH Judge Thornton. If HH Judge Thornton's judgment was to be disturbed, the proper course was to appeal, rather than seek to have it in effect reversed by a court not of superior but of concurrent jurisdiction hearing the second claim. That the second claim is in substance an attempt to reverse HH Judge Thornton is important in the context of wider principles of finality of judgments. Where, wholly exceptionally, a collateral, first instance, action can be brought it has to be based on new evidence, that must be such as entirely changes the aspect of the case: see per Earl Cairns LC in ***Phosphate Sewage v Molleson*** [1879] 4 App. Cas. 801 at 814. The second claim in our case not merely falls short of that standard, but relies on no new evidence at all.

38. In ***Allsop*** the Court of Appeal endorsed the conclusion in ***Laing*** that the second claim was an abuse of process (even if it doubted the application of the ***Phosphate Sewage*** test).

39. I intend to direct myself in accordance with the detailed, indeed exhaustive analysis of the law and conclusions reached in ***Allsop***. The conclusions there are not only relevant but they are of course binding on me.

40. Applying these principles, the facts and circumstances in this claim lead in my judgment to the following conclusions:

41. First, the issue in this claim is essentially whether it was the Claimant's money that resulted in him being given the charge for £500,000 over Chilton House. This is precisely the same issue that was before the court in the criminal proceedings, in which it was found both at first instance and on appeal that the money did not come from the Claimant but from Saff. It needs no 'intense focus' on the facts (to adopt the term in ***Laing***), to appreciate that the issue in the criminal proceedings is the same as it would be in this court.

42. Secondly, the findings in the criminal proceedings did not take the form of a conviction. Instead Judge Tomlinson made the findings after hearing detailed oral and written submissions. I am unable to see any material difference between a decision arrived at by means of a conviction and a decision to strike out a prosecution because of the absence of relevant facts to put before a jury. Both involve a careful examination of relevant contemporaneous and other documents and witness statements and a conclusion being reached. Moreover, it was recognised in the criminal proceedings both at first instance and on appeal that the jurisdiction to stay a prosecution as an abuse of process is only rarely and exceptionally to be exercised. Accordingly clear findings were required and were reached. I recognise that this is an unusual case and precedents may not exist for a decision that a civil claim amounts to an abuse results from an anterior decision in a criminal proceeding to stay a prosecution. However, it seems to me that such a result may be arrived at in an appropriate case.

43. In my judgment, it is sufficient to attract the doctrine of abuse of process if the decisions of the anterior criminal court and subsequent civil court involve the same issue. I do not accept the submission on behalf of the Claimant that this

civil claim is incapable of amounting to a collateral attack on a criminal judgment because there was no judgment. I would conclude that the decision to stay the criminal proceedings constituted in form and effect a judgment.

44. Thirdly, this civil claim will of necessity cover the same ground as that examined in the criminal proceedings leading to the stay of the prosecution. The issue, namely whether it was the Claimant's money that was made available to Mr Ditta, is identical in both criminal and civil proceedings.

45. Fourthly, the same evidence (or lack of evidence) will be before the civil court as was before the criminal court. No new evidence will be available in this civil claim such as might cast the matter in a different light; indeed no new evidence will be available at all. Ms Walker's detailed comparison of the close similarity of the evidence before the criminal court and this court was not challenged on behalf of the Claimant.

46. Fifthly, I have concluded that in these circumstances, to rerun in this court the issue decided in the criminal proceedings as to whether it was the Claimant's money that was made available to Mr Ditta, and on essentially the same evidence, will amount to a collateral attack on the decision of the criminal court and will thereby bring the administration of justice into disrepute. The only motive on the part of the Claimant for pursuing this civil claim must be, or at least involve, seeking to achieve this court arriving at a different and contrary conclusion to that reached in the criminal court and on the same evidence. In my judgment, most people would look askance at what amounts to an attempt to persuade this court to come to a contrary conclusion on an issue that has

previously been decided in criminal proceedings and on the same evidence. To my mind, this is liable to bring the administration of justice into disrepute.

47. Sixthly, in my judgment it makes no difference that the criminal court and this court are not courts of concurrent jurisdiction, as was the case in ***Laing***. The feature of importance in this unusual case is that the decision of both courts centres on the same issue and involves the same evidence.

48. Seventhly, if the proper course to challenge a decision in criminal proceedings is by way of appeal, that is precisely what happened here and the appeal was unsuccessful. On this basis a challenge in this court which will in effect challenge the decisions in the criminal proceedings both at first instance and in the CACD could be viewed as an even more stark case of abuse of process.

49. I reject the submission on behalf of the Claimant that he will be left without a remedy. If the Claimant is without a remedy, it is because the criminal court has held after a close examination of the documents and witness statements that it was not his money that was made available to Mr Ditta, and consequently he could not pursue a criminal prosecution based on the premise that it was his money. This also undermines the Claimant's submission that the evidential threshold in criminal and civil proceedings is different. While it is indeed the case that the criminal and civil standards of proof differ, the striking feature underlying the decision of the criminal court anterior to this case is that there was a complete *lack* of relevant evidence to support the prosecution. Since the evidential position is the same in this court, there is no reason to conclude that the civil standard of proof would lead to a different result.

50. For these reasons I conclude that this claim represents an improper attempt to relitigate the same decision as has been reached in the criminal proceedings. While it is true that the Defendants were not party to those proceedings, this makes no difference. The issue and the evidence at large in the criminal proceedings is the same as that in this civil claim. The relevant legal principles do not flow from res judicata estoppel but from considerations going to abuse of process. For the reasons set out above it would amount to an abuse of process for the decision reached in the criminal proceedings to be challenged in this claim. Such a challenge amounts in my view to an impermissible collateral attack on the decision of the criminal court. Accordingly, I am satisfied that the claim falls to be struck out as an abuse of the process of the court pursuant to CPR 3.4(2)(b).

Defendants' submissions – no reasonable grounds to bring the claim and summary judgment

51. The Defendants apply in the alternative for the proceedings to be struck out on the basis that there are no reasonable grounds for bringing the claim, pursuant to CPR 3.4(2)(a). Ms Walker advanced the application in this regard on the basis that it was better viewed as a defendant's application for summary judgment (sometimes called reverse summary judgment) under CPR 24.2. Mr Panton did not object, as recorded in paragraph 4 above.

52. CPR 24.2 is in the following terms:

> **Grounds for summary judgment**
>
> **24.2** The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
> (a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or
(ii) that defendant has no real prospect of successfully defending the claim or issue; and
(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

(Rule 3.4 makes provision for the court to strike out(GL) a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)

53. The note in brackets underneath the text of the rule suggests that the court's power to strike out a statement of case under CPR 3.4 engages similar considerations to those that apply to giving summary judgment.

54. CPR 3.4.2(a) is in these terms:

Power to strike out a statement of case

3.4

(2) The court may strike out a statement of case it it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim.

55. The Defendants submit that this is a case lacking in substance, as demonstrated by the decisions of HHJ Tomlinson and the CACD to stay the prosecution because, despite the Claimant's witness evidence, they were satisfied that he was acting as a proxy prosecutor in the sense that it was not his money that was lent to Mr Ditta. The Defendants say that notwithstanding what the Claimant and his witnesses are prepared to say in their statements, which material has

already been reviewed in the criminal proceedings, the contemporaneous documents or lack of them wholly undermine the Claimant's allegations that it was his money that was lent to Mr Ditta or that he has suffered any loss.

56. Ms Walker referred me to the following among other documents in support of her submission that there is a lack of any documents relating to a business relationship between the Claimant and Mr Ditta, contrasted with the existence of documents pointing to Saff as the individual to whom Mr Ditta owed money:

56.1 The registered charge names the Claimant as lender but in the box for the lender's address the address given is that of Saff.

56.2 The James Bloomer completion statement makes reference to Mr and Mrs Iqbal and refers to "Paid Abid Ditta £450,000". However it is an incomplete document, or more accurately a poorly photocopied document whose meaning is opaque. Further, the reference to '*Abid* Ditta' may not be a reference to the Mr Ditta who is said to owe money, as his first name is Adil.

56.3 An email from Mr Ditta sent in 2011 (4 years after the alleged loan) refers to postcodes of properties and is said to relate to property investment, but its meaning is wholly unclear.

56.4 In an email sent on 8 May 2012 by Mr Ditta to Saff, Mr Ditta begs Saff for help and understanding regarding his desperate financial situation, including the following: "The balance of 450k I will pay bits of all the time which ever money comes in I will keep paying every penny off." This suggests that Mr Ditta's creditor was Saff,

including notably regarding £450,000, which is the same sum said to be comprised in the charge plus interest, and gives no support to any suggestion that the Claimant was also a person to whom he owed money.

56.5 In similar vein are emails sent in November 2012 by Mr Ditta to Saff or his personal assistant, Julie Lowe. On 23 November 2012 Mr Ditta wrote in an email to Ms Lowe: "450k I owe you and like I said I will pay minimum 50k a year but inshalla more starting Jan."

57. In short, submits Ms Walker, there is a complete absence of documents to support a case that the Claimant was the lender to Mr Ditta and that it is the Claimant's money that has been lost.

58. Ms Walker referred me to the oft-cited statement of principle as to the correct approach on applications by defendants for summary judgment by Lewison J, as he then was, in ***Easyair Ltd v Opal Telecon Ltd*** [2009] EWHC 339 (Ch).

Claimant's submissions – no reasonable grounds to bring the claim and summary judgment

59. Mr Panton accepts that the evidence to support the making of an advance by the Claimant to Mr Ditta is exiguous. At one point in his oral submissions he referred to the paper trail for the alleged advance as a "few scrappy bits of paper" and at another as "patchy". However, he submits that this is irrelevant. In his submission, the existence of the registered charge is the end of the matter and it is not possible to go behind it unless they are making a claim for rectification of the register.

60. Mr Panton relies on the decision of the Court of Appeal in ***Cherry Tree Investments Ltd v Landmain Ltd*** |[2013] Ch 305. That case involved a lender ("Dancastle") granting a secured loan to the defendant ("Landmain") on the terms of a facility agreement. Clause 12.3 of the facility agreement provided that the moneys secured by the charge should become immediately due on the execution of the facility agreement. This was more extensive than the statutory power of sale, which was exercisable only if the moneys secured by the charge had become due. On the same day the facility agreement was executed the parties also executed a legal charge in the standard Land Registry form which stated that Landmain with full title guarantee charged "the property by way of legal mortgage as security for the payment of the sums detailed in panel 9". The sidenote to panel 9 read "insert details of the sums to be paid (amount and dates) and so on". The parties failed to complete the panel 9 box so on the face of the charge nothing was secured by it. The charge was nonetheless registered at the Land Registry. A matter of months later Dancastle served notice on Landmain that the moneys secured by the facility agreement had become immediately due and payable. Landmain disputed this notice on the grounds that under the facility agreement Dancastle was not in a position to serve such a notice unless an event of default had occurred, which it contended had not happened. Nonetheless Dancastle went ahead and sold the property at auction to the claimant ("Cherry Tree"). Cherry Tree took a transfer of the property but when it applied to the Land Registry to register the transfer, it was unable to obtain registration due to the objections of Landmain. Cherry Tree therefore brought a claim seeking an order for registration of its name as owner in the proprietorship register. It applied for summary judgment on the basis that the

statutory power of sale had been varied by clause 12.3 of the facility agreement, so that the court was not concerned to decide Landmain's argument that no event of default had occurred.

61. At first instance Judge Pelling QC decided that the facility agreement and charge had been executed as part of a single transaction and that they could be treated as one. He held that the charge should be read as if the variation to the statutory power of sale in clause 12.3 of the facility agreement had been incorporated into the charge. In those circumstances the charge was effective to include an extension to the statutory power of sale and so the sale to Cherry Tree was valid and effective.

62. The Court of Appeal reversed the first instance decision, Arden LJ dissenting. The majority, Longmore and Lewison LJJ, held that the court's ability to consider extrinsic evidence under the principles of interpretation as an aid to construing the charge did not extend to the insertion of whole clauses which the parties had mistakenly failed to include. They further held that in view of the public nature of a registered charge, extrinsic evidence as an aid to interpretation should not extend to collateral documents to which a anyone who wished to inspect the register had no access. Further, in the context of a charge intended to be completed by registration at the Land Registry, the insertion of a missing clause ought to have been effected if at all, by a properly pleaded and proved claim for rectification. It was therefore wrong to treat the registered charge as including the extended power of sale which was included in the facility agreement alone.

63. The decision in ***Cherry Tree Investments Ltd*** concerns the application of well known and often discussed rules of interpretation of contracts. In the circumstances and on the facts of that case, the result was that the registered charge stood alone and was to be interpreted as such, without recourse to the extended power of sale that was included in the facility agreement.

64. Mr Panton submits that this supports his submission that a registered charge speaks for itself for all purposes and that "it is simply not open to anybody to go behind what is written on that registered charge unless they are making a claim for rectification of the register". In my view this places a weight on the decision which it was not intended to bear. ***Cherry Tree Investments Ltd*** is a case about the rules of interpretation in the context of a registered charge. It can nowhere be gleaned from the decision that the existence of a registered charge is sufficient for the charge to be good against the world and unchallengeable for all purposes. That would be a surprising proposition. For example, the validity of a registered charge may be challenged by a claim or defence of fraud or misrepresentation. It would also be surprising if the only challenge to the validity of a registered charge was by way of a claim for rectification. That may be an impracticable remedy to achieve, especially when it is being sought by someone who was not party to the original document, or by a person who has no interest in rectifying it.

65. Indeed in the present case it would be strange and unjust if the Defendant's only answer to the claim in professional negligence lay in having to assert a counterclaim for rectification. It would be unjust as the Defendant may be unable to obtain sufficient evidence to surmount the high burden of proof

needed to succeed in a claim in rectification. Further the Defendant has no interest in the charge being rectified. It would be strange as the Defendant has a far simpler answer to the claim based on the straightforward defence which is consistent with principle that the Claimant must explain and prove his loss. I cannot see any reason why the Defendant should be unable to put forward this answer to the claim and in my judgment none can be gleaned from the decision in ***Cherry Tree Investments Ltd***.

66. Mr Panton also submits that the Claimant has lost the registered charge for £500,000 over Chilton House and, as put at paragraph 33 of his skeleton, "irrespective of why he had a £500,000 charge on the property in the first place". The submission continues by asserting that absent any claim for rectification, it is not open to any party to go behind what is registered at the Land Registry. However, it seems to me that this is simply another way of putting his previous submission that a registered charge is good against the world and is unchallengeable, save by way of a claim for rectification. I have already rejected that argument. Furthermore, it seems to me to ignore the fundamental point that the claim is for damages for professional negligence and it is incumbent on the Claimant to set out and prove his loss. If he is unable to do so, because he cannot show that he has lent the money said to be secured by the charge in the first place, or because he cannot otherwise explain the basis of the charge, then his claim for damages will fail.

<u>Discussion – no reasonable grounds to bring the claim and summary judgment</u>

67. In view of what has gone before I can take this more shortly. The documents that would be expected to have come into existence to show the making of an

advance by the Claimant to Mr Ditta, or even to point to them having a business relationship, are strikingly lacking in this case. The Defendants' application for specific disclosure for such documents has been met by the answer that the Claimants had no documents, because all his dealings with Mr Iqbal, through whom his money is said to have been paid to Mr Ditta, were conducted through Saff as the Claimant's middleman. He had checked with Saff but to the extent documents had ever existed, they did not any more.

68. To my mind, this is as unpersuasive as it was to Judge Tomlinson and the CACD. However, the matter does not end there, as such documents as do exist (see paragraph 56 above) are strongly suggestive that if a loan of £450,000 was made to Mr Ditta, the lender was Saff, not the Claimant. This is the same conclusion reached in the criminal proceedings, by means of the finding that the Claimant was not the real prosecutor, but was a proxy acting for Saff, who was a serial convicted fraudster and preferred to keep his profile below the radar or concealed altogether.

69. I remind myself of the statement of principle of Lewison J in ***Easyair***, which is widely regarded as a classical statement of the law on applications for summary judgment, as borne out by the frequency with which it is cited judicially and in advocates' submissions. I intend to direct myself in accordance with that statement, which is in paragraph 15 of the judgment and seven sub-paragraphs. It is not necessary to cite them in full.

70. First, the court must be careful before giving summary judgment on a claim. It is a strong thing to deprive a party of putting his claim before a court at a trial and the power to do so should be exercised with caution and only where the

court is satisfied that the claim or defence, as the case may be, has no reasonable prospect of success.

71. I bear in mind that the Claimant's witness statements in this claim support his case that it was his money that was invested with Mr Ditta. See, for example, his Third Witness Statement dated 3 March 2022. However, these statements must also be viewed in the context of contemporaneous documents, or the lack of them. In this case, as noted above, there is striking absence of contemporaneous documents to support the claim, when such documents would be expected to exist. Moreover, such contemporaneous documents as exist contradict the claim by pointing to the lender being Saff and not the Claimant.

72. It seems to me that Lewison J's statement in ***Easyair*** at paragraph 15(iv) is apposite in this regard:

"This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents."

73. For the reasons set out above I have concluded that the Claimant has no realistic prospect of success. Indeed, to categorise the claim as "fanciful" may itself be an exaggeration. The claim carries no degree of conviction at all. No question of a mini-trial arises for the simple reason that there is a lack of evidence on which to form any conclusion. Nor, given the history of disclosure in the case, is there any question of new evidence that can reasonably be expected to be available at trial.

74. I therefore conclude that the Defendants have surmounted the hurdle for an order awarding them summary judgment under CPR 24.2. There is no other compelling reason why the case should be disposed of at a trial. The Defendants have also met the test for striking out the claim under CPR 3.4(2)(a).

Non-compliance with rules etc.

75. The Defendants also advanced their application on the ground that the Claimant has failed to comply with the rules pursuant to CPR 3.4(2)(c). In view of the decision I have reached on the other grounds of the application there is no need to consider this further. However, in the course of the hearing I expressed the tentative view that any breaches on the part of the Claimant were not of so serious a nature as to deserve the claim being struck out. Ms Walker did not pursue the point and in my view she was right not to do so.

The order to be made

76. I will hear counsel either in person or in writing as to the form of order to be made together with any consequential matters.