LITIGATION - CANADA

"Clean up, clean up, everybody clean up": the doctrine of clean hands

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Introduction

On occasion, in response to a motion or claim by an adverse party seeking equitable relief, a party will argue that the relief sought should be denied on the basis that the moving party has not come to court with 'clean hands'. This update traces the origin of what is often referred to as the 'doctrine of clean hands' and examines recent cases where:

- a moving party has been denied equitable relief on the basis that it came to court with unclean hands; and
- such arguments did not defeat the moving party's claim.

Origins

The doctrine of clean hands originated in the English courts of chancery as a limit to a party's right to equitable relief, where the party had acted inequitably in respect of the matter. In the seminal case *Toronto (City) v Polai*,(1) the Ontario Court of Appeal provided some insight into the origins and purpose of the doctrine:

> *"The maxim 'he who comes into equity must come with clean hands' which has been invoked mostly in cases between private litigants, requires a plaintiff seeking equitable relief to show that his past record in the transaction is clean:* Overton v. Banister *(1844), 3 Hare 503, 67 E.R. 479;* Nail v. Punter *(1832), 5 Sim. 555, 58 E.R. 447;* Re Lush's Trust *(1869), L.R. 4 Ch. App. 591. These cases present instances of the Court's refusal to grant relief to the plaintiff because of his wrongful conduct in the very matter which was the subject of the suit in equity."*(2)

Although the court declined to use the doctrine to dismiss the appellant's action for an injunction in that case, it did set the stage for the maxim's future use in Canadian courts.

In *Canson Enterprises Ltd v Boughton & Co*,(3) the Supreme Court of Canada endorsed the doctrine as an example of the "fusion of law and equity".(4) Indeed, courts have come to rely on such equitable principles to craft and limit appropriate legal and equitable remedies.

Recent cases

Modern courts appear increasingly willing to use the doctrine to punish the bad behaviour of equitable claimants. For example, *Servello v Servello*(5) dealt with a son's appeal of a trial judge's decision to set aside the transfer of property from the respondent mother to the appellant son, dismissing the son's counterclaim for continued shared use of the property and other equitable remedies. Although the son acknowledged that the property was rightfully owned by his mother, he refused to transfer it to her, preferring to use the property as leverage in his efforts to secure an

interest in it. The Ontario Court of Appeal affirmed the trial judge's decision that "if the court grants [the son] the relief he requests, it would effectively be endorsing his wrongful actions. A court of equity will not reward bad behaviour".(6)

Further, the court need not specifically refer to the doctrine in order to take it into account: it is fundamental to the consideration of all equitable remedies. In *Steward v Bardsley*,(7) the defendants appealed the trial judge's decision to refuse equitable set-off after hearing evidence that the defendants had improperly withdrawn money from an energy company in which both the plaintiff and the defendants were shareholders. The defendants argued that the doctrine no longer applies to equitable set-off, as it has not been specifically referred to in previous case law. The Nova Scotia Court of Appeal rejected this argument, holding that the equitable principle of clean hands is "fundamental";(8) should a court determine that it is not, such determination would be direct and not left to inference.

Even where a claimant has acted inequitably, courts have shown restraint by refusing to apply the doctrine where the wrongful act is unrelated to the equity sought. In *Massa v Saulim*,(9) the plaintiff's motion for a *Mareva* injunction was unsuccessfully challenged on the basis that he did not have clean hands. In that case, the plaintiff's affidavit offered strong circumstantial evidence that the defendant had tricked him into participating in a fraudulent product distribution scheme. However, the plaintiff admitted that, at a certain point in the transaction, he had attempted to avoid paying tax on the products being shipped. The court refused to limit the plaintiff's relief, finding that "the iniquity must be done to the defendant himself" to amount to a basis for denying equitable relief.(10)

Comment

The doctrine of clean hands will not come into play in every case where equitable relief is sought. It is the type of allegation that lawyers should not be quick to include among their arguments, unless there is a reasonable basis for doing so. In a proper case, however, it remains a powerful weapon that can defeat the adverse party's claim and affect how the adverse party is thereafter regarded by the court, to the extent that the adverse party continues to advance other claims that do not sound in equity.

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Endnotes

(1) *Toronto (City) v Polai*, [1969] OJ. No 1624 (CA).

(2) *Polai* at para 46.

(3) *Canson Enterprises Ltd v Boughton & Co*, [1991] SCJ. No 91 (SCC).

(4) *Canson Enterprises* at paras 51, 94.

(5) *Servello v Servello*, 2015 ONCA 434 (CA).

(6) *Servello v Servello*, 2014 ONSC 5035 (SCJ) at para 117.

(7) *Stewart v Bardsley*, 2014 NSCA 106 (CA).

(8) *Stewart* at para 60.

(9) *Massa v Saulim*, 2013 ONSC 750 (SCJ).

(10) *Massa* at para 10, quoting *Polai* at para 46.

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