

## ***Rock v Henderson* [2021] NSWCA 155 (29 July 2021) – New South Wales Court of Appeal**

‘Abuse of process’ – ‘Appeal’ – ‘Breach of protection order’ – ‘Children’ – ‘Family court proceedings’ – ‘Female perpetrator’ – ‘Improper purpose’ – ‘Malicious prosecution’ – ‘Protection order’ – ‘Separation’ – ‘Systems abuse’ – ‘Trespass’

Proceeding: Application for leave to appeal against striking out Statement of Claim in full.

Facts: The male applicant and female respondent were formerly husband and wife with financial and child proceedings pending in the Family Court. In 2018 there was an incident at Sydney Airport between them where it was alleged the applicant approached the respondent and her current partner and caused her humiliation and embarrassment [58]. The respondent made a written statement which led to the police obtaining a provisional protection order against the applicant [54]. It was dismissed in June 2019 [4].

The applicant sued the respondent for damages for malicious prosecution and for trespass to land. The malicious prosecution submission related to the protection order application [4]. The trespass to land submission related to the respondent entering the applicant’s property in July 2019 where the children, whom she was prohibited from approaching by a separate protection order, resided with him [4]. The respondent filed a Notice of Motion to the District Court seeking the claim be struck out, in full or in part pursuant to Uniform Civil Procedural Rules 2005 (NSW), rule 14.28 [5]. The primary judge ordered the applicants’ claim be struck out in full as the applicant commenced the proceedings for an improper purpose, namely to circumvent or derive some advantage in the family law proceedings. The applicant applied for leave to appeal.

### Grounds of Appeal:

The Primary judge erred in finding the appellant’s actions for malicious prosecution and trespass were an abuse of process in that they were commenced for an improper or collateral purpose in that:

1. there was an absence of evidence capable of supporting that finding; and
2. as a matter of law, the purpose ascribed to the applicant was not an improper or collateral purpose as a matter of law.

Decision and Reasoning: Leave granted, appeal upheld.

Wright J considered the evidence that the claimed amount was the same as the proceeds from the sale of the Lilydale house provided no basis for a claim of circumventing the family law proceeding or obtaining an advantage [87],[91]. Naming the children in the claim for damages for trespass was not an improper purpose [92]. The evidence was insufficient to cross the high threshold to prove the proceedings were instituted for an improper or collateral purpose and therefore the primary judge erred in his judgement.

Wright J found that the elements of malicious prosecution were sufficiently clear and the minor defects in the applicant's statement did not justify the claim being struck out [117]. Further, the distress caused to the applicant by the children's distress was relevant to his claims for damages and therefore was not liable to be struck out as tending to cause prejudice, delay or embarrassment [117].

Brereton JA and Belle P agreed with the orders proposed by Wright J [50].