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PRICEWATERHOUSECOOPERS LLP V SEBI 2021 SC 2021 (10) 1

Supreme Court of India
Civil Appeal 7777 of 2014
Decided on 15 October 2021
Citation: 2021 (10) 1 SC
Bench: Justice Dr. D.Y. Chandrachud, Justice A.S. Bopanna, Justice Hima Kohli
Subject: Civil Appeal against Order of Securities Appellate Tribunal (SAT) upholding SEBI's order imposing penalty for violation of PFUTP Regulations and Insider Trading Regulations
Keywords: Fraudulent and unfair trade practices, Insider trading, Manipulative and deceptive devices, Penalty, Prohibition of Fraudulent and Unfair Trade Practices Regulations, Prohibition of Insider Trading Regulations, Scienter, Section 15HB, Section 15HT, Section 15J, Section 15T(2), Section 15T(3), Section 15T(4), Section 15T(5), Section 15T(6), Section 15T(7), Section 15T(8), Section 15T(9), Section 15T(10), Section 15T(11), Section 15T(12), Section 15T(13), Section 15T(14), Section 15T(15), Section 15T(16), Section 15T(17), Section 15T(18), Section 15T(19), Section 15T(20), Section 15T(21), Section

ial evidence that would lead to a different outcome to that before Rose J or establish that any breach of duty by PwC caused the directors to act as they did. As the judge noted at [101] he had already addressed and rejected the argument that there could be no materially different evidence bearing on the question of what the directors would have done in December 2008 and May 2009. He then dealt with the issue of causation, setting out at [103]-[104] PwC's argument that nothing that PwC could have told the directors either directly or in the form of external expert advice would have made any difference to what the directors knew or would have done. He rejected that argument at [105] to [107] in these terms:

> "105. I reject the argument that there is no realistic possibility of BTI proving reliance on a misstatement contained in the 2007 or 2008 audit reports. Rose J found that the Directors were acting conscientiously in seeking to make appropriate provision in the accounts for the Lower Fox River liability. It is not possible to say, on the basis of their evidence to Rose J, that they would have disregarded material information that they were given and ploughed ahead with the December (or May) dividend regardless. It cannot be concluded on this application that, if PwC had questioned the amount of the provision, or required disclosure of a risk of greater liability, or declined on the basis of the proposed provision to give an unqualified audit report on a going concern basis, the Directors would not have changed the contents of the accounts. Whether, in those circumstances, they would have made changes and would have declared the dividends that they did must be an issue for trial. It is not possible to say that if advice had been given that AWA should make provision based on the highest figure in a range of estimates of liability, that was something that the Directors already knew.

> 106. The Directors did in fact have various assessments of liability from management and connected, non-independent advisors, but they did not have independent advice from an expert lawyer or consultant about the risks or the validity of the assumptions that they were making, or about what would be a prudent provision to make. Nor had they any advice from PwC about qualifications or disclosure that were appropriate in the accounts. It is therefore not possible to conclude, without hearing the evidence at trial, that nothing that the Directors learnt could have made a difference.

> 107. Further, it is clear from the evidence given to Rose J that the Directors required a clear audit certificate from PwC in order to proceed as they did. The September plan required this. The timing of the submission of the draft accounts, the issue of the audit certificate and the meeting at which the May dividend was declared shows that PwC's audit was the final matter to be put in place to allow the Directors to proceed which they did immediately upon receipt. There is clearly an arguable case that the Directors relied on the terms of the PwC audit report and on the absence of any challenge in approving the 2007 and 2008 accounts and declaring the dividends, and if they did so they relied on any misstatement contained in PwC's reports."

30. The judge went on to deal with PwC's case on its third and fourth grounds, scope of the duty of care and the allegation that AWA had suffered no loss, rejecting its case on both grounds. Those conclusions are not the subject of the appeal so that it is not necessary to consider them further.

The grounds of appeal

31. There are two grounds of appeal:

(1) That the judge erred in concluding that the claim against PwC is not an abuse of process by reason of collateral attack;

(2) That the judge erred in concluding that the claim was not bound to fail.

32. The written Grounds of Appeal elaborate the various arguments in support of each ground, which it is not necessary to set out in detail here, since they are picked up in my summary of the submissions on behalf of PwC in the next section of the judgment.

33. There is also a Respondent's Notice which seeks to argue that the judgment was correct for additional reasons. Again it is not necessary to elaborate those here, as they are picked up in my summary of the submissions on behalf of BTI in the next section of the judgment.

The parties' submissions

34. On behalf of PwC, Mr Salzedo QC submitted that this claim involved relitigation of issues already determined by Rose J and as such was a clear abuse of process. Where there was such an abuse of process, it was the duty of the court to strike out the claim, even at an early interlocutory stage, and it was not a matter of discretion.

35. He took the Court carefully through the judgment of Rose J, noting that the principal witnesses Mr Martinet and Mr Courteault who had been directors of Sequana were cross-examined at length (in the case of Mr Martinet for eight and a half days). Rose J had accepted their evidence as honest and truthful and found there was no basis for criticising any of the defendant's witnesses. Mr Salzedo QC emphasised that, as emerged from that judgment, the decision as to what provision to make in the accounts for the Fox River liabilities and to what assets to leave in the company was the directors' decision alone.

36. Mr Salzedo QC submitted that, after the 2007 accounts were approved by the directors on 28 October 2008, the provision in the accounts going forward was remodelled and recalculated. All that remained the same was the assumption that the share of the total remediation costs to be borne by NCI/API would be 60%, of which AWA's share would be 60%. Mr Salzedo QC submitted that even that 60% figure was not retained in reliance on the 2007 accounts, but because Mr Bartolotta, a member of the AWA team with an accounting background, considered that 60% was the right figure.

37. It was clear from the judgment of Rose J that the decision to pay out the December dividend was not based on the 2007 accounts audited by PwC but on the December interim accounts prepared internally. Mr Salzedo QC placed particular reliance on the fact that, as recorded in [365] of the judgment, after all the evidence was given, BTI accepted that the 60% figure used for NCR/API's share of the provision for the purposes of the capital reduction and the December dividend was a reasonable best estimate, although BTI maintained its challenge to the reduced share used in the 2008 audited accounts and in turn for the purposes of the May dividend of 38%. Mr Salzedo QC submitted that for BTI to argue, as it now had to in the present action, that any reasonable auditor would have reached the conclusion that the 60% figure was unacceptable, when it had accepted, after extensive evidence before Rose J, that 60% was a reasonable best estimate, was not only abusive but an argument that was bound to fail.

38. The issue of whether the 38% figure was justified had been one of the most hotly contested issues before Rose J. Having considered all the factual and expert evidence, the judge had rejected all the criticisms raised by BTI. In particular she rejected the argument that the directors should have taken independent legal advice about the various pieces of litigation in the United States, which ultimately increased AWA's liability, in circumstances where BTI wished to argue in this action that PwC should have ensured that the directors took such independent advice. Mr Salzedo QC drew attention to the "Emphasis of Matter" which PwC inserted in the 2008 accounts to reflect the significant uncertainty as to the outcome of litigation in relation to the Fox River liability.

39. Rose J dealt with the criticisms in relation to disclosure of contingent liabilities in the 2008 accounts. She concluded that such disclosures were not relevant as a matter of law to whether the accounts showed a true and fair view or whether they were such as to enable a reasonable judgment to be made by the directors about the declaration of the May dividend. However, in case she was wrong about that, she dealt with the main factual issue raised which was whether there should have been disclosure of a possible contingent liability in respect of the Kalamazoo River. She held that none of the directors was aware of any liability, which was remote, so that there was no breach of International Accounting Standard FRS12 through the absence of disclosure.

40. Mr Salzedo QC also relied upon various passages from the lead judgment of David Richards LJ in the appeal in respect of the section 423 claim. At [19], he noted that although the May dividend was the subject of sustained challenge at trial, before the Court of Appeal BAT and BTI accepted that the May dividend was paid in compliance with Part 23 of the Companies Act 2006. At [27] David Richards LJ also noted that the December and the May dividends had been held by the judge to have been paid in compliance by the directors with the relevant statutory and common law rules as to the duties of directors and there was no appeal against those findings. Finally, at [227]-[228] David Richards LJ held that since the estimate of liability for the purposes of the accounts and for determining AWA's distributable profits was not challenged on appeal, it necessarily followed that BTI accepted that the liability, with or without the May dividend, was unlikely to render AWA insolvent. Mr Salzedo QC submitted that this was inconsistent with BTI's criticism of PwC in this action for auditing the 2008 accounts on a "going concern" basis.

41. Mr Salzedo QC then engaged in a careful analysis of the Amended Particulars of Claim in these proceedings. He demonstrated the large degree of overlap between the allegations and issues in these proceedings and those determined by Rose J and the extent to which, for BTI to succeed in these proceedings, it would have to persuade another judge to make findings and draw conclusions from the evidence which are different from and contrary to those made by Rose J. However, given the conclusion I have reached as to the outcome of the appeal, it is not necessary to set out the detail of that analysis, since even assuming that Mr Salzedo QC is correct in all the points he made on overlap and collateral attack, I consider that the pursuit of these proceedings is not an abuse of process for reasons set out hereafter.

42. In relation to the consent order dismissing BTI's application for a joint trial, Mr Salzedo QC submitted that having PwC in the main trial would not have reduced the risk of losing on the claim against Sequana and the directors from BTI's perspective. All it would have brought was another party with expert accountants and factual witnesses who were effectively expert accountants arguing that the provisions were right. Therefore joinder would not have improved BTI's chances of winning overall. Joinder was not a great prize for them and they were not giving up anything by accepting bifurcation.

43. On the law on abuse of process, Mr Salzedo QC submitted there were narrow but important differences between the parties. There were four key cases in relation to which PwC submitted that the judge had not got them quite right. I will summarise the decisions in those cases during the course of this section of the judgment to avoid repetition hereafter. The first was the decision of the Court of Appeal in Laing v Taylor Walton [2007] EWCA Civ 1146; **[2008] PNLR 11**. In that case, the claimant property developer had a dispute with the counterparty about what agreement they had reached. He lost that litigation and then sued his solicitor for failing to draft the agreement in the terms which he thought it should have provided. The Court of Appeal, overturning Langley J, struck that claim out as an abuse of process because the solicitor could only be at fault if the original agreement had been in terms which the first judge said it was not.

44. Langley J had thought that there was a reasonably compelling case that the decision of the first judge, HHJ Thornton QC, as to the terms of the agreement was open to serious challenge, so that it would not bring the administration of justice into disrepute to allow that issue to be relitigated. One of the problems with that approach identified by Buxton LJ giving the lead judgment in the Court of Appeal (upon which Mr Salzedo QC particularly relied) was:

> "22. The more significant difficulty is however that everything said to us and to Langley J. in criticism of H.H. Judge Thornton's judgment could have been said to H.H. Judge Thornton (and mainly was so said); and could have been deployed in the appeal from H.H. Judge Thornton that was never brought. What is sought to be achieved in the second claim is, therefore, not the addition of matter that, negligently or for whatever reason, was omitted from the first case, but rather a relitigation of the first case on the basis of exactly the same material as was or could have been before H.H. Judge Thornton."

45. Mr Salzedo QC also relied upon what Buxton LJ said at [25]:

> "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 H.H. Judge Thornton. If H.H. 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 H.H. Judge Thornton is important in the context of wider principles of finality of judgments. In Hunter, at 545D, Lord Diplock said that the proper course to upset the decision of a court of first instance was by way of appeal. 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 L.C. 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."

46. At [33] Buxton LJ said that Langley J had given insufficient weight to the central factor creating the abuse, that the proceedings were in substance a complete re-litigation of the decision of HHJ Thornton QC. Mr Salzedo QC submitted that that was precisely the position here. There were three specific points in common between the two cases. First, at the first trial, the relevant issue was decided between the most appropriate parties, there the parties to the agreement, here between the company acting by assignment in the interests of its main creditor and the directors and sole shareholder. Second, the key common issues were decided at the first trial at least on the basis of oral evidence of witnesses and there was no guarantee they would be available for a second trial. Third, the key issue determined at the first trial in each case was logically upstream of the key issue for determination at the second trial.

47. Overall, Mr Salzedo QC submitted that, just as in that case, the second claim here was a collateral attack on the decision in the first trial which, like the Court in that case, this Court should not permit. He submitted that there was nothing in the points of distinction drawn by BTI in its skeleton between that case and the present. He challenged the suggestion that there would be no issue of credibility turning on oral evidence in the present case. He reiterated that, to succeed against PwC, BTI would have to overturn Mr Martinet's evidence, accepted by Rose J, that he was acting in good faith and as to the sophisticated analysis of the provision. He also challenged the point made by BTI that the most appropriate parties to a claim that PwC were negligent were BTI and PwC, submitting that the correct question is: who are the most appropriate parties to the common issues? Those common issues were the propriety of the provisions, the accuracy of the accounts and the legality of the dividends. The most appropriate parties to those issues were the parties to the first claim. Although he accepted that Laing was not a case where there had been any attempt to join the defendant in the second proceedings to the first proceedings or seek a joint trial, he submitted that the attempt by BTI to obtain a joint trial had been half-hearted and was not pursued, so that it did not make a decisive difference between the present case and Laing.

48. The second key case to which Mr Salzedo QC referred was the decision of Hamblen J in **Art & Antiques Ltd v Richards** [2013] EWHC 3361 (Comm); **[2014] PNLR 10**. The claimant jewellers suffered a burglary and made a claim on its insurance which was brought in arbitration since the policy contained an arbitration clause. The arbitrator dismissed the claim on the basis that the claimant had failed to comply with Condition Precedent 2 ("CP2") in the policy which required detailed stock records to be kept. The claimant also unsuccessfully contended that there had been no concluded contract containing an arbitration clause. Applications to challenge the Award under sections 67 and 69 of the Arbitration Act 1996 were dismissed by the Commercial Court.

49. The claimant then brought proceedings in the Commercial Court against its brokers and one of the brokers' employees claiming that CP2 had not been incorporated in the policy, but that the brokers had fabricated a copy of the policy incorporating CP2, alternatively if it had been incorporated, the brokers had negligently failed properly to explain its effect. The claimant also sued the insurers on the basis that the brokers' acts had been done as their agents. That claim against the insurers was struck out by Hamblen J on the grounds of issue estoppel.

50. Hamblen J also struck out the claim against the brokers and the employee which depended upon the assertion that the policy was not subject to CP2, not on the grounds of issue estoppel since they had not been parties to the arbitration, but on the grounds of abuse of process. He considered that Laing was analogous to that case, aside from the fact that the first decision was in arbitration, and supported a finding of abuse of process. He said at [46] of his judgment that there was no new evidence casting doubt upon the correctness of the arbitrator's decision. The Award was sought to be challenged by appeal but that application under section 69 had been dismissed on the basis that the decision was "not open to serious doubt". To relitigate the issue would be a collateral attack on the final and binding Award and the arbitrator's decision related to the terms of the policy between the claimant and the insurers which had been determined by the agreed contractual machinery of arbitration.

51. The judge concluded:

> "In all the circumstances, I conclude that it would bring the administration of justice into disrepute, and would be oppressive and unfair on Towergate [the brokers] and Mr Richards [the employee], for A&A to be allowed to fight the issue of whether or not the contract contained CP2 all over again. It would accordingly be an abuse of process."

The claim based upon the allegation that, on the basis that the policy did contain CP2, the brokers had failed properly to explain its effect, was allowed by the judge to proceed on the grounds that it had a real prospect of success.

52. Mr Salzedo QC relied on that case as further support for his contention that the present proceedings should be struck out for abuse of process. He also submitted that any criticism of that case by BTI on the ground that Hamblen J had followed and applied the decision of Teare J at first instance in Michael Wilson & Partners, which had been reversed by the Court of Appeal, was misplaced. Mr Salzedo QC was clearly correct in that submission. The part of the decision of Teare J which Hamblen J followed at [23] of his judgment was that abuse of process may be relied upon where the earlier decision was that of an arbitral tribunal. On that point Teare J was upheld by the Court of Appeal: see Simon LJ at [50] to [69] of his judgment.

53. The third key case was the decision of the Court of Appeal in Michael Wilson & Partners. Mr Salzedo QC accepted that Simon LJ's judgment, which went through the law on abuse of process in detail (including citation at [46] of Laing), set out an authoritative summary at [48] of the themes which emerge from the cases:

> "48. The following themes emerge from these cases that are relevant to the present appeal.

> (1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in **Hunter v. Chief Constable** [1982] AC 529, Lord Hoffmann in the Arthur Hall [2002] 1 AC 615 case and Lord Bingham in **Johnson v. Gore Wood** [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in **Hunter v. Chief Constable**. Both or either interest may be engaged.

> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse, see **Bragg v. Oceanus [1982] 2 Lloyd's Rep 132**; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur Hall case.

> (3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in **Johnson v. Gore Wood** and Buxton LJ in Laing v Taylor Walton **[2008] PNLR 11**.

> (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the Arthur Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case [2004] Ch 1; or, as Lord Hobhouse put it in the Arthur Hall case, if there is an element of vexation in the use of litigation for an improper purpose.

> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris [2001] 1 WLR 1388.

> To which one further point may be added.

> (6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd [2014] AC 160 at [17] as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the Taylor Walton case, at [13]."

54. Mr Salzedo QC referred this Court to the later part of the judgment at [87] and following where Simon LJ concluded that, contrary to the conclusion of Teare J, the high threshold which engages the court's duty to prevent abuse of process was not met. Mr Salzedo QC noted the point made at [89], that Mr Sinclair had not only not been a party to the arbitration, but he had been invited by MWP to join as a party to the arbitration, but had refused. At [90] Simon LJ continued:

> "Despite this, he now relied on the arbitration proceedings and award to characterise MWP's claim against him as an abuse of process, seeking to take the benefit of an arbitration award by which the Sinclair defendants would not have been bound had it been decided differently. This was the point about lack of mutuality which plainly troubled the Judge; and it was a highly material, if not dispositive, factor. As Kerr LJ said in **Bragg v. Oceanus**: " where, as here, consolidation was in fact sought by the party in question, I cannot begin to see how any question of abuse of the process of the Court could be said to arise.""

55. Mr Salzedo QC submitted that, unlike Mr Sinclair, who had simply not wanted to join in the arbitration, in the present case PwC had a legitimate reason for refusing to agree to consolidation of the proceedings

and a joint trial, namely that the claim against PwC was bad and it wanted to strike it out and make that application, so that it could not be ready for the trial already fixed. PwC had accepted the overlap of issues and that it would be sensible for them to be tried together and it was not its fault that the claim against it was served so late. Furthermore, the stance adopted by PwC had been a perfectly reasonable one in the circumstances, so that it was in a completely different position from Mr Sinclair. It could not be said that the only reason the two sets of proceedings were not tried together was because of the stance adopted by PwC.

56. Mr Salzedo QC also referred to [96] and [97] of the judgment where Simon LJ dealt with the "special circumstances" relied on by the judge, that Mr Sinclair had been a witness in and had funded the arbitration, that the tribunal had found that the particular "Max" shares in issue were held to the order of Mr Sinclair and that the tribunal intended that EPIL, the company which held the shares, would transfer them to Mr Sinclair in consequence of the Award. In relation to the points about the shares, Simon LJ did not consider those material because the tribunal did not have jurisdiction to adjudicate on the claims in a way which bound MWP in relation to a non-party, namely Mr Sinclair. Mr Salzedo QC submitted that a distinguishing factor between that case and the present is that the parties to the arbitration, MWP and Emmott, had not been the appropriate parties to the dispute about the basis on which the shares were held, the appropriate parties being EPIL and Mr Sinclair. In contrast, as he had already submitted, the appropriate parties to the common issues in dispute here were the parties to the claim tried by Rose J and the claim against PwC was "downstream" of that claim.

57. The fourth key case to which Mr Salzedo QC referred was the decision of Mr Peter Macdonald Eggers QC, sitting as a Deputy High Court Judge in **Gazprom Export LLC v DDI Holdings Ltd [2020] EWHC 303** (Comm); **[2020] 4 CMLR 16** (a case decided since the decision of Fancourt J in the present case) where at [37] the judge summarised the principles relevant to abuse of process. It is unnecessary to cite that case further, as it is accepted by both parties that it is an accurate summary of the law.

58. In criticising the approach to the law of Fancourt J, Mr Salzedo QC submitted that in accepting, at [75], Simon LJ's principle that "lack of mutuality was a highly material if not dispositive factor", the judge erred because the point Simon LJ was making related to arbitration not the general principles of abuse of process. He also submitted that, at [81] to [86], the judge put too narrowly the principle to be derived from Laing and Arts & Antiques that there was abuse where the very same issues were to be decided on the basis of the very same material. The principle was wider, that there is abuse where substantively the same issue is to be decided on what is in substance the same material. The judge had erred in those paragraphs and in [100] in considering that, if the claimant could show some new element of the second claim, that sufficed to take the second claim outside the rationale of those cases. He submitted that this case was within that rationale and that to allow BTI to challenge the findings made by Rose J would be a clear abuse. In relation to the matters decided by her, there was no real sign of any new evidence. The judge had rejected at [96] the suggestion that new AWA documents might turn up and Mr Salzedo QC graphically described any such suggestion as "Micawberism on stilts".

59. He also submitted that, to the extent that BTI's pleading made additional allegations, for example that PwC should have refused to accept the 60% assumption for the provision in the 2007 accounts as being too optimistic, that involved directly impugning the findings of Rose J and seeking to relitigate an issue which was not pursued after the evidence was concluded.

60. He submitted that, if he was wrong that relitigation of the common issues was an abuse of process, there was still no reasonable prospect of the claims succeeding at trial (ground 2 of his application and appeal). Whilst different judges could take different views of the same facts, there was no reasoned basis to expect that to happen here. The conclusion of Rose J that the provisions were the best estimates was reached after considering detailed factual and expert evidence, upon which Fancourt J agreed with PwC: see [29] to [36] of his judgment. Furthermore, there was no prospect of a second judge concluding that, if in conducting the audits PwC had made further enquiries about the reasonableness of the provisions, it would have got an answer from the directors indicating that it was not a best estimate at all.

61. Mr Salzedo QC made similar criticisms of all the conclusions reached by the judge at [105] to [107] to the effect that it was not possible to say, without hearing all the evidence, that if PwC had complied with its duty, nothing the directors would have learnt would have made a difference. The judge had been lured by a siren voice singing for him to leave it all to trial, whereas on the close examination to which Mr Salzedo QC subjected the allegations, there was nothing in them which could meet the summary judgment test.

62. At the outset of his submissions on behalf of BTI, Mr Andrew Thompson QC submitted that PwC bore a very heavy burden to show that this was a rare case where it was an abuse to litigate issues not previously litigated between these parties, in circumstances where neither side was bound in these proceedings by the findings made by Rose J. He submitted that, for a number of reasons, PwC could not discharge that burden.

63. He submitted that, although Mr Salzedo QC referred repeatedly to a collateral attack on the judgment of Rose J, as **Arthur Hall v Simons** and Michael Wilson & Partners demonstrated, there was nothing inherently abusive in inviting inconsistent decisions where the parties to the two sets of proceedings were not the same. There had to be something more to make the collateral attack abusive. Mr Thompson QC placed emphasis on what Simon LJ said in Michael Wilson & Partners at [94]:

> "It also seems to me that the Judge placed too much weight on 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, it was mounting an illegitimate collateral attack on the award. However, as Lord Hobhouse expressed it in the Arthur Hall case [2002] 1 AC 615, 743 C: "There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived in another case."

64. He also submitted that, leaving aside whether it was dispositive or merely a highly material factor, the fact that there was no mutuality was at least a very powerful factor against a finding of abuse. In effect the position being adopted by PwC was the unattractive and opportunistic one that BTI would effectively be bound by the findings in the first proceedings because any collateral attack on them would be abusive, whereas PwC was not and never would have been bound by any adverse findings in the first proceedings at all.

65. He submitted that it was a highly material factor that BTI had sought unsuccessfully to have a joint trial of the two claims, which was resisted by both sets of defendants. He relied upon the dictum of Kerr LJ in **Bragg v Oceanus [1982] 2 Lloyd's Rep 132** at 138:

> "But where, as here, consolidation was in fact sought by the party in question, I cannot begin to see how any question of abuse of the process of the court could be said to arise."

Later in his judgment Kerr LJ recognised that this was so even though:

> "It must be accepted that the situation may result in inconsistent decisions by different judges on identical issues, albeit against the background of two trials which may take somewhat different courses".

66. Mr Thompson QC accepted that, as Mr Salzedo QC submitted, a point of distinction between this case and **Bragg v Oceanus** is that that case concerned a defendant who was party to the first proceedings who had sought consolidation of the two sets of proceedings and who was now seeking to raise against a different claimant the same defence which had failed in the first proceedings. However, the limit to the abuse jurisdiction which Kerr LJ identified was stated in quite general terms by Simon LJ in Michael Wilson & Partners at [40] and [90]. Mr Thompson QC also relied upon the analogy with the position in that case where Mr Sinclair had been invited to join in the arbitration proceedings but had refused.

67. In relation to the two consent orders by which PwC agreed to the application for a joint trial being dismissed and subsequently agreed to a stay of these proceedings pending the determination of the Sequana claim, Mr Thompson QC relied upon the decision of the Court of Appeal in Kennecott Utah Copper Corporation v Minet Ltd [2003] EWCA Civ 905; [2004] PNLR 10, to which I had referred during the course of argument. There the claimant made claims under its insurance policy in respect of an explosion at its plant. The insurers denied liability on the basis that the claimant had failed to test and commission the plant properly in breach of terms of the policy. The claimant commenced proceedings against the insurers, to which the brokers Minet were added as defendants in relation to limited issues concerned with the testing and commissioning obligations, in respect of which a preliminary issue was ordered to be tried. For tactical reasons, the claimant did not pursue in those proceedings its alternative claim against the brokers (in the event that the claim against the insurers failed) for breach of duty and misstatement, but intimated in solicitors' correspondence that, if the claim against the insurers failed, that alternative claim against the brokers would be pursued. The brokers' solicitors indicated that any application to amend to bring that alternative claim would be opposed.

68. Following the trial of the preliminary issue, Langley J gave judgment against the claimant, holding inter alia that the plant was not covered because it had not been fully tested within the meaning of the policy and that it could not be said that the plant had attached to the policy notwithstanding the wording as a consequence of an agreement between the insurers and Minet. The claim against Minet in those proceedings was also dismissed. The claimant pursued an appeal against the insurers and shortly before the appeal hearing, a settlement was reached under which the insurers paid a proportion of the claimant's losses. The claimant then issued fresh proceedings against, inter alia, Minet, to recover the shortfall, alleging a negligent failure to obtain adequate cover or properly explain the terms of the cover obtained. It was contended that if the claimant had known the true position it would have obtained appropriate cover elsewhere.

69. Minet applied to strike out the proceedings on the grounds that they were barred by issue estoppel, alternatively an abuse of process, on the grounds that the claim would involve undermining the findings of Langley J. Reversing the judge at first instance, the Court of Appeal held that no issue estoppel arose, nor was it an abuse of process to raise the claim against Minet when it could have been pursued in the first proceedings, since the failure to do so was for good tactical reasons in relation to the claim against the insurers and, if that claim had succeeded, it would have obviated the need for the proceedings against Minet.

70. Mr Thompson QC focused in particular on how the Court of Appeal dealt, in the context of whether there had been an abuse of process, with the solicitors' correspondence before the preliminary issues trial about the possible alternative claim against Minet. He relied in particular on [74] and [75] of the judgment of Pill LJ:

> "74. I agree with Chadwick L.J. that in the particular circumstances of this case, the failure to follow the course recommended by Cresswell J [in Aneco Reinsurance (Underwriting) Ltd (In liquidation) v Johnson & Higgins Ltd **[1998] 1 Lloyd's Rep. 565** that claims against brokers should be brought at the same time as claims against insurers] does not mean that the process of the court is being abused. The claimants and Minet favoured the prior determination of preliminary issues for reasons which each of them considered cogent, including a belief that they would succeed against the reinsurers. As Longmore L.J. has put it, the attraction of a preliminary issue on the attachment of the operational cover was obvious. In the event it is of course the reinsurers who have gained from having been involved in an action much less complex than if the claim over against the brokers (including the Jardine defendants) had been heard at the same time. Following interlocutory hearings, the preliminary issues were framed in a way which could reasonably be regarded as in the interests of the parties and not inimical to the interests of justice.

> 75. Even if the views of the parties have proved to be unsound, the second action is not in my judgment an abuse of the process of the court in the circumstances. Minet did not agree to the holding over of a claim against them but were party to the course events took, with full knowledge of the circumstances. They cannot be heard to say that the claimants are abusing the process of the court by bringing the present action against them. Nor is the court affronted."

71. The same point was essentially made by Chadwick LJ at [43] to [49] and Longmore LJ at [65]. Mr Thompson QC submitted that the case management reasons for the alternative claim being deferred were weaker than in this case which is an a fortiori one because PwC agreed to the consent orders. In that case, there was no agreement to defer the claim to later proceedings and no involvement of the court, but the parties had ventilated their positions and Minet knew exactly what the position of the claimant was as to why the alternative claim was not being pursued in the first proceedings.

72. Applying the legal principles to the facts, Mr Thompson QC submitted that there was no question of BTI having delayed in pursuing these proceedings. It had issued the claim form in October 2014 to protect limitation, but was not in a position to plead out its claim until it received the disclosure to which it was entitled under the Funding Agreement, the last tranche of which was received in May 2015. The Particulars of Claim were then served on 29 May 2015.

73. BTI determined that the correct approach was to have the two proceedings tried together and issued the application for a joint trial in June 2015, making the point expressly in its evidence in support that there was a danger of inconsistent findings if the proceedings were not heard together, which made it clear that, in certain circumstances (of which the most likely was that BTI lost the first claim) the second claim would be pursued against PwC. BTI faced objections to the application from both sets of defendants. Mr Thompson QC submitted that, as Fancourt J found, it was entirely reasonable for BTI to have compromised the application, which the judge considered finely balanced.

74. Mr Thompson QC relied upon the consent orders to which PwC had agreed. In relation to the consent order dismissing the application for a joint trial, he submitted that it was implicit that, if the claim against Sequana and the directors failed, BTI could pursue its alternative claim against PwC, since the whole basis of the application was the risk of inconsistent findings if the proceedings were not heard together. PwC had not suggested in response that there was no such risk because, in the event that BTI lost against Sequana and the directors, it would be unable to pursue the alternative claim because to do so would be an abuse of process.

75. In relation to the consent order for a stay, Mr Thompson QC noted that before the judge PwC had argued that the stay demonstrated that it was intended that BTI would not be entitled to pursue the claim against PwC if it lost the Sequana claim. He submitted that that argument did not stand up to analysis. The reason for the stay was obvious: if the Sequana claim were successful and a full recovery were made, it would not be necessary to pursue the second claim against PwC, so it made no sense to waste time and money pursuing the claim against PwC, in parallel with the Sequana claim, until the question of loss had been resolved in the first proceedings. If anything were to be inferred from the stay it was that, although stayed, the proceedings against PwC remained on foot and, in the event that the claim against Sequana and the directors failed, the stay would be lifted and the second proceedings would proceed.

76. Overall, Mr Thompson QC submitted that the case management position and the consent orders were determinative of the appeal against PwC. The judge had underestimated the importance of those matters, but, even if the case management point was not determinative, it was a highly material factor pointing against the second proceedings being an abuse of process, as the judge found at [100] of his judgment.

77. Mr Thompson QC went on to make submissions as to why, even without the case management point, the second proceedings were not an abusive collateral attack in any event. He accepted that there was a substantial degree of overlap between the issues in the two cases, particularly as regards whether the accounts showed a true and fair view and whether the dividends were lawful, although he submitted that the extent of the overlap was nothing like as substantial as PwC contended. He also submitted that BTI was raising a number of new points not raised before Rose J. It is not necessary to summarise the detail of those submissions in this judgment, since I have concluded that, whatever the extent of the overlap and, even if Mr Salzedo QC were correct in all his submissions in relation to the overlap and the new points, these proceedings do not constitute an abuse of process for the reasons set out hereafter.

78. In relation to both grounds of appeal, Mr Thompson QC challenged PwC's criticism of the judge's conclusion that there would be new evidence at the second trial. He submitted that there clearly would be such new evidence: (i) on the new points not before or not decided by Rose J, the so-called 100% point, the modelling errors, OU1, the 2007 accounts and whether it had been correct for the accounts to be on a "going concern" basis; (ii) there will be disclosure of the PwC audit papers and audit files, none of which was before Rose J; (iii) PwC witnesses, none of whom gave evidence before Rose J would inevitably have to give evidence at the second trial and be cross-examined; (iv) there will be different expert evidence. This new evidence might well cast new light on the issues decided by Rose J.

79. In relation to ground 2, Mr Thompson QC drew attention to various authorities which indicate that, in auditors' negligence claims, issues of causation are peculiarly fact-sensitive and thus inappropriate for determination on a summary basis: **Man Nutzfahrzeuge AG v Freightliner Ltd** [2003] EWHC 2245 (Comm) per Cooke J at [45] and **Equitable Life Assurance Society v Ernst & Young (A firm)** [2003] EWCA Civ 1114; [2004] PNLR 16 per Brooke LJ (giving the judgment of this Court, of which the other members were Rix and Dyson LJJ) particularly at [57] and [59].

80. He submitted that ground 2 was hopeless. It was impossible to determine at this early stage that this complex and fact-sensitive claim had no real prospect of success at trial. This ground of appeal had to be considered on the basis that (i) ground 1 had failed, so that the proceedings were not an abuse of process and that (ii), as was common ground, the findings of Rose J are not binding on BTI or PwC in these proceedings. Indeed they would not even be admissible in evidence at the second trial: see per Sir Andrew Morritt V-C in Bairstow at [15]-[27] applying the principles of **Hollington v Hewthorn [1943] KB 587** to civil proceedings.

81. Mr Thompson QC submitted that although PwC claimed to be relying on the evidence before Rose J to argue that the second claim had no real prospect of success, it had not put any of that evidence before the Court. What PwC was really relying on was the findings of Rose J, which were, of course, neither binding nor admissible.

Discussion

82. Given the extent of common ground as to the law, it is possible to state the principles of law in relation to abuse of process which are applicable in a case such as the present relatively shortly. Where the parties to the second proceedings are not the same as those to the first proceedings (as in the present case), no question arises of the application of the doctrines of issue estoppel or res judicata, so that the parties are not bound in the second proceedings by the findings in the first. However, as the fourth theme or principle stated by Simon LJ in Michael Wilson & Partners at [48(4)] and the cases there cited recognise, there may still be an abuse of process where the parties to the second proceedings are not the same as those in the first.

83. The mere fact that the second proceedings involve the relitigation of issues decided in the first proceedings or a challenge to findings made by the judge in the first proceedings (and thus a collateral attack on the judgment in the first proceedings) does not without more amount to an abuse of process, as is made clear by the citation from the speech of Lord Hobhouse in the Arthur Hall case in [94] of the judgment of Simon LJ in Michael Wilson & Partners quoted at [63] above.

84. The circumstances in which such a collateral attack will be an abuse were clearly stated by 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."

85. That statement of the applicable principle in a case such as the present is a correct statement of the law and has been applied several times by this Court: see for example [48(4)] of the judgment of Simon LJ in Michael Wilson & Partners and [65] of my judgment in **Kamoka v Security Service** [2017] EWCA Civ 1665.

86. Furthermore, where the parties to the second proceedings are not the same as the parties to the first proceedings, the authorities are clear that it will only be in a very rare or exceptional case that the court will find that the second proceedings are an abuse of process: see for example per Sir David Cairns in **Bragg v Oceanus [1982] 2 Lloyd's Rep 132** at 138-9, per Lord Hobhouse at [26] In re Norris [2001] 1 WLR 1388, per Simon LJ in Michael Wilson & Partners at [48(5)] and per Flaux LJ in Kamoka at [119].

87. There is no question of the first limb of the Bairstow test applying, since PwC was not a party to the proceedings before Rose J, so that it cannot be said that relitigation of the same issues would be manifestly unfair to PwC or that it would vex or harass PwC for the issues to be relitigated. Accordingly, there will only be an abuse of process in relitigating issues decided by Rose J if to do so would bring the administration of justice into disrepute. 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."

88. It has not been suggested on behalf of PwC that BTI is pursuing these proceedings other than for the genuine purpose of seeking to recover the losses it has suffered, which it failed to recover in the first proceedings. Rather, what is contended is that, because the allegations made in these proceedings involve inviting a second judge to make findings which are contrary to those made by Rose J and thus involve a collateral attack on her judgment, the proceedings are an abuse of process; hence the considerable reliance placed by Mr Salzedo QC on the decisions in Laing and Arts & Antiques.

89. Despite the cogent and careful submissions advanced by Mr Salzedo QC both in opening the appeal and in reply, I am firmly of the view that the present proceedings, notwithstanding that they involve to a considerable extent relitigation of the same issues as decided by Rose J, do not bring the administration of justice into disrepute. My principal

tension for reaching that conclusion is the procedural and case management factors of the two sets of proceedings and the prospects of success. I present the agreement of both sets of defendants to a joint trial I have set out at paragraph 16 of my Order of 12 February, which I do not propose to repeat, but I would simply highlight a number of features of that procedural history which are relevant here.

98. First, contrary to Mr Sabah QC's submission, there is no question of the claim against Fiona Trust "Nay" Ltd. There has been no order in October 2014, only five months after the Separate claim form. Mr Sabah QC's reliance on the Court of Appeal judgment in Nay v Arbuthnot, through no fault of Mr Arbuthnot, is misplaced. The claim was not even entitled under the Funding Agreement, which could plead no such claim.

99. Second, RTS's solicitors wrote to Paul's solicitors in May 2015 to say that the Particulars of Claim were served, setting out the claims against Paul, with an order that they cease his trial together, given the extent of overlap between the issues. Paul responded to the letter of claim received promptly in June 2015. Despite prioritising from RTS's solicitors, Paul did engage in constructive correspondence and sought to have the two RTS and Bond trial joint and interlocutory findings, since if of such, it would suffice disposal of issues. In a caveat, on 30 October 2015 stated that, that this was said by Bequanes and the directors, and Paul, but Paul was not seeking to adopt the decisions, as Paul was entitled to adopt Civil Procedure Rules 3.1(2) and the course of argument, it is to be referred that, at the time of the proceedings, Paul sought to argue, at the proceedings that, if there were separate trials, RTS would not be able to challenge the findings made at the Bond trial, or to adduce contradictory findings at the second trial.

100. Paul's case, on the basis of the sentimental opposition of both sets of defendants and no doubt to put because of the quid pro quo from the Singapore Government, Paul's case, on the basis of the sentimental opposition of both sets of defendants to adduce expert evidence, the consent RTS, and Bond, to a joint trial was not pursued. Contrary to Mr Sabah QC's submission, there is no question of Arbitration proceedings being "stayed" or "adjourned" it is clear from the correspondence from RTS's solicitors and the evidence in support, that having stated that the directors had "no objection" to the joint trial, RTS's solicitors were acutely conscious of the extent of the overlap between the issues in the two cases and sought to have the Bond trial heard first.

101. Furthermore, Paul, wrongly he claims to have been disrupted, that in the absence of a joint trial, in certain circumstances, he would be prejudiced. Mr Sabah QC's argument to the contrary, the most obvious was that RTS would be able to challenge the findings in the Bond trial. RTS would not be able to challenge the findings made at the Bond trial, or to adduce contradictory findings at the second trial.

102. Contrary to Mr Sabah QC's submission, the Court of Appeal in Nay v Arbuthnot, in the Court of Appeal, Lord Justice Tomlinson, stated that, "the second claim against Paul". As at the date of the claimant in **Adds Assets Ltd v WM Company** [2007] EWCA Civ 1234, paragraph NGE 7(B). RTS had made its position in relation to the second claim against Paul, as set out in Paragraph 8 of RTS's Order.

103. In retrospect, it is submission that the parties all consented to the application for a joint trial being determined. If the issue before the court can better Mount, it is likely that there would have been express consent. Unfortunately, the Court of Appeal in Nay v Arbuthnot, in the Court of Appeal, Lord Justice Tomlinson, stated that, "the second claim against Paul" is clear from the correspondence from RTS's solicitors and the evidence in support, that having stated that the directors had "no objection" to the joint trial, RTS's solicitors were acutely conscious of the extent of the overlap between the issues in the two cases and sought to have the Bond trial heard first.

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peal should be dismissed. However, in deference to leading counsel's submissions, I add my own short analysis of why, in the rather unusual circumstances of this case, I have concluded that BTI should be permitted to pursue its claim against PwC.

124. The starting point must be that these proceedings do not involve the same parties as the proceedings before Rose J. There is therefore no question of res judicata or issue estoppel. In consequence, what might be called the Phosphate Sewage line of authorities are of no application.

125. In such circumstances, there is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case: see Lord Hoffmann in **Hall v Simons.** As Lord Hobhouse noted in the same case at page 751D-E, "to challenge in later litigation an earlier non-binding decision between different parties is not itself abusive, provided there are good reasons for doing so" (emphasis supplied).

126. What matters is whether or not the second set of proceedings is an abuse of process. As the House of Lords made plain in Hunter, 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.

127. As Flaux LJ notes, it is common ground that unfairness to PwC does not arise here, because it had no involvement in the first set of proceedings before Rose J. But on the question of fairness, I would go further. In the circumstances, I consider that it would be unfair to prevent BTI from pursuing its claim against PwC. There are two reasons for that. First, PwC would not have been bound by any adverse findings which Rose J may have made against it in the first trial. It would therefore be curious, and potentially unfair, to find that the position was asymmetric and that BTI were effectively bound, as against PwC, by the adverse findings made against it by Rose J. Secondly, it would be unfair because, as Flaux LJ explains at paragraphs 89-105 above, 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 because of the very risk that it itself had originally identified.

128. PwC's application relied foursquare on the proposition that to allow the claim to go ahead against PwC would bring the administration of justice into disrepute. Of particular significance when considering that issue is how and why it is that, in the present case, there is a risk of two trials.

129. The importance of the procedural history to an application to strike out for abuse of process can be found in a number of the authorities. Thus in Bragg, the party against whom the application was made had originally sought to consolidate both proceedings. Kerr LJ said that in those circumstances, and despite the risk of inconsistent findings, he could not "begin to see how any question of abuse of the process of the court could be said to arise". Similarly, in **Wilson v Sinclair,** Sinclair had not been a party to the original arbitration and, although he had been invited by Wilson to join as a party and agree to be bound by an award, he had refused so to do. The Court of Appeal refused to allow him to defeat the second litigation, because he was seeking to take the benefit of an arbitration award by which he would not otherwise have been bound if the award had been decided differently.

130. In my view, these authorities are analogous to the present case. BTI was clear from the moment that its case against PwC took shape that, if the original trial was not adjourned so as to accommodate the claim against PwC, there was a risk of inconsistent findings. The application for a joint trial was opposed by both Sequana and PwC and, as Flaux LJ demonstrates above, BTI found itself in a difficult position. It extricated itself from that position as best it could, but without wavering from its stated position that there was a risk of inconsistent findings if, as would now happen, there were two sets of proceedings. Nobody suggested that its analysis was wrong. PwC's argument now that this risk amounts to an abuse of process has to been seen in the light of that procedural history.

131. This Court has to ask itself: is the administration of justice brought into disrepute as a result of there being two trials, one against the directors and one against the auditors, in circumstances where BTI always maintained that two trials gave rise to the risk of inconsistent findings? For the reasons comprehensively explained by Flaux LJ, I consider that the answer to that question is in the negative.

132. Having concluded that this is not an abusive collateral attack, it seems to me that Mr Salzedo QC's alternative argument, to the effect that this is a claim which has no realistic prospect of success, cannot run. As he himself accepted, that argument repeatedly presupposed that, on a number of the issues of detail, no outcome was possible other than the one determined by Rose J. But that cannot be said with any certainty, particularly since it is agreed that there are new allegations here, and there will be different evidence. Furthermore, at this stage of the case, it would be quite wrong to embark on a lengthy mini-trial on the myriad issues, or to attempt any sort of early neutral evaluation.

133. For these reasons, therefore, I agree entirely with the approach of Flaux LJ and I too would dismiss this appeal.

Lord Justice Henderson

134. I agree with both judgments.

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Comments

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