Neutral Citation Number: [2021] EWCA Civ 9

Case No: A3/2019/3088

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (ChD)
MR JUSTICE FANCOURT
[2019] EWHC 3034 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2021

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE FLAUX
and
LORD JUSTICE COULSON

- -

Between :

PRICEWATERHOUSECOOPERS LLP	**Appellant**
- and -	
BTI 2014 LLC	**Respondent**

- -
- -

Simon Salzedo QC, Tony Singha and Zahra Al-Rikabi (instructed by **Reed Smith LLP**) for the **Appellant**
Andrew Thompson QC and Ciaran Keller (instructed by **Debevoise & Plimpton LLP**) for the **Respondent**

Hearing dates : 27 and 28 October 2020

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The appellant (to which I will refer as "PwC") appeals with the permission of the judge against the Order of Fancourt J dated 25 November 2019 dismissing PwC's application to strike out the claim of the respondent (to which I will refer as "BTI") or parts thereof pursuant to CPR 3.4(2)(a) and/or for summary judgment pursuant to CPR 24.(2)(a)(i) and (b).

2. The claim is a claim for damages for negligence against PwC in respect of its audit of the 2007 and 2008 annual accounts of a company then known as Arjo Wiggins Appleton Ltd or "AWA" (now renamed Windward Prospects Ltd and the nominal second defendant to these proceedings) finalised in October 2008 and May 2009 respectively.

3. BTI is a wholly-owned subsidiary of BAT Industries plc ("BAT"). As assignee of AWA, it sued AWA's former parent company Sequana S.A. and the directors of AWA, ("the Sequana claim"), claiming the recovery of very large dividends paid by AWA to Sequana in December 2008 (€443 million, "the December dividend") and May 2009 (€135 million, "the May dividend"). Those dividends were paid against the background of the two audits. That claim was heard by Rose J (as she then was) in a trial lasting 32 days in February to April 2016. In her judgment dated 11 July 2016 ([2016] EWHC 1686 (Ch)), Rose J found that that claim failed. She held that the accounts relied upon by the directors of AWA for payment of the dividends were proper accounts for the purposes of Part 23 of the Companies Act 2006 (specifically sections 836 to 838) and that, accordingly, the dividends could not be recovered from Sequana and the directors. Although Rose J granted permission to appeal against that decision, the appeal was not pursued, apparently because of the perilous financial position of Sequana.

4. At the same time as the Sequana claim, Rose J heard BAT's own claim, as creditor, against Sequana under section 423 of the Insolvency Act 1986 seeking repayment of the dividends ("the section 423 claim"). That claim succeeded in relation to the May dividend, but not the December dividend. That decision was upheld by the Court of Appeal in its judgment dated 6 February 2019 ([2019] EWCA Civ 112). However, days later on 15 February 2019, Sequana entered insolvency protection in France and went into compulsory liquidation on 15 May 2019. None of Sequana's liability to BAT has been paid.

The factual background

5. The factual background is set out at [7] to [17] of the judgment of Fancourt J dated 15 November 2019, which I gratefully adopt:

> "7. Another wholly-owned subsidiary of BAT, Appleton Papers Inc ("API"), purchased two paper coating businesses from National Cash Register Company ("NCR") in 1978. API operated in the Lower Fox River area of Wisconsin. Under the terms of the sale and purchase agreement, API took over NCR's liabilities, including any environmental liabilities, and BAT agreed to indemnify NCR against API's failure to discharge

those liabilities. At a later time, API's immediate parent company was separated from the BAT group and changed its name to AWA, but API's and BAT's liabilities remained. The paper businesses purchased by API had previously been responsible for polluting the Lower Fox River. In the 1990s, environmental liability claims were notified against NCR and API in this regard, comprising clean-up costs ("remediation liability") and natural resources damages ("NRDs") resulting from the pollution.

8. An agreement was made between BAT, NCR and API in 1998 to share out these environmental liabilities. BAT and API agreed to assume liability for 55% up to a total of $75 million. It was later determined that liability in excess of that amount would be allocated as to 60% to BAT and API. There was also agreement in relation to possible liability for further identified decontamination sites ("Future Sites") where NCR or API might have "arranger" liability (that is to say, liability for facilitating or contributing indirectly to contamination). One such site was the Kalamazoo River in Michigan, in relation to which the first intimation of liability was issued in 1998 and a request for information from the Environmental Protection Agency was received by NCR and API in 2003.

9. By 2000, it was clear that API would have a substantial liability in relation to the Lower Fox River, though its amount was uncertain, and there was a risk of a future claim in relation to the Kalamazoo River and other Future Sites.

10. In that same year, AWA was acquired by Sequana. It sold off API in 2001 on terms that AWA would indemnify API against certain environmental liabilities. In that way, both BAT and AWA had contingent liabilities in respect of API's direct and indirect liability for remediation costs and NRDs. AWA purchased an insurance policy ("the Maris policy") to pay for these future liabilities. By November 2008 the policy was worth about $250 million.

11. After the sale of API, AWA ceased to trade. The proceeds of sale of AWA's businesses were lent to Sequana, with the result that, in time, the only assets of AWA were the inter-company receivable from Sequana, the Maris policy and certain other historic insurance policies. By the end of 2006, the Sequana receivable was valued at £464.6 million in AWA's accounts, which showed a fully paid-up share capital of in excess of £200 million. The 2006 accounts included a provision of £50.8 million in excess of the value of the Maris policy for Lower Fox River liability.

12. In 2008, the Directors decided to explore ways of releasing to Sequana tied up capital in AWA. To achieve this, they

proposed to reduce the share capital of AWA from €318.6 million to €1 million and then pay one or more large dividends to Sequana, which could be set off against the inter-company receivable. Before these steps were taken, PwC audited the 2007 accounts. This work was completed on 28 October 2008 ("the 2007 accounts"). The 2007 accounts included a provision of €59.3 million (in excess of the value of the Maris policy) for the Fox River liability and valued the receivable at €569.7 million.

13. On 15 December 2008, the Directors each signed a solvency statement and Sequana, as sole shareholder, passed a special resolution to reduce the share capital. On the following day, AWA prepared a new set of interim accounts that reflected the reduced share capital ("the December interim accounts"). This time, the Lower Fox River provision was €58.4 million, which derived from new estimates of the aggregate remediation liability provided to AWA in November 2008. On 17 December 2008, the board of AWA approved the December interim accounts and resolved to pay the December dividend by way of set-off against the receivable. This left an outstanding balance of the Sequana debt of €142.5 million.

14. In the first part of 2009, the Directors undertook work on the necessary Lower Fox River provision for the 2008 annual accounts (to 31 December 2018). The conclusion was eventually reached that the Maris policy was sufficient to cover the best estimate of liability and that no further provision was therefore needed. On 18 May 2009, PwC gave an unqualified certificate that the accounts gave a true and fair view of the state of AWA's affairs. These accounts ("the 2008 accounts") showed distributable reserves of €137 million. The Directors approved them. On the same day, the board of AWA resolved to pay the May dividend by way of set-off against the Sequana debt.

15. Still on the same day, Sequana sold AWA to its former general counsel, Mr Gower, then acting as a consultant to AWA, and another connected person who had advised AWA in relation to the liability issues. From that time, Sequana was no longer exposed to any risk that its debt to AWA would have to be used to fund AWA's environmental indemnity liabilities, and AWA was left with assets of only about €3 million in excess of the Maris policy to meet any such liabilities.

16. In none of AWA's relevant accounts was provision or disclosure made in relation to potential liability at the Kalamazoo River or other Future Sites.

17. When, within less than a year after these events, it became clear that NCR and API's liability and therefore AWA's and BAT's exposure was significantly greater than the value of the Maris policy, and claims were notified in respect of the

> Kalamazoo River, the question of the lawfulness of the December and May dividends was considered. AWA in due course brought the claim against Sequana and its former directors. The benefit of that claim was assigned to BTI in September 2014 as part of a funding agreement with BAT."

The Sequana claim and the judgment of Rose J

6. Fancourt J summarised the issues before Rose J and her conclusions in relation to them at [19] of his judgment:

> "19. The issues that Rose J had to decide in the first claim were, in broad terms, the following:
>
> i) Whether the declarations of solvency made by the directors of AWA were validly made, so that the reduction in capital was effective. The Judge held that they were valid.
>
> ii) Whether appropriate provision for the liabilities of AWA (in particular the Lower Fox River liability) was made in the accounts on which AWA relied for declaring the December and May dividends. The Judge held that appropriate provision had been made and that the December interim accounts enabled a reasonable judgment to be made and the 2008 accounts were properly prepared for the purposes of sections 837 and 838 of the 2006 Act.
>
> iii) Whether appropriate disclosure had been made of contingent liabilities in the 2008 accounts. The Judge held that disclosure of such liabilities was not a material matter for the purposes of section 836(1) but, in any event, that no disclosure was required as regards the Kalamazoo River because the risk of liability was "remote". She did not address the question of whether further disclosure, beyond an emphasis of matter, was required in relation to the possibility that the best estimate of the value of the Lower Fox River liability was much too low."

7. The judge then went on to analyse the judgment of Rose J in detail at [20] to [37]. For the purposes of this appeal, it is not necessary to repeat that analysis, which I also adopt. I consider the particular findings of Rose J upon which Mr Simon Salzedo QC for PwC relied in this appeal in the section of this judgment below dealing with the parties' submissions. It is worth emphasising at this point that, for reasons given later in this judgment, those findings are neither binding on the parties to the present proceedings nor, in fact, admissible in evidence in these proceedings.

The procedural background to the present action

8. The Sequana claim was issued by AWA on 9 May 2014. A Funding Agreement was entered into on 30 September 2014 pursuant to which BTI took an assignment of

AWA's claims. The claim form in the present claim against PwC was issued in October 2014 due to concerns about limitation, but not served until February 2015. In the meantime, on 19 November 2014, an order was made for the Sequana claim and the section 423 claim to be tried together and a trial date of February 2016 was fixed.

9. On 5 May 2015, BTI's solicitors wrote to PwC's solicitors stating their intention to make an application to the Court to have the present claim tried together with the Sequana claim and the section 423 claim. They stated:

> "It has become increasingly clear to us that there is an overwhelming level of overlap between the claims against your client and the claims against Sequana and the Former Directors, such that they clearly ought to be tried together. The legal, factual and accounting issues are the same or very similar in both sets of claims. A court trying each set of claims will have to consider the same events, same documents and nearly all of the same issues. The expert and the factual evidence required in each trial would have to deal with the same issues. There would generally be a vast duplication of time, effort and cost involved in having the two sets of claims tried together separately. There would also be a very serious risk, to put it at its lowest, of inconsistent findings of fact and law".

10. The letter proposed a trial in October or November 2016, noting that this would necessitate adjournment of the trial already fixed for February 2016 and stating that they had written separately to Sequana's solicitors. They invited PwC's comments on the proposals.

11. PwC did not respond at that stage to these proposals. On 29 May 2015, the Particulars of Claim were served. Any delay in serving the pleading was no fault of BTI. Under the Funding Agreement it was entitled to receive disclosure from AWA which it needed to plead out its claim. That disclosure was received in tranches, the last of which was not received until May 2015, shortly before the pleading was served.

12. On 12 June 2015, BTI's solicitors wrote again on the subject of the cases being tried together, stating that:

> "We trust that, having now had the opportunity to review the Particulars of Claim in these proceedings, you will recognise (if it was not already clear to you) that the overlap between the claims is obvious and overwhelming. We have yet to hear from you in relation to our proposals in this regard despite having written to you over a month ago."

13. The letter continued that BTI had issued an application to have all the claims heard at the same time. That application together with other applications for case management orders was filed on 8 June 2015. Copies of the relevant papers were enclosed. The hearing was fixed for 2 and 3 July 2015. Sequana and the directors opposed the joint trial application. It was not known if PwC would oppose the application but if it did it would have the opportunity to raise objections at that hearing. BTI's solicitors asked PwC's solicitors to let them know PWC's position as soon as possible.

14. As the judge noted at [41] of his judgment, in his witness statement in support of the joint trial application, Mr Lloyd of BTI's solicitors gave examples of the high level of overlap in the issues arising in the various claims, pointing out that a central question in both the Sequana claim and the PwC claim was whether AWA's 2007 and 2008 accounts and various interim accounts had been properly prepared. He also pointed out that, if the claims were not heard together, it was likely third party disclosure would be sought against PwC. He also referred to the risk of inconsistent findings and ultimately inconsistent judgments of the court. He accepted that if a joint trial were ordered the existing trial date would have to be vacated.

15. In its evidence in reply to the joint trial application, PwC contended that the claim against it was misconceived and it intended to apply to strike it out or for summary judgment, so that its position was that it would be premature to make an order for a joint trial that would deprive it of its procedural right to seek a summary determination of the claim against it. It acknowledged the substantial overlap in the claims and that if they had been brought at the same time, there would have been much to be said for managing them together towards a single trial. It was said in the alternative that if the court nevertheless gave directions for a single trial, the earliest possible trial date would be January or February 2017.

16. The various applications were listed for hearing before Mann J on 3 July 2015, following a day's pre-reading. In the Sequana claim the other applications included an application to amend the Particulars of Claim and for permission to adduce expert US law evidence. Lengthy skeleton arguments were exchanged. PwC maintained the position set out in its evidence, so its position was it opposed a joint trial in circumstances where it wanted to pursue a strike-out application. Sequana and the directors strongly opposed an adjournment of the trial date on the basis that it was "set in stone" by previous agreement and any later trial date would be uncertain in view of PwC's proposed applications. The allegations against the directors were serious and had been hanging over them for some time. It was said that there was no prejudice to BTI from having separate trials.

17. On the day before the applications were due to be heard, BTI reached agreement with Sequana and the directors that their trial would not be adjourned and that the application to amend and for expert evidence would be granted. PwC was notified of this compromise late in the evening and told that BTI would therefore not be pursuing the joint trial application against PwC.

18. Shortly before the hearing the next day, Mann J was informed that the application against PwC was not being pursued as a consequence of that compromise with Sequana and the directors. At the hearing, the judge reviewed the terms of a consent order and suggested various changes. The order as made in the current proceedings was a consent order which dismissed the application for a joint trial, gave directions in relation to the strike-out application and extended time for service of PwC's Defence until 2 months after the decision on the strike-out application. The strike-out application was subsequently issued on 27 July 2015 and Mann J gave further directions for the filing of evidence in relation to the application and for a three day hearing.

19. By a further consent order dated 27 October 2015, BTI and PwC agreed that PwC's strike-out application and all further proceedings in the current action should be stayed

until after the conclusion of the proceedings against Sequana and the directors, either by judgment or settlement.

20. A yet further consent order was made on 25 June 2018 whereby BTI had permission to amend its Particulars of Claim (amendments which addressed the substance of much of the strike-out application) and file and serve that pleading, but the action was otherwise stayed until the earlier of handing down of judgment by the Court of Appeal in the appeals by BTI and BAT or notification of a settlement of those appeals.

21. The judgment of the Court of Appeal was handed down on 6 February 2019 after which the stay was lifted on 6 March 2019 and this action continued. PwC issued the application the subject of this appeal on 26 March 2019.

The judgment below

22. Having set out the factual background, his analysis of the judgment of Rose J and the procedural background to which we have just referred, Fancourt J then set out some of the detail of the Amended Particulars of Claim at [51] to [62] of his judgment which it is not necessary to repeat here. To the extent that it is necessary to focus on particular aspects of the pleaded case, they are summarised later in this judgment. He then set out at [63] to [71] his analysis of BTI's pleaded case, noting that there is a significant overlap between the issues decided by Rose J (and issues she would have decided but for a concession by BTI after the evidence had been heard) and the issues raised against PwC.

23. He identified at [63] the following matters which would be directly or indirectly in issue again:

> "i) whether in the December interim accounts provision based on 60% of the total remediation costs was in the circumstances at that time an appropriate provision for Lower Fox River liability;
>
> ii) whether it was appropriate to provide in the December interim accounts only $35 million for the NRDs on the basis of a likely settlement with the Government;
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> iii) whether a reduction in the 2008 accounts of NCR/API's share of liability to 38% was appropriate;
>
> iv) whether a reduced figure in the 2008 audited annual accounts for AWA's share of NCR/API's NRDs in the sum of $11.3 million was reasonable;
>
> v) whether potential liability at the Kalamazoo River was a contingent liability or remote."

24. However, at [64] he noted that, in this action, those issues would fall to be considered against the backdrop of the 2007 accounts that BTI contends should and would have been materially different but for PwC's breach of duty. Rose J was not concerned with the propriety of the 2007 accounts audited in October 2008 but only with the December 2008 interim accounts and the 2008 audited accounts. The judge considered at [66] that

the issues here are different, encompassing what provision would in fact have been included in the 2007 accounts, the December interim accounts and the 2008 accounts if PwC had carried out its audits non-negligently.

25. The judge then identified new issues raised in this claim in relation to the 2008 accounts. At [68] to [71] he set out what BTI would have to prove in relation to the two audits if the claim were to succeed, concluding that to succeed on breach of duty and causation it will have to show that the December interim accounts and the 2008 accounts would have been different in various respects from the accounts that Rose J held showed a true and fair view of AWA's affairs.

26. In the next section of his judgment the judge dealt with the law on abuse of process in cases where there is no *res judicata* or issue estoppel, particularly as summarised by the Court of Appeal in *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646. Since I propose to deal with the law on abuse of process below, there is no need to reiterate the judge's analysis, other than to say that in my judgment he analysed the law correctly.

27. He discussed at [77] to [80] the decisions of the Court of Appeal in *Laing v Taylor Walton* [2007] EWCA Civ 1146; [2008] PNLR 11 and of Hamblen J in *Art & Antiques Ltd v Richards* [2013] EWHC 3361 (Comm); [2014] PNLR 10 upon which PwC particularly relied before the judge and before this Court, submitting that this case was indistinguishable in principle from those cases. I deal with those cases myself below. The judge's conclusion on this part of the case is at [83]:

> "Thus, although it is not *prima facie* an abuse of process to bring a second claim against a different party, who would not have been bound by any material findings in the first claim, and usually will not be so, it may be abusive in a case where success on the second claim will involve re-litigating the very same issues as in the first claim and the court reaching different conclusions on those issues on the basis of the same evidence. That is why a close "merits based" analysis of the facts of any particular case is required, and the ultimate question is a general one of whether, in all the circumstances, a party is abusing or misusing the court's process."

28. The judge then went on to deal with the first ground of PwC's application, abuse of process. He set out the parties' respective submissions before giving his reasons at [88] to [100] for concluding that the case was distinguishable from *Laing* and did not amount to a collateral challenge to Rose J's decision. He went on to conclude that, applying the principles set out in *Michael Wilson & Partners* to the facts, the present claim was not an abuse of process which would bring the administration of justice into disrepute.

29. He then went on to deal with the second ground of PwC's application, that the claim was doomed to fail because there could be no material 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 reason for reaching that conclusion is the procedural and case management history of the two sets of proceedings and the attempts by BTI to procure the agreement of both sets of defendants to a joint trial. I have set out that history in detail at [8] to [21] above, which I do not propose to repeat, but I would simply highlight a number of features of that procedural history which are striking and relevant.

90. First, contrary to Mr Salzedo QC's submission, there is no question of the claim against PwC being "late". The claim form was issued in October 2014, only five months after the Sequana claim form. Although Particulars of Claim were not served until May 2015, that was through no fault of BTI. It was waiting for the disclosure to which it was entitled under the Funding Agreement before it could plead out its claim.

91. Second, BTI's solicitors wrote to PwC's solicitors in May 2015 before the Particulars of Claim were served, setting out their intention to seek an order that the two cases be tried together, given the extent of overlap between the issues. The application for a joint trial was issued promptly in June 2015. Despite prompting from BTI's solicitors, PwC did not engage in constructive correspondence and it was not until after BTI had filed the joint trial application and evidence in support, that, in its evidence in response, PwC took the primary position (maintained in its skeleton argument) that, although it recognised the extent of the overlap, it resisted any order for a joint trial, because it wanted to make a strike out application. It was only in the alternative that it contended that, if there were to be a joint trial, it could not be ready for the existing trial date, so there would have to be an adjournment.

92. Third, it is striking that in their skeleton argument opposing the application for a joint trial, Sequana and the directors said that "the balancing exercise lies in favour of dismissing the application as the claimants will suffer no prejudice if the actions are tried separately and they do not suggest otherwise". This must have been predicated upon BTI being entitled to challenge the findings made at the first trial in a second trial and seek inconsistent findings, since if it could not, it would suffer obvious prejudice. It is correct, as Mr Salzedo QC pointed out, that this was said by Sequana and the directors, not PwC, but PwC was not seeking to argue the contrary in its skeleton argument. As Coulson LJ said during the course of argument, it is to be inferred that, at the time of the application, it had not occurred to any of the parties that, if there were separate trials, BTI would not be able to challenge the findings made at the first trial and to seek to obtain inconsistent findings at the second trial.

93. Fourth, in the face of the sustained opposition of both sets of defendants and no doubt in part because of the *quid pro quo* from the Sequana defendants of agreement to BTI's amendments and application for permission to adduce expert evidence, by consent BTI's application for a joint trial was not pursued. Contrary to Mr Salzedo QC's submission, there is no question of BTI's application having been "half-hearted". It is clear from the correspondence from BTI's solicitors and the evidence in support, that having analysed the disclosure they had received, they were acutely conscious of the extent of the overlap between the issues in the two cases and were keen to have them tried together.

94. Furthermore, PwC must be taken to have known throughout, that in the absence of a joint trial, in certain circumstances (of which, despite Mr Salzedo QC's argument to the contrary, the most obvious was that the claim against Sequana and the directors failed) BTI intended to pursue the second claim against PwC. As in the case of the claimant in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748, BTI had made its position in relation to the second claim clear: see per Thomas LJ at [21]-[22].

95. In retrospect, it is unfortunate that the parties all consented to the application for a joint trial being dismissed. If the issue had been argued out before Mann J, it is likely that

there would have been express consideration of whether the correct course was to order a joint trial, even if Sequana and the directors would to an extent be prejudiced by an adjournment, or to run the risk that there would have to be two trials with the risk of inconsistent findings. If, as PwC now contends, it would be an abuse for BTI to seek such inconsistent findings in a second trial, it would have been incumbent on PwC to raise that point before the judge, particularly in the light of the position of Sequana and the directors that BTI would suffer no prejudice if there were separate trials, which as I said only makes sense if it is predicated upon BTI being entitled to challenge the findings in the first trial at the second trial and seek to obtain inconsistent findings.

96. Furthermore, unlike Fancourt J, I am not convinced that if the matter had been fully argued before Mann J it would have been finely balanced. I would expect most judges to have regarded a joint trial, with the necessity to adjourn the existing trial date despite the sustained opposition of Sequana and the directors, as the lesser of two evils compared with two consecutive expensive trials, with the risk of inconsistent findings. Contrary to the suggestion which Mr Salzedo QC seemed to be making at one point in his submissions, I consider that it is inconceivable that, once the issue was raised, Mann J would somehow have put BTI to its election as to which defendant to pursue. It seems to me that the one thing no judge would have done is to say, in effect: I am not prepared to adjourn the current trial to enable these two sets of proceedings to be heard together, but BTI must choose whether to pursue Sequana and the directors or PwC, because any separate pursuit of the claim against PwC may well be an abuse of process.

97. However, whether I am right in the analysis in the previous paragraph or not, I agree with Fancourt J that it was entirely reasonable for BTI to have compromised its application and, since PwC consented to the application being dismissed, there is no basis for it to criticise BTI's conduct.

98. The fact that BTI had made clear its intention, if necessary, to pursue the second proceedings against PwC and PwC then agreed first to the consent order dismissing that application and then to the consent order staying the second proceedings pending the determination of the first proceedings, is completely inconsistent with any suggestion that the subsequent pursuit of the second proceedings is an abuse of process. It is simply impossible to spell out of either consent order an implied promise by BTI not to pursue PwC if it lost against Sequana and the directors. On the contrary, I agree with Mr Thompson QC that agreement by PwC to both consent orders constituted an implicit agreement that, in certain circumstances, the second proceedings would be pursued. The fact that one such circumstance was that the Sequana claim succeeded, but BTI failed to make full recovery, does not detract from the fact that the most likely circumstance in which the second proceedings would be pursued would be if BTI lost its claim in the first proceedings and needed to proceed against PwC to make any recovery at all.

99. In my judgment, Mr Thompson QC is right that this is a stronger case than *Kennecott v Minet* and indeed an *a fortiori* one, given that, in that case, this Court found that there was no abuse of process where the claimant had made clear why it was not pursuing the alternative claim against Minet in the first proceedings for tactical reasons, but that course was not agreed by Minet. In contrast, in the present case, as I have said, the agreement by PwC to the two consent orders constituted an implicit agreement that, in the event the claim against Sequana and the directors failed, the claim against PwC might well be pursued, even though that would necessarily entail the risk of inconsistent

findings. Given that PwC agreed both consent orders, there is no question of the Court being affronted by the pursuit of these proceedings or of their pursuit being an abuse of process. What Pill LJ said in *Kennecott v Minet* at [75] is all the more applicable where what has occurred in terms of case management has been agreed in consent orders.

100. Furthermore, given that BTI sought a joint trial precisely to avoid the risk of inconsistent findings at two trials, but its application was resisted by both sets of defendants, leading it to the perfectly reasonable compromise it made, I consider that the dictum of Kerr LJ in *Bragg v Oceanus* which I have cited at [65] above is applicable. Whilst it is correct, as Mr Salzedo QC submitted, that the context of what Kerr LJ said was that the defendant was seeking to raise the same defence as had failed in the first CTI proceedings in circumstances where it had unsuccessfully sought consolidation of the two sets of proceedings, the principle which Kerr LJ enunciated is of general application, as was recognised by Simon LJ in *Michael Wilson & Partners* at [90]. It is no answer for Mr Salzedo QC to say that, unlike Mr Sinclair in that case, PwC had a legitimate reason for not agreeing to a joint trial. I am prepared to accept, as Fancourt J appears to have done in his judgment on consequential matters, that PwC's proposed strike-out application was a genuine and reasonable one. However, the fact is that BTI made an application for a joint trial precisely to avoid the risk of inconsistent findings, as its evidence in support made clear. If the defendants, including PwC, had agreed to a joint trial, the risk of inconsistent findings would have been avoided. Having, in effect, successfully resisted the application, it lies ill in PwC's mouth to complain now about the risk of inconsistent findings, let alone that because of that risk, these proceedings are an abuse of process.

101. In my judgment, the case management position in the two sets of proceedings, which culminated in the consent orders, is the critical ground of distinction between the present case and both *Laing* and *Arts & Antiques*. As Lord Hobhouse said in the *Arthur Hall* case at 751, quoted by Simon LJ in *Michael Wilson & Partners* at [42]:

> "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. So far as questions of law are concerned, the doctrine of precedent contemplates this. So far as questions of fact are concerned, each court had to try and decide questions of fact on the evidence adduced before it. Judicial comity and common sense take care of most situations in practice but the law does tolerate the possibility of apparently inconsistent decisions. The element of vexation is an aspect of abuse, the use of litigation for an improper purpose, trying to have repeated bites at the same cherry. The objectionable element is not the risk of inconsistency."

102. As I have already indicated, there was no suggestion here that BTI was using the second proceedings for an improper purpose. Furthermore, the fact that BTI had sought a joint trial to avoid the risk of inconsistent findings, but that application was resisted by both sets of defendants, even if their reasons for resistance were not unreasonable, provides good reason for BTI to be seeking to invite the court to make findings different from and inconsistent with those made by Rose J. In *Laing* and *Arts & Antiques* there were no case management or consent orders as in the present case, so that, contrary to the

submissions of Mr Salzedo QC, the present case is not analogous with either of those cases.

103. I also consider that there is considerable force in BTI's point about lack of mutuality. The logical consequence of PwC's position is that BTI is effectively bound in the proceedings against PwC by the findings made by Rose J, because any challenge to them is an abuse, whereas PwC is not bound by those findings at all, since it was not a party to the first proceedings. I agree with Mr Thompson QC that this position is an unattractive and opportunistic one in circumstances where PwC opposed the application for a joint trial and did not suggest in its opposition that, if BTI lost the first trial, it would be precluded from pursuing PwC because to do so would be an abuse of process.

104. I also agree with Mr Thompson QC that the suggestion made by Mr Salzedo QC that, in determining whether the second proceedings are abusive, the Court should look at the question whether, in the first proceedings the common issues were determined between the appropriate parties and conclude that because they were and the second proceedings are somehow "downstream" they are abusive, is a novel one, which is irrelevant and inconsistent with *Michael Wilson & Partners*. In any event, it seems to me that Mr Salzedo QC's argument, even if it had force in other situations, cannot support a conclusion of abuse of process where BTI sought a joint trial which was opposed by PwC and PwC then agreed to the consent orders in which it was implicit that there might well be a second trial, with the risk of inconsistent findings.

105. In all the circumstances, I agree with Mr Thompson QC that the case management position culminating in the consent orders is determinative of the appeal on this ground against PwC. Even assuming that Mr Salzedo QC is right in his analysis of the claim in these proceedings, that its success depends upon the second judge making findings inconsistent with those of Rose J and that it is a collateral attack on her judgment, nevertheless, because of the case management position and the consent orders, it is not possible to say that the pursuit of this claim would bring the administration of justice into disrepute or is otherwise an abuse of process.

106. In relation to the second ground of appeal, it was common ground that the relevant principles to be applied on an application for summary judgment generally are summarised in the judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

107. PwC contends that, even if the second proceedings are not an abuse of process, the Court should strike them out at this stage because there is no real prospect of their succeeding at trial. Two points should be emphasised immediately. First, Mr Salzedo QC accepts that although the two grounds of appeal are distinct, there is an inevitable overlap between them, in the sense that for some of the same reasons as he says the second claim is abusive, he contends that it has no real prospect of success. It follows that once the conclusion is reached that there is no abuse of process, ground 2 also loses much of its force. Second, this is an application made at a very early stage of these proceedings, not just before disclosure but before PwC has even served a Defence, so that it is a somewhat ambitious application, to say the least.

108. The overarching point which Mr Salzedo QC made on this second ground is that there was no real prospect of a second judge reaching a different conclusion to that reached by Rose J. In my judgment the fallacy in that argument is that it appears to proceed on

the assumption that the factual and expert evidence will be the same as before Rose J. This is not correct, as Fancourt J recognised. As Mr Thompson QC pointed out, there is likely to be fresh evidence not before Rose J on a number of matters: (i) on the new points not considered by Rose J, including the 2007 accounts, to which I revert below; (ii) different expert evidence; (iii) there will be disclosure of PwC audit files and papers not before Rose J; (iv) PwC witnesses involved in the audits, none of whom gave evidence at the first trial, will inevitably have to give evidence at the second trial and be cross-examined.

109. This substantial body of new evidence may cast a different light on the issues decided by Rose J which will not, in any event, be binding on the Court at the second trial. Furthermore, as Mr Thompson QC rightly submitted, her findings will not even be admissible in evidence at the second trial: see *Bairstow,* particularly at [27]. In my judgment, it simply cannot be said that a second judge will inevitably reach the same conclusion as she did on those issues.

110. Mr Thompson QC answered in detail all the various points raised by PwC as to why BTI's pleaded case, particularly in relation to reliance and causation, had no real prospect of success at trial. I do not propose to address all those various points, not least because, as I pointed out in argument, Mr Salzedo QC realistically did not press ground 2 very forcefully in his oral submissions. It suffices to say that, in relation to the other points than those which I address expressly below, I consider that Mr Thompson QC was able to demonstrate that the entire pleaded case was sufficiently arguable to go forward to trial.

111. In so far as PwC seek to criticise the conclusions of Fancourt J at [105] of his judgment rejecting PwC's argument that there was no realistic possibility of BTI proving reliance on any misstatement in the 2007 and 2008 audited accounts, that criticism is misplaced. As the judge noted, Rose J had found that the directors had acted honestly and conscientiously in approving the dividends, so it cannot be said at this stage that they would have ignored further material information and ploughed ahead with the dividends. In my judgment, the judge was entirely correct to conclude as he did at [105], quoted at [29] above.

112. Furthermore, as Fancourt J pointed out at [106] (also quoted at [29] above) it is also not possible to say without hearing evidence at the second trial, that if PwC had recommended the making of further disclosures in the accounts or the seeking of further independent legal advice, nothing the directors would have learnt would have made any difference.

113. One aspect of the issue of reliance on which Mr Salzedo QC placed particular emphasis was the contention that any errors or non-disclosures in the 2007 accounts as audited by PwC, even if established, are of no causative relevance because the December dividend was paid out in reliance not on the 2007 audited accounts but on the December 2008 interim accounts. He referred to what was said in the witness statement of Mr Lloyd, BTI's solicitor, who contended that it was apparent from Note 9 to the December 2008 interim accounts that the starting point was the provision in the 2007 audited accounts. Mr Salzedo QC submitted that this was incorrect and the figure for the provision set out in the December 2008 interim accounts had been completely recalculated.

114. Mr Lloyd also contended that reliance by the directors not only on the December 2008 interim accounts but also the 2007 audited accounts in deciding to pay the December dividend was also apparent from the minute of the relevant board meeting. However, Mr Salzedo QC submitted that what that minute stated was that the directors had to consider the 2007 audited accounts and if they did not show sufficient distributable profits to justify the dividend (which they did not because they were prepared before the capital reduction) the directors were under a duty to satisfy themselves that the dividend could be supported by interim accounts. The directors then discussed the interim accounts and concluded that they did show sufficient distributable profits to justify the dividend. Accordingly, it was the December 2008 interim accounts not the 2007 audited accounts on which the directors relied in paying the December dividend.

115. Mr Thompson QC's answer to the submission that any errors in the 2007 accounts were not causative was that part of the enquiry was what had been dubbed the "should not" question, whether the directors should pay a dividend in accordance with their fiduciary duties. He submitted that that is a subjective question involving what the directors actually thought and in determining that subjective question, the directors, who Rose J held to have acted conscientiously, would have looked not only at the latest interim accounts but also the last audited annual accounts, not least because the interim accounts will be based on the last audited accounts. The directors would need to ask themselves the question why do the December 2008 interim accounts allow me to pay a dividend? Mr Thompson QC submitted that Mr Salzedo QC's reliance on the minute of the board meeting as showing just a mechanical exercise of seeing whether the 2007 accounts justified the dividend or not was misguided.

116. Mr Thompson QC also submitted that Mr Salzedo QC's submission, that BTI's case that there was a link between the 2007 audited accounts and the interim accounts was flawed and had no real prospect of success because the provision in the interim accounts was calculated afresh after the audited accounts were prepared, was wrong. The important link was the 60% figure which remained constant. Mr Salzedo QC had suggested that the figure in the interim accounts had been completely recalculated by Mr Bartolotta. However, this was simply wrong as was apparent from [185] of Rose J's judgment. Far from recalculating the 60% figure, Mr Bartolotta had challenged the move away from the 60% figure, in other words he was saying keep consistency with the figure of 60% used in the existing accounts.

117. In my judgment, Mr Thompson QC was able to demonstrate a clearly arguable case both that the directors had relied on the 2007 audited accounts in paying the dividend and that the alleged error in the 2007 accounts in relation to the 60% figure was carried through to the interim accounts, so that there was not the "clean break" for which Mr Salzedo QC contended. Accordingly, it cannot be said that BTI's pleaded case as to reliance on the 2007 accounts has no real prospect of success. The judge was right to reach the conclusion he did at [107] (quoted at [29] above) as to the clear arguable case of reliance by the directors on the PwC audit reports and the absence of challenge by PwC, in approving the 2007 and 2008 accounts and declaring the dividends and, if they did so, they relied on any misstatement in PwC's reports.

118. It is important to bear in mind, on a strike-out application such as the present that, as Mr Thompson QC emphasised, the Court should not look at the various complaints made by BTI in isolation but at their cumulative effect, on the assumption that all the complaints could be made good at trial. On that basis, it cannot be said that BTI's case

on reliance and causation is anything other than a plainly arguable one which can only be determined at trial.

119. In my judgment, it cannot be concluded at this early stage of these proceedings that any part of the claim has no real prospect of success. In a complex fact-sensitive case such as the present, involving allegations of auditors' negligence, the caution sounded by the Court of Appeal in the *Equitable Life* case at [59] is particularly apposite:

> "There may of course be cases where, even at a preliminary stage, and even though an assumption of negligence or breach of contract is made in favour of the claimant, it is nevertheless obvious that the claim as a whole, or some distinct aspect of it, cannot succeed. In such a case, the right to bring such proceedings, in whole or part, to an efficient close, without any risk of unfairness or injustice, is a valuable adjunct of the court's powers. However, in our judgment a court should be cautious, particularly in a complex case, about claiming to foresee, especially at the very outset of proceedings, a clear path to the summary dismissal of a case on the ground that, even though the issue of liability needs to go to trial, all issues of quantum must go against the claimant. This is particularly so when one considers that there are other mechanisms available, such as the ordering of preliminary issues, for judging whether a case, or part of a case must fail so far as matters of quantum are concerned."

120. Finally, I should address, in relation to both grounds of appeal, Mr Salzedo QC's fall-back position, that if the Court was not prepared to strike out the whole claim as an abuse of process or as having no real prospect of success at a second trial, it should at least strike out those parts of the claim which sought to relitigate issues decided by Rose J. There are two answers to that submission. First and foremost, given my conclusion that, even if this claim involves relitigation of issues decided by Rose J and a collateral attack on her judgment, there is no abuse of process because of the case management history, there is no warrant for striking out part of the claim.

121. Second, what this would entail is essentially "salami slicing" in relation to a claim which involves one cause of action or a series of inextricably interlinked causes of action. Contrary to Mr Salzedo QC's submissions, this approach is not supported by the judgment of Hamblen J in *Arts & Antiques* which was a case where the claim which was allowed to proceed to trial was a separate cause of action for negligence which proceeded on the basis that the policy did contain CP2. Furthermore, for reasons I have already given, the assertion on behalf of PwC that the factual and expert evidence at the second trial will be the same as at the first trial is simply wrong. There is likely to be a substantial body of new evidence which may cast a different light on issues decided by Rose J, so that it is simply not possible to say, at this early stage of the proceedings, before any Defence has been served and before disclosure, that any part of the claim now put forward has no real prospect of success.

Conclusion

122. In all the circumstances, I consider that Fancourt J was correct to dismiss PwC's application and that this appeal should be dismissed.

Lord Justice Coulson

123. I agree that, for the reasons set out in detail by Flaux LJ, this appeal 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.