Collateral Damage: a review of the law on collateral attack in light of recent authority

Caytons
Changing Perceptions

Introduction

In their recent note, Sam Moore and Mark Loraine looked at the case of *Percy v Merriman White and Mayall* [2022] All ER (D) 77 which confirmed that the deeming provision in section 1 (4) of the Civil Liability (Contribution) Act 1978 will not prevent a defendant to a contribution claim from disputing *its own* liability.

The case is also of interest as the latest in a string of recent authorities in which the Court of Appeal has considered what constitutes an abusive collateral attack. The others were A*llsop v Banner Jones* [2022] Ch 55, *PwC v BTI 2014* [2021] EWCA Civ 9, *Tinkler v Ferguson* [2021] 4 WLR 27 and *Greene v Davies* [2022] 4 WLR 45. The remarkable fact that the Court of Appeal has been called on five times in less than eighteen months to consider this point illustrates the uncertainty which surrounded it. These cases provide some welcome clarity.

We have, therefore, prepared a note which reviews some of the key landmarks in this area, considers each of the recent appeal cases and draws conclusions on the current state of the law.

HUNTER

A collateral attack is an attempt by a party to litigation to use that action to discredit a decision in earlier proceedings. The modern law starts with *Hunter v West Midlands Police* [1982] A.C. 529. This was a civil claim by the 'Birmingham Six'. It was brought a long time before their convictions were found to be unsafe. The House of Lords' impression of the overall merits could hardly be clearer, and this might be a factor behind the conclusions reached. Here is Lord Diplock (who gave the sole reasoned speech) setting the scene:

> *"Hunter is one of six murderers ("the Birmingham Bombers"), members or supporters of the I.R.A., who were responsible for planting and exploding two bombs in public houses in the centre of Birmingham on November 21, 1974; as a result 21 people were killed and eight score of other innocent victims injured. For a detailed account of what happened in relation to Hunter and the other Birmingham Bombers after the holocaust until the launching of this action by Hunter and similar actions by those others in November 1977, reference should be made to the judgment of Lord Denning M.R"*

The suspects had acquired facial injuries after their arrest. These might have been consistent, as the euphemism goes, with them 'falling down the steps' in police custody. They sought to contend at their

criminal trial that confessions had been beaten out of them and ought not to be admitted. They failed. The confessions were admitted in evidence. They were convicted and sent to prison for life.

They sued the police for damages. In the civil action, they adduced evidence from an expert witness and witnesses of fact which were not relied on in the criminal proceedings. The police applied to strike out the claim as an abuse of process. The Judge dismissed the application on account of the fresh evidence. The Court of Appeal reversed him. The House of Lords dismissed a further appeal.

Lord Diplock (with whom the others agreed) recited that the abuse of process jurisdiction exists to prevent misuse of the courts' procedure in a way which would be manifestly unfair to a party to litigation or would otherwise bring the administration of justice into disrepute among right-thinking people. He said:

> *"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the* purpose *of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made*."

He concluded that the proper method of challenging the judge's decision would have been to mount an appeal.

He accepted that the Judge had been right to apply the test from the old case of *Phosphate Sewage Company v Molleson* (1879) 4 App Case 801 as to whether fresh evidence entirely changes the aspect of the case but could not agree that the threshold had been met. He aligned with the Court of Appeal that "*the so-called "fresh evidence" on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then*."

APPLICATION IN CASES AGAINST PROFESSIONALS

What has sometimes been called the *Hunter* principle had the potential for significant application in the professional liability field. For example, would the outcome have been the same if Mr Hunter had sued his solicitors and argued that he would not have been convicted if they had run the case differently? How about a botched litigation claim in which the disappointed party to a civil action maintains that the Judge would have come to the opposite conclusion but for its solicitor's negligence?

Could the principle be used as a sword as well as a shield? Might a claimant be able to say that a defendant is estopped from defending a claim if that implicitly involved discrediting an earlier judgment? What about the outcome of a regulatory prosecution, such as a decision of the Solicitors Disciplinary Tribunal ('SDT')? The courts would grapple with these sorts of questions in the decades following *Hunter*.

A SHORTCUT FOR DEFENDANTS?

Beginning with *Somasundaram v Julius Melchior* [1988] 1 WLR 1394, early cases suggested that the courts would readily strike out claims against lawyers if they involved contending that an earlier court had got it wrong. This applied to civil as well as criminal proceedings. It even extended to a case in which the underlying action had been withdrawn by consent partway through a trial and another in which summary judgment had been ordered against the claimant in the earlier proceedings after he failed to comply with an interim order.

But *Walpole v Partridge & Wilson* [1994] QB 106 acted as a corrective. The claimant was a pig breeder who was convicted of obstructing a veterinary officer in the execution of his duty. He consulted the defendant solicitors about an appeal. Counsel gave favourable advice, but the solicitors never got round to making the appeal. At first instance, they persuaded the court that the claim should be struck out as an abuse of process.

In the Court of Appeal, Ralph Gibson LJ (with whom the others agreed) concluded (emphasis added) that, *"The decision of their Lordships in* Hunter's case*...was, in my judgment, not that the initiation of such proceedings is necessarily an abuse of process but that it may be,"* and observed that the House of Lords had accepted that a case in which fresh evidence passing the *Phosphate Sewage* test was available would be an exception to what he considered a general rule of public policy. He concluded that:

> *"If there is a sufficiently arguable case to show that the defendant solicitors, by their breach of duty, put the plaintiffs in the position of being unable properly to contest the first decision, so that the plaintiffs were reasonably compelled to submit to judgment on the issue, then, in my judgment, the plaintiffs' claim is not shown to be an abuse of the process of the court merely because it will, if it succeeds, require the court to assess damages on the basis that the prior decision of the court would not have been made if the solicitors had not been in breach of duty."*

Yet if that were thought to herald a sea change, the court went the other way two years later in *Smith v Linskills* (1996) 2 All ER 353.

In *Arthur JS Hall v Simons* (2002) 1 AC 615, the Court of Appeal sought to rationalise the law by reference to a hierarchy of decisions. It concluded that:

1. A collateral attack on a criminal conviction will be hardest to justify. Nothing short of fresh evidence satisfying the *Phosphate Sewage* test will ordinarily suffice.

2. Little less is required to challenge the final decision of the court in civil proceedings when evidence has been received and judgment given.

3. An interim judgment given without a fully-contested hearing or an approved consent order is of less weight and the conditions must be met to justify a collateral challenge to such a judgment or order will be less stringent. Nevertheless, such orders involve an exercise of judicial authority, embodied in an enforceable order of the court and are not to be lightly disregarded.

It went on to conclude (emphasis added):

> *"The initiation of proceedings against legal advisers which involves a collateral attack upon a consent judgment approved by the court in previous proceedings may, and ordinarily will, be an abuse of the process unless the plaintiff can properly allege a breach of duty which either (1) deprived the plaintiff of a reasonable opportunity of appreciating that better terms were available whether on settlement or at a contested hearing than the plaintiff obtained, or (2) placed the plaintiff in the position of having to accept a settlement significantly less advantageous or more disadvantageous than he should have had."*

In the House of Lords, the principal focus was on advocate's immunity, which the court decided should be abolished. However, the Law Lords who considered the *Hunter* principle in their speeches took a different view of it from the Court of Appeal.

At least three of them considered there to be a fundamental distinction between criminal cases, in which there was a clear public policy against collateral attacks on convictions, and civil cases, where the objection was less apparent.

Lord Hoffmann disapproved of the Court of Appeal's weighting of different types of judgment. He concluded (emphasis added) that:

> *"There is, I think, a relevant difference between criminal proceedings and civil proceedings... It follows that in my opinion it would ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong...The resulting conflict of judgments is likely to bring the administration of justice into disrepute.... The proper procedure is to appeal, or if the right of appeal*

has been exhausted, to apply to the Criminal Cases Review Commission… I say it will ordinarily be an abuse because there are bound to be exceptional cases in which the issue can be tried without a risk that the conflict of judgments would bring the administration of justice into disrepute. Walpole v Partridge & Wilson [1994] QB 106 *was such a case….*

On the other hand, in civil (including matrimonial) cases, it will seldom be possible to say that an action for negligence against a legal adviser or representative would bring the administration of justice into dispute. Whether the original decision was right or wrong is usually a matter of concern only to the parties and has no wider implications. There is no public interest objection to a subsequent finding that, but for the negligence of his lawyers, the losing party would have won. But here again there may be exceptions….

I would suspect that, having regard to the power of the court to strike out (sic) *actions which have no real prospect of success*[1]*, the* Hunter *doctrine is unlikely in this context to be invoked very often. In my opinion, the first step in any application to strike out an action alleging negligence in the conduct of a previous action must be to ask whether it has a real prospect of success".*

Lord Steyn and Lord Browne Wilkinson agreed that it would ordinarily be an abuse to use a civil claim to make a collateral attack on a criminal conviction and that such claims should in most cases be struck out. Lord Browne Wilkinson, however, was sceptical as to how far *Hunter* goes where the challenge is to a decision in a civil case.

Lord Hope took the view that the question as to whether the lawyers' conduct of the defence was negligent was something which arises "*outwith the trial process*," although he considered that there may be cases where the question as to whether the conviction was attributable to the lawyers' negligence was calculated to cast doubt on the conviction itself. This, he concluded, would be an abusive collateral attack.

Lord Hobhouse considered the counterfactual of the Claimants in *Hunter* pursuing their lawyers and concluded that there would have been no reason why their action should not have gone ahead.

After *Arthur JS Hall*, it might have been concluded that there would be little scope of persuading a court to strike out a claim against a solicitor on the basis that it involved a collateral attack on a civil judgment, except perhaps in the case of a defendant to a successful defamation claim which Lord Hoffmann identified as a potential exception.

Thus, in *Laing* v *Taylor Walton* [2007] All ER (D) 238, the Judge rejected an application by the defendant solicitors to strike out the claim against them. The background to this case was a dispute between Mr Laing and a Mr Watson, who were property developers. They had entered into a joint venture. They gave conflicting accounts of what had been agreed between them. The Judge preferred Mr Watson's account and gave judgment for him.

Mr Laing then sued his solicitors. He alleged, in effect, that their negligence in the drafting of agreements led the Judge to the wrong conclusion. Langley J accepted that there was a reasonably compelling case that the Judge had got it wrong. However, the Court of Appeal reversed him. Buxton LJ explained that the proper approach to these sorts of cases is for the court:

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

He concluded:

"I of course agree that it will not necessarily, or perhaps usually, be a valid objection to a claim for solicitors' negligence in or about litigation that the claim asserts matters different from those

[1] This is in fact the test for summary judgment under CPR Part 24. The test for striking out a statement of case under CPR Part 3.4 (a) is whether it discloses any reasonable grounds for bringing or defending a claim

decided in that litigation. That is so not only of cases where the solicitors' have made what might be called administrative errors that have prevented the earlier proceedings from being properly pursued or their outcome challenged by the proper means (eg Walpole v Partridge & Wilson *[1994] AC 106); but also where errors in assembling the evidence or understanding the law are alleged to have led to an incorrect result, as was the case in* Hall v Simons *itself. But the present case is significantly different from those just mentioned. The difference is that, as shown in §19 above, in order to succeed in the new claim Mr Laing has to demonstrate not only that the decision of Judge Thornton was wrong, but also that it was wrong because it wrongly assessed the very matters that are relied on in support of the new claim. That is an abusive relitigation of Judge Thornton's decision not by appeal but in collateral proceedings, and in substance if not strictly in form falls foul of the* Phosphate Sewage *rule.*

Moses LJ added:

"I should explain why I conclude that the challenge is impermissible. Allegations of negligence during the course of litigation, against solicitors or advocates, will normally involve an attempt by a claimant to demonstrate that the previous conclusion of the court would have been different, absent negligence on the part of the lawyer. In many cases it will, indeed, be necessary to do so in order to prove causation and loss. The paradigm is the loss of a case due to negligent advocacy. But to bring such proceedings for negligence does not bring the administration of justice into disrepute; Hall v Simons *teaches to the contrary.*

But such cases differ from the instant appeal in two important respects. Firstly, in the normal run of case, the impugned conduct of the lawyer is independent of the factual conclusions of the court; those conclusions are only relevant to prove causation and loss. His case does not, in reality, involve any challenge to the findings or conclusion of the court. He merely contends that, in the light of the negligence of which he now complains, the court's conclusions would have been different. But this not so in the present case. As Buxton LJ has demonstrated (at paragraphs 19 and 27), the claimant cannot establish that his adviser's drafting of the agreements was negligent without challenging the judge's findings as to credibility and fact. To make good the allegations of negligence, Mr Laing must show that his account of the agreements is the truth. He must demonstrate that Judge Thornton's judgment of his credibility was wrong".

A SHORTCUT FOR CLAIMANTS?

Brinks v Abu-Saleh [1995] 1 WLR 1478 was the mirror image of *Hunter*. It arose out of another high-profile crime, the Brink's-Mat robbery. Here, the Defendants rather than the Claimant had been parties to the criminal proceedings. Far from seeking to attack the criminal court's findings, the Claimant bank maintained that the Defendants were stuck with them.

Jacob J gave summary judgment for the bank. After considering *Hunter*, he said:

"a defendant cannot show that there is an issue which ought to be tried if he has lost that issue in a criminal trial and is simply seeking its relitigation on essentially the same evidence. His defence would be an abuse of process."

In *McCaulry v Hope* (unreported, Court of Appeal 8 December 1998), the Deputy Judge (upholding the Master) applied *Abu-Saleh* in favour of a claimant seeking summary judgment on a personal injury claim arising from a road traffic accident. The Defendant had already been convicted of driving without due care and attention.

In the Court of Appeal, it was argued that there was a tension between *Hunter* and section 11 of the Civil Evidence Act which provides that, where a person has been convicted of a criminal offence, "*he shall be taken to have committed that offence unless the contrary is proved*" (emphasis added). The Court of Appeal agreed that the emphasised words gave a clear mandate to a defendant to attack his earlier conviction, provided that he had good cause for doing so.

Smedley J reached the same conclusion in *J v Oyston* [1999] 1 WLR, handed down a few days before the Court of Appeal's decision in *McCaulry.* The Judge observed that Lord Diplock in *Hunter* had in fact distinguished between claimants seeking in later proceedings to impugn an earlier court's findings and defendants seeking to defend claims brought in reliance on earlier findings.

The position of previous civil proceedings was considered in *Secretary of State v Bairstow* [2004] 4 All ER 325. Mr Bairstow was a company director. He was dismissed and brought a claim for wrongful dismissal. He lost at first instance and on appeal. The Secretary of State then brought disqualification proceedings against him.

The Judge found that Mr Bairstow was bound by the findings in the earlier proceedings. The Court of Appeal had a different view. Sir Andrew Morritt VC (with whom the others agreed) drew from the authorities that it would only be an abuse of process to challenge the factual findings and conclusion of an earlier court if (a) it would be manifestly unfair to a party to the later proceedings for the same issues to be relitigated or (b) to allow relitigation would bring the administration of justice into disrepute.

He could not accept that it would be manifestly unfair to the parties to require the Secretary of State to plead and prove her case. He did not believe that relitigation would bring the administration of justice into disrepute. In reaching that conclusion, he observed that the conclusions of a criminal court would only be *prima facie* evidence and could see no reason why the decision of a civil court should be treated as conclusive.

Bairstow was applied to a judgment of the SDT in *Conlon v Simms* [2007] 3 All ER 802. Mr Simms was successfully prosecuted for dishonesty by what was then the Office of Supervision of Solicitors. He was struck off the roll. His appeal to the Divisional Court was dismissed. His former partners subsequently claimed that he had induced them to enter into partnership with him by fraudulent misrepresentations and non-disclosure. They relied on the findings of the SDT. Mr Simms denied the allegations. The Court of Appeal reached the same conclusion as it had in *Bairstow*.

THE RECENT CASES

ALLSOPP

In *Allsopp*, the Defendant solicitors acted for Mr Allsopp in family proceedings. They went badly for him. He blamed his solicitors. The solicitors sought to strike out his claim against them as disclosing no reasonable grounds for bringing a claim and as an abusive collateral attack on the decision of the family court. As is common practice, they applied for summary judgment as well. The Judge accepted that some of the allegations represented a collateral attack and that there was no fresh evidence to satisfy the *Phosphate Sewage* test. He duly struck them out.

The Court of Appeal started by going back to basics. It explained that the law relating to collateral attack is an offshoot from or extension of the rules relating to *res judicata*, which (broadly) prevent a party from raising an issue or argument decided in an earlier action between the same parties. It observed that *Phosphate Sewage* was really a *res judicata* case. In the case of a collateral attack, said the court, the parties are not the same as in the earlier action and so *res judicata* does not arise. It follows that it is not necessary for a claimant rely on an exception such as *Phosphate Sewage.* At least where the challenge is to a civil judgment, the *Phosphate Sewage* test had no application.

The court went on to stress that it is important to be very clear about what is meant by relitigation. It said that this means (emphasis added):

> *"arguing the* same *issue, that has already been determined in earlier proceedings, all over again in later proceedings. In civil proceedings, generally speaking, for an issue to be the same, it will arise as between* <u>*the same parties*</u> *(or their privies)* "

It continued (emphasis added):

> *"The role of the doctrine of abuse of process is, correspondingly, much more limited. The abuse doctrine will only arise* where *one of the parties to the earlier litigation sues a stranger to that litigation. In such a case, the claim will typically be permissible and not abusive, and that will generally be because the case is not one of relitigation at all. Rather, the stranger to the earlier litigation will be the subject of the later claim because that person has done or failed to do something which (had that person behaved as he or she should) affected the terms or nature of the anterior decision. …It may be that the later claimant's former legal advisers failed properly to prepare the case …or failed, in an appeal, to deploy or consider a potentially winning point…. In all of these cases, what is being focused on is "the impugned conduct of the lawyer* (which is) *independent of the … conclusions of the court" in the anterior decision."*

It allowed the appeal.

PwC

The judgment in *PwC* was handed down just three days after that in *Allsop*. It was an auditor's negligence claim. As often in such cases, the facts were convoluted and dry. Suffice it to say for present purposes that the Claimant sought to take points against the auditors which had been ventilated in a previous action against directors of a company. The Judge declined to strike out the claim as an abusive collateral attack. The Court of Appeal upheld her.

Flaux LJ drew from the authorities the following principles:

a. Where, as here, the parties are not the same in the later proceedings, they are not bound by the earlier decision;

b. The fact that the later proceedings involve relitigation of issues in the earlier proceedings does not, without more, amount to an abuse;

c. It will only be in very rare or exceptional cases that the court will find that the later proceedings are an abuse of process.

d. It will be an abuse only if (i) it would be manifestly unfair to the parties to the later action for the same issues to be relitigated, or (ii) to allow relitigation would be to bring the administration of justice into disrepute;

He concluded that there could be no question of it being manifestly unfair to PwC to relitgate the same issues as it was not a party to the original action. The concept of bringing the administration of justice into disrepute, he concluded, involves using litigation for some collateral purpose rather than the genuine purpose of obtaining the relief sought. There was no suggestion of anything of that sort in the present case. Coulson LJ who gave a concurring judgment said that he would go further on the question of fairness and conclude that it would be positively unfair to the Claimant to prevent the claim going ahead.

TINKLER

Three weeks later, the Court of Appeal handed down judgment in *Tinkler.* This case arose from a boardroom power struggle. Mr Tinkler came off worst. He was dismissed. He brought an action against the other directors for defamation and malicious falsehood. They, in turn, caused the company to bring a claim for a declaration that Mr Tinkler's dismissal was justified. He counterclaimed seeking reinstatement. The company's action was heard first. Mr Tinkler lost and was refused permission to appeal.

The directors applied to strike out Mr Tinkler's claim as a collateral attack on the judgment in the company's action and as disclosing no reasonable grounds for bringing a claim. The Judge duly struck it out. Significantly, he concluded that the fact that the first action was between Mr Tinkler and the company and the second between him and the directors personally was a distinction without a difference.

There was yet more bad news for Mr Tinkler in the Court of Appeal. His appeal failed. The court concluded that he was making the same essential complaint about the same individuals in both sets of proceedings. As such, it would be manifestly unfair to the respondents and an improper use of the court proceedings to allow the action to continue.

GREENE

The next case under consideration involved the question as to whether regulatory proceedings should be struck out as a collateral attack on the judgment of a civil court. Mr Greene is the senior partner of the well-known firm, Edwin Coe. It acted in judicial review proceedings for a company owned and controlled by Mr Davies. The original proceedings were determined, except for a claim for damages which was stayed. On Mr Davies confirming that he wanted to proceed with this, Edwin Coe opened a new file and sent Mr Davies a client care letter naming him as the client. The claim was summarily dismissed. Edwin Coe invoiced Mr Davies but he denied that he was the client. He refused to pay. Edwin Coe brought proceedings and won.

Mr Davies then brought a claim of his own, in which he sought to get the order in the previous action set aside on the 'fraud unravels everything' principle. He claimed that Mr Greene had misled the court and withheld material documents. The Judge who had tried the original action struck out the claim of his own motion. On an application by Mr Davies to set aside his order, the Judge made clear that the emails relied on would have made no difference to his decision. He dismissed the application.

Mr Davies then complained to the SDT. It accepted that there were serious allegations which warranted further investigation. The SRA disagreed. It concluded that the Judge had already determined the matter. The SDT nevertheless certified that there was a case for Mr Greene to answer. He applied for the case to be struck out as an abusive collateral attack and lacking substantive merit. The SDT found for Mr Greene. But the Divisional Court allowed an appeal by Mr Davies.

The Court of Appeal concluded that Mr Davies' regulatory complaint was wider than the issues determined by the Judge. It did not depend on establishing that the Judge was *in fact* misled, nor even that Mr Greene had acted dishonestly. It allowed an appeal insofar as Mr Davies sought to contend that the Judge had been misled, which it agreed should not be relitigated, but otherwise dismissed it.

PERCY

Percy, it will be recalled, was a contribution claim brought by a firm of solicitors against a barrister. Both had originally been sued by a client in an action arising from a dispute between property developers. The client settled on drop hands terms with the barrister, but he was brought back into the dispute by a contribution notice from the solicitors. The solicitors settled with the client and pressed on with their claim against the barrister,

In addition to his conclusions on the 1978 Act which Sam and Mark considered in their note, the Judge found that it would be an abuse to allow the barrister to argue that the court in the underlying proceedings had reached the wrong conclusion. He found that it would bring the administration of justice into disrepute.

The Court of Appeal disagreed. Sir Julian Flaux found the Judge's conclusion on collateral attack *"startling"*. He indicated that there was no question of a collateral attack being unfair to the parties as neither of them was party to the original action. He found it difficult to see how it could be said that a challenge to the decision in an original action would bring the administration of justice into disrepute.

Lewison LJ, who gave the other reasoned judgment, added that the Judge's "*bald conclusory statement*" does not explain *why* he thought the administration of justice would be brought into disrepute. He distinguished *Laing* on the basis that the claimant there was bound by the judgment in the original action and could have appealed against the decision if he considered it to be wrong. As neither the solicitor nor the barrister was a party to the original action, an appeal against the judgment was not an option. They were, therefore, not bound by it.

Both Lord Justices of Appeal observed that, in any event, the barrister did not need to show that the Judge in the original action was wrong but merely that another Judge might have reached a different conclusion.

CONCLUSIONS

Contrary to the impression created in some of the older authorities, it is now clear that a claim will not be an abuse of process simply because it involves a challenge to an earlier decision of a civil court or tribunal. There is a need for "*an intense focus on the facts of the particular case,*" but the general principles which the court will apply are now clear.

It is not necessary for a claimant to establish that it has fresh evidence which satisfies the *Phosphate Sewage* test. It is only in an exceptional case that the courts will strike out a claim as an abuse of process. The applicant would need to establish either that it was manifestly unfair to it to have to relitigate issues determined in the earlier proceedings, or that relitigation would bring the administration of justice into disrepute.

Where the defendant was not a party to the earlier action there is no relitigation and it would not be manifestly unfair to it for the action to proceed. It might also be positively unfair on the claimant for its claim to be stifled. The position might, however, be different if, on analysis, the later action involves essentially the same complaints about the same individuals, as was the case in *Tinkler*.

That might have justified a different result in *Greene* if the court had accepted that the issues in the regulatory proceedings were identical to those in the earlier civil action. *Greene* itself shows that mere overlap will not be enough.

Whether the party seeking to go behind the earlier judgment was in a position to appeal it appears to remain a relevant factor but it is not necessarily conclusive. The weight to be attached to it remains uncertain. It is certainly not fatal to a claim that the claimant sought and was refused permission to appeal the earlier decision, as in cases like *Allsopp*.

The administration of justice would not be brought into disrepute by a party challenging an earlier court's findings, nor by different civil courts reaching different conclusions on the same issues. *PwC* suggests that it would need to be established that the pleaded claim for a civil remedy was not the real purpose of the later action and that, in truth, it was being advanced for some collateral purpose.

It is apparent that it will now be a rare case in which a defendant to a professional negligence claim can successfully apply to strike out the claim as an abusive collateral attack on a civil judgment. However, it does not necessarily follow that there will never again be such a case. *Laing* was cited in all but one of the recent appeals and there was no suggestion that it might be wrong or confined to singular facts. It illustrates that it remains possible for a claim to be dismissed on this basis in the right case. Identifying the right case will be the challenge.

Public policy considerations would appear to make it much easier to resist claims which seek to attack criminal convictions, but cases such as *Partridge & Wilson* demonstrate that there are at least exceptions to this.

Percy indicates that the same analysis will need to be carried out in cases where it is the claimant seeking to argue that the defendant's defence amounts to an abusive collateral attack, although case

law dating back to the 1990s suggests that the courts will be even slower to find an abuse of process in this scenario.

It remains, of course, to be seen how the law evolves from here.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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Caytons
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