JUDGMENT : The Hon. Mr Justice Langley : QBD Commercial Court. 20th February 2007

Introduction

1. This is an interesting and, to my mind, difficult problem. It arises on applications by the Defendants to strike out the claim on the basis of issue estoppel or analogous principle or as an abuse of process and for summary judgment. The essential complaint is that the claim is an improper attempt to relitigate questions already decided against the Claimant.

The Claim in the TCC

2. The Defendant solicitors ("Taylor Walton") are sued by the Claimant ("Mr Laing") for professional negligence in relation to their work in connection with agreements said to have been made between Mr Laing and a Mr Watson and/or Mr Watson's company, Burkle Holdings Ltd, pursuant to which Mr Watson invested £500,000 in a development project promoted by Mr Laing at Glory Mill, High Wycombe. Two oral agreements are involved, the first in October/November 1999, and the second, said to be a variation of the first, made in late April or early May 2002.

3. There is no doubt that £500,000 was lent to Mr Laing for the purpose of the development. The development proceeded. Mr Laing and Mr Watson fell out over the terms of their agreement. The detail does not matter. Mr Watson claimed that it had been agreed that he should be entitled both to a 12.5% profit share in the development and to a beneficial interest in a 12.5% shareholding in the company owning the development. Mr Laing claimed that only one 12.5% profit interest was to be granted to Mr Laing and that insofar as there was an agreement in relation to a 12.5% shareholding that was only as security for that 12.5% interest. The "value" of 12.5% is said to be of the order of £1.5 million.

4. Mr Kelly of Taylor Walton was instructed by Mr Watson/Burkle in relation to the agreements and drafted documentation intended to reflect what, or at least part of what, had been agreed.

5. Mr Watson/Burkle took proceedings against Mr Laing in the Technology and Construction Court. Mr Laing sought disclosure from Mr Watson in the course of which the question arose whether or not Taylor Walton were retained by Mr Laing during the transaction. Mr Kelly said he was, jointly with Mr Watson. After a four-day hearing, it was decided by HHJ Toulmin, in a judgment dated 23 March 2005, that Taylor Walton were not retained by Mr Laing despite Mr Kelly's evidence to the contrary. There was no appeal.

6. The claim proceeded to trial. It was tried by HHJ Thornton. The trial lasted 7 days. It ended on 1 July 2005. There is a reserved judgment, dated 26 September 2005, running to 55 pages. Mr Watson won and Mr Laing lost. Judge Thornton accepted Mr Watson's evidence that at the outset there was an oral "25%" agreement. Mr Watson's case was that Mr Kelly was only instructed by him to document the 12.5% shareholding and that is why the documents reflect only 12.5%. The judge was not impressed by Mr Laing's evidence. He was hostile to Mr Laing (for whom Mr Marks QC appeared) calling Mr Kelly, but a witness statement by Mr Kelly was put in evidence. Mr Kelly's evidence was supportive of Mr Laing's case that there was only one 12.5%.

7. Mr Laing was advised of the difficulties of an appeal on questions of fact and there was no appeal from the decision of HHJ Thornton.

The Present Claim

8. Mr Laing's claim against Taylor Walton asserts a duty of care (contrary to the decision of Judge Toulmin), that the agreement with Mr Watson was for only 12.5% (contrary to the decision of Judge Thornton), that had Mr Kelly drafted the documents as he should have done they would have shown clearly that there was only one 12.5%, and that (flatly contrary to the evidence accepted by Judge Thornton) had he done so Mr Watson would in fact have signed them because he knew that was the true agreement they had made. Despite some of the wording in paragraph 18 of the Particulars of Claim, Mr Marks expressly disavowed any claim on any other basis such as a loss of a chance. The case stands or falls on Mr Watson signing up to one 12.5% had it been put squarely to him. The damages claimed are damages to compensate Mr Laing for the cost of his liability to Mr Watson/Burkle calculated on the basis of both a 12.5% shareholding and a 12.5% profit share.

9. This apparently remarkable claim is made all the more extraordinary by the fact that it is not even submitted that there is any new evidence on which Mr Laing can rely to contend that had it been before Judge Thornton the judge would or even might have reached a different conclusion.

10. It is acknowledged by Mr Marks that Judge Toulmin's decision is binding between Mr Laing and Mr Watson and that documents held by Taylor Walton for which privilege has been claimed on behalf of Mr Watson/Burkle are indeed privileged and cannot be disclosed without a waiver, which has been refused. They will not therefore be in evidence if this claim continues.

11. There is, however, a further singular feature of this case. Mr Kelly (apart from denying negligence) in effect agrees with Mr Laing's case both as to duty of care and as to the substance (one 12.5%) of what was agreed between Mr Laing and Mr Watson.

12. To add to the exceptional nature of these events and this evidence, Mr Marks took me through some of the more significant documents at the time of and surrounding the oral agreements and when (in November 2004) the dispute between Mr Laing and Mr Watson arose. I have also read Judge Thornton's judgment. In my judgment Mr Marks advanced a reasonably compelling case that the decision of Judge Thornton on the terms of the agreements is open to serious challenge. If it was wrong, I think it also to be reasonable to conclude that, despite

its stark nature, the case on causation in these proceedings is also far from hopeless. I think it would be wrong for me to say more in view of the decision I have come to and it is right to acknowledge that the case was no different from that put before Judge Thornton who had the advantages not only of hearing the witnesses and, no doubt, having detailed submissions on behalf of Mr Watson. But my judgment that there is a serious case to be made in favour of Mr Laing is, I think, material to the issues before me. Indeed it is fatal to the application by Taylor Walton for summary judgment, albeit Mr Flenley acknowledged that application was aimed at Mr Laing's case being that Judge Thornton would have decided otherwise had there been no negligence and not (as it became clear in the course of the hearing it was) on the basis that Mr Watson would have signed documentation recognising he had only one 12.5% interest. I am satisfied that, seen in isolation, the claim by Mr Laing has a real prospect of success including success on the causation and duty issues.

The Law: Abuse of Process/Issue Estoppel

13. Mr Flenley, for Taylor Walton, submits that this claim is a blatant attempt to relitigate issues already decided and to make a collateral attack on the decision of Judge Thornton. That is not, in substance, challenged by Mr Marks. He submits, however, that it does not follow that the court must strike out the claim and it should not do so where there is a real prospect of the claim succeeding and Mr Kelly himself is in agreement with the core of the attack on the decision.

14. The law in relation to the strict doctrine of issue estoppel can be addressed shortly. Taylor Walton were neither parties nor privies to the proceedings in the Technology and Construction Court. Nothing decided there can be binding upon them for that reason. If Taylor Walton are to succeed in the application it must be on the basis of abuse of process analogous to issue estoppel.

15. I was referred to a number of authorities, starting with the decision of the House of Lords in ***Reichel v Magrath*** (1889) 14 App Cas 665 and continuing with the further decisions of the House in ***Hunter v Chief Constable of the West Midlands Police*** [1982] AC 529 and ***Arthur JS Hall & Co v Simons*** [2002] 1 AC 615. In particular I was referred to passages in the speech of Lord Hoffmann in the latter case in which he said that the power to strike out should be exercised only in cases in which relitigation of an issue previously decided would be "manifestly unfair" to a party or "would bring the administration of justice into disrepute" (at 702H to 703A) and referred to the facts of the case itself in which claims were brought against lawyers for their conduct of earlier litigation in terms (at page 705H) that:

"I can see no objection on grounds of public interest to a claim that a civil case was lost because of the negligence of the advocate, merely because the case went to a full trial. In such a case the plaintiff accepts that the decision is res judicata and binding upon him. He claims, however, that if the right arguments had been used or evidence called, it would have been decided differently."

16. Lord Hoffmann's dictum does not, as Mr Flenley rightly submitted, apply directly to this case. Mr Laing makes no claim as to the conduct of the trial. His claim relates to the drafting of the agreements which were considered at the trial. Nor does Mr Laing accept the decision of Judge Thornton; he says bluntly that it was wrong. Nonetheless, I think this case is at least partly analogous. It is founded on an allegation that if lawyers had acted differently either the outcome of the trial would have been different or the issue would have been beyond argument.

17. There are two more recent decisions of the Court of Appeal which, although also distinguishable, I think provide useful guidance. The first decision is ***Secretary of State for Trade and Industry v Bairstow*** [2004] Ch 1. Mr Bairstow was found to be guilty of grave misconduct and neglect of his duties in wrongful dismissal proceedings which he brought against a company of which he had been the managing director. The Secretary of State sought an order against him under Section 8 of the Directors Disqualification Act 1986. The Court of Appeal held that the findings in the first action would not be admissible as evidence of the facts found (as Mr Flenley accepts would apply in this case also) and that it would not be unfair or bring the administration of justice into disrepute to require the Secretary of State to prove his case. I agree with Mr Flenley that in a regulatory context and where the party to the previous decision did not instigate the subsequent proceedings, the decision itself is not surprising and can be distinguished from the present case. At paragraph 38, Sir Andrew Morritt V-C, in a judgment with which the other members of the court agreed, after reviewing the earlier authorities, said:

"In my view these cases establish the following propositions. (a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. (b) If the earlier decision is that of a court exercising a criminal jurisdiction …. (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (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."

18. The second decision of the Court of Appeal is ***Simms v Conlon*** [2006] EWCA Civ 1749. Mr Simms was a partner in a firm of solicitors. His partners were Mr Conlon and Mr Harris. The Solicitors Disciplinary Tribunal found that Mr Simms had acted dishonestly. His appeal to the Divisional Court was rejected. Messrs Conlon and Harris sued Mr Simms relying on the dishonesty found against him. Mr Simms denied dishonesty but his partners contended that

for him to do so would be to make a collateral attack on the findings of the Divisional Court. The Court of Appeal nonetheless allowed Mr Simms to pursue his defence.

19. Mr Flenley, again rightly, submitted the case is distinguishable. Mr Simms was not the instigator of the second proceedings and only sought to defend himself against serious allegations. Those factors were material to the decision of the Court: see the judgment of Jonathan Parker LJ at paragraph 146 and of Ward LJ at paragraph 178. Moore Bick LJ, at paragraphs 168 and 169, emphasised the need "to be particularly cautious before holding that it would be an abuse of process for a party to challenge findings of fact made in previous proceedings between himself and a person who is not a party to the current litigation" because normally such findings are only binding between parties and their privies and they are not admissible in evidence in subsequent litigation. He concluded that it followed that

> *"some additional factor must be present to justify preventing a party to the current proceedings from challenging findings of fact made in the earlier proceedings."*

20. The parties are, therefore, rightly agreed that, where, as here, there is a collateral attack on the findings of Judge Thornton, the relevant criteria established in authority are whether or not to permit that attack would be manifestly unfair to Taylor Walton or would otherwise bring the administration of justice into disrepute; but there are no absolutes or prescriptive rules to be applied in reaching a judgment on whether or not one or the other of those criteria is met.

The Factors

21. I think the factors material to a decision in this case are finely balanced. Taylor Walton can point to the following:
    i) It is Mr Laing who is the instigator of the present proceedings and who seeks to make a direct attack on the findings of Judge Thornton in earlier proceedings in which Mr Laing was represented and had every opportunity to make his case but lost.
    ii) No new evidence or arguments are available; the allegation is that the Judge simply came to a wrong decision on a factual issue.
    iii) If, as is now submitted by Mr Marks, it can be demonstrated on the documents that the Judge was wrong, so too it could have been demonstrated on appeal, but no appeal was brought.
    iv) There is a basic unfairness in permitting the issue to be relitigated. The key issue was whether Mr Laing and Mr Watson agreed upon 12.5% or 25%. If they agreed upon 12.5%, Mr Watson/Burkle would have lost and Taylor Walton would have had no liability. If they agreed on 25%, Mr Laing would have lost (as he did) and Taylor Walton would have had no liability because of the very fact that was what Mr Laing had agreed. Yet to permit the present claim to proceed creates the risk that Taylor Walton will be liable for "12.5%" which could not otherwise have arisen, and Mr Watson/Burkle would incidentally have had a windfall which would not be recoverable from them. Thus, as Mr Marks submitted, it was not sensible for Mr Laing to seek to join Taylor Walton in the original proceedings because they could have had no liability to either party.
    v) There is potential further unfairness in Taylor Walton not being able to deploy documents for which Mr Watson/Burkle claim privilege and in difficulties in obtaining evidence from Mr Watson at a trial. Mr Watson lives in Spain.

22. Mr Laing, on the other hand, relies upon the facts that:
    i) Taylor Walton, by Mr Kelly, accept that they were acting for both parties in drafting the documentation which is criticised in the present case;
    ii) Mr Kelly also supports Mr Laing's case that only one 12.5% was involved (see, for example, his letter to Mr Laing dated 15 April 2004 and his witness statement dated 18 November 2004);
    iii) Mr Laing's case is itself one which I consider has a real prospect of success before another court;
    iv) If these proceedings are permitted to continue, Taylor Walton can defend them in the usual way by denying negligence and causation and, if thought appropriate, pleading contributory negligence.
    v) It would be unfair to Mr Laing if he were not permitted to pursue a case in which he alleges it was the negligent drafting of the documentation which exposed him to the claim by Mr Watson/Burkle. The case will require Mr Laing to prove not only negligence but causation, and so that presented with clear documentation (even assuming it was not clear) limiting his consideration to one 12.5%, Mr Watson would in fact have signed it.

Conclusion

23. As I have said, I think these considerations are finely balanced. Mr Laing avowedly seeks to reverse the decision of Judge Thornton by contending no more than that he lost when he should have won. But the truly unusual features of this case are that the basis for that contention is that it was his solicitors whose drafting enabled Mr Watson to pursue a case which otherwise he could not have done, because he would in fact have acknowledged the truth, and that the solicitors agree with Mr Laing in that Mr Kelly perceived himself to be acting for Mr Laing (and Mr Watson) and understood their agreement to be as Mr Laing says it was.

24. There is, I think, some unfairness to Taylor Walton. Granted the burden of proof, however, I do not think much can be made of Mr Watson's possible reluctance to give evidence and it is not said that he will not do so. Granted Mr Kelly's evidence, I cannot see that any documents for which privilege might continue to be claimed, are likely to be of assistance to Taylor Walton in defending Mr Laing's claim. The unfairness lies more in the exposure to a claim which arises from Judge Thornton's rejection of Mr Laing's evidence. But that unfairness has to be balanced against unfairness to Mr Laing from the fact that Mr Kelly himself believes Mr Laing was right and, as I have said,

I do think there is a real prospect of Mr Laing establishing that he and Mr Kelly were right and the Judge wrong. It also has to be balanced against the fact that Taylor Walton can pursue the other defences available to them in an answer to the claim.

25. In my judgment it would not be seen as bringing the administration of justice into disrepute to permit this claim to continue nor, if it is to do so, is any unfairness to Taylor Walton so manifest when balanced against the fair interests of Mr Laing that it would justify striking it out.

26. I shall therefore dismiss the application. I will hear the parties when this judgment is handed down on the form of order and any ancillary issues which cannot be agreed. The judgment was provided to the parties in draft on 8 February 2007.

Mr J. Marks QC (instructed by McBride Wilson & Co) for the Claimant
Mr W. Flenley (instructed by Mills & Reeve) for the Defendant