Neutral Citation Number: [2012] EWHC 2560 (Comm)

Case No: 2010 FOLIO 1194

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings,
Fetter lane. London EC4A 1NL

Date: 21/09/2012

Before :

MR. JUSTICE TEARE

Between :

MICHAEL WILSON & PARTNERS LIMITED	**Claimant**
- and -	
(1)THOMAS IAN SINCLAIR **(2)SOKOL HOLDINGS INCORPORATED** **(3)EAGLE POINT INVESTMENTS LIMITED** **(4)BUTTERFIELD BANK (BAHAMAS) LIMITED**	**Defendants**
-and-	
THOMAS IAN SINCLAIR **SOKOL HOLDINGS INCORPORATED**	Part 20 Claimants
JOHN FORSTER EMMOTT	**Part 20 Defendant**

Michael Fealy and Nicholas Sloboda (instructed by **DLA Piper**) for the **Defendants and Part 20 Claimants**
Charles Samek QC and David Mumford (instructed by **Healys LLP**) for the **Claimant**
Philip Shepherd QC (instructed by **Michael Robinson**) for the **Part 20 Defendant**

Hearing dates: 18-20 July 2012

Approved Judgment
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR. JUSTICE TEARE

Mr. Justice Teare :

1. This is an application by the First and Second Defendants ("the Sinclair Defendants") to strike out, or obtain summary judgment in respect of, a claim by the Claimant ("MWP") for or in respect of certain shares ("the Max shares") which the Third Defendant ("EPIL") received from an AIM listed company ("Max"). MWP claims that EPIL received the Max shares on behalf of the Part 20 Defendant ("Mr. Emmott") in breach of fiduciary duty by Mr. Emmott. The Max shares are, it is said, beneficially owned by MWP. The Sinclair Defendants and Mr. Emmott say that the shares were never received by EPIL on behalf of Mr. Emmott. Instead, they were received by EPIL on behalf of Mr. Sinclair, the First Defendant, and there was therefore no breach of fiduciary duty by Mr. Emmott. The application to strike out is supported by Mr. Emmott. It is opposed by MWP.

2. It is a remarkable feature of the claim brought by MWP that the central allegations made in it have already been determined against MWP in an arbitration in which MWP, Mr. Emmott and Mr. Sinclair have been involved, for the past 6 years. I use the word *involved* deliberately. MWP and Mr. Emmott were party to that arbitration. Mr. Sinclair was not. He did however give evidence to the arbitral tribunal. His interest in the arbitration was such that he funded Mr. Emmott's defence of the claim brought in the arbitration by MWP against Mr. Emmott. The arbitrators (Lord Millett, Christopher Berry and Valerie Davies) held that there was no relevant breach of fiduciary duty by Mr. Emmott and that the Max shares were beneficially held by Mr. Sinclair. Notwithstanding that award (which was unsuccessfully challenged by MWP under sections 68 and 69 of the Arbitration Act 1996; see *MWP v Emmott* [2011] EWHC 1441 Comm) MWP now seeks to raise the same issues in this, the Max action. The application to strike out therefore raises interesting questions regarding the interplay between arbitration and litigation.

3. Before considering the parties' submissions as to whether MWP is able to raise the same issues again in this court it is necessary to describe the facts in a little more detail.

4. MWP is a company which provides legal and business consultancy services in, among other places, Kazakhstan. Michael Wilson is its Managing Director. At the times relevant to these actions until 30 June 2006, John Forster Emmott was a director and employee of MWP.

5. Mr. Sinclair has at all material times been the Managing Director and a major shareholder of Sokol, a company incorporated in Delaware with interests in (among other places) Kazakhstan. Sokol was formerly a client of MWP and it engaged MWP in connection with various natural resource transactions in Kazakhstan (and elsewhere), including the transaction with which the Max Action is principally concerned (referred to as the "Max 1 Transaction").

6. Butterfield is the trustee (since 22 August 2006) of a trust in which Mr. Emmott is interested and is understood directly or indirectly to own EPIL, a Bahamian international business company.

7. The Max 1 Transaction involved the purchase and on-sale of interests in certain oilfields in Kazakhstan by Sokol, eventually to Max, which is an AIM listed company. MWP was engaged by Sokol in relation to the Max 1 Transaction,

ultimately pursuant to a written letter of engagement dated 6 January 2005 (the "Sokol Engagement Letter"). Mr. Emmott acted on MWP's behalf in connection with it. He played a significant role in furthering its success.

8. Shortly before the conclusion of the transaction certain players who were important to the success of the deal (the so-called "deal team") were rewarded by the issue of shares in Max. 134.1 million shares in Max were issued on or about 4 August 2005 to some 25 allottees (including Sokol), in accordance with instructions given by Mr. Sinclair.

9. 14.75 million of those shares (the "Max Shares") were issued to EPIL. It is MWP's case that the Max Shares were issued to EPIL for the benefit of Mr. Emmott as his reward for his participation in and contribution to the Max 1 Transaction. MWP further says that since Mr. Emmott was involved in the transaction as the agent and employee of MWP, the Max Shares ought to have come to it (in addition to the fees which it was paid or due pursuant to the Sokol Engagement Letter). It is MWP's case that, wrongfully and in breach of his contractual and fiduciary duties to MWP, Mr. Emmott connived with the Sinclair Defendants to divert the Max Shares to Mr. Emmott personally (though EPIL), when he ought to have ensured that they were granted to MWP.

10. EPIL also received in connection with the Max 1 Transaction a sum of $950,000. MWP likewise says that this sum (the "Max Funds") ought to have come to it, and that again wrongfully and in breach of duties Mr. Emmott diverted that opportunity to himself. Mr. Emmott has admitted that US$250,000 of the Max Funds were paid for his benefit and that he should account for them to MWP.

11. In June 2006 Mr. Emmott left MWP to work for a competitor business known as "Temujin". MWP says that Mr. Emmott conspired with two other former employees, Mr. Nicholls and Mr. Slater, in late 2005 to form Temujin and take advantage of work and opportunities belonging or available to MWP. The work and opportunities included projects in which the Sinclair Defendants were concerned. The role of the Sinclair Defendants in this alleged conspiracy, and their assistance and procurement of the alleged breaches of contract and fiduciary duty which it involved, are the subject of the Temujin Action.

12. On 14 August 2006, shortly following Mr. Emmott's departure, MWP commenced arbitration proceedings against Mr. Emmott pursuant to the arbitration clause in Mr. Emmott's contract of engagement with MWP (the "Emmott Arbitration"). In the Emmott Arbitration MWP pursued claims for breach of contract and fiduciary duty on Mr. Emmott's part in connection with a wide range of matters, including his undisclosed profit represented by the Max Shares and Max Funds, and his participation in the conspiracy to form and divert work to Temujin. It was Mr. Emmott's case in the Emmott Arbitration that the Max Shares were in fact intended for Mr. Sinclair's benefit and that they were simply warehoused by EPIL because Mr. Sinclair did not have his own offshore holding arrangements set up in time. In support of its claims in the arbitration MWP obtained freezing, disclosure and receivership orders from the Commercial Court (2006 Folio 921).

13. MWP invited Mr. Sinclair to join the Emmott Arbitration as a party in order that the claims in respect of the Max Shares could be determined conclusively as between the parties concerned. He refused.

14. On 19 October 2006 Mr. Sinclair issued proceedings in the Supreme Court of the Bahamas (the "Bahamian Action") seeking a declaration that the Max Shares belonged to him. EPIL was a Defendant to that action and gave a voluntary undertaking on 20 July 2007 (previously given orally at a hearing on 26 and 27 March 2007) that it would "*…hold safe and…not dispose of, transfer, charge or otherwise deal in the 14.75 million shares in Max Petroleum plc presently held by EPIL until the conclusion of these proceedings*..". MWP, which was also joined as a Defendant, successfully challenged the jurisdiction of the Bahamian Court. Accordingly, the Bahamian Court gave no decision on the merits. In his submissions to the Bahamian Court of Appeal counsel for MWP, Mr. Simms, said that if MWP's claims to beneficial ownership of the shares were held in the London arbitration to be wrong "then it will abandon its claim to the shares and that is the end of the matter."

15. The tribunal in the Emmott Arbitration issued its Second Interim Award adjudicating on the liability aspects of MWP's claims on 22 February 2010. (It was re-issued on 6 April 2010 with typographical and other corrections.) Among other findings, the Emmott tribunal found that (1) Mr. Sinclair had not given Mr. Emmott any Max Shares and was under no legal obligation to do so, and (2) Mr. Emmott had no interest in any of the Max Shares and had not made a profit, secret or otherwise, for which he would be made liable to account to MWP. However, Mr. Emmott was held liable to account for US$250,000 of the Max Funds but not the balance. The tribunal concluded that MWP had "no claim to any of the 14.75 million shares in Max held by the trustee of Mr. Emmott's Bahamian trusts and that they are held to the order of Mr. Sinclair. We shall authorise and direct each of the parties to inform the relevant trustees and the Supreme Court of the Bahamas of this finding but not of the reasons on which it is based."

16. By its Seventeenth Procedural Order dated 24 March 2010, paragraph 5, the tribunal stated that the parties were "authorized and instructed to inform the relevant Bahamian Court and the relevant Trustees of the dismissal of MWP's claim to any interest in shares in Max Petroleum."

17. On 6 April 2010 the tribunal issued a "Clarification" of its award. The tribunal stated that declaratory relief had not been granted because they considered it sufficient to dismiss MWP's claim and to give the direction in paragraph 5 of the Seventeenth Procedural Order. They added that if this should prove not to be sufficient to dispose of the proceedings in the Bahamas and enable the trustees to transfer the shares to Mr. Sinclair they would reconsider their decision not to grant a declaration.

18. By letter dated 22 April 2010 the tribunal authorized and directed Mr. Emmott's solicitor to release to Mr. Sinclair, the EPIL Trustees and the Bahamian Court the whole of section 5 of its award and paragraph 27 of section 8 of the award. That explains how it is that Mr. Sinclair, though not a party to the arbitration, has a redacted copy of the award. (By the Eighteenth Procedural Order dated 22 February

2012 the tribunal recorded that it was common ground that the whole of the award has been and will be before the Commercial Court.)

19. The ancillary freezing and receivership orders were discharged, insofar as they related to the Max Shares, by Order of Cooke J on 15 October 2010.

20. The Max Action was commenced on 12 October 2010. Proceedings were served on the Sinclair Defendants in the jurisdiction. The Sinclair Defendants served a Defence and Counterclaim on 18 November 2010. MWP served a Reply and Defence to Counterclaim on 2 February 2011, and the Sinclair Defendants served a Reply to the Defence to Counterclaim on 22 February 2011.

21. In March 2011 the proceedings were served on the Butterfield Defendants in the Bahamas but they have neither acknowledged service nor filed a Defence.

22. On 8 June 2011 Andrew Smith J. dismissed MWP's applications to challenge the award under sections 68 and 69 of the Arbitration Act 1996.

23. In September 2011 EPIL transferred the Max shares to Mr. Sinclair.

24. On 14 November 2011 MWP served Amended Particulars of Claim (having obtained the Court's permission to do so on 17 October 2011) including on the Butterfield Defendants in the Bahamas (on 8 December 2011). The latter again failed to take any steps in respond. The Amended Defence of the Sinclair Defendants was served on 12 December 2011 at the same time as the Strike-Out Application.

25. In the Max Action MWP alleges that the Max Shares and the Max Funds represented opportunities belonging to MWP which Mr. Emmott wrongly exploited for his personal benefit in breach of his contractual and fiduciary duties to MWP. Its alternative case is that they were secret commissions or bribes paid to Mr. Emmott. MWP claims that the Sinclair Defendants procured the issue of the Max Shares and payment of the Max Funds for Mr. Emmott's benefit knowing and intending that Mr. Emmott would thereby breach his duties. MWP makes no claim in the Max Action against Mr. Emmott. Instead it seeks:

    i. declarations against the Sinclair Defendants and Butterfield Defendants that the Max Shares and the Max Funds (or appropriate parts thereof) were held by EPIL on constructive trust for MWP;
    ii. equitable compensation for the dishonest assistance of the Sinclair Defendants in Mr. Emmott's breaches of his fiduciary duties;
    iii. damages for breach by Sokol of the Sokol Engagement Letter;
    iv. damages for Mr. Sinclair procuring Sokol's breach of contract, and damages against both Sinclair Defendants for procuring Mr. Emmott's breaches of contract;
    v. against the Sinclair Defendants, damages in the tort of fraud;
    vi. and against Sokol, damages or an account on the basis of its unjust enrichment, by reason of it having benefited from the Max 1 Transaction without properly compensating MWP for its services

and other contributions (part of the benefits being instead having been diverted to Mr. Emmott).

26. MWP also sues Sokol in the Max Action for a number of unpaid invoices.

27. The Sinclair Defendants deny the claims against them on (inter alia) the basis that the Max Shares were issued to EPIL for the sole benefit of Mr. Sinclair, and that EPIL was used as an offshore vehicle to receive the shares because the offshore trust structure which Mr. Sinclair had asked Mr. Emmott to set up had not been completed in time. They say that the Max Shares were held by EPIL on bare trust for Mr. Sinclair. As to the US$950,000 payment, the Sinclair Defendants do not admit the payment, but deny that they made or procured it. A set-off and counterclaim is also asserted in respect of alleged negligence on the part of MWP (acting by Mr. Emmott) in making arrangements for the receipt of the Max Shares.

28. On 2 May 2012 Mr. Emmott was joined as a Part 20 Defendant by the Sinclair Defendants with the leave of this court.

The strike out application

29. The question raised by the application to strike out MWP's claim may be described as follows: Where A has pursued a claim in arbitration against B alleging a breach of fiduciary duty and has failed to establish that claim can A thereafter pursue a claim against C in court alleging that C has dishonestly assisted B in committing a breach of fiduciary duty?

30. The Sinclair Defendants say that the answer to that question is No, for three reasons.

    a. First, there is privity of estate between Mr. Sinclair and Mr. Emmott such that MWP is estopped from making allegations against Mr. Sinclair which contradict the findings of the arbitral tribunal.

    b. Second, it is an abuse of the process of the court to permit MWP to challenge the findings of the tribunal.

    c. Third, MWP has obtained "satisfaction" from Mr. Emmott such that any claims against others who are jointly and severally liable with Mr. Emmott are extinguished.

Privity of estate

31. In *Powell v Wilshire* [2005] QB 117 there was a dispute over the ownership of an aircraft. Mr. Powell, the claimant, claimed that he acquired good title to the aircraft having bought it in good faith from Mr. Etherington who claimed to have bought it in good faith from Mr. Ebbs. Mr. Wiltshire, the defendant, claimed the aircraft was his. He had obtained judgment from the County Court in proceedings between himself and Mr. Ebbs. The court had declared that he, Mr. Wiltshire, was the owner of the aircraft. Mr. Wiltshire argued that Mr. Etherington was bound by that decision and therefore unable to deny Mr. Wiltshire's title and could not pass good title to Mr. Powell.

32. At first instance the court held that Mr. Powell was the owner of the aircraft. Mr. Wiltshire appealed. The Court of Appeal accepted that a judgment in personam raised an estoppel between the parties to the proceedings and their privies and that a person who claimed title to an interest in land or chattels was privy to the interest of those from whom he claimed title, but only if the title he claimed was acquired after the date of the judgment. Since Mr. Powell had purchased the aircraft from Mr. Etherington before Mr. Wiltshire had obtained judgment against Mr. Ebbs, Mr. Powell was not precluded from claiming good title to the aircraft. Mr. Wiltshire's appeal was therefore dismissed.

33. Latham LJ expressed his conclusion at paragraph 25 as follows:

> "……..where title to goods is in dispute ……..a person claiming title is privy to the interests of those through whom he claims that title for the purposes of the operation of the doctrine of estoppel per rem judicatam but only if the title he claims was acquired after the date of the judgment."

34. Arden LJ said at paragraph 36 as follows:

> "Res judicata promotes the important public policy of finality in legal proceedings and thus legal certainty……..If there was no estoppel per rem judicatam in this situation the result would always be that a defendant to an action about the ownership of property could always avoid the result of an adverse judgment by disposing of the property before the judgment was enforced. That would clearly be an intolerable state of affairs……."

35. Holman J. said at paragraph 51:

> "If after A has obtained a final judgment establishing that a chattel belongs to A rather than B, A wishes to sell it, it is essential that a purchaser can rely on the judgment as against B for otherwise A cannot really benefit from his judgment. Any alternative view would lead to uncertainty and commercial chaos."

36. On behalf of the Sinclair Defendants Mr. Fealy made the following submissions:

    a. As between MWP and Mr. Emmott MWP is estopped *per rem judicatam* from alleging, contrary to the decision of the arbitral tribunal, that Mr. Emmott received the Max shares (via EPIL) in breach of fiduciary duty and that MWP is beneficially entitled to those shares.

    b. EPIL is Mr. Emmott's privy because, as MWP alleges, EPIL is the nominee of Mr. Emmott. Therefore, as between MWP and EPIL MWP is estopped *per rem judicatam* from alleging, contrary to the decision of the arbitral tribunal, that Mr. Emmott received the Max shares (via EPIL) in

breach of fiduciary duty and that MWP is beneficially entitled to those shares.

c. Finally, there is privity of estate between EPIL and Mr. Sinclair because EPIL has transferred the Max shares to Mr. Sinclair. Therefore, as between MWP and Mr. Sinclair MWP is estopped *per rem judicatam* from alleging, contrary to the decision of the arbitral tribunal, that Mr. Emmott received the Max shares (via EPIL) in breach of fiduciary duty and that MWP is beneficially entitled to those shares.

37. On behalf of MWP Mr. Samek QC submitted that the decision and reasoning of *Powell v Wiltshire* did not apply to the facts of the present case, for these reasons:

a. EPIL's legal title to the Max shares was not in issue in the arbitration. That legal title has now been transferred by EPIL to Mr. Sinclair. What was in issue was the beneficial title to the shares. Mr. Sinclair alleged that the beneficial title always rested with him and the arbitrators agreed with him. That beneficial title did not derive from the transfer by EPIL but by events which preceded the arbitration award.

b. The essence of estoppel per rem judicatam was mutuality and there was none here because if the arbitrators had decided in favour of MWP that decision would not have been binding upon Mr. Sinclair since he was not party to the arbitration.

38. At issue in the arbitration was the beneficial ownership of the Max shares. The beneficial ownership of the Max shares is also at issue in the Max action. Thus the same estate has come into question in both the arbitration commenced by MWP and the litigation commenced by MWP.

39. EPIL held the legal title to the Max shares. As a result, the aspect of beneficial ownership in dispute in the arbitration was the right to instruct EPIL as to whom to transfer the Max shares. Did MWP have that right or did Mr. Sinclair have that right ? The arbitrators held that the beneficial ownership of the shares rested with Mr. Sinclair, not with MWP. He was entitled to instruct EPIL as to whom to transfer the shares. As and when that transfer was effected the transferee would be the beneficial owner of the shares so long as that was the intention underlying the transfer.

40. Had Mr. Sinclair instructed EPIL to transfer the shares to a third party, thereby intending to transfer both legal and beneficial interest in the shares, and had MWP then sued that third party claiming beneficial ownership of the Max shares the third party would have been able to say, on the authority of *Powell v Wiltshire,* that MWP was estopped from so contending. If the third party could do so then there must be force in the submission that Mr. Sinclair, as the transferee of EPIL, is equally be able to do so.

41. However, it is of the essence of estoppel per rem judicatam that it works mutually; see *Powell v Wiltshire* at paragraph 34 per Arden LJ. A person can only take the benefit of a decision if he would have been prejudiced by it had it gone the other way. But in the present case, if the decision of the arbitrators had been in favour of

MWP, Mr. Sinclair would not have been bound by it because he had not been party to the arbitration. There would therefore be no mutuality. This problem did not arise in *Powell v Wiltshire*. The person seeking to take the benefit of the estoppel in that case was Mr. Wiltshire who had been party to the earlier proceedings.

42. There is therefore a tension, indeed a conflict, between two principles. On the one hand it would, in the language of Arden LJ, be intolerable and, in the language of Holman J., would lead to uncertainty and commercial chaos if MWP were not bound by the arbitrators' decision. On the other hand it would be inconsistent with the mutual nature of estoppel per rem judicatam to enable Mr. Sinclair to take the benefit of such an estoppel when he would not have been affected by a decision going the other way.

43. I have not found the resolution of this conflict easy. Mr. Fealy, on behalf of Mr. Sinclair, submitted that if the decision of the arbitrators had gone the other way but that EPIL had nevertheless transferred the shares to Mr. Sinclair, Mr. Sinclair would have been bound by the arbitrator's decision and that therefore there was mutuality. I was not convinced that that was a satisfactory answer to the problem posed by Mr. Samek. Mr. Sinclair would no doubt have said in such circumstances that he was and always had been entitled to the shares and was not bound by the arbitration award to which he was not party. That would seem to me to be right.

44. It is tempting to say that the interests of certainty should prevail, particularly in circumstances where the arbitrators clearly intended and expected that their decision would be acted upon by the shares being transferred to Mr. Sinclair. However, in circumstances where it was not disputed that estoppel per rem judicatam works mutually so that a person can only take the benefit of an estoppel if he would have been prejudiced by the decision had it gone the other way I have concluded that MWP cannot be estopped, as against Mr. Sinclair, from alleging that which the arbitrators have rejected.

Abuse of Process

45. The type of abuse of process alleged by Mr. Sinclair is that which occurs where a person seeks to make a collateral attack on an earlier decision of a court of competent jurisdiction. This type of abuse is illustrated by two decisions of the House of Lords; *Reichel v Magrath* (1889) 14 App.Cas. 665 and *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. The relevant authorities were reviewed by the Vice-Chancellor in *Secretary of Trade and Industry v Bairstow* [2004] 1 Ch 1. He expressed the governing principles in these terms at paragraph 38:

> "(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 then, because of the terms of sections 11 to 13 of the Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view

> as to whether the evidence to displace such presumption must satisfy the test formulated by Lord Cairns LC in *Phosphate Sewage Co Ltd v Molleson* 4 App Cas 801 , 814, cf the cases referred to in paragraphs 32, 33 and 35 above.) (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*." [emphasis added]

46. It was submitted on behalf of Mr. Sinclair that MWP's claim in this court was a challenge to the decision of the arbitral tribunal which was the competent tribunal to determine disputes between MWP and Mr. Emmott. That tribunal had determined that Mr. Emmott did not receive the Max shares in breach of fiduciary duty and that the Max shares were not beneficially owned by MWP. MWP now seeks findings from this court which contradict the determination of the tribunal which is, it is submitted, an abuse of the process of this court because it brings the administration of justice into disrepute. In support of that submission the following points were made:

    a. The central plank or starting point of the claims which Mr. Sinclair seeks to strike out is that Mr. Emmott received the Max shares (via EPIL) beneficially and that the beneficial ownership of those shares now rests with MWP. That is the very issue which the tribunal determined against MWP.

    b. The Max action was commenced after MWP had lost its claim to the Max shares in arbitration and long after MWP had informed the Bahamian Court of Appeal that if MWP's claim to the Max shares were determined by the arbitral tribunal to be wrong then MWP "will abandon its claim to the shares and that is the end of the matter."

    c. To permit MWP to have a second attempt at proving the allegations it has already failed to establish in arbitration would bring the administration of justice by this court into disrepute.

    d. It is unfair to both Mr. Sinclair and to Mr. Emmott who have successfully resisted the claims of MWP in arbitration to subject them to the same attack in litigation.

47. Mr. Emmott supported this proposition and emphasised the manifest unfairness to him of permitting the claims in the Max action to be advanced in circumstances

where he had successfully resisted the allegations of breach of fiduciary duty with regard to the Max shares in arbitration.

48. It was submitted on behalf of MWP that the Max action was not an abuse of the process of this court. The following points, in particular, were made:

    a. Mr. Sinclair was not a party to the arbitration and so was not only not bound by it but also could not rely on it. Reliance was placed on *Lincoln National Life v Sun Life Assurance Co. of Canada* [2005] 1 Lloyd's Rep. 606 and *Dadourian Group International Inc. v Simms* [2009] 1 Lloyd's Rep. 601.

    b. It is not settled law that the doctrine of abuse of process applies where the relevant previous decision is that of an arbitration tribunal. There is uncertainty in the law which is a material consideration on a summary disposal hearing.

    c. Assuming that the doctrine of abuse of process does apply where the previous decision was that of an arbitral tribunal the Max action is not an abuse of the process of this court because:
        i. The onus is on Mr. Sinclair to show that the Max action is an abuse of the process of this court; see *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 132 at p.138, *Calyon v Michailaidis and others* [2009] UKPC 34 at paragraphs 35 and 36 per Lord Rodger and *Nesbitt v Holt* [2007] PNLR 24 at paragraph 24 per Smith LJ.
        ii. A mere challenge to the findings of the arbitral tribunal, without more, is insufficient to bring the administration of justice into disrepute.
        iii. MWP accepts that the arbitration award is conclusive as between MWP and Mr. Emmott. In that arbitration MWP sought a remedy against Mr. Emmott and failed. MWP does not seek a remedy against Mr. Emmott in the Max action. Mr. Emmott has been brought into the action by Mr. Sinclair, not by MWP. MWP seeks a remedy against Mr. Sinclair. It was unable to seek that remedy against Mr. Sinclair in the arbitration. To seek that remedy now and for the first time cannot be an abuse of the process of this court.

49. The first question is whether the doctrine of abuse of process can apply where the previous decision was that of an arbitral tribunal.

50. In answering this question it is necessary to bear in mind that the question is whether the process of this court is being abused by a claim being brought before it. The nature of the court or tribunal which has given the decision said to be under collateral attack will or may be important in deciding whether the proceedings in this court are an abuse of its process. For example, where the decision under collateral attack is the decision of a jury in a criminal trial, there may be particularly cogent reasons for saying that the collateral attack is an abuse of the process of this court; see *Arthur JS Hall v Simons* [2002] 1 AC 615 at p.702 per Lord Hoffmann.

But there is high authority for saying that it is unwise to limit to fixed categories the circumstances in which it is the court's duty to prevent its processes from being abused; see *Hunter v Chief Constable* [1982] AC 529 at p.536 per Lord Diplock and *Arthur JS Hall v Simons* [2002] 1 AC 615 at p.702 per Lord Hoffmann. I have therefore concluded that there can be no rule that the court can have no such duty merely because the tribunal whose decision is under attack is an arbitral tribunal. However, it will probably be a rare case where an action in this court against a non-party to an arbitration can be said to be an abuse of the process of this court. Where a claimant has a claim against two or more persons and is obliged to bring one such claim in arbitration the defeat of that claim in arbitration will not usually prevent the claimant from pursuing his claim against the other persons in litigation. Arbitrations are private and consensual and non-parties cannot, in the absence of consent, be joined or be affected by the decisions of the arbitral tribunal.

51. Mr. Samek relied upon *Lincoln National Life v Sun Life Assurance Co. of Canada* [2005] 1 Lloyd's Rep. 606 and *Dadourian Group International Inc. v Simms* [2009] 1 Lloyd's Rep. 601. But neither of these decisions is authority for the proposition that the doctrine of abuse of process either does not or cannot apply where the previous decision is that of an arbitral tribunal.

52. *Lincoln National Life v Sun Life Assurance Co. of Canada* was a case involving two arbitral tribunals. A question considered by the Court of Appeal was whether a decision in one arbitration could give rise to an estoppel per rem judicatam in the other arbitration. The question arose in the context of insurance and reinsurance. It was not suggested that the principles of res judicata and issue estoppel could have any direct application; see paragraph 53 of the judgment of Mance LJ. But a submission was made that if, on a proper reading of the first award, an issue had been determined in a manner giving rise to an issue estoppel as between the parties to the arbitration, a reinsurer whose rights or liabilities depended upon the legal position between the parties to the first award was entitled to rely against the insurer, who was one of those parties, upon that determination; see paragraph 48 of the judgment of Mance LJ. In fact no issue estoppel was created by the first arbitration award and so the observations of the court on the issue were obiter; see paragraph 71 of the judgment of Longmore LJ.

53. Abuse of process was not relied upon; see paragraph 63 of Mance LJ's judgment. Mance LJ added that even if an arbitral tribunal had power to prevent its process from being abused certain considerations would have excluded its use on the facts of the case before the court. First, it was not obviously just to allow a stranger to an arbitration to enjoy a one-sided entitlement to hold a party to an award with a concomitant right to challenge its correctness whenever it appeared favourable to do so; see paragraph 66. Second, there was no reason why the reinsurer should gain any benefit from an award to which it was not party; see paragraph 67. Third, there are important differences between arbitration and litigation. In litigation different parties can be joined and trials heard together. By contrast arbitration is a consensual process and there is no ability to join different parties or to try connected matters together save by consent. Thus different conclusions may be reached by different arbitrators on the same evidence; see paragraph 68.

54. I accept that these are relevant considerations to bear in mind when deciding whether, on the facts of any particular case, there has been an abuse of the process of this court. It seems to me that they will often cause this court to conclude that it is not an abuse for A to make allegations against B which are contrary to the findings in an arbitration between A and C to which B was not party. However, in the light of the clear guidance from the House of Lords to which I have referred I am unable to accept that the doctrine of abuse of process cannot apply merely because the decision under collateral attack is that of an arbitral tribunal. Further, the court in *Lincoln National Life v Sun Life Assurance Co. of Canada* was not considering the case of an arbitration followed by litigation but of successive arbitrations.

55. In *Dadourian Group International v Simms* there had been an arbitration between DGI and Charlton in which the arbitrator had held that Charlton had made a fraudulent misrepresentation. Charlton did not honour the award and DGI commenced proceedings against the individuals behind Charlton. DGI claimed the costs incurred in the arbitration. The trial judge held that these were recoverable. It had been argued that these were not recoverable because the chain of causation was broken by DGI's breach of an agreement. The judge rejected this argument because the arbitrator had held that DGI had not broken the agreement and that the defendants were bound by that decision, being a decision between the contracting parties. The Court of Appeal held that the judge had been wrong in this approach and relied upon the reasoning in *Lincoln National Life v Sun Life Assurance Co. of Canada* to the effect that res judicata did not apply as between parties who were not parties to the same arbitration. That decision does not affect the question whether the doctrine of abuse of process can apply where the decision under collateral attack is that of an arbitration tribunal. Abuse of process was not considered.

56. The second question, assuming, as I have held, that the doctrine of abuse of process is capable of applying where the earlier decision was that of an arbitral tribunal, is whether, on the facts of this particular case, MWP's claims in the action before the court amount to a collateral attack on the findings of the tribunal and are an abuse of the process of this court.

57. I accept that the burden of proof in this regard is on Mr. Sinclair; see *Bragg v Oceanus Mutual* [1982] 2 Lloyds Rep.132 at p. 138 per Sir David Cairns. The test is "exacting"; see *Calyon v Michailaidis and others* [2009] UKPC 34 at paragraphs 35 and 36 per Lord Rodger. This must especially be so where the decision under collateral attack is that of an arbitration tribunal (for the reasons I have already given).

58. In considering whether the burden has been discharged it must be necessary to consider all the circumstances of the case. Some assistance in this regard was given by Sir David Cairns in *Bragg v Oceanus Mutual* at p.139. Was the first trial before the most appropriate tribunal or between the most appropriate parties? Was the second trial for the genuine purpose of obtaining the relief sought? Was a party in the first trial at some disadvantage from which he would be free in the second trial? In *Arthur JS Hall v Simons* [2002] 1 AC 615 at p.643 Lord Bingham gave further guidance:

> [38] As recognised by the Court of Appeal in the *Walpole* case [1994] QB 106, 116 and *Smith v Linskills* [1996] 1 WLR 763, 769, the House of Lords did not decide in the *Hunter* case that the initiation of later proceedings collaterally challenging an earlier judgment is necessarily an abuse of process but that it may be. In considering whether, in any given case, later proceedings do constitute an abusive collateral challenge to an earlier subsisting judgment it is always necessary to consider with care (1) the nature and effect of the earlier judgment, (2) the nature and basis of the claim made in the later proceedings, and (3) any grounds relied on to justify the collateral challenge (if it is found to be such).

59. In the present case there is no doubt that the factual allegations being made as to the conduct of Mr. Emmott in this action mirror exactly the failed allegations in the arbitration. The difference between the arbitration and the litigation is that the claim in the arbitration was against Mr. Emmott alleging that he had acted in breach of fiduciary duty whereas the claim in the litigation is against Mr. Sinclair alleging that he dishonestly assisted in that breach of duty. However, the underlying factual allegations concerning Mr. Emmott are the same. There is therefore a collateral challenge to the findings of the arbitration tribunal. But that can be said to be justified because Mr. Sinclair was not a party to the arbitration and had refused to be party to it. The Max action is therefore the only means by which MWP can bring its claim against Mr. Sinclair. It cannot, it is said, be an abuse of the process for MWP to seek to use its process in those circumstances.

60. If those had been the only material circumstances I would not have been persuaded that the proceedings in this court were being abused. However, there are, it seems to me, special circumstances in this case which must, in my judgment, be taken into account. First, Mr. Sinclair was a witness in the arbitration and was cross-examined. Second, Mr. Sinclair, no doubt because of his interest in the outcome of the arbitration, funded Mr. Emmott's defence in the arbitration. Third, the arbitration tribunal concluded that the Max shares were held to the order of Mr. Sinclair. Fourth, the arbitration tribunal intended and expected that the effect of its award would be that EPIL would transfer the Max shares to Mr. Sinclair. To that end it authorised disclosure of the relevant section of its award to Mr. Sinclair, the EPIL Trustees and the Bahamian Court. That explains how Mr. Sinclair, a non-party to the arbitration, has a copy of the award and reasons which would ordinarily be private and confidential to the parties.

61. I have considered whether this was a case where MWP was labouring under a disadvantage in the arbitration from which it would be free in the litigation. In his written submissions Mr. Samek said that there was a substantial lack of disclosure of relevant documents in the arbitration and referred to the witness statement of Mr. Marino in support. However, I was not referred to any comments by the arbitrators in this regard and the point was not developed orally. Mr. Samek also said that Mr. Sinclair had not given disclosure in the arbitration because he had successfully quashed a *subpoena* issued against him in Colorado. I was told that the order against Mr. Sinclair was set aside on the grounds that all relevant documents were held by

Sokol (against whom also a *subpoena* was issued). This appears to be confirmed by Mr. Marino who nevertheless claimed in his witness statement that both Sokol and Mr. Sinclair had further relevant documents which had not been disclosed and that the same "evasion and obstruction" will not be possible in the Max action. However, these assertions were not developed in any way and, as I have already said, I was not referred to any comments by the arbitrators criticising the disclosure given in the arbitration. I was not therefore persuaded that MWP was labouring under a disadvantage in the arbitration from which it would be free in the Max action.

62. In my judgment the special circumstances of this case which I have noted above have persuaded me that it would be an abuse of the process of this court to permit MWP to make the same factual allegations which it had made in the arbitration and had been rejected. Whereas many arbitrations have, and are intended to have, effect only between the parties to them this arbitration was different. Whether the Max shares were held by EPIL to the order of Mr. Sinclair or of MWP was the issue at the heart of the arbitration. The tribunal plainly envisaged that EPIL would dispose of the Max shares in accordance with the instructions of Mr. Sinclair pursuant to the award of the tribunal. This is apparent from the terms of their award, the terms of the Seventeenth Procedural Order, their Clarification dated 6 April 2010 and their letter dated 22 April 2010.

63. Further, proof of the allegation that EPIL had received the Max shares on behalf of Mr. Emmott in breach of his fiduciary duty is a necessary condition of MWP's claim in this court against Mr. Sinclair. Yet the tribunal rejected that allegation when it was made by MWP against Mr. Emmott. It is accepted that MWP is estopped as against Mr. Emmott from alleging that EPIL had received the Max shares on behalf of Mr. Emmott in breach of his fiduciary duty. Mr. Samek asserted that he could put that allegation to Mr. Emmott in cross-examination in this case. However, given the admitted estoppel it is difficult to see the basis on which that could be permitted. It was not explained to me how it could be permitted. That difficulty is a further manifestation that MWP's claim in this case is an abuse of process.

64. I accept that staying the claim in this court as an abuse will prevent MWP from advancing its claim against Mr. Sinclair (save for the one claim in debt which it is accepted would not be stayed). But it is clear that MWP had a full opportunity in the arbitration to put its case on the facts when cross-examining not only Mr. Emmott but also Mr. Sinclair. In those circumstances I do not consider that the fact that Mr. Sinclair refused to be party to the arbitration and that this court is therefore the only tribunal in which MWP can advance its claim against Mr. Sinclair is sufficient to prevent the claim in this court from being an abuse of process. This is especially so where the alleged breach of fiduciary duty by Mr. Emmott is the necessary pre-condition of MWP's claim against Mr. Sinclair.

65. I also accept that mutuality is absent. If the tribunal had decided in favour of MWP Mr. Sinclair would have rightly maintained that he was not bound by the findings of the tribunal. In *Lincoln National Life v Sun Life Assurance Co. of Canada* Jacob LJ said, at paragraph 88, that where a party seeks to re-litigate in subsequent proceedings against Y a point he fought fully in earlier proceedings against X, it

may that, notwithstanding a lack of mutuality, he can be prevented from doing so on the grounds of abuse of process. He expressed no concluded opinion on that issue. But it appears that mutuality is not a bar to an abuse of process argument. In *Reichel v Magrath* (1889) 14 App Cas 665 the new vicar, Magrath, was able to rely on the abuse of process even though he had not been party to the earlier proceedings between Reichel and the Bishop of Oxford and the Queen's College and so was not bound by any issue estoppel arising out of those proceedings. In *Arthur JS Hall v Simons* [2002] 1 AC 615 at p.701 Lord Hoffmann said of *Reichel v Magrath*:

> "Although the parties were different, the case was within the spirit of the issue estoppel rule. Dr. Magrath was claiming though the college, which had been a party to the earlier litigation."

66. The lack of mutuality is a factor to be taken into account but in the circumstances of the present case it does not, in my judgment, prevent MWP's claim in court from being an abuse of process. Mr. Sinclair had not been a party to the arbitration but his involvement in the arbitration and the fact that he has received the shares from EPIL pursuant to the award bring the case "within the spirit" of the issue estoppel rule.

67. There is also the issue of fairness. Both Mr. Sinclair and Mr. Emmott have been involved in a long arbitration and each has been cross-examined. It is said that it would be manifestly unfair to permit MWP to advance its allegations a second time, this time in open court. I am not persuaded that it would be manifestly unfair in the case of Mr. Sinclair since he always maintained that the result of the arbitration would not bind him and therefore he must have been aware of the risk that further proceedings would be brought against him. Mr. Emmott's position is different. He has defended himself against the allegations made against him. The tribunal found that the suggestion that he received 14.75 million shares was incredible. However, the tribunal found that he expected to receive some shares in Max, about 250,000 shares, and that had not MWP obtained a freezing order against the shares Mr. Sinclair might well have given Mr.. Emmott some shares in Max for which Mr. Emmott would have had to account to MWP as a secret profit. Thus it cannot be said that Mr. Emmott's reputation survived the arbitration intact. Nevertheless, when allegations have been fully and carefully considered it is usually unfair to permit the accuser to have a second opportunity to make the same allegations. Circumstances may exist which justify a second opportunity but I am persuaded that they do not exist in this case. It is true that MWP did not make Mr. Emmott a party to the litigation. He was made a party by Mr. Sinclair late in the day (with the leave of the court), giving rise to the suspicion that the joinder was only done to strengthen the abuse of process argument. Whether or not that was so Mr. Emmott would have been a witness in the proceedings and MWP would have wished to put its allegations to him a second time. I consider that that would be manifestly unfair to him.

68. For these reasons I have concluded that the Sinclair Defendants have discharged the exacting burden of establishing that MWP's claim in this action (apart from the claim in debt) is an abuse of the process of this court.

Satisfaction

69. That is sufficient to determine this application. I shall therefore deal briefly with the third argument on strike out, satisfaction. Where A has a claim against B and C who are jointly and severally liable to A in tort and A recovers judgment from B, who pays the judgment sum to A, A cannot thereafter maintain a claim for the same sum against C. Damage is an essential part of the cause of action and so once A has recovered his loss from B his cause of action against C is extinguished; see *Heaton v AXA Equity and Law Life Assurance* [2002] 2 AC 329 at p.335, paragraph 3, per Lord Bingham. It is to be noted that Lord Bingham identified another reason for this conclusion. A claim by A against C would amount to a collateral attack on the judgment already given.

70. Counsel for Mr. Sinclair submitted that there has been a final judicial settlement of MWP's claims against Mr. Emmott as regard the Max shares the effect of which was that MWP has obtained satisfaction of its claims for wrongdoing by Mr. Emmott and so any claim against Mr. Sinclair, who is jointly and severally liable with Mr. Emmott, has been extinguished.

71. In so far as the principle relied upon is based upon the claim against Mr. Sinclair being a collateral attack on the award in the arbitration between MWP and Mr. Emmott I have already concluded that it is and that the claim should be struck out as an abuse of the process of this court.

72. In so far as the principle relied upon is based upon MWP having obtained satisfaction from Mr. Emmott I am not persuaded that it applies where the claimant, far from obtaining judgment and satisfaction, has had his claim dismissed. The position is simply one where A, who has claims against B and C, who are jointly and severally liable to A, has had his claim against B dismissed. Whether he can advance his claim against C depends, in my judgment, upon whether such a claim would be a collateral attack on the judgment against A such that it should be struck out. It is an abuse of language to say that A has obtained "satisfaction" from B when his claim has been dismissed.

Summary judgment

73. The claim that summary judgment should be given to Mr. Sinclair on MWP's claims was based on two arguments, as follows:

    a. MWP's claim that it is beneficially entitled to the Max shares by reason of Mr. Emmott's alleged breach of fiduciary duty has no real prospect of success in the light of *Sinclair Investments v Versailles* [2011] 3 WLR 1153 and *Cadogan Petroleum v Tolley and others* [2011] EWHC 2286 Ch.

    b. The pleading is in a number of respects deficient.

74. It is strictly unnecessary to deal with these further arguments but I shall express my views shortly.

75. In *Sinclair Investments v Versailles* it was held that a beneficiary of a fiduciary's duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary; see the judgment of Lord Neuberger MR. at paragraph 88.

76. MWP has sought to address the difficulty created by *Sinclair Investments v Versailles* by reformulating its case as follows: the shares held by EPIL constitute assets acquired by Mr. Emmott by exploiting the property of and/or opportunities belonging to MWP with the knowledge and assistance of Mr. Sinclair and/or Sokol.

77. It was submitted on behalf of Mr. Sinclair that reformulating the claim to beneficial ownership of the 14.75 million Max shares in this way will not avail MWP, essentially for the reasons given by Newey J. in *Cadogan Petroleum v Tolley and others* [2011] EWHC 2286 (Ch). That case involved bribes or secret commissions. The claimants, who had bought certain equipment, claimed that they had had the opportunity to reduce what they were to pay by at least the amount of the alleged bribes and secret commissions and accordingly relied upon Lord Neuberger's acceptance that there could be a proprietary interest where advantage had been taken of an opportunity or right which was properly that of the beneficiary. Newey J. did not accept that argument. He said, at paragraph 30:

> "…….A bribe is to be seen as something the fiduciary obtained by doing a wrong rather than by depriving the beneficiary of an opportunity. Were it otherwise, beneficiaries would (contrary to the view of the Court of Appeal in *Sinclair*) very frequently have proprietary interests in bribes and secret commissions since they could commonly be said to have been derived from opportunities to obtain a reduced price (or, where an asset is being sold, an increased one), and cases approved in *Sinclair* could have been expected to have been decided differently……."

78. Counsel for MWP puts its case this way. The Max shares represented parts of the reward to those who participated and assisted in the Max transaction which should have come to MWP. Reliance is placed on evidence that MWP was to be rewarded not only by fees charged for hours spent but also, in a number of cases, by way of an equity stake in the transaction in connection with which it had been engaged. Thus it was said that the opportunity to receive the Max shares was properly an opportunity of MWP which Mr. Emmott took for himself. MWP's case was therefore distinguishable from *Cadogan*. It was not simply a case of the beneficiary of the fiduciary duty being deprived of the opportunity to enter into a transaction at a lesser price (commensurate with the amount of the bribe). It was a case of the beneficiary being deprived of the very shares which it expected to receive as its reward for its work on the Max transaction.

79. This case was challenged by counsel for Mr. Sinclair as contrived and improbable. But it is not possible on this application to decide the question of fact, namely, whether MWP really expected to receive 14.75 million shares as part of its reward for its services.

80. It was further said that the case had not been pleaded. However, the case is raised by paragraph 29 of the Amended Particulars of Claim.

81. I am therefore not persuaded that MWP's claim (leaving aside the question of abuse of process) has no real prospect of success.

82. The pleading of the causes of action relied upon has been criticised as defective. Those causes of action are dishonest assistance, breach of contract by Sokol, procuring a breach of contract, fraud and restitution. Following the criticisms the pleadings have been re-amended by the provision of further particulars (though it may be that permission for such re-amendments is yet to be granted). I have considered each cause of action and the further particulars. I do not consider that the pleadings can be said to be defective in the light of the further particulars.

Conclusion

83. The claim by MWP (save for the claim in debt) should be struck out as an abuse of the process of this court.

84. The claim by MWP should not be struck out on the basis of estoppel arising from privity of estate or on the basis of "satisfaction".

85. The claim for summary judgment on the basis that MWP's claim to beneficial ownership of the Max shares must fail because of the decision in *Sinclair Investments* and because the pleading is defective is dismissed.