Neutral Citation Number: [2022] EWCA Civ 414

Case No: CA-2021-000442

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
Lord Justice Popplewell and Mr Justice Garnham
[2021] EWHC 38 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2022

Before:

DAME VICTORIA SHARP, PRESIDENT OF THE QUEEN'S BENCH DIVISION
LADY JUSTICE THIRLWALL
and
LORD JUSTICE NEWEY

- -

Between:

DAVID GREENE	**Appellant**
- and -	
DAVID DAVIES	**Respondent**

- -
- -

Ben Hubble QC (instructed by **Kingsley Napley LLP**) for the **Appellant**
Martina Murphy and David Green (instructed by **Gunnercooke LLP**) for the **Respondent**

Hearing date: 2 March 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on 29 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives

Lord Justice Newey:

1. The question raised by this appeal is whether disciplinary proceedings against the appellant, Mr David Greene, arising from a complaint made by the respondent, Mr David Davies, fall to be struck out as an abuse of process or for lack of merit.

Basic facts

2. Mr Greene is the senior partner in Edwin Coe LLP. He was vice president of the Law Society in 2019 and became its president in 2020.

3. A company of which Mr Davies was the sole director, Eco-Power.co.uk Limited ("Eco-Power"), developed a system for reducing vehicle exhaust emissions. On 13 June and 16 July 2007, Transport for London ("TfL") and the Public Carriage Office ("the PCO") approved the system for use in London taxis and, on 11 September 2007, a modified version of the system was also approved. On 28 March 2008, however, approval for both the original and modified systems was withdrawn. Eco-Power responded by bringing judicial review proceedings, instructing Edwin Coe to represent it. The relief sought in the claim form included damages.

4. TfL and the PCO conceded that the decision to withdraw the approvals in respect of the original system had been unlawful, but the challenge to the withdrawal of approval for the modified system failed, with His Honour Judge Hickinbottom (as he then was) dismissing the claim in so far as it concerned that approval on 22 April 2008. In an order made on the following day, Judge Hickinbottom directed the parties to file written submissions as to both costs and any directions to be given in relation to the damages claim as it related to the unlawful withdrawal of the approvals of the original system. Subsequently, in a written decision dated 24 November 2008, Judge Hickinbottom determined that Eco-Power should pay 75% of TfL's and the PCO's costs of the judicial review proceedings and, with regard to the damages claim, made this order:

> "The Claimant's claim for damages shall be stayed with permission to apply. If the Claimant wishes to pursue that claim, it shall make an application to lift the stay and for directions in that claim, which will be set down for hearing before HHJ Hickinbottom with a time estimate of 30 mins. Each side will lodge and serve any further submissions relating to directions at least 7 days before the hearing."

5. Correspondence between Edwin Coe and Eco-Power followed. On 11 November 2009, Mr Davies confirmed to Mr Greene in an email that he "definitely" wanted to proceed with the damages claim, and on 16 November 2009 Mr Greene sent Mr Davies an email in which he said:

> "Many thanks for the payment. We are opening a new file for the damages claim. I attach our standard terms of business."

Those terms of business were headed:

> "CLIENT: David Davies

MATTER: Damages"

6. Eco-Power's damages claim was then pursued, with Edwin Coe as its solicitors. On 21 May 2020, however, Simon J concluded that the claim had no real prospect of success.

7. On 3 December 2010, Edwin Coe invoiced Mr Davies for £7,218.74 in respect of fees for acting in the damages claim. Mr Davies having refused to pay, Edwin Coe issued proceedings to recover its fees. Mr Davies' response was that Edwin Coe's client had been Eco-Power, not him.

8. The claim was the subject of a fast-track trial before District Judge Stewart in Winchester County Court on 12 December 2012. Edwin Coe relied on a witness statement which Mr Greene had made on 2 December 2012. Having mentioned the Court of Appeal's refusal on 29 July 2008 to grant Eco-Power permission to appeal from Judge Hickinbottom's April 2008 decision, Mr Greene said this in his statement:

> "9. I did not hear from Mr Davies for some considerable time. In the meantime the invoices delivered by my firm in relation to the judicial review remained in part undischarged.
>
> 10. On or about 16 November 2009 I spoke to Mr Davies. He asked if we would be willing to act to pursue the damages claim identified on the judicial review against Transport for London, the PCO and the Energy Savings Trust. I had not been in contact with him for some time. He explained what had happened in the meantime. He was at the time in negotiation with Transport for London in relation to a modified emission system. He was keen to issue a claim in damages.
>
> 11. At that time we were owed money on the previous file for his company. Mr Davies made it clear that his company had little or no money. It could not afford our fees. I was only willing to take on the claim on the basis that Mr Davies himself would meet our bills. I opened a file in his name and sent him terms and conditions, again, in his own name."

9. Mr Greene gave oral evidence at the trial and was cross-examined by Mr Davies, who was representing himself. In the course of his evidence, Mr Greene said that a new file had been opened for the damages claim because the previous file had been closed. Mr Greene explained:

> "We'd closed our file in relation to Eco-power because you'd stopped instructing us in relation to the judicial review …. We lodged an appeal against the judicial review finding and permission was refused. So that was the end of that matter as far as we were concerned. You came back to us a year, or some time later, in relation to a potential damages claim."

Mr Greene also said:

> "I think if there had been continuous instruction and we had been continuously instructed with Eco-Power and then we'd said, right, okay, from now on it's going to be you personally that I could understand, but the fact is we had finished the Eco-Power file some time considerably earlier and, as I say in my statement, you approached us again I think 12 months later saying could we do a damages claim."

Pressed on whether there had in fact been continuous emails, Mr Greene repeated that there had been "a break of a year". He also mentioned that he did not have "the old files in relation to Eco-power" and that the new file had been opened in Mr Davies' name because "Eco-power had no money … and hadn't discharged previous bills".

10. District Judge Stewart was not shown any of the correspondence which had passed between Mr Davies and Edwin Coe between July 2008 (when permission to appeal Judge Hickinbottom's decision was refused) and November 2009 (when Edwin Coe opened the file in Mr Davies' name). Neither Mr Davies nor Edwin Coe had disclosed it, and a chronology which Edwin Coe had prepared did not refer to it. It seems that it was available to Mr Davies on his laptop, but he did not take either Mr Greene or the District Judge to it.

11. District Judge Stewart gave an ex tempore judgment in favour of Edwin Coe. Towards the end of his judgment, he said:

> "11. Where does all this lead me? It seems to me I can make the following findings in this case with ease. Firstly, one cannot look at any one particular document in isolation from any other. I have to consider the whole course of dealing between these parties and Edwin Coe and the limited company. In my judgment, it is quite clear that there were two separate terms and conditions sent at very different times for different purposes, for Ecopower for the judicial review, page 76 are the terms and conditions. They were clearly accepted by that company. Secondly, a year later, or thereabouts, on page 87, one sees the terms and conditions. It clearly identifies Mr David Davies to be the client and it clearly shows on that document that there was a new client creation and Mr David Davies became the client ….
>
> 13. The course of conduct was here, clearly, in my judgment, … those terms and conditions. The defendant accepted by his conduct those terms and conditions by continuing to instruct Mr Greene and in my judgment all of these invoices were addressed to him. They remain payable and the one that I am dealing with, the sole invoice for this amount of money, of £7,218.74, remains unpaid …. The liability for payment rests with this defendant and nobody else."

12. Mr Davies applied for permission to appeal against District Judge Stewart's decision, but His Honour Judge Hughes QC declined to grant it, first, on the papers and, secondly, following an oral hearing on 7 January 2013. It appears that, at that hearing,

Mr Davies sought to rely on the fact that there had been correspondence between himself and Mr Greene in 2008-2009, but Judge Hughes was not persuaded that that mattered.

13. On 29 June 2015, Mr Davies issued a further application for permission to appeal against the 2012 decision, seeking to have it set aside on the following grounds:

> "2. The District Judge was deliberately misled by the evidence of Mr David Greene in that Mr Greene stated that there had been a break in representation where he had not heard from the Appellant for a year.
>
> 3. There was no break in the chain of representation as asserted by Mr Greene. This is shown by emails produced at appendix 1 to these grounds ….
>
> 4. This was material to the District Judge's reasoning."

14. That application was superseded by a fresh claim, issued on 24 September 2015, in which Mr Davies again asked that the 2012 order be set aside, and on the same grounds. District Judge Stewart struck out the claim of his own motion, but Mr Davies applied to set aside that order, and the application came before District Judge Stewart on 9 February 2016. Counsel for Mr Davies submitted that the 2012 decision had been "based on a lie by Mr Greene" and took the District Judge to certain of the emails which had passed between Mr Davies and Edwin Coe in 2008-2009.

15. Mr Davies' application was, however, dismissed. District Judge Stewart said in his ex tempore judgment:

> "9. What he is saying is that Mr Greene, who gave evidence on behalf of the Claimants in the original action, Edwin Coe, had misled the Court and it is said that so material was the misleading that it was really, effectively, tantamount to giving fraudulent representations to the Court as to what exactly was going on between the parties in the widest sense, that is Mr David Davies, Eco Power and Edwin Coe, between 2008 and 2009.
>
> 10. That does seem to be the pivotal date and I am asked, should the Court of its own initiative set aside this judgment in the light of the fact that Mr David Davies has now put before the Court some very important, he says, emails that exist between the period July 2008 and November 2009 …. [W]hat he says is, that there is significant dialogue between Edwin Coe, notably Mr Greene, and himself when the tenor of the evidence of Mr Greene seemed to be suggesting that they had not heard, Edwin Coe that is, from Mr David Davies, or for that matter Eco Power, for some significant time. The time period being about July 2008 to November 2009.

11. The emails suggest that there had been dialogue between the parties. That may be the case, but if l apply *Ladd v Marshall*, I have got to see whether this evidence could have been obtained promptly and whether it would have made any material difference. Even if these emails were before me, that does not dislodge the second agreement, the terms and conditions of which reach Mr David Davies, clearly citing he was to be the client and he was then at his election to accept those terms and conditions or to reject them.

12. By virtue of his conduct, he decided to accept them. Nothing in these emails displaces that. All it shows is there was some dialogue. But that is a million miles away from suggesting that Mr Greene had actually misled the Court. I cannot find anything in those emails that, (a) would have made any difference if they had been before me and secondly, anything in them that suggests that the evidence that Mr Greene gave me, either in writing or in the witness box, any way shows him to be anything other than truthful and I have to say that they do not displace the primary evidence that he gave me.

13. In any event, all of this evidence was available on computers, either by Mr David Davies producing it or Edwin Coe producing it …. They could have been produced at the trial. They were not.

14. The second point is, even if they were before me, they would not have made any difference because the rock of Gibraltar in this case is, effectively, the second agreement that went out from Edwin Coe to Mr David Davies citing him to be the client and that is irrebuttable ….

16. So, all of those are observations that I make. I cannot be satisfied or even begin to allow a plane to leave the runway, so to speak, that there has been any allegation of fraud. In other words, deliberately misleading this Court by Mr Greene. In my judgment, Mr Greene did nothing of the sort.

17. Even if these emails were before me, as I say, they would have made no difference …. Because even if all of this was put before the Court and I could be satisfied that there had been fraud, or the Court had been seriously misled at the original hearing, that might cause me such anxiety to set it aside of my own initiative under the first stage of the test. But this is a million miles from any fraudulent activity or deliberate misleading of the Court.

18. The real seeds of the problem are that Mr Davies did not think it was necessary to put them before the Court. He certainly thought at the appeal hearing it was necessary, but it

> made no difference and I can safely say that it would not have made any difference to me."

16. On 16 March 2019, Mr Davies filed a complaint with the Solicitors Disciplinary Tribunal ("the SDT"). The complaint began:

> "I would like to file a formal complaint of dishonesty against Mr David Greene, solicitor and senior partner of Edwin Coe LLP who has lied under oath and provided false sworn statements at a court hearing on December 12th 2012 in order to gain a fraudulent financial Judgment against me personally and has now initiated Legal proceedings for a Possession Order to sell my home …."

Later in the complaint, Mr Davies said:

> "In order to create the false impression that representation had ended for EcoPower Ltd and that a completely new claim had been started for a damages claim for me personally, David Davies, [Mr Greene] claimed that there was a gap in representation for a year and that I then came back to him year later (in November 2009) asking if he would represent me personally for a new damages claim. He made false written statements that he did not hear from me for some considerable time and categorically stated under oath that his representation for Eco-Power Limited ended after the appeal was refused in July 2008."

In the course of the complaint, Mr Davies referred to "blatant, obvious and unarguably false and dishonest statements", to Mr Greene having "deliberately and consciously lied" and to the judicial system having "failed by holding the belief and trust that a solicitor is being truthful, regardless of the evidence to the contrary and ruling in the solicitors favour".

17. On 21 March 2019, a division of the SDT decided that Mr Davies' complaint "appeared to raise prima facie serious allegations" which warranted further investigation by the Solicitors Regulation Authority ("the SRA"). Responding on 13 June, the SRA referred to District Judge Stewart's 2012 judgment and his refusal to set aside his judgment in 2016 and said that the SRA did not intend either to initiate its own application or to seek Mr Davies' agreement to its undertaking the existing application. In a letter dated 19 June, however, Mr Davies said that the SRA had not given proper consideration to his complaint. He reiterated that Mr Greene had made "false and dishonest" statements to "improperly gain a financial Judgement against [him] personally". He maintained that it was "not valid to state the fact that the Judge had dismissed the Appeal because he has done so based on the false written statements and statements under oath made by David Greene". Mr Davies concluded:

> "I have been advised that it is a standard practice for a rule 5 statement to specify the professional rules which are alleged to have been breached.

> The case as pleaded is based on an allegation that Mr Greene misled the Court. As such the rule 5 statement is to include the following allegations:
>
> 1 An allegation that, in providing the Court with misleading information, the Respondent breached principles 1, 2 and 6 of the SRA Principles 2011 ….
>
> 2 An allegation that, in misleading the Court, the Respondent acted (a) dishonestly alternatively (b) recklessly (for the reasons set out in the rule 5 statement) and a statement that it is not necessary to prove either dishonesty or recklessness in order to establish a breach of Principles 1, 2 and 6."

18. The SRA Principles to which Mr Davies referred were that you must "uphold the rule of law and the proper administration of justice" (Principle 1), "act with integrity" (Principle 2) and "behave in a way that maintains the trust the public places in you and in the provision of legal services" (Principle 6). The "rule 5" cited by Mr Davies was rule 5 of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the 2007 Rules"), to which I return below.

19. On 21 June 2019, a differently constituted division of the SDT considered Mr Davies' complaint and concluded that there was a case to answer. It referred in its memorandum of consideration to both the SRA's letter of 13 June and Mr Davies' of 19 June and said in paragraph 9:

> "The allegations were of serious misconduct. The Tribunal noted that it had been maintained by the Respondent that the Applicant personally was the client in the Damages Claim and by the Applicant that the client was in fact Eco Power. On the information available the Tribunal could not determine one way or the other the contractual arrangement relating to the fees. The Tribunal noted that the Damages Claim was issued in the name of Eco Power, and not the Applicant. On the face of it this suggested that the Firm had been acting for and instructed by Eco Power. Further, the supporting documents indicated there had been continuing correspondence during the period that it appeared the Respondent had indicated he had not heard from the Applicant. For these reasons, the Tribunal determined that there was a case to answer."

20. On 17 July 2019, Mr Greene applied for the case certified by the SDT to be struck out on the basis that Mr Davies' application was an abuse of process. Three points were advanced:

> "(i) that the Applicant had failed to disclose to the Tribunal the terms of the Judgment of District Judge Stewart sitting in the Winchester County Court dated 9 February 2016 ('the 2016 Judgment');

> (ii) that in the light of the 2016 Judgment there was no merit in the application and no conceivable basis on which the Lay Application could be successful; and
>
> (iii) the Tribunal proceedings amounted to a collateral attack on the 2016 Judgment".

21. Mr Greene's application was heard by a division of the SDT, again differently constituted, on 13 August 2019. The SDT acceded to the application on the second and third of the grounds advanced by Mr Greene for the reasons given in a written judgment dated 6 September 2019. It concluded in paragraph 11.45 of its judgment that District Judge Stewart's 2016 judgment "provided a clear, comprehensive and direct answer to the matters complained of" by Mr Davies. The SDT went on:

> "11.47 The Tribunal considered that the narrow and specific allegations made by the Applicant [i.e. Mr Davies] in his Lay Application (that the Respondent [i.e. Mr Greene] had lied in a witness statement, provided a misleading chronology to the court, and made false statements during cross-examination) were answered by the 2016 Judgment. Submissions were made on behalf of the Applicant that the 2016 Judgment was essentially irrelevant because it was not alleged that District Judge Stewart had been misled, but instead that the Respondent had made false statements in those proceedings (demonstrated by documentary evidence of correspondence during a period when the Respondent had said there had been none) which raised conduct issues. The Tribunal rejected this submission. The Tribunal considered that the terms of the 2016 Judgment made it clear that precisely the matters said to raise conduct issues had been considered, in the light of the supporting documentation, and had been comprehensively rejected.
>
> …
>
> *Lack of Merits*
>
> 11.49 [T]he Tribunal found that the 2016 Judgment made a material difference to the position presented to the previous Tribunal which considered certification on 21 June 2019. The judgment made it clear that the precise matters said to constitute misconduct had been considered by District Judge Stewart and, following consideration of the relevant supporting material adduced by the Applicant in support of his Lay Application to the Tribunal, and were roundly rejected. The Tribunal considered that not only did District Judge Stewart conclude that he had not been misled, he provided informed and authoritative findings that the Respondent had not been untruthful or in any way fraudulent in his evidence before the civil court. In the light of that finding, which engaged directly with the allegations made by the Applicant, the Tribunal did not consider there was any remote possibility that the Lay

> Application may succeed. Accordingly, the Tribunal was satisfied beyond reasonable doubt that the strike out application should be upheld on the basis that the Lay Application had no reasonable or realistic prospects of success. The Tribunal determined that the Applicant's Lay Application should be struck out on that basis ….
>
> *Abusive Collateral Attack*
>
> 11.50 The Tribunal fully accepted the submissions made about it being improper for it to entertain proceedings brought for the purpose of mounting a collateral attack upon a final decision made by another court of competent jurisdiction in previous proceedings. The Tribunal considered there may be circumstances where an unsuccessful litigant might properly raise issues of professional misconduct arising out of a case which had been lost notwithstanding the court's final determination. However, on the facts of the present case, this did not arise. The Tribunal accepted that the Applicant may have genuinely believed that his application raised distinct regulatory issues, but as noted above the Tribunal had rejected the submissions to this effect made on the Applicant's behalf. The Tribunal considered that in this case the potential regulatory issues were precisely those questions considered by District Judge Stewart and on which he made clear findings. There was no meaningful distinction between the issues thoroughly ventilated in the Applicant's unsuccessful set-aside claim and the issues featuring in his Lay Application. Whilst he may not have intended any abuse of the Tribunal's processes, the Tribunal did not consider that his application raised any potential regulatory issues falling out-with Judgment of District Judge Stewart … dated 9 February 2016. Accordingly, the Tribunal considered that to entertain the Lay Application would require it to go behind the decision of a court of competent jurisdiction which would be improper."

22. Mr Davies appealed against that decision, and on 12 January 2021 the Divisional Court (Popplewell LJ and Garnham J) allowed the appeal and set aside the SDT's order, concluding in paragraph 78 of its judgment that "the SDT's decision of 6 September 2019 is flawed both in its analysis of abuse of process and on the merits".

23. Mr Greene now, however, challenges the Divisional Court's decision in this Court.

The framework

24. The Law Society is designated as the "approved regulator" for solicitors by the Legal Services Act 2007. Section 28 of that Act requires an "approved regulator" to act, so far as is reasonably practicable, in a way which is compatible with the "regulatory objectives". Those objectives are specified in section 1(1) as:

> "the objectives of–

> (a) protecting and promoting the public interest;
>
> (b) supporting the constitutional principle of the rule of law;
>
> (c) improving access to justice;
>
> (d) protecting and promoting the interests of consumers;
>
> (e) promoting competition in the provision of services within subsection (2);
>
> (f) encouraging an independent, strong, diverse and effective legal profession;
>
> (g) increasing public understanding of the citizen's legal rights and duties;
>
> (h) promoting and maintaining adherence to the professional principles."

25. The Law Society has delegated matters relating to regulation to an independent arm, the SRA.

26. Complaints about solicitors are determined by the SDT, which was brought into being by section 46 of the Solicitors Act 1974. So far as Mr Davies' complaint about Mr Greene is concerned, SDT procedure is governed by the 2007 Rules, which continue to apply to applications made before the Solicitors (Disciplinary Proceedings) Rules 2019 came into force. It is relevant to note the following parts of the 2007 Rules:

    i) Rule 5 provided for an application to the SDT in respect of any allegation or complaint made against a solicitor to be "supported by a Statement setting out the allegations and the facts and matters supporting the application and each allegation contained in it";

    ii) Under rule 6, a solicitor member of the panel of the SDT was to certify whether there was a "case to answer", meaning, by rule 2, "an arguable or prima facie case";

    iii) Rule 7(1) stated:

    > "The applicant may file supplementary Statements with the Clerk containing additional facts or matters on which the applicant seeks to rely or further allegations and facts or matters in support of the application. Any supplementary Statement containing further allegations against the respondent shall be treated as though it were an application for the purposes of rules 5(3) and 6(1), (2), (3) and (5)";

    iv) Rule 11(6) barred an application or allegation in respect of which a case to answer had been certified from being withdrawn without the consent of the SDT;

v) Rule 15(4) provided:

> "The judgment of any civil court in any jurisdiction may be proved by producing a certified copy of the judgment and the findings of fact upon which that judgment was based shall be admissible as proof but not conclusive proof of those facts."

The issues

27. The issues to which the appeal gives rise can be addressed under the following headings:

i) Abuse of process

ii) Lack of merit.

28. I shall take these in turn.

Abuse of process

Some principles

29. In *Hunter v Chief Constable of the West Midlands* [1982] AC 529 ("*Hunter*"), the House of Lords declined to permit men who had been convicted of murder to proceed with civil claims for assaults that they claimed had taken place when they were in police custody, the judge at the criminal trial having ruled on a voir dire that the police had proved beyond reasonable doubt that there had been no violence or threats to the men. Lord Diplock referred at 536 to:

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".

Lord Diplock observed at 536 that "[t]he circumstances in which abuse of process can arise are very varied", but explained at 541 that the abuse of process exemplified by the case before the House of Lords was:

> "the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon 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".

The applicable principle was, Lord Diplock said at 542, stated in passages from the judgment of A. L. Smith LJ in *Stephenson v Garnett* [1898] 1 QB 677 and the speech of Lord Halsbury LC in *Reichel v Magrath* (1889) 14 App Cas 665. In *Stephenson v Garnett*, A. L. Smith LJ said at 680-681:

> "the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court".

In *Reichel v Magrath*, Lord Halsbury LC said at 668:

> "I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again".

30. The Court of Appeal considered the implications of *Hunter* and cases subsequent to it in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2004] Ch 1 ("*Bairstow*"), where a director against whom an application had been brought under the Company Directors Disqualification Act 1986 was held to be able to dispute findings which had been made against him by a High Court Judge in previous wrongful dismissal proceedings. Sir Andrew Morritt V-C, with whom Potter and Hale LJJ agreed, concluded at paragraph 38 that "[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". "If", Sir Andrew Morritt V-C noted, "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". If, on the other hand, there is no such identity of parties, 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".

31. That approach was recently reaffirmed in *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7, [2021] 3 WLR 1317. In that case, Marcus Smith J, with whom Lewison and Arnold LJJ agreed, observed at paragraph 44(i):

> "The jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation. It is an *exceptional* jurisdiction, enabling a court to protect its procedures from misuse. Thus, a court is able to - indeed, has a duty to - control proceedings which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people …."

32. The Divisional Court accepted in paragraph 48 of its judgment in the present case that the principle identified in *Hunter* applies in the context of disciplinary proceedings,

and Ms Martina Murphy, who appeared for Mr Davies with Mr David Green, rightly did not suggest otherwise.

33. Several of the cases to which we were referred illustrate that it is not necessarily an abuse of process to invite a Court or tribunal to make a finding inconsistent with one made in earlier proceedings. In *R v L* [2006] EWCA Crim 1902, [2006] 1 WLR 3092, a man was convicted of the manslaughter of his son even though Hedley J had found in care proceedings that it was impossible to say which of the child's parents was the more likely to have inflicted the injuries. The Court of Appeal held that the prosecution had not been an abuse of process and that the conviction should stand. Sir Igor Judge P, giving the judgment of the Court, said at paragraph 58 that it would be "astonishing" if "the decision in the care proceedings resulted in a terminating, unappealable ruling against the prosecution in the criminal proceedings, which by long established constitutional principle should, unless the defendant pleads guilty, be decided in open court by a jury, or magistrates". Sir Igor Judge P went on in paragraph 59:

> "In our judgment the decision in the care proceedings was not, and could not be, a final determination of the criminal proceedings. Moreover, no question of autrefois acquit, or issue estoppel, or double jeopardy could arise. Even if Hedley J had invited the Crown to attend the hearing of the care proceedings as an interested party, and said in terms (and he did not) that he intended his decision finally to decide the outcome of all proceedings involving the appellant, for the purposes of criminal proceedings, any such observations would, on proper analysis, have been meaningless. In the language of Lord Lane in *Imperial Tobacco Ltd v Attorney General* [1981] AC 718, 752 the criminal court would not be bound by any such pronouncement."

34. In *Conlon v Simms* [2006] EWCA Civ 1749, [2008] 1 WLR 484, the claimants alleged that they had been induced to enter into partnership with the defendant by fraudulent misrepresentations and sought to rely in that connection on findings of dishonest conduct which the SDT had made against the defendant. The Court of Appeal held that it was not an abuse of process for the defendant to deny the SDT's findings. Taking in turn the two conditions which Sir Andrew Morritt V-C had identified in *Bairstow* (see paragraph 30 above), Jonathan Parker LJ said:

> "149. As to the first of those conditions (unfairness to Mr Conlon and Mr Harris if the issues as to Mr Simms's dishonesty had to be relitigated), I consider that that condition is not satisfied in the instant case. As claimants in the action, Mr Conlon and Mr Harris have to establish, essentially, that had they known that Mr Simms had acted dishonestly in the course of his practice as a solicitor when they entered into the relevant agreements with him they would not have entered into those agreements; and that in consequence they have suffered financial loss. I can see no good reason why, in attempting to do so, they could not have pleaded and proved specific examples of Mr Simms's dishonest conduct, rather than

> seeking to import the entirety of the SDT's findings into their pleading as, in effect, determinative of the issue of dishonesty. Indeed, it may well be that a single example of Mr Simms's dishonesty, if serious enough, would (if proved) be sufficient to support their claim ….
>
> 150. By contrast, Mr Simms, as defendant in the action, is doing no more than denying the allegations of dishonesty. I find it hard to see that how, simply by so doing, he is 'initiating' anything, in any relevant sense; or, for that matter, how he can be said to be thereby 'changing the form of the proceedings': see *Reichel v Magrath* 14 App Cas 665, 668, per Lord Halsbury LC, quoted by Lord Diplock in the *Hunter* case [1982] AC 529, 542c–d. Were the issues before the SDT and the issues in the present action identical, the position might be different, but they are not. The basic issue before the SDT was whether Mr Simms's dishonest conduct, taken as a whole, justified his being struck off. The basic issue in the present action is whether Mr Conlon and Mr Harris were deceived by Mr Simms into entering into agreements with him.
>
> 151. In my judgment, however, the critical factor in the context of the first of the Bairstow conditions is that Mr Conlon and Mr Harris could, without (so far as I can see) any real difficulty, have selected particular matters from the SDT findings and pleaded and proved them: it was not necessary for them, in order to make good their claim, to seek to import the entirety of those findings ….
>
> 152. As to the second *Bairstow* condition (to permit such relitigation would bring the administration of justice into disrepute) I consider that that condition also is not satisfied in the instant case, for essentially the same reasons. In my judgment right-thinking people (to use Lord Diplock's expression in the *Hunter* case) would consider it unfair to Mr Simms that, faced with a pleading which sought to import the SDT findings en bloc, he should be prevented from requiring Mr Conlon and Mr Harris to prove their case."

35. In *Ashraf v General Dental Council* [2014] EWHC 2618 (Admin), [2014] ICR 1244, Dr Ashraf, a dental practitioner, had applied to stay disciplinary proceedings against him on the strength of the fact that a criminal prosecution relating to the same matters had ended with his acquittal. The Divisional Court (Sir Brian Leveson P and Cranston J) dismissed an appeal by Dr Ashraf against the Professional Conduct Committee's decision not to accede to his application. Sir Brian Leveson P said in paragraph 33 that a passage from *R (Redgrave) v Commissioner of Police for the Metropolis* [2003] EWCA Civ 4, [2003] 1 WLR 1136 "cannot be considered authority, if it ever was, for the proposition that it would necessarily be an abuse of process to bring disciplinary proceedings against a person on substantially the same subject matter as had been the subject of failed criminal proceedings" and went on in paragraph 34:

> "In that regard, it is important to bear in mind that the purpose of criminal proceedings is the imposition of a sanction for breach of the criminal law; regulators have no choice whether or not a prosecution is mounted (usually by the CPS) following a complaint of crime even if the complainant is the NHS. The focus of regulators is to maintain the standards and integrity of the profession to ensure that public confidence is and can be maintained and it would not be in the public interest for a form of regulatory arbitrage to take place if there was an 'either/or' approach to whether proceedings should be pursued through the criminal courts or by the regulator …. The test must not be whether a second bite of the cherry might secure a 'better' outcome but, rather, what is in the public interest, viewing the case through the lens of the obligations placed on the regulator."

36. It is also relevant to mention *R v Metropolitan Police Disciplinary Tribunal ex p. Police Complaints Authority* (1993) 5 Admin LR 225. In that case, a woman (Mrs Al-Subaie) who had been convicted of keeping a disorderly house complained that police officers who had given evidence at the trial had perjured themselves and planted a whip. The Police Complaints Authority directed that disciplinary charges should be brought against the officers, and the Divisional Court (Nolan LJ and Jowitt J) held that the matter should proceed. "It must be clearly recognised", Nolan LJ said at 240, "that *Hunter* provides no authority for any general proposition that false statements made at the trial of a convicted defendant cannot form the subject of disciplinary proceedings so long as that conviction stands". *Hunter* "was a wholly different case as regards the identity of the parties to the subsequent proceedings, the purpose of those proceedings, and the demonstrable identity between the questions sought to be raised in the subsequent proceedings and the question which had been answered in the earlier trial". Nolan LJ said at 239:

> "The disciplinary proceedings are not being brought by Mrs Al-Subaie. The PCA [i.e. the Police Complaints Authority], at whose direction they are brought, was not concerned in the criminal trial. The PCA cannot be accused of pursuing the collateral purpose of setting aside Mr Al-Subaie's conviction. Mrs Al-Subaie's motives in making her complaint may have a bearing on her credibility, but that is another matter entirely and one which has yet to be tested."

37. I find it helpful to have in mind, too, principles relating to issue estoppel. As Lord Sumption explained in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160, at paragraph 17, "issue estoppel" describes the "principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties". As Lord Sumption also noted, the policy underlying issue estoppel may be regarded as "the more general procedural rule against abusive proceedings".

38. In *Thomas v Luv All Promotions Ltd* [2021] EWCA Civ 732, [2022] 4 WLR 9, Lewison LJ (with whom Lewis LJ and I agreed) discussed the role of issue estoppel in

relation to a decision made on more than one ground. After citing, among other things, *Spencer Bower & Handley, Res Judicata*, 5th ed (2019), at paragraph 8.25, and *Good Challenger Navegante SA v Metalexportimport SA (The Good Challenger)* [2003] EWCA Civ 1668; [2004] 1 Lloyd's Rep 67, Lewison LJ concluded in paragraph 51 that "even if a 'twin ratio' decision can create an estoppel in relation to both rationes, an inability to appeal may be one of the special factors which persuade a court to permit a challenge to at least one of the rationes". *Spencer Bower & Handley* states in paragraph 8.25:

> "Another useful test is whether, given a right of appeal, the losing party could effectively appeal against the determination. If there can be no effective appeal against a determination this normally indicates that it was not fundamental. The test is not universally valid because decisions of a court of final appeal and decisions of lower courts from which there is no right of appeal create issue estoppels in the normal way. The ultimate test is whether the determination is such that without it the judgment cannot stand ….
>
> The same principle applies where the court finds alternative grounds in favour of the successful party. Those findings do not create issue estoppels because the losing party could not effectively appeal against any of them separately, and if one was upheld the appeal would fail. There may be a cause of action estoppel or merger but no issue estoppel because no single finding could be 'legally indispensable to the conclusion' or the 'essential foundation or groundwork of the judgment, decree, or order' as Dixon J said in *Blair v Curran*."

The Divisional Court's judgment

39. The Divisional Court accepted in paragraph 58 of its judgment that "there may be cases where a complaint is inconsistent with a civil judgment and the circumstances would make it unfairly vexatious for the solicitor to be required to relitigate in the disciplinary proceedings the issues which had been investigated and resolved in the civil proceedings, despite the difference in function between the respective tribunals". However, it considered that "Mr Davies' complaint is not unfairly vexatious of Mr Greene, if it is sufficiently arguable to raise a case to answer on its merits, and a decision by the SDT to continue with disciplinary proceedings against Mr Greene could not reasonably be regarded as an affront to the administration of justice or an abuse of process". District Judge Stewart, the Divisional Court said in paragraph 51, was not considering "the identical question" as that raised by Mr Davies' complaint: the District Judge "was not addressing the question whether Mr Greene's conduct fell short of the relevant professional standards" and, having regard to Mr Davies' letter of 19 June 2019, the SDT "was bound to consider whether the conduct complained of breached [the SRA Principles cited in that letter], even if it fell short of deliberate dishonesty". Further, "[a]lthough Mr Davies was both the lay applicant in the SDT proceedings and a party in the civil action, the case before the SDT is a disciplinary complaint in which there is a public interest irrespective of the identity of the prosecutor": paragraph 56. "[O]nce a case to answer has been certified, the application and allegations cannot be withdrawn without the consent of the SDT",

"[t]he statutory regulatory objectives dictat[ing] that there should be a disciplinary inquiry": paragraph 56. "[W]hen it comes to matters which are relevant to the regulatory functions which the Tribunal is engaged in", the Divisional Court said in paragraph 57, "it must generally reach its own view: a judgment of a civil court is of no more than evidential weight". In fact, "[i]t is difficult to see how a complaint can properly be characterised as an abuse merely because it is inconsistent with a civil judgment, when the Rules provide that the civil judgment is not necessarily dispositive of a question of professional conduct": paragraph 57.

Mr Greene's case in outline

40. Mr Ben Hubble QC, who appeared for Mr Greene, submitted that allowing Mr Davies to proceed with his complaint would both bring the administration of justice into disrepute and be manifestly unfair to Mr Greene. The complaint, Mr Hubble said, is premised on District Judge Stewart having been misled in 2012. That very question was the subject of the 2016 judgment given by the same Judge, who explained in trenchant terms in a reasoned judgment that he was not misled. Citing *Conlon v Simms*, Mr Hubble said that the case for viewing the complaint as abusive is the stronger because Mr Greene did not initiate the proceedings that are now at issue, namely, the application in respect of Mr Davies' complaint. Mr Hubble relied, too, on the fact that the application has been brought by Mr Davies rather than the SRA, and further suggested that it is reasonable to assume that the complaint was designed to achieve what the 2015 application had failed to bring about: the setting aside of the 2012 judgment. Mr Hubble recognised that disciplinary processes have a regulatory function which a civil action lacks, but he pointed out that that difference cannot be determinative or the *Hunter* principle could have no application to complaints. To permit Mr Davies to pursue his complaint would in the circumstances bring the administration of justice into disrepute, Mr Hubble maintained. Given the lengthy history, it would also be manifestly unfair to Mr Greene.

The scope of the complaint

41. Two points arise in relation to the scope of Mr Davies' complaint. First, should the complaint be seen as limited to one of dishonesty or is it to be taken to extend also to (honest) breaches of Principles 1, 2 and 6 of the SRA Principles? Secondly, is it crucial to the complaint that District Judge Stewart was in fact misled?

42. With regard to the first of these points, the Divisional Court proceeded on the basis that Mr Davies' complaint had been widened by his letter of 19 June 2019. The Divisional Court noted that, in its original form, the complaint "made very clear that the allegation was that Mr Greene had deliberately and dishonestly lied to DJ Stewart" (paragraph 21 of the judgment), but considered that the 19 June 2019 letter had the consequence that "the SDT would be bound to consider whether the conduct complained of breached the 2011 Principles identified in Mr Davies' document of 19 June 2019, even if it fell short of deliberate dishonesty" (paragraph 75).

43. Mr Hubble took issue with this. Mr Greene, Mr Hubble submitted, was and is entitled to treat the complaint itself as defining the allegations against him. The ambit of the complaint must, Mr Hubble argued, be ascertained by reference to the original document, not other pre-certification correspondence.

44. I cannot accept this. Rule 7 of the 2007 Rules specifically provided for an applicant to file supplementary statements containing "further allegations" and for any supplementary statement containing further allegations to be treated as though it were an application for the purposes of rule 6(1), (2), (3) and (5) (dealing with certification of a case to answer). Moreover, it can be seen from paragraph 5 of the memorandum of consideration of the SDT panel which certified that there was a case to answer on 21 June 2019 that the panel had Mr Davies' 19 June letter before it. In the circumstances, it seems to me that the question whether the case certified by the SDT should be struck out, in accordance with Mr Greene's application, must be approached on the footing that the complaint includes allegations that Mr Greene breached Principles 1, 2 and 6 of the SRA Principles without any dishonesty.

45. Turning to the second point, it was a recurring theme of Mr Hubble's submissions that Mr Davies' complaint was that District Judge Stewart had been misled. In this connection, he drew attention in particular to the places in which Mr Davies used the word "misled" in his 19 June 2019 letter. As already mentioned, Mr Davies prefaced his explanation of the allegations which the rule 5 statement was to include with the sentence: "The case as pleaded is based on an allegation that Mr Greene *misled* the Court" (emphasis added). Further, when explaining why he considered that the SRA's letter of 13 June 2019 had not answered his allegations against Mr Greene, Mr Davies said:

    i) "It includes some statements which are factually incorrect and also dismiss aspects of the complaint on the grounds that the Judge has not taken action, so therefore the SRA are able to dismiss the complaint, which is obviously a flawed and unreasonable position, because the Judge has clearly been *misled* by the false and dishonest statements made by David Greene or influenced because he is a prominent solicitor";

    ii) "It is not valid or reasonable to quote a Judge who has made his ruling based on the false evidence provided in writing and under oath by David Greene. The Judge has either been *misled* or improperly influenced"; and

    iii) "It is clearly the case that the SRA 'Investigation' has not scrutinized the evidence of the complaint at all. In fact it has not provided any reasonable answers to any of the questions raised and has made statements which seem to dismiss the clear, unarguable and credible evidence detailed in the complaint that David Greene has made false and dishonest statements in writing and under oath and has *misled* the Judge in order to gain a financial judgment"

    (emphasis added in each case).

46. On the other hand, the word "misled" did not feature anywhere in Mr Davies' original complaint of 16 March 2019. Mr Davies began that by saying that the complaint was "of dishonesty", Mr Greene having "lied under oath and provided false written statements … in order to gain a fraudulent financial Judgment". Mr Davies was thus giving the purpose for which Mr Greene had given the allegedly false evidence as "in order to gain a fraudulent financial Judgment". That did not of itself, however, amount to an assertion that Mr Greene had succeeded in the suggested purpose, let alone mean that it was a necessary element of the complaint that the evidence had in fact brought about "a fraudulent financial Judgment". Again, Mr Davies identified as

one of the "several aspects of this deception and fraud" which "raise very serious concerns and undermine the credibility and trust in legal professionals and the judicial system they represent" that "the Judicial System has failed by holding the belief and trust that a solicitor is being truthful, regardless of the evidence to the contrary and ruling in the solicitors favour", but that was only one of the "several aspects". The others referred to Mr Greene having been prepared "to lie in sworn written statements and under oath for financial gain" and to his having been willing "to make these false and dishonest statements for financial gain without fear of being held to account". Elsewhere in the complaint, Mr Davies spoke of Mr Greene having "deliberately and consciously lied", to his having "falsely claimed that representation for EcoPower Ltd had ended in July 2008", to his having "made false written statements that he did not hear from [Mr Davies] for some considerable time" and to his having "categorically stated under oath that his representation for Eco-Power Limited ended after the appeal was refused in July 2008". In the circumstances, I do not read the original complaint as *depending* on District Judge Stewart having in fact been misled by the allegedly false evidence, regardless of whether it should be taken to have *included* an assertion to that effect. Doubtless, Mr Davies considered that the District Judge had been misled, but that was not crucial to the complaint.

47. Was, then, Mr Davies' complaint narrowed in this respect by his letter of 19 June 2019? I do not think it was. As I see it, Mr Davies was not defining, let alone limiting, his complaint in the passages from the 19 June 2019 letter quoted in paragraph 45(i) and (ii), but rather advancing reasons why the SRA should not have considered District Judge Stewart's judgments to be fatal to the complaint. In the passage set out in paragraph 45(iii), Mr Davies referred to the complaint being that Mr Greene "has made false and dishonest statements in writing and under oath and has misled the Judge in order to gain a financial judgment", but that is perfectly consistent with Mr Davies' complaint including a free-standing allegation, in line with the original complaint, that Mr Greene "made false and dishonest statements in writing and under oath", regardless of whether he also misled District Judge Stewart. With regard, finally, to the sentence in which it was said that the case "is based on an allegation that Mr Greene misled the Court", Mr Davies immediately went on to specify allegations which the rule 5 statement was to include, and he there referred to "providing the Court with misleading information". That, it seems to me, is consistent with Mr Davies alleging that Mr Greene's evidence was such as was *liable to mislead* the Court rather than necessarily having that effect. In fact, it seems to me that the word "misled" can also be read in that way, as can the reference in the letter to "misleading the Court".

48. Mr Hubble accepted that the giving of false evidence by a solicitor in Court proceedings can, in principle, found disciplinary proceedings whether or not the evidence has affected any Court decision and even, presumably, if it is simply disbelieved by the Court. As the Divisional Court said in paragraph 76 of its judgment, "a lie that does not mislead the recipient is still a lie", and I would add that a lie that does not *in the event* mislead may nonetheless involve "providing the Court with misleading information". Further, I do not think a solicitor need necessarily have known that his evidence was false for there to be scope for disciplinary proceedings.

49. In the present case, Mr Davies' original complaint and his 19 June 2019 letter are replete with references to Mr Greene having given false evidence which are apt to

constitute allegations of misconduct regardless of whether the evidence in question affected District Judge Stewart's 2012 decision or was even accepted by him (though it can be assumed that it was). In my view, the complaint must be understood as extending to allegations of that kind, and there is no good reason to view Mr Davies as alleging only a composite such as "Mr Greene gave false evidence which caused District Judge Stewart to be misled".

50. In short, Mr Davies' complaint is not, in my view, confined to either dishonesty or the giving of evidence which had the effect of misleading District Judge Stewart. It also, as I see it, encompasses allegations, first, that Mr Greene breached Principles 1, 2 and 6 of the SRA Principles without any dishonesty and, secondly, that Mr Greene gave false evidence, regardless of whether it resulted in District Judge Stewart being misled.

Bringing the administration of justice into disrepute: discussion

51. The foundation for Mr Davies' application to set aside District Judge Stewart's 2012 order was the proposition that the District Judge had been "deliberately misled" or, in the words of Mr Davies' counsel, that the decision was "based on a lie by Mr Greene". The principles governing applications of that kind were summarised as follows by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328, [2013] 1 CLC 596 in a passage at paragraph 106 approved by the Supreme Court in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450 (see paragraphs 56, 57 and 67):

> "The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

52. In his 2016 judgment, District Judge Stewart concluded that the 2008-2009 email correspondence between Mr Davies and Edwin Coe, first, cast no doubt on Mr Greene's truthfulness and, secondly, would anyway have made no difference to his 2012 decision. With regard to the latter point, the District Judge said that "the rock of

Gibraltar in this case is, effectively, the second agreement that went out from Edwin Coe to Mr David Davies citing him to be the client and that is irrebuttable". On the basis of those conclusions, there was neither "conscious and deliberate dishonesty" nor materiality: the email correspondence did not "entirely [change] the way in which the first court approached and came to its decision" and was not "causative of the impugned judgment being obtained in the terms it was". On top of that, District Judge Stewart cited *Ladd v Marshall* [1954] 1 WLR 1489 and noted that the emails could have been produced at the 2012 trial.

53. District Judge Stewart's conclusions in his 2016 judgment are plainly at odds with Mr Davies' complaint. The District Judge explicitly rejected the suggestion that Mr Greene had been untruthful or deliberately misled him and was further clear that the 2008-2009 email correspondence would not have affected his decision in 2012 even if it had been before him.

54. On the other hand:

i) In *Conlon v Simms*, Jonathan Parker LJ observed at paragraph 150 that the issues in the action with which he was concerned were different from those which had been before the SDT, drawing a distinction between, on the one hand, whether Mr Simms had deceived the claimants in the civil proceedings into entering into agreements with him and, on the other, whether Mr Simms' conduct justified his being struck off. A similar distinction can be drawn in the present case, between whether Mr Greene's conduct enabled Mr Davies to have the 2012 order set aside and whether it warrants disciplinary proceedings. A specific respect in which the questions arising from Mr Davies' complaint are not identical to those which were before District Judge Stewart in 2016 relates to the SRA Principles. The complaint raises, among others, the question whether Mr Greene gave incorrect evidence honestly but nevertheless in breach of the SRA Principles. That was obviously not something with which District Judge Stewart was concerned and, unsurprisingly, his 2016 judgment does not deal with it;

ii) As noted above, it is not necessarily an abuse of process to invite a Court or tribunal to make a finding inconsistent with one made in earlier proceedings. To quote Sir Andrew Morritt V-C in *Bairstow*, "[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". *R v L* demonstrates that a person can be the subject of a criminal prosecution requiring proof beyond reasonable doubt despite a High Court Judge having concluded that guilt had not been proved even to the civil standard. Equally, it can be seen from *Ashraf v General Dental Council* that disciplinary proceedings can potentially be brought "on substantially the same subject matter as had been the subject of failed criminal proceedings". Similarly, a determination by a civil Court cannot necessarily preclude disciplinary proceedings based on allegations which the civil Court had rejected;

iii) While, notwithstanding the fact that there was an interval of more than three years between the 2012 and 2016 hearings, District Judge Stewart might be thought to have been especially well placed to assess whether the 2008-2009 email correspondence would have altered his 2012 decision, it is not apparent

that he had any particular advantage when deciding whether the evidence Mr Greene gave in 2012 was incorrect or why he gave that evidence;

iv) Disciplinary proceedings have a different function from civil litigation and have a public interest element which a civil claim lacks. It is true that, in the present case, the complaint has been brought by Mr Davies rather than the SRA, and it could be that (however mistakenly) Mr Davies hopes that success with the complaint would enable him to reopen Edwin Coe's judgment against him. However, a lay complaint cannot proceed unless (as happened here) the SDT certifies that there is a case to answer and, once so certified, a complaint cannot be withdrawn without the consent of the SDT;

v) It is far from clear that Mr Davies would have been barred from challenging District Judge Stewart's finding that Mr Greene had been truthful even in subsequent civil proceedings between the same parties. To quote Lewison LJ in *Thomas v Luv All Promotions Ltd* again, "even if a 'twin ratio' decision can create an estoppel in relation to both rationes, an inability to appeal may be one of the special factors which persuade a court to permit a challenge to at least one of the rationes". In the present case, Mr Davies could not have hoped to appeal District Judge Stewart's 2016 decision successfully given the District Judge's finding that the 2008-2009 email correspondence would have made no difference to him in 2012.

55. In the circumstances, it seems to me that the SDT panel which ruled on Mr Greene's strike out application approached it on an erroneous basis. It saw District Judge Stewart's 2016 judgment as necessarily fatal to the complaint, saying for example that "the 2016 Judgment provided a clear, comprehensive and direct answer to the matters complained of by [Mr Davies]"; that the finding that Mr Greene had not been untruthful meant that there was not "any remote possibility that the Lay Application may succeed"; and that "[t]here was no meaningful distinction between the issues thoroughly ventilated in [Mr Davies'] unsuccessful set-aside claim and the issues featuring in his Lay Application". However, the issues raised by Mr Davies' complaint were not in fact identical to those before District Judge Stewart and, in any event, it is not necessarily an abuse of process to invite a Court or tribunal to make a finding inconsistent with one made in earlier proceedings. As Ms Murphy said, there has to be a fact-specific assessment in the particular case. The Divisional Court was right, therefore, to consider the SDT's decision flawed as regards its analysis of abuse of process.

56. For my part, I would agree with the SDT that to permit re-litigation of the question whether the 2008-2009 email correspondence would have altered District Judge Stewart's decision in 2012 had it been before him would bring the administration of justice into disrepute. When District Judge Stewart has himself said in plain terms that the emails would have made no difference to him, right-thinking people would, as it seems to me, think it absurd for Mr Davies to invite the SDT to determine that the material would have changed what District Judge Stewart did. To that limited extent, accordingly, I would strike out the proceedings against Mr Greene.

57. In contrast, I agree with the Divisional Court, for the reasons given in paragraph 54 above, that the balance of Mr Davies' complaint should not be struck out as bringing the administration of justice into disrepute.

Manifest unfairness: discussion

58. The Divisional Court concluded in paragraph 58 of its judgment that Mr Davies' complaint would not be unfairly vexatious of Mr Greene if it is sufficiently arguable to raise a case to answer on the merits and a decision by the SDT to continue with disciplinary proceedings against Mr Greene could not reasonably be regarded as an affront to the administration of justice. Challenging that conclusion, Mr Hubble submitted that the Divisional Court had failed to have proper regard to the fact that the prosecutor in the disciplinary proceedings is the defendant to the civil claim, to the fact that there have already been two sets of civil proceedings, to the fact that the proper route to challenge the 2012 and 2016 decisions was by way of appeal, to the fact that Mr Greene's evidence was given as long ago as 2012 and to District Judge Stewart's dismissal of the set aside application in 2016.

59. There is, however, no reason to think that the Divisional Court overlooked such matters. Moreover:

    i) While Mr Davies is the complainant, the SDT had to certify that there was a case to answer for the matter to go further;

    ii) Aside from the fact that an appeal against the 2016 decision could have had no real prospect of success in the light of District Judge Stewart's finding that the 2008-2009 email correspondence would not have made a difference to him in 2012, an appeal would have been no substitute for disciplinary proceedings, which have a different function;

    iii) While Mr Davies' complaint relates to events which occurred 11 years ago, there is documentary evidence as to what Mr Greene said both in his witness statement and in his oral evidence, and the 2008-2009 email correspondence is also available;

    iv) The 2016 decision which, on Mr Greene's case, Mr Davies should not be allowed to challenge was made after a brief hearing and on an application which would not otherwise seem to have required much expenditure of time or money on the part of either Mr Greene or his firm;

    v) The lapse of time since 2012 is in part attributable to efforts on the part of, first, Edwin Coe and, latterly, Mr Greene himself to stave off Mr Davies' allegations;

    vi) Supposing the complaint against Mr Greene to raise an arguable case on the merits, there is a public interest in allowing disciplinary proceedings to continue.

60. In the circumstance, it seems to me that the Divisional Court was right to take the view that the application in respect of Mr Davies' complaint should not be struck out as manifestly unfair to Mr Greene.

Conclusion

61. I would strike out the proceedings against Mr Greene in so far as Mr Davies' complaint suggests that District Judge Stewart would have made a different decision

in 2012 had the 2008-2009 email correspondence been available to him. That apart, however, I agree with the Divisional Court that the application in respect of the complaint should not be struck out as an abuse of process if it is sufficiently arguable to raise a case to answer on the merits.

Lack of merit

62. The Divisional Court considered that the test to be applied in deciding whether there is a case to answer against a solicitor in SDT proceedings is the same as that applicable in deciding whether to withdraw a criminal case from the jury in accordance with *R v Galbraith* (1981) 73 Cr. App. R 124: see paragraph 59 of the Divisional Court's judgment. The Divisional Court cited in this connection *Solicitors Regulation Authority v Sheikh* [2020] EWHC 3062 (Admin), where Davis LJ said at paragraph 9:

> "As to the required approach in dealing with a submission of no case to answer – it being common ground that the criminal standard of proof applies to these proceedings – the test is still conveniently taken from the decision of the Court of Appeal (Criminal Decision) in *Galbraith* …. In summary, a case will be withdrawn if (a) there is no evidence to support the allegation against the defendant or (b) where the evidence is sufficiently tenuous such that, taken at its highest, a jury properly directed could not properly convict. On the other hand, if, on one possible view of the evidence, there is evidence on which a jury could properly convict then the matter should be allowed to proceed to verdict."

63. Mr Hubble did not take issue with this test but submitted that District Judge Stewart's 2016 judgment stands as the answer to Mr Davies' complaint. The complaint raises the question whether the District Judge was deliberately misled in 2012, and that issue has already been determined by the District Judge himself. There is, Mr Hubble argued, no sensible basis for thinking that the SDT would come to different conclusions to District Judge Stewart.

64. When considering this aspect of the case, the Divisional Court considered the 2008-2009 emails in some detail. In paragraph 77 of its judgment, it said:

> "We therefore conclude that the SDT erred in its decision of 6 September 2019 in not properly examining the correspondence underlying Mr Davies' complaint, and that had it done so it would have been bound to find that there was a case to answer. It is material to note that on the earlier occasion when a different division of the SDT did so, it concluded that there was a case for Mr Greene to answer."

65. Given the way in which Mr Hubble framed his submissions, I do not need to rehearse the contents of the 2008-2009 emails, and I think it better not to do so. As Mr Hubble said, his submissions on this aspect of the appeal really turned on the status and role of District Judge Stewart's 2016 judgment.

66. In my view, it cannot be inferred from the 2016 judgment that there is no case to answer against Mr Greene. Pursuant to rule 15(4) of the 2007 Rules, the judgment is admissible in the disciplinary proceedings as proof of findings of fact on which it was based, but not as conclusive proof. The SDT will need to look beyond the judgment to the underlying evidence, and it seems to me that it cannot be said either that there is no evidence to support the allegations against Mr Greene or that the evidence is so tenuous that, taken at its highest, the SDT could not properly find the allegations proved. I should stress, however, that I am not expressing any view at all as to whether the allegations are *likely* to be found proved.

Overall conclusion

67. I would strike out the proceedings against Mr Greene in so far as Mr Davies' complaint suggests that District Judge Stewart would have made a different decision in 2012 had the 2008-2009 email correspondence been available to him. I would otherwise, however, dismiss the appeal.

Lady Justice Thirlwall:

68. I agree.

Dame Victoria Sharp, President of the Queen's Bench Division:

69. I also agree.