Neutral Citation Number: [2024] EWCA Civ 482

Case No: CA-2022-001964

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 30th April 2024

Before :

LORD JUSTICE LEWISON

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Between :

THOMAS WARD AND ANOTHER	**Appellant**
- and -	
SECRETARY OF STATE FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY	**Respondent**

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- -

MR. WARD appeared **In Person**

CARLY SANDBACH (C) (instructed by **Michael Knights, the Insolvency Service**) for the **Respondent**

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Approved Judgment

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LORD JUSTICE LEWISON :

1. The background to this case is in proceedings in the Upper Tribunal on a reference by Mr. Ward and Mr. Page following warning notices and a recommendation from the FCA's Regulation Committee.

2. The background is set out in Ms. Sandbach's skeleton argument, paragraphs 3, 4 and 9. The Upper Tribunal, after a lengthy process, found that there had been breaches by Mr Ward of various regulatory standards and determined that Mr. Ward should pay a financial penalty of almost £500,000.

3. The Upper Tribunal refused permission to appeal and that refusal was confirmed by Lady Justice Whipple who also refused permission to appeal. In the meantime there had been parallel proceedings brought by the Secretary of State under the Directors Disqualification Act. Those proceedings were managed so as to allow the Upper Tribunal to determine the matters first. In particular at a pre-trial review on 23rd March 2021, the court vacated what was then a trial date and re-listed it to await the decision of the Upper Tribunal in order that the disqualification proceedings would follow on from the Upper Tribunal hearing and benefit from its findings.

4. The matter eventually came before His Honour Judge Rawlings; and the question arose at the start of the trial in September 2022 whether it was open to Mr. Ward to challenge the findings of the Upper Tribunal. His Honour Judge Rawlings held that he was not so entitled and recorded that at paragraph 9 of his judgment, when he said this:

> "On the first day of the trial I accepted submissions by Ms. Sandbach that any challenge to the factual issues determined by the Upper Tribunal, it being clear that Mr. Page and Mr. Ward do wish to challenge the factual issues determined by the Upper Tribunal, would be what is known as a *res judicata*, the effect of which was that those factual issues which have been decided by the Upper Tribunal cannot be challenged before me".

5. His order, made on that occasion, recorded in paragraph 2 a declaration that:

> "The defendants and each of them are, pursuant to the principles of issue estoppel and *res judicata*, subject to an estoppel in respect of the relevant findings made in the UT proceedings and they are accordingly bound by such findings for the purpose of these proceedings".

6. Mr. Ward subsequently applied for permission to appeal. There is some indication, I am told, that permission was refused in October 2022 but I was not aware of that. At any rate, the application for permission came before me. Most of the grounds of appeal were challenged to the judge's findings of fact, based as they were on the decision of the Upper Tribunal, and his own evaluative decision whether those facts justified disqualification. In themselves they would not have justified the grant of permission to appeal, but I was concerned at the judge's reference to *res judicata* for which he gave no reasons in his substantive judgment. He did give reasons in an *ex*

tempore ruling but I have seen no transcript of that, although Ms. Sandbach has told me something about it.

7. At that stage, the Secretary of State had not submitted a respondent's statement. I understand now that that was because the Secretary of State was not aware of the application for permission to appeal.

8. In my order I said this:

> "1. The FCA is a body corporate established under section 1A of the Financial Services and Markets Act 2000. Paragraph 16 of schedule 1 of the FSMA states that 'In carrying out its function, the FCA is not to be regarded as acting on behalf of the Crown and its members, officers and staff are not be regarded as Crown servants'.
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> 2. The Secretary of State is a minister of the Crown and acts on behalf of the Crown. The proceedings in the Upper Tribunal were brought by the FCA in its capacity as regulator. The disqualification proceedings in the court were brought by the Secretary of State. In the latter proceedings, Mr. Ward wished to challenge the findings of fact made by the Upper Tribunal in proceedings brought by the FCA
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> 3. The judge held at 9 that Mr. Ward was not permitted to challenge the findings of the Upper Tribunal because of the principle of res judicata. He gave no detailed reasoning in support of that conclusion, which he confirmed at paragraphs 30, 31 and 38. The Secretary of State has filed no statement under Practice Direction 52C, paragraph 19 which would explain the judge's reasoning.
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> 4. The principle of res judicata is that a decision pronounced by a judicial tribunal which has jurisdiction over a cause or matter cannot be challenged in subsequent proceedings by the parties to those proceedings and their privies. The Secretary of State was not a party to the proceedings in the Upper Tribunal and it is seriously arguable whether he is a privy of the FCA. In addition the general rule is that a finding of fact in proceedings between A and B is not admissible in subsequent proceedings between B and C. This principle applies equally to Directors Disqualification proceedings: Secretary of State v Bairstow [2004] Ch 1.
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> If the judge was wrong in his decision that the Upper Tribunal proceedings amounted to res judicata as between the Secretary of State and Mr. Ward, then he would have been wrong not to allow Mr. Ward to challenge the factual findings made by the Upper Tribunal. If on the other hand he was right, I cannot see that Mr. Ward's detailed critique would itself ground a successful appeal, particularly since his application for

> permission to appeal against the decision of the Upper Tribunal has been refused. I consider the best course of action is to adjourn this application for permission to appeal in to court for a short hearing which the Secretary of State is required to attend.".

9. It is that hearing which has taken place before me this morning. Now, I have been provided with Ms. Sandbach's submissions to the judge at the start of the trial and in paragraphs 34 and following she addressed the question of the status of the Upper Tribunal decision and findings. The sub-heading to that section of the skeleton argument is: "*Res judicata*, issue estoppel and the doctrine against collateral attack (abuse of process)". Paragraph 34 states that:

> "As is trite, pursuant to these doctrines the defendants are estopped in the extant proceedings from disputing or continuing to dispute the correctness of the decision of the Upper Tribunal and are bound by the constituent of necessary findings made by the Upper Tribunal in reaching the same".

10. The next two paragraphs then deal with the question of *res judicata* but do not, on my reading at any rate, deal with the question of whether a collateral attack is an abuse of process. That, I think, is confirmed by the judge's order made on that occasion which speaks of *res judicata* and estoppel but not of abuse of process.

11. Ms. Sandbach, I think, accepts that the judge would not have been correct to find *res judicata* in the strict sense, but she says two things. First of all, that the judge used the phrase "*Res judicata*" in its widest sense, as described by Lord Sumption in *Virgin Atlantic Airways v Zodiac Seats UK* [2014] AC 150 as a portmanteau term. In that sense the phrase is capable of including cases where a collateral attack on a previous decision would be regarded as an abuse of process. Such an attack will be an abuse if (a) it would be manifestly unfair to a party to the later proceedings for the same facts to be litigated, and (b) to permit re-litigation would bring the administration of justice into disrepute.

12. Alternatively, she submits that if the judge did use the phrase in its narrow sense, the Secretary of State would serve a respondent's notice in any appeal, relying on the principle of abuse of process and that such a respondent's notice would inevitably succeed, with a result that there is no real prospect of a successful appeal by Mr. Ward.

13. There is, in my view, a difference between *res judicata* in its narrow sense and abuse of process. The latter but not the former requires the judge to make an evaluative judgment on the facts of the particular case. In some cases it will not be an abuse to permit re-litigation of the same issues as is shown by the *Secretary of State v Bairstow* case. This court reviewed the case in *Allsop v Banner Jones* [2022] Ch 55 in which Ms. Sandbach herself appeared for the successful appellant; but this court decided it was not abusive on the facts of that case to permit certain issues to be re-litigated. So the question of abuse must be decided on a case by case basis.

14. As I have said, in my view what was put to the judge was *res judicata* in its narrow sense. In the *Secretary of State v Potiwal* [2012] EWHC 3723 (Ch), Mr. Justice

Briggs considered whether a decision of a VAT tribunal created a *res judicata* between the Secretary of State and the defendant in subsequent disqualification proceedings. He held that it did not because HMRC and the Secretary of State were not privies. Had that stood alone it might well have justified permission to appeal.

15. However, as I have said, the Secretary of State has said that a respondent's notice would be served, relying on a broader principle. That would require the Court of Appeal to decide that if the point had been put on a wider basis, Mr. Ward would have had no realistic prospect of resisting it. In *Potiwal*, although Mr. Justice Briggs rejected the narrow form of *res judicata*, he accepted that it would be an abuse of process for Mr. Potiwal to re-litigate the issues that had been found against him by the VAT tribunal.

16. Ms. Sandbach lists a number of factors in paragraphs 59 and 60 of her skeleton argument which, she says, lead inexorably to the conclusion that were the matter to be put on a wider basis, it would be found to be an abuse of process in the disqualification proceedings for Mr. Ward to challenge the factual findings made by the Upper Tribunal. They are the same issues as were decided by a specialist tribunal. The disqualification proceedings were managed so that the Upper Tribunal would determine those issues and there would inevitably be a collateral challenge to the Upper Tribunal's factual findings in the event that Mr. Ward were allowed to do so. Those features make it an abuse of process not least because there is a risk of inconsistent findings which would bring the administration of justice into disrepute, not to mention the time that would be taken by court proceedings in the event that Mr. Ward were permitted to challenge the factual findings of the Upper Tribunal.

17. I regard those submissions as compelling and on the basis that they would be advanced on appeal by a respondent's notice, I consider that there is no real prospect that Mr. Ward would succeed in rebutting them. So, for those reasons I refuse permission to appeal.

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(This Judgment has been approved by the Judge.)