Hilary Term
[2011] UKSC 1
On appeal from: [2009] EWCA Civ 730

JUDGMENT

R (on the application of Coke-Wallis) (Appellant) *v* Institute of Chartered Accountants in England and Wales (Respondent)

before

Lord Phillips, President
Lord Rodger
Lord Collins
Lord Clarke
Lord Dyson

JUDGMENT GIVEN ON

19 January 2011

Heard on 8 and 9 November 2010

Appellant	*Respondent*
Lawrence Jones Joseph Curl (Instructed by Marriott Harrison)	Michael Beloff QC Catherine Callaghan (Instructed by Bates Wells & Braithwaite LLP)

LORD CLARKE (with whom Lord Phillips and Lord Rodger agree)

Introduction

1. This appeal is concerned with the relevance and application of the principles of autrefois acquit, res judicata and abuse of process in the context of successive proceedings before a regulatory or disciplinary tribunal.

The background facts

2. The appellant is a chartered accountant and a member of the respondent institute ("the Institute"), which is responsible for the regulation of chartered accountants including the appellant. At the relevant time he and his wife were directors and shareholders of a number of trust companies carrying out regulated financial services work in Jersey. On 18 December 2002 the Jersey Financial Services Commission issued a direction ("the direction") to the companies and their directors to cease to take on any new trust company business and to commence an orderly winding up of the companies' affairs. It also directed that "no records or files in respect of the companies or any customers shall be removed from the offices of the companies".

3. On 22 December 2002, the appellant was stopped by the police at the St Helier ferry terminal, having checked his car on to the ferry to St Malo. On examination of the car, the police found suitcases containing files relating to clients, computer equipment, network servers and back up tapes. The documents included original trust deeds, trust and company documents, share certificates, company memoranda and articles, and letters of wishes. The appellant and (later the same day) his wife were arrested and charged with the offence of failing to comply with the direction. On 16 September 2003 they were both convicted of failing to comply with the direction, contrary to article 20(9) of the Financial Services (Jersey) Law 1998. I will refer to the appellant's conviction as "the Jersey conviction". On 22 October 2003 the appellant was fined £7,500. The appellant and his wife sought leave to appeal to the Jersey Court of Appeal against their convictions but leave was refused in a fully reasoned judgment on 14 January 2004.

4. On 2 November 2004 the Institute's Investigation Committee preferred a complaint against the appellant. In the course of these proceedings this has been called "the conviction complaint" but that does not seem to me to be an accurate

description. I shall call it "the first complaint". That complaint was heard by a disciplinary committee ("the tribunal") on 19 April 2005 but was dismissed on the same day. On 7 March 2006 the Investigation Committee preferred a second complaint, which has been referred to as "the conduct complaint", but which I will refer to as "the second complaint".

5. On 7 December 2006 a differently constituted tribunal held a hearing in order to determine a preliminary issue raised by an application made by the appellant, namely that the second complaint should be summarily dismissed on the ground that the same complaint had already been dismissed. The appellant's case was that the first and second complaints made the same allegations and that the second complaint should be dismissed on the grounds of autrefois acquit or res judicata or that it should be dismissed or stayed on the ground that, having regard to the dismissal of the first complaint, the second complaint was an abuse of process. The tribunal dismissed the application.

6. On 7 March 2007 the appellant issued an application for judicial review of that decision on the basis that the tribunal had erred in law and that it should have summarily dismissed the second complaint on the grounds advanced before it. On 6 November 2008 Owen J ("the judge") dismissed the application for judicial review. On 4 February 2009 Sullivan LJ granted permission to appeal to the Court of Appeal but on 15 July 2009 the Court of Appeal, comprising Sir Anthony May P, Arden LJ and Jacob LJ, dismissed the appeal.

7. The appellant lodged a petition for permission to appeal to the Supreme Court but, before the petition was determined, a disciplinary tribunal heard the complaint on 9 December 2009 at a hearing which the appellant chose not to attend. It found the complaint proved, ordered that the appellant be excluded from membership of the Institute and made an order for costs against him. Permission to appeal to the Supreme Court was subsequently granted and the sanctions imposed by the tribunal have been suspended pending the outcome of this appeal.

The issues

8. In this appeal the appellant raised the same issues as he had raised both before the tribunal and before the courts below, namely that the second complaint should have been summarily dismissed on one or other or all of the grounds of autrefois acquit, res judicata or abuse of process.

9. All of these grounds depend to a greater or lesser extent upon a comparison of the two complaints. The appellant's primary position throughout has been that

the basis of the two complaints was the same and that the second complaint should have been dismissed on the ground of autrefois acquit or res judicata. In short he relied upon the general principle that nemo debet bis vexari pro una et eadem causa, that is that nobody should be vexed twice in respect of one and the same cause. In these circumstances it is convenient to begin by a comparison of the two complaints but, before doing so, it is necessary to set out the relevant provisions of the Institute's bye-laws. The resolution of the issues between the parties as to the correct comparison between the two complaints depends, at least in part, upon the true construction of bye-laws 4 and 7.

The bye-laws

10. Bye-law 4 is entitled "Liability of members and provisional members to disciplinary action". Bye-law 4(1) provides, so far as relevant:

> "A member or provisional member shall be liable to disciplinary action under these bye-laws in any of the following cases, whether or not he was a member or provisional member at the time of the occurrence giving rise to that liability -
>
> (a) if in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy;
>
> …
>
> (e) if any of the circumstances set out in paragraph (2) exist with respect to him."

Paragraph (2) sets out a number of specific circumstances. They include, for example, failure to satisfy a judgment debt. They do not, however, include conviction of a criminal offence.

11. Bye-law 7, which is entitled "Proof of certain matters", provides, so far as relevant:

> "(1) The fact that a member, member firm or provisional member has, before a court of competent jurisdiction, pleaded guilty to or been found guilty of an indictable offence (or has, before such a court, outside England and Wales, pleaded guilty to or been found guilty of an offence corresponding to one which is indictable in England and Wales) shall for the purposes of these bye-laws be

conclusive evidence of the commission by him of such an act or default as is mentioned in bye-law 4(1)(a) or 5(1)(a), as the case may be.

…

(3) A finding of fact

…

(b) in any civil or criminal proceedings before a court of competent jurisdiction in the United Kingdom or elsewhere;

…

shall for the purposes of these bye-laws be prima facie evidence of the facts found."

12. The Institute submitted both to this court and to the courts below that, on their true construction, bye-laws 4 and 7 provided for two different charges. The first was pleading guilty to or being convicted of an indictable offence of the kind identified in bye-law 7(1) and the second was being guilty of the underlying conduct. The underlying conduct on the part of the appellant relied upon in this case was that identified in bye-law 4(1)(a), namely "any act or default likely to bring discredit on himself, the Institute or the profession of accountancy".

13. In the Court of Appeal the President of the Queen's Bench Division, with whom Arden LJ and Jacob LJ agreed, held at para 20 that the discreditable conduct alleged in the first complaint was the Jersey conviction, which was both conclusive evidence of the discreditable conduct and the discreditable conduct itself. It was submitted on behalf of the appellant that so to conclude was to misconstrue the bye-laws. I agree.

14. Bye-law 4(1) identifies the "occurrence(s) giving rise to liability" to disciplinary action. The only relevant occurrence here was that the appellant had "committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy". Only bye-law 4 identifies the occurrences giving rise to liability. In my opinion, if the occurrence relied upon cannot be found in bye-law 4 then the complaint must fail. It was submitted that the Jersey conviction was such an occurrence. However, there is nothing in bye-law 4(1)(a) which supports the conclusion that such a conviction is itself an act or default of the kind specified. Moreover, such a conviction is not one of the circumstances identified in bye-law 4(1)(e), which are limited to the circumstances set out in bye-law 4(2).

The bye-laws could have included a conviction as one of those circumstances but they did not.

15. I do not see how bye-law 7(1) can fill that lacuna. It is not concerned with the nature of the occurrence but with proof of it. This is clear from the heading and from the bye-law itself. Thus bye-law 7(1) provides for what is to be conclusive proof of the commission of "such an act or default as is mentioned in bye-law 4(1)(a) or 5(1)(a) as the case may be". Bye-law 7(3)(b) provides for a fact found in any civil or criminal proceedings before a court of competent jurisdiction in the United Kingdom or elsewhere to be prima facie evidence of the fact so found. There is nothing in bye-law 7(1) or 7(3) that provides that a conviction is itself the act or default mentioned in bye-law 4(1)(a).

16. In short, there is nothing in the bye-laws which provides that a qualifying conviction itself amounts to the discreditable conduct. It is simply conclusive proof of discreditable conduct. The Institute's case involves treating a conviction within the meaning of bye-law 7(1) as if it were one of the occurrences referred to in bye-law 4(1)(e) and (2), which it is common ground that it is not.

Complaints 1 and 2 compared

17. The first complaint alleged that the appellant was liable to disciplinary action under bye-law 4(1)(a), namely that:

> "in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy
>
> IN THAT HE:-
>
> was convicted upon indictment at the Royal Court of Jersey on 16 September 2003 of failing to comply with a direction issued on 18 December 2002 by the Jersey Financial Services Commission contrary to article 20(9) of the Financial Services (Jersey) Law 1998."

The complaint then set out a summary of the complaint, which referred to the Jersey conviction and set out the underlying facts which led to it in some detail. The summary concluded by saying that the appellant had been convicted of failing to comply with the direction and that the conviction was conclusive evidence for the purposes of bye-law 7(1) of the commission by him of such an act as is mentioned in bye-law 4(1)(a).

18. The second complaint begins in identical terms to the first, alleging that the appellant was liable to disciplinary action under bye-law 4(1)(a), namely that:

> "… in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy".

The complaint continues:

> "IN THAT HE:-
>
> On Sunday 22 December 2002, attempted to remove from Jersey, accounts books and records as listed in the witness statement of Peter Howard Beamish dated 18 February 2003 in contravention of the direction issued to him on 18 December 2002 by the Jersey Financial Services Commission in accordance with article 20(9) of the Financial Services (Jersey) Law 1998."

There follows a summary of the complaint.

19. It is correctly accepted that the substance of the underlying conduct was the same in the case of both complaints. They both set out in the course of their respective summaries the facts that led to the Jersey prosecution and conviction. Although the particulars on the face of the first complaint assert the conviction and the summary refers to it, the summary concludes by stating the submission of the Investigation Committee to be that the conviction was conclusive evidence for the purposes of bye-law 7(1) of the commission by him of such an act as is mentioned in bye-law 4(1)(a). Thus, taken as a whole, I do not read the first complaint as meaning that the conviction was the act complained of as being contrary to bye-law 4(1)(a). The act complained of was the failure to comply with the direction based on the removal of documents and the like by hiding them in the car and trying to take them off the island.

20. If the conclusion expressed above is correct, namely that on the true construction of the bye-laws the role of a conviction is only that expressly stated in bye-law 7(1), namely as conclusive evidence of a breach of bye-law 4(1)(a), the conviction was not capable of itself being the act complained of as being a breach of bye-law 4(1)(a). In these circumstances, on a fair view of the first complaint, the act complained of as a breach was not being convicted but failing to comply with the direction. That is precisely the same complaint as is advanced in the second complaint. Although it is spelt out in a little more detail on the face of the complaint, the alleged breach of bye-law 4(1)(a) is the same in each complaint.

21. The question is what is the legal effect of the conclusion that the second complaint is the same as the first. It was submitted on behalf of the appellant that the consequence is that the second complaint must be dismissed, either on the basis of autrefois acquit or on the basis of res judicata.

Autrefois convict

22. There is some support for the appellant's case that the principles of autrefois convict apply to proceedings before non-statutory disciplinary or regulatory tribunals of this kind. It is the decision of the Judicial Committee of the Privy Council in *Harry Lee Wee v Law Society of Singapore* [1985] 1 WLR 362. It is however of limited assistance because it appears to have been accepted by the appellant solicitor and the respondent, who was the Law Society of Singapore, that the principles of autrefois acquit applied to disciplinary proceedings of this kind. Lord Bridge said at p 368G:

> "No one would dispute that the doctrine of autrefois convict and acquit is applicable to disciplinary proceedings under a statutory code by which any profession is governed."

The Judicial Committee plainly thought that such principles should be applied in a case of this kind.

23. However, the proceedings before the tribunal were not criminal proceedings. In the famous case of *Connelly v Director of Public Prosecutions* [1964] AC 1254 Lord Devlin said at p 1356 that the doctrine of res judicata occupies the same place in the civil law as the doctrine of autrefois acquit or convict does in the criminal law. In these circumstances, while not conceding that the principles of autrefois acquit do not apply to disciplinary tribunals, it was submitted on behalf of the appellant that the underlying principle of nemo debet bis vexari pro una et eadem causa applies to both criminal and civil cases and extends to disciplinary proceedings.

24. The oral argument focused in particular upon the principles of res judicata. In an outline summary of the Institute's submissions produced in the course of the oral argument by Mr Michael Beloff QC, the first two propositions were these. First, in terms of the dividing line between criminal and civil proceedings drawn by Lord Devlin in *Connelly v DPP* for the purposes of the application of the Latin maxim now embodied in common law (nemo debet bis vexari), disciplinary proceedings fall on the civil side of the line. Second, it follows that where the cause of action in the sets of proceedings is the same the relevant legal principle is

res judicata not autrefois acquit. I would accept those submissions. In my opinion, if the appellant cannot succeed on the basis of res judicata, he will not succeed on the basis of autrefois acquit. I therefore turn to res judicata.

Res judicata

25. It is important to note that this appeal is concerned only with the case where there have been two successive sets of disciplinary proceedings. It is not concerned with a case in which either set of proceedings was either criminal or civil proceedings. In the 4th edition of *Spencer Bower and Handley* on *Res Judicata* (2009) it is stated at para 1.05 that res judicata can either give rise to a cause of action estoppel or to an issue estoppel. In this case the appellant relies upon cause of action estoppel, which is concisely defined in para 1.06 in this way: "If the earlier action fails on the merits a cause of action estoppel will bar another."

26. The relationship between cause of action estoppel and issue estoppel was described, in terms that have been generally accepted, by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198:

> "The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim 'Nemo debet bis vexari pro una et eadem causa.' In this application of the maxim 'causa' bears its literal Latin meaning."

Res judicata, or estoppel per rem judicatam, is thus a generic term of which cause of action estoppel and issue estoppel are two species. The distinction between the two species is of potential importance because the former creates an absolute bar, whereas the latter does not: see para 47 below.

27. Although the point was not conceded on behalf of the Institute, it was not submitted in the course of the argument that the principle did not apply to non-statutory disciplinary proceedings of this kind. In any event, the principle does in my opinion apply to such proceedings. There is no doubt that it applies to what may be called ordinary civil proceedings. In *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273, where an issue estoppel was held to arise out of a determination of a planning application, the principle was held to apply to public law proceedings. Lord Bridge (with whom the other members of the appellate committee agreed) stated the general principle and emphasised its fundamental importance in this way at p 289C-D:

> "The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa.' These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions."

The House of Lords thus stressed the importance of the res judicata principle in terms which in my opinion apply equally to cause of action estoppel and to issue estoppel.

28. The judge described the objects and powers of the Institute at paras 9 and 10 of his judgment. The Institute was incorporated by Royal Charter in 1880 to promote the profession of accountancy by compelling the observance of strict rules of conduct for its members and by setting a high standard of professional education. By a Supplemental Royal Charter of 1948 the principal objects of the Institute were declared to include the maintenance of high standards of practice and professional conduct by all its members. The Institute is, at least for some purposes, a public body: see eg *Andreou v Institute of Chartered Accountants in England and Wales* [1998] 1 All ER 14. The Institute has the power from time to time to make bye-laws under para 15(a) of the Supplemental Charter. By para 15(b) no new bye-law or rescission or variation of a bye-law shall have effect until approved by the Privy Council.

29. In these circumstances I see no reason why the principles of cause of action estoppel should not apply to proceedings before a disciplinary tribunal set up under the bye-laws. The provisions of the Charter and Supplemental Charter are akin to statutory provisions and it seems to me that similar principles to those identified by Lord Bridge in *Thrasyvoulou* apply to them. It was not suggested in the course of the argument that there was anything in the Charter or Supplemental Charter to lead to the conclusion that the principles of cause of action estoppel should not apply to successive sets of disciplinary proceedings.

30. Indeed, even if the bye-laws created only private rights as between the Institute and its members, I see no reason why the principle of cause of action estoppel should not apply. In *Meyers v Casey* [1913] HCA 50, (1913) 17 CLR 90, where the High Court of Australia was considering a decision of the committee of the Victoria Racing Club, at p 114 Isaac J said this of objections considered by the committee:

> "They are, by reason of the committee's decision, res judicatae, as much as if instead of the committee it had been the Supreme Court unappealed from, that has so held. That rests on the well known rule that a competent court or other tribunal has jurisdiction to give a wrong judgment, and if there is no appeal in the strict sense, then its decision, whether right or wrong, must stand, and cannot be questioned in any subsequent proceedings elsewhere."

31. See also *Spencer Bower and Handley* at para 2.05 where the editors say:

> "Every domestic tribunal, including any arbitrator, or other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order, or statute, is a 'judicial tribunal' for present purposes, and its awards and decisions conclusive unless set aside."

In addition to *Meyers v Casey* and other cases, the editors cite *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 per Diplock LJ at p 643C, where he said that, the parties having chosen an arbitration tribunal to determine the issues, they are bound by an interim arbitration award on specific issues under the principle of issue estoppel. He added at p 643E that the power of an arbitrator to make an interim award was first conferred by the Arbitration Act 1934 and that, before then, the only kind of award he could make was a final award which determined all the issues between the parties. It is implicit in Diplock LJ's judgment that in such a case the principles of cause of action estoppel would apply.

32. None of the propositions in the Institute's outline summary challenged the applicability in principle of cause of action estoppel to decisions of the disciplinary tribunal. I referred earlier to the first two submissions. The third proposition relates to the case of *Harry Lee Wee*, to which it is not necessary further to refer. The Institute's fourth proposition is that, for the purposes of res judicata the causes of action (or in the context of discipline, the charges) must be the same. I would accept that that is so.

33. The fifth proposition is that in this case the charges were in fact different. Attention is drawn to the distinction between the particulars of the discreditable conduct in the two complaints, which is said to reflect a distinction drawn in the bye-laws themselves, one based on the fact of the Jersey conviction and the other based on the conduct which led to it. I would not accept that submission. I have already considered the two complaints in some detail. For the reasons I have given, I have concluded that the alleged breach of bye-law 4(1)(a) in each case was the same, namely the failure to comply with the direction by seeking to spirit the various documents off the island. The alleged breach was not that the appellant was convicted of doing so. Although the conviction is referred to in the particulars of the first complaint, a fair reading of the document as a whole is that the Institute's Investigation Committee (which was in effect the prosecutor) was seeking to rely upon the conviction as conclusive evidence of the underlying breach, which was of course the correct approach on the true construction of bye-law 7(1) as explained above.

34. In para 1.02 *Spencer Bower and Handley* makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are that: "(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was - (a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem." It is not in dispute that all those elements are established except (iv) and (v). Even if any of the others were in dispute, I would hold that they are plainly satisfied. As to (vi), it was not suggested that the first decision was in rem but it is plain that the parties to both sets of proceedings were the same.

35. As to (iv) and (v), the critical question is whether the first decision was final and on the merits. If it was, since I have already concluded that the question raised in both sets of proceedings was the same, it follows that it determined a question raised in the second proceedings. I therefore turn to the argument before and the decision of the tribunal in respect of the first complaint.

36. The hearing took place on 19 April 2005. The appellant did not attend and was not represented but the Institute was represented by Ms L Peto. The tribunal was advised by a legal assessor, Mr C Hopkinson. In the days before the hearing the appellant had sent Ms Peto a considerable number of emails taking a variety of points and attaching a number of documents. He was seeking an adjournment of the hearing. Ms Peto very fairly put the documents before the tribunal, which considered them and, having done so, refused the application for an adjournment. The particulars of the complaint were then read by the assessor and Ms Peto submitted to the tribunal that, if she was able to satisfy it that the conviction fell within bye-law 7(1), that would be conclusive proof of an offence under bye-law 4(1)(a). She did not submit, in my opinion correctly, that the conviction itself was contrary to bye-law 4(1)(a).

37. Ms Peto appreciated that, in order for the conviction to come within bye-law 7(1), she had to show that the offence of which the appellant was convicted in Jersey was an "offence corresponding to one which is indictable in England and Wales". This point had been taken by the appellant in the course of the email exchanges prior to the hearing. The only statutory provisions in England and Wales which Ms Peto initially suggested satisfied the bye-law were sections 173 and 177 of the Financial Services and Markets Act 2000 ("the 2000 Act"). Ms Peto explained the underlying facts as set out in the judgment of the Jersey Court of Appeal refusing the appellant's application for leave to appeal against the Jersey conviction. However, she then invited the tribunal to find the complaint proved on the basis of the conviction alone. She submitted that the various points on the facts taken by the appellant went only to mitigation. The legal assessor then said that he would like to see the corresponding offence in England. There followed some discussion of sections 165, 173 and 177 of the 2000 Act.

38. After Ms Peto had concluded her submissions on this point the tribunal retired to consider the question whether the offence of which the appellant was convicted in Jersey was an "offence corresponding to one which is indictable in England and Wales". When they returned they announced their decision in these terms:

> "We are satisfied that the defendant was convicted on indictment in the Royal Court of Jersey of failing to comply with a direction issued under the Financial Services (Jersey) Law 1998, prohibiting the removal of files and documents. We note that it was alleged (and not disputed by the defendant) that, jointly with his wife, he was caught by the police removing from the jurisdiction of the Jersey authorities original documents and records concealed in the back of his car, in breach of this requirement. This is not the sort of conduct that is to be expected of a member of this Institute.

> However, we have to be satisfied that this offence corresponds to one which is indictable in England and Wales. Our attention has been drawn to sections 165, 173 and 177 of the Financial Services and Markets Act 2000. We are not satisfied that any of the offences set out in these sections corresponds to the offence of which he was convicted in Jersey. We therefore dismiss the complaint."

39. The tribunal subsequently issued their decision in writing. They set out the basis for the application for an adjournment and gave their reasons for refusing the application. They said that they had proceeded with the hearing on the basis that the appellant denied the complaint. They then made a number of findings of fact, which identified the direction and the circumstances of the appellant's arrest and the search of his car. They summarised the points on the merits made by the appellant and they stated at para 7 of their findings of fact that under bye-law 7(1), the fact that a member has, before a court outside England and Wales, been found guilty of an offence corresponding to one which is indictable in England and Wales, shall for the purposes of the bye-laws be conclusive evidence of the commission by him of such an act or default as is mentioned in bye-law 4(1)(a).

40. The tribunal then repeated in identical or almost identical language to that quoted in para 38 above what they had said when announcing their decision orally on 19 April. The written document concluded by stating in capital letters that the tribunal accordingly dismissed the complaint.

41. The question is whether the decision was final and on the merits. In my opinion the answer is that it was both final and on the merits. The hearing on 19 April had been fixed as a hearing of the complaint on the merits. The appellant applied for an adjournment which was refused. The hearing on the merits accordingly proceeded. It was for the Institute to put whatever material it wished before the tribunal and to put its case as it thought fit. It is plain from the transcript of the hearing to which I have referred that the Institute based its case on bye-law 7(1) which made the Jersey conviction conclusive evidence of a breach of bye-law 4(1)(a) provided that the Jersey offence corresponded to one which is indictable in England and Wales. Although it could have done, it did not put its case in any other way. It could have relied upon the findings of fact as prima facie evidence of the facts under bye-law 7(3)(b) or it could have relied upon the underlying facts themselves. All the relevant evidence was available to it. It did not, however, do so. Nor did it apply for an adjournment in order to do so.

42. It is plain on the evidence that a conscious decision was taken to rely only upon the Jersey conviction. In her witness statement, Tracey Owen, Head of Legal Services in the Institute's Professional Standards Directorate, said that the investigation case manager proceeded on an assumption that there was a

corresponding offence in England and Wales and that bye-law 7(1) would apply. She added that, to the extent that the issue was considered at all, the case manager would not have been inclined to proceed with a detailed and lengthy investigation gathering witness statements from officials in Jersey "when he had the option of relying just on the fact that Mr Coke-Wallis had been convicted". In its written case the Institute relied upon that evidence in support of a submission that the respondent's Investigation Committee considered that the case could be dealt with most economically and efficiently by framing the complaint by reference to bye-law 7(1) "rather than by reference to the appellant's underlying conduct, which would have involved a time-consuming and resource-intensive process of gathering witness statements from officials and police officers in Jersey and potentially arranging the attendance of witnesses at a hearing". The submission added that that "short cut" proved not to be possible because there was no corresponding indictable offence in England and Wales.

43. Notwithstanding its reference to findings of fact in their written decision, the tribunal understood the position as being that the Institute was relying on the conviction because, having set out their conclusion that the Jersey conviction was not for an offence which corresponded to an indictable offence in England and Wales, it expressly stated that the complaint was dismissed. If it had reached the opposite conclusion and held that the Jersey conviction was based on an offence which corresponded to an indictable offence in England and Wales, it would have found the complaint proved because the conviction would have been conclusive evidence of a breach of bye-law 4(1)(a). There could have been no doubt that such a decision would have been final and on the merits. In my judgment, the same is true of the decision to dismiss the complaint.

44. This conclusion is supported by the decision of the House of Lords in *Workington Harbour & Dock Board v Trade Indemnity Co Ltd (No 2)* [1938] 2 All ER 101, where the plaintiffs sued on a bond which the defendants had given to guarantee the performance of a contractor who had undertaken to build a dock for the plaintiffs. The bond provided that a certificate which complied with certain criteria would prove the amount due. In the action on the bond the plaintiffs relied upon a certificate which they said complied with the criteria and was thus conclusive evidence of the defendants' liability under the bond. The action failed because the certificate did not specify a relevant act or default as required by the bond. The plaintiffs brought a second action relying, not upon the certificate, but upon the underlying facts, which they said amounted to breaches of the contract and thus triggered liability under the bond. The action failed on the basis of res judicata.

45. Lord Atkin described the position concisely at pp 105-106**:**

> "The question will always be open whether the second action is for the same breach or breaches as the first, in which case the ordinary principles governing the plea of res judicata will prevail. In the present case, in my opinion, the plaintiffs are suing on precisely the same breaches as those in the first action, and for the same damages, though on different evidence. … I am satisfied that the first action raised the issue of all the contractors' breaches, and treated, and meant to treat, the engineers' certificate as conclusive proof of both the breaches and the losses arising therefrom. … The result is that the plaintiffs, who appear to have had a good cause of action for a considerable sum of money, fail to obtain it, and on what may appear to be technical grounds. Reluctant, however, as a judge may be to fail to give effect to substantial merits, he has to keep in mind principles established for the protection of litigants from oppressive proceedings. There are solid merits behind the maxim nemo bis vexari debet pro eadem causa."

That maxim states what Lord Bridge described in *Thrasyvoulou* as a fundamental principle in the law. For the reasons I have given above, it is a fundamental principle which applies to successive disciplinary proceedings.

46. As I see it, the principle stated by Lord Atkin applies to the facts here. In all the circumstances I have reached the conclusion that all the constituent elements of cause of action estoppel are established on the facts.

47. It was not suggested in argument that, unless there is some special exception which applies to disciplinary proceedings, the determination of the first complaint is not an absolute bar to the second complaint. In this regard at para 7.04 *Spencer Bower and Handley* say that the bar created by a cause of action estoppel is absolute with no exception for special circumstances. There is potentially such an exception in cases of issue estoppel: *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 104.

48. On the second day of the appeal, the Institute introduced, for the first time in the course of this litigation, a novel proposition in the form of the seventh of its outline submissions. The proposition is that in any event, given the disciplinary context the Supreme Court should recognise a public interest exception to the strict application of the doctrine of cause of action estoppel which is absent in the case of conventional civil litigation. This was prompted by a suggestion made by Lord Phillips in the course of the argument that an absolute principle of the kind adverted to by Lord Keith in *Arnold* would or might put the safety of the public at risk. So, for example, if such an absolute rule applied to doctors it might put the lives of patients at risk.

49. For my part, I see the force of the introduction of such a principle. However, whether and in what circumstances to permit such an exception seems to me to be essentially a matter for Parliament and not for the courts. Different considerations no doubt apply to different professions. For example the risk to patients may be thought to be of a different order from the risks to the clients of accountants. I note in this context that Parliament has taken action in the case of decisions made by a number of Fitness to Practise and Professional Committees, including those of the General Pharmaceutical Council, the General Medical Council, the General Dental Council, the General Optical Council, the General Osteopathic Council, the General Chiropractic Council and others. Part II of the National Health Service Reform and Health Care Professions Act 2002 created the Council for Healthcare Regulatory Excellence to supervise the manner in which self-regulation operates in the field of health care. Section 29 of that Act gives that Council the right to refer to the High Court decisions made in disciplinary proceedings of a self-regulatory body such as those identified above.

50. Thus Parliament has intervened in specific ways in order to ensure that the public interest is protected. As I see it, very different considerations may arise in different contexts and what steps should be taken is a question of policy which may depend upon the profession concerned. Parliament may think it appropriate to ensure that the relevant profession is consulted before introducing specific provisions. It is perhaps noteworthy that it did not occur to the Institute to suggest that there should be an exception to the principles of res judicata identified above until the eleventh hour. In these circumstances, for my part, I would not invent a public interest exception but leave it to Parliament to decide whether and in what circumstances to do so.

51. It follows that I would allow the appellant's appeal on the basis that the first and second complaints relied upon the same conduct and that, once the first complaint was dismissed, it was contrary to the principles of res judicata to allow the Institute to proceed with the second complaint.

Abuse of process

52. The conclusions which I have reached so far make the question whether the second complaint should be dismissed or stayed on the ground of abuse of process academic. The question of abuse of process raises points of some interest but I have reached the conclusion that it would not be appropriate for the Court to express an opinion on them. This is in part because it would in all probability involve doing so on the hypothesis that the first and second complaints are different. It does not seem to me to be sensible to embark on that exercise in circumstances in which I have concluded that they are the same. I therefore express no opinion under this head.

Conclusion

53. For the reasons I have given, I would allow the appeal on the ground that the second complaint made the same complaint as the first complaint and that the dismissal of the first complaint, which was a final determination of the first complaint on the merits, made that complaint res judicata such that the Institute was not entitled to make or proceed with the second complaint.

LORD COLLINS

54. Mr Coke-Wallis is a chartered accountant. In flagrant breach of a specific direction from the Jersey Financial Services Commission that no records or files in respect of the companies or any customers were to be removed from the offices of the companies, he (and his wife) attempted, unsuccessfully, to take via the car ferry to St Malo suitcases containing files and digital material relating to the companies and their clients. Mr Coke-Wallis and his wife were convicted in Jersey on a charge of failing to comply with the direction, and the Jersey Court of Appeal refused leave to appeal against conviction.

55. For the reasons given by Lord Clarke, I agree that the appeal should be allowed, even though that leads to the thoroughly undesirable result that for purely technical and wholly unmeritorious reasons the second tribunal's decision that he be excluded from membership of the Institute cannot stand.

56. The Institute accepted that the classic res judicata principles applied to professional disciplinary bodies. If this had been a case for application of an abuse of process approach rather than the more rigid res judicata principles, then I would have had no hesitation in concluding that the second set of proceedings was not an abuse. But the effect of the decision of this court is simply to reverse the Court of Appeal's finding that the discreditable conduct alleged in the two complaints was different (a conviction complaint and a misconduct complaint), and to come to the almost inevitable conclusion that they were both misconduct complaints. Consequently the decision of this court is that the Court of Appeal simply misapplied well-settled res judicata principles, and does not raise a question of law of general public importance normally fit for consideration by this court. As Lord Bingham said in *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222, 2228, it is not the role of the highest court to correct errors in the application of settled law.

57. It has been held or assumed in a number of decisions in other common law jurisdictions that res judicata principles apply to successive complaints before professional disciplinary bodies. Many professional disciplinary bodies are established or regulated by legislation, but the principles apply equally irrespective of the status of the disciplinary body. The reason is that from the earliest times it has been recognised that the principle of finality or res judicata applies to tribunals established by the parties, such as an arbitral tribunal: *Dunn v Murray* (1829) 9 B & C 780; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 643, per Diplock LJ.

58. For example, in Canada it was accepted by the Manitoba Court of Appeal that principles of res judicata applied to a complaint by the College of Physicians against a doctor. On the facts it was held that the College could take proceedings against the doctor for sexual misconduct notwithstanding that four years previously the College had rejected the complaint, but that was because the earlier decision was not regarded as a final decision: *Holder v College of Physicians and Surgeons of Manitoba* [2003] 1 WWR 19. In *Solicitor v Law Society of New Brunswick* [2004] NBQB 95 the Law Society was held to be barred from bringing a complaint based on alleged fraudulent billing, when the solicitor had already been reprimanded for billing irregularities arising out of the same matters; and in *Visser v Association of Professional Engineers & Geoscientists* [2005] BCSC 1402 it was held that the Association was not entitled to bring successive disciplinary proceedings for different offences based on the same conduct. In Australia it was held that a doctor who had been censured by a Medical Board could not subsequently be the object of a second inquiry into alleged infamous conduct: *Basser v Medical Board of Victoria* [1981] VR 953. See also in New Zealand *Dental Council of New Zealand v Gibson* [2010] NZHC 912 (dentist bound by findings of disciplinary tribunal). In some cases the same result has been achieved by finding that the disciplinary tribunal is functus officio after the first decision: *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 (Canadian Supreme Court). In the United States, in *Florida Bar v St Louis*, 967 So 2d 108 (Fla 2007) and *Florida Bar v Rodriguez*, 967 So 2d 150 (Fla 2007) the Supreme Court of Florida accepted that res judicata principles applied to successive complaints brought by the Bar, but held that on the facts the causes of action were different. But it has also been said that res judicata or double jeopardy principles may not apply to disciplinary bodies because their "disciplinary requirements serve purposes essential to the protection of the public, which are deemed remedial, rather than punitive": *Spencer v Maryland State Board of Pharmacy*, 846 A 2d 341, 352 (Maryland Court of Appeals, 2003); cf *Re Fisher*, 202 P 3d 1186, 1199 (Sup Ct, Colorado, 2009).

59. Although it may make no practical difference, it is not the principles of autrefois convict which apply to disciplinary proceedings, which are civil in nature. Lord Bridge was in error, when, speaking for the Judicial Committee of the

Privy Council in *Harry Lee Wee v Law Society of Singapore* [1985] 1 WLR 362, 368, he accepted that the principles of autrefois acquit applied to disciplinary proceedings. The statement was obiter, and the point does not seem to have been argued.

60. The effect of the decision of this court is that a person who has shown by his discreditable conduct that he is not fit to practise may continue to do so. The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour: see e.g. *Bolton v Law Society* [1994] 1 WLR 512, 518, per Sir Thomas Bingham MR; *Gupta v General Medical Council* [2002] 1 WLR 1691, para 21, per Lord Rodger. It is unfortunate that the Institute's procedural error should have had such far-reaching (and absurd) consequences, but there is no principled basis for upholding the decision of the Court of Appeal.

LORD DYSON

61. I agree entirely with the conclusions and reasoning of Lord Clarke on all the issues that arise on this appeal. I add a few words because it seems to me that the House of Lords decision in *Workington Harbour & Dock Board v Trade Indemnity Co Ltd (No 2)* [1938] 2 All ER 101 provides particularly illuminating support for the appellant's case.

62. In that case, the defendant contractor had agreed to construct a new dock for the plaintiff board and had given a bond to guarantee the performance of the contract. The defendant defaulted and the plaintiff made a claim on the bond. In the first action, it relied on an engineers' certificate showing that the defendant owed it £78,000 which it had failed to pay. The construction contract provided that any certificate of the engineers should be final and binding on the contractor. Thus in the first action the plaintiff relied on the certificate as conclusive evidence of all the defendant's breaches of the construction contract as well as the amount of damages that it was liable to pay. This claim was dismissed on the grounds that the certificate was technically defective.

63. The plaintiff then brought a second action in which it sought to prove its claim for damages for breach of the construction contract without recourse to the engineers' certificate. This claim was dismissed on the grounds of res judicata. As Lord Atkin said at p 106D, the issues in the first action covered every breach by the contractor and all the damage suffered by the plaintiff in consequence. These issues were therefore precisely the same as those in the second action.

64. In the present case, the first complaint alleged a breach of bye-law 4(1)(a), namely that the appellant had committed an act or default likely to bring discredit on himself, the Institute or the profession of accountancy by failing to comply with the direction issued on 18 December 2002. The Institute sought to prove this breach by relying on the conviction of 16 September 2003. The second complaint alleged the same breach of the same bye-law, but this time the Institute sought to prove the breach without recourse to the conviction. The first and second complaints were closely analogous to the first and second actions in the *Workington* case. The plaintiff in that case and the Institute in the present case both sought to prove on the second occasion by different means what they had failed to prove on the first. The Institute's two complaints were the same, just as both proceedings issued by the plaintiff in *Workington* were in respect of the same cause of action. The principle of res judicata is a bar to the second complaint as it was a bar to the second action in *Workington.*