



Enough is enough? Setting aside a judgment for fraud

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Introduction

- *Takhar v Gracefield*: does an applicant to set aside a judgment obtained by fraud have to show that he or she exercised reasonable diligence in relation to fraud when the matter was first litigated?
- A broader view: a “*bare-knuckle fight*” between two fundamental legal doctrines:
 1. “Fraud unravels all”
 2. Finality in litigation
- **Structure of this talk:**
 1. The Legal Landscape
 2. *Takhar v Gracefield*
 3. Discussion – enough is enough? (*Briggs v Sumption*; practical points)

(1) The Fraud Principle

- *Lazarus Estates Ltd v Beaseley* [1956] 1 QB 702, per Denning LJ:
“No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...”
- *HIH v Chase Manhattan* [2003] 1 All ER (Comm), per Lord Bingham:
“Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal.!”
- Fraudulent settlements – *Hayward v Zurich* [2016] EWCA Civ 327; *Gohil v Gohil* [2015] UKSC 61; *Sharland v Sharland* [2015] 3 WLR 1070
- Fraudulent claims – *Perry v Raleys* [2019] UKSC: “the court simply has no business rewarding dishonest claimants”
- Maintaining the integrity of the Court’s own process

(2) The Finality Principle

Res Judicata

Abuse of Process

Issue Estoppel

Henderson v Henderson

Cause of Action Estoppel

Collateral Attack

Res Judicata

- Two key principles:
- Public interest in finality of litigation
- Ds should not be harassed twice in respect of same set of circumstances
- **Definition:**
- *“A res judicata is a decision, pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter(s) so decided, so that except on appeal it cannot be relitigated between the parties or their privies” – Res Judicata, 4th Ed, Spencer-Bower & Handley*
- *“Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle” – per Lord Sumption in Virgin Atlantic v Zodiac Seats [2013] UKSC 46*
- **Approach:** consider cause of action / issue estoppel before *Henderson* / **abuse of process:** see *Gaydamak v Leviev* [2014] EWHC 1167 (Ch)

Res Judicata: Issue Estoppel v Cause of Action Estoppel

- *Arnold v National Westminster Bank plc* [1991] 2 AC 93, per Lord Keith:
- "**Issue estoppel** may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."
- "**Cause of action estoppel** applies where a cause of action in a second action is identical to a cause of action in the first, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, the bar is absolute in relation to all points decided, unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in earlier proceedings does not permit the matter to be re-opened".

Res Judicata: Issue Estoppel v Cause of Action Estoppel

- **Similarities**
- Parties must be the same in both sets of litigation – but NB ‘privies’
- Both sets of litigation must be identical – same issue / same cause of action
- Absolute bar to subsequent litigation unless fraud justifies setting aside original judgment
- Need for litigation to have been determined by judgment
- **Differences**
- Fresh evidence: an issue (but not a cause of action) which has been decided, or ought to have been decided, in previous litigation can be reopened if there is fresh evidence but only if that evidence entirely changes that aspect of the case and could not with reasonable diligence have been obtained before.
- Need to identify the issue: *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853
- Default judgment: does not determine any particular issue (therefore no issue estoppel) but does determine (whole) cause of action
- Settlement / consent: needs to be sufficiently clear to cover a particular issue; need for express term to preclude further claims

Abuse of process: *Henderson v Henderson*

- *Henderson v Henderson* [1843-1860] All ER Rep 378:
- "the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case"
- *Johnson v Gore Wood* [2002] 2 AC 1:
- "*Henderson v Henderson* abuse of process, ... although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them."
- **Comparison with Cause of Action / Issue Estoppel**
- No need for parties to be identical in both sets of litigation
- No need for litigation to be identical; subsequent litigation can be "related"
- Does not provide an absolute bar: balancing exercise per *Johnson*
- Exceptional circumstances exception
- NB separate tort of abuse of process: *Willers v Joyce* [2018] EWHC 3424 (Ch)

Abuse of process: Collateral Attack

- *Hunter v Chief Constable of West Midlands* [1982] AC 529
- C convicted of murder; C claimed confessions false and due to police violence; judge ruled confessions admissible.
- C's subsequent civil claim against the police for damages for assault was struck out as a collateral attack on C's murder conviction.
- If want to rely on fresh evidence to challenge conviction, would need to satisfy the test in *Phosphate Sewage Co v Molleson* (1879) 4 App Cas 801:
 - “the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been, ascertained by me before”.
- NB collateral attack is not automatically struck out as an abuse of process: court retains a discretion: see *SSTI v Bairstow* [2003] EWCA Civ 321

RBS v Highland Financial Partners [2013] EWCA Civ 328

The pre-*Takhar* test:

1. Conscious and deliberate dishonesty in relation to the relevant evidence given, or action taken, statement made, or matter concealed
2. The relevant evidence, action, statement or concealment must be material
3. The question of materiality is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what the decision might be made if the claim were to be retried on honest evidence

Takhar v. Gracefield Developments

- Does an applicant to set aside judgment for fraud have to satisfy the reasonable diligence test?
- *Takhar*: Not a very promising appeal?
 - Lord Bridge, ***Owens Bank v. Bracco*** [1992] 2 AC 443 HL: “*the common law rule [is] that the unsuccessful party ... is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him **and could not have been discovered with reasonable diligence before the judgment was delivered....** This is the rule to be applied in an action brought to set aside an English judgment on the ground that it was obtained by fraud.*”
 - Lord Templeman, ***Owens Bank v. Etoile*** [1995] 1 WLR 44 PC: “*An English judgment is impeachable in an English court on the ground that the first judgment was obtained by fraud but only by the production and establishment of evidence newly discovered since the trial **and not reasonably discoverable before the trial: see Boswell v. Coaks (1894) 86 LT 365n.***”

Takhar v. Gracefield Developments – the facts

- Dispute between Mrs Takhar and the Krishans about terms upon which certain properties transferred to Gracefield.
 - Mrs Takhar: properties remained hers beneficially
 - The Krishans: properties transferred to Gracefield beneficially subject to agreed division of profits from redevelopment
- The Krishans adduced a written Profit Share Agreement, purportedly signed by Mrs Takhar, supporting their position
- Mrs Takhar's position: she had not seen the Profit Share Agreement prior to the dispute arising
- March 2010: Mrs Takhar applied for permission to adduce handwriting evidence re the signature. Application failed: trial imminent and Mrs Takhar made no positive case of forgery
- At trial in Summer 2010, judgment for the Krishans; judge relies upon signed Profit Share Agreement
- January 2013: Mrs Takhar's solicitors pay £300,000 compensation to her

Takhar v. Gracefield Developments

- October 2013: Mrs Takhar obtains handwriting report – concludes that signature on Profit Share Agreement forged
- December 2013: Mrs Takhar applies for original judgment to be set aside for fraud
- Defendant contended that claim was an abuse of process. That point heard as a preliminary issue.
- Newey J: not an abuse of process – no reasonable diligence requirement: “*Were it impossible to impugn the judgment, the winner could presumably have been sent to prison for his fraudulent conduct and yet able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud.*” [2015] EWHC 1276 (Ch), para 37

Takhar v. Gracefield Developments – Court of Appeal

- CA: Newey J decision reversed, [2017] EWCA Civ 147
- Patten LJ: “*Authority part... there is clearly a powerful argument that the rule of policy against re-litigation ought to admit of an exception in cases of fraud regardless of whether the due diligence condition is satisfied.*” (para 52)
- But held that the matter had been decided by authority, including *Owens Bank v. Bracco*, and *Hunter v. Chief Constable of West Midlands*:

“*So far as this court is concerned [the due diligence condition] represents the balance struck by the English authorities between the two policy considerations which are in play and in my view we are obliged to apply it.*” (para 54)

Takhar v. Gracefield Developments – Supreme Court

- Appeal allowed – but with differing reasons
- “*A bare-knuckle fight between two important and long-established principles of public policy*” Lord Briggs, para 68

Takhar v. Gracefield Developments – Supreme Court

- Lord Kerr:
 - *“The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice. Quite apart from this, the defrauder, in obtaining a judgment, has perpetrated a deception not only on their opponent and the court but on the rule of law.... It appears to me that the policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming.”* (para 52)
 - Two possible exceptions: (1) where fraud raised at original trial and the new evidence is relied upon to advance that pre-existing case; and (2) where a deliberate decision taken not to investigate fraud (para 55)

Takhar v. Gracefield Developments – Supreme Court

- Lord Sumption:
 - The only jurisdiction in play is abuse of process (para 61)
 - Question is whether fraud “*should*” have been raised in earlier proceedings
 - “*the basis upon which the law unmakes transactions, including judgments, which have been procured by fraud is that a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are.... It follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he ‘should’ have raised it.*” (para 63)
 - Where fraud raised in earlier proceedings, provisional view that position is the same
- Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agreed with *both* Lord Kerr and Lord Sumption

Takhar v. Gracefield Developments – Supreme Court

- Lord Briggs:
 - *“I would have preferred a more flexible basis upon which, recognising that many cases will straddle any bright line, the court can apply a fact-intensive evaluative approach to the question whether lack of diligence in pursuing a case in fraud during the first proceedings ought to render a particular claim to set aside the judgment in those proceedings for fraud an abuse of process. This approach would in particular seek to weigh the gravity of the alleged fraud against the seriousness of the lack of due diligence, always mindful of the principle that victims of a fraud should not be deprived of a remedy merely because they are careless.”* (para 68)
- Lady Arden: agreed with the majority; but suggested amendment to the CPR

Takhar v. Gracefield Developments – Discussion

- Pre-requisites for claim to set aside judgment for fraud:
 - *RBS v. Highland* conditions: (1) conscious and deliberate dishonesty; (2) evidence, action, statement or concealment material; (3) materiality = impact on evidence supporting original decision
 - New evidence not before court in earlier proceedings
- No reasonable diligence requirement
- Areas of uncertainty:
 - Fraud previously raised unsuccessfully as an issue (difference between Lord Kerr and Lord Sumption)
 - Claimant chose not to investigate a suspected fraud or not to rely on a known one
 - In either case, does the court have a discretion?
- An Opportunity missed?

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