October 16, 2023

Unravelling the threads – When can judgments be set aside for fraud?

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In *Finzi* v *Jamaican Redevelopment Foundation Inc* (Jamaica) [2023] UKPC 29, the Judicial Committee of the Privy Council recently reviewed the principles of English law that govern when a party can set aside a judgment (or arbitral award) as having been obtained by fraud, and to what extent 'fresh evidence' of fraud is required. In so doing, their Lordships took a different approach than the English Court of Appeal had advocated in another recent decision (*Park* v *CNH Industrial Capital Europe Ltd (t/a CNH Capital)* [2021] EWCA Civ 1766). The Privy Council concluded that the Court of Appeal had read too much into statements made *obiter* by Lord Sumption in a Supreme Court decision on the same issue (*Takhar* v *Gracefield Developments Ltd* [2019] UKSC 13), and imposed a more stringent test to determine whether a claimant could still challenge a judgment as procured through fraud when the relevant evidence was already available at the time of the original trial.

In addition to providing a full and thoughtful review of the authorities, *Finzi* also offers a good reminder of the function that the Privy Council plays. Decisions by the Privy Council are binding on all Commonwealth states which continue to allow an appeal to this English judicial body from their own, national, tribunal of final instance. Privy Council rulings are not, however, binding on the English Courts themselves, being only of 'persuasive authority'. The importance of that 'persuasive authority' is not, however, to be underestimated. The members of the Privy Council's Judicial Committee tend to be the Justices of the Supreme Court, and they will not shy away from commenting frankly on decisions made by all levels of the English Courts – including the Supreme Court.

Fraud unravels all?

The suggestion that a party who suffers an adverse judgment or arbitral award which has been procured by fraud should have no recourse against the party misleading the court or tribunal offends, it is suggested, basic notions of morality and justice. Lord Denning famously said in *Lazarus Estates Ltd* v *Beasley* [1956] 1 All ER 341 that:

> "*fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all … once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever*"

But that is not the only principle at play. To use Lord Brigg's analogy in *Takhar*, this situation is a bare-knuckle fight between 'fraud unravels all' and, in the other corner, 'there should be an end to litigation'. This second principle is derived from the decision in *Henderson* v *Henderson* (1843) 3 Hare 100, where the Court held that "*… a litigant should bring forward his whole case*" in any proceedings, rather than keeping some aspect of it to himself, only to then vex the defendant with a second action and in effect seeking to have a second bite at the cherry. The *Henderson* principle also reflects the fact of life that any judicial determination of a dispute, or findings on contested facts, may well be imperfect. The aim of legal proceedings is to provide (per Lord Wilberforce in *The Ampthill Peerage* [1977] AC 547):

> "*… the best and safest solution ... and having reached that solution it closes the book ... in the interest of peace, certainty and security it prevents further inquiry ... there are cases where the certainty of justice prevails over the possibility of truth ... and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud.*"

Takhar* v *Gracefield Developments

A full panel of seven Supreme Court Justices considered this clash of maxims in *Takhar* v *Gracefield Developments Ltd*. The case arose out of a family dispute over ownership and the proceeds of sale of properties that were sold after renovations. Ms Takhar initially owned the properties but then transferred them to Gracefield Developments Limited, a company in which her cousin had an interest. Ms Takhar argued that she nevertheless retained beneficial ownership of the properties, but she lost at trial and was ordered to pay monies to her cousin's benefit.

In finding against Ms Takhar, the judge heavily relied on a profit share agreement which supported the cousin's case as to how the monies were to be distributed. The evidence before the judge was that only the last page of the agreement bearing Ms Takhar's signature could be found. That single signed page had been located in the files of the solicitors acting for the other side in the transaction that lay at the heart of the dispute. Ms Takhar could not explain how her signature came to be on that page, and she did not (or could not) advance a case of forgery at trial. At the last minute before the trial was due to commence, Ms Takhar had applied for permission to adduce the evidence of a handwriting expert, but the judge refused this because the application had been made too late. When Ms Takhar took the stand, she was unable to say that the signature was not hers, but her evidence was that she could not say how it had ended up on the relevant page. The judge, who preferred the evidence of Ms Takhar's cousin in any event, concluded that Ms Takhar must have taken away a copy of the agreement to sign, returned it signed to the cousin's solicitors, who then misfiled it or lost the other pages of the signed copy. He went on to hold that even though the properties were transferred by Ms Takhar into the name of the Gracefield company before Ms Takhar signed the agreement, that transfer had been made on the terms that were subsequently recorded in the agreement.

After the trial, Ms Takhar fired her solicitors. Her new legal team procured a report by a handwriting expert who concluded that the signature on the agreement had been transposed from and was identical to Ms Takhar's signature on an earlier letter sent to the same firm of solicitors (a letter which the cousin presumably had a copy of). Armed with this new evidence, Ms Takhar commenced a fraud claim against her cousin, and sought to have the first judgment against her set aside. Her cousin applied to have that second claim struck out as an abuse of process, arguing that Ms Takhar had been in a position to make any such fraud claim at the original trial, but had just left it too late. At first instance, Newey J disagreed and held that Ms Takhar's claim was not an abuse of process. He found that a party who seeks to set aside a judgment on the basis that it was obtained by fraud did not have to demonstrate that she could not have discovered the fraud by the exercise of reasonable diligence. Ms Takhar's cousin appealed. The Court of Appeal allowed that appeal, finding that there was in fact such a requirement of due diligence. The Court of Appeal held that the judge had erred as a matter of law, since the House of Lords had already determined the point in an earlier decision, *Owens Bank Ltd* v *Bracco* [1992] 2 AC 443. There, Lord Bridge had held that:

> "*… the unsuccessful party who has been sued to judgment 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.*"

Now it was Ms Takhar's turn to appeal to the Supreme Court on a point of law of public importance. Seven Justices unanimously found that there was after all no due diligence requirement, and that there were overwhelming policy considerations in favour of allowing a challenge to a judgment where the issue of fraud had not already been canvassed and decided in the original proceedings - as it had not been in Ms Takhar's case – her handwriting report was 'new' or 'fresh' evidence of fraud. Lord Kerr concluded that the judge had correctly

identified the crux of the matter when he had described the consequences of letting a fraudulent judgment stand in stark terms:

> "*Supposing that a party to a case in which judgment had been given against him could show that his opponent had obtained the judgment entirely on the strength of, say, concocted documentation and perjured evidence, it would strike me as wrong if he could not challenge the judgment even if the fraud could reasonably have been discovered. 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.*"

Lord Sumption's proviso

One might think that a unanimous decision by the full Supreme Court ought to have settled the law. However, Lord Sumption in his judgment arrived at the same conclusion by somewhat different reasoning. He referred to the general basis on which transactions and judgments can be set aside, namely that a reasonable person is entitled to assume that their counterparty acts honestly and is "… *not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are.*" Since the law does not expect reasonable people to be on the lookout for fraud, contributory negligence is not a defence in a fraud claim, and the fraudster cannot say that the victim was negligent or foolish to allow themselves to be taken in. Lord Sumption did, however, add a proviso (emphasis added):

> "*If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material*"

It was this suggestion that a claimant might nevertheless be prevented from setting aside a judgment where there had been a deliberate decision not to rely on fraud (as opposed to a failure to exercise reasonable diligence to discover a fraud) which continued to trouble the courts.

The general test

Before looking at the next case in the line leading up to the Privy Council's decision in *Finzi*, it should be recalled that a judgment cannot be set aside by just pointing to fraud generally. In *Takhar*, the Supreme Court confirmed that a claimant had to meet the following test before a judgment would be set aside:

- There must have been 'conscious and deliberate dishonesty' in relation to evidence given, actions taken, statements made, or matters concealed which are relevant to the first judgment that is to be set aside.

- Such dishonesty must have been material. The claimant has to show with fresh evidence that the dishonest matters (e.g. the previous evidence) were an operative cause of the first court giving judgment. The fresh evidence has to show that the first court would entirely have changed the way in which it approached and came to its decision.

- The focus is on the impact of the dishonest evidence on the actual judgment, rather than on speculating what the court would have found if there had been honest evidence before it. To illustrate this, Ms Takhar would say that the court would not have found that she agreed to a profit-sharing arrangement set out in an agreement that she had in fact never signed.

Park* v *CNH Industrial Capital Europe Ltd

Next, it was the Court of Appeal's turn to overturn a judgment procured by fraud. Mr Park was a director of a company which he used to run his farming business. That company was Park Organics Farms Limited ("**POFL**"), registered number 06048475. Mr Park's farm was called Park Hall Farm, and it was located in Lancashire. In 2013 and 2014, Mr Park entered into four hire purchase agreements with CNH, a finance company, for equipment for his farm. CNH prepared the agreements on their pro forma terms. Each of the forms was sent to Mr Park already filled in by someone at CNH, stating that the "*The Hirer*" was a "*Limited company – NAME ONLY - Park Hall Farms Limited - trading as Park Hall Farms Limited.*" Mr Park then signed the contracts as presented to him "*for and on behalf of The Hirer*" with the word "*Director*" written next to his own name. Mr Park also gave a personal guarantee, by which he guaranteed all monies owed to CNH by "*Park Hall Farms Limited*". The guarantee gave a Companies House number of 03616349 for that company.

A case of mistaken identity

It turned out that CNH had got the identity of the counterparty completely wrong. No company called "*Park Hall Farms Limited*" in fact existed. The company number on the guarantee was for a different company, called Park Hall Farms Enterprises Limited, which had no connection with Mr Park at all. That other company ran a farming business from an entirely different Park Hall Farm in Shropshire - not Lancashire, where the 'real' Mr Park was conducting his business. It was not POFL, Mr Park's company. The Court of Appeal noted that due to CNH's error, Mr Park was not personally liable for sums due to CNH under hire purchase agreements with a company that did not exist, and he had only signed a personal guarantee for debts that might be owed to CNH by some other company altogether which had no relation to him (he had not guaranteed the monies that CNH sought to recover). Neither could CNH enforce the hire purchase agreements against the non-existent company. CNH would need to rectify these agreements somehow in order to correct their mistake, otherwise they would go unpaid.

Mr Park fell into arrears. and CNH terminated two of the hire purchase agreements. Five months later, CNH sent a Mr Smith to visit Mr Park at the (correct) Park Hall Farm in Lancashire. Mr Park's evidence was that Mr Smith arrived after 10pm, after Mr Park and his wife had retired for the night. Mr Smith had no prior appointment and admitted that he climbed over a locked gate to gain entry to the grounds of Park Hall Farm. Mr Smith had with him a document called a Deed of Rectification which he presented and asked Mr Park to sign. Mr Park later testified in court that Mr Smith only showed him the last page (where he was to sign) and told him that the document was a formal release of any claims that Mr Park might have over the hired equipment, so that CNH could then sell the equipment and discharge (at least in part) the money that CNH considered Mr Park owed to it. What the Deed of Rectification actually said, however, was that all the hire purchase agreements would be rectified so that the hirer would be, and had always intended by both parties to be, "*John Andrew Park trading as Park Hall Farms Limited*" – so Mr Park in his personal capacity. Rectification of a contract is available where both parties had a common intention or understanding that their written agreement then failed to reflect, and CNH's Deed of Rectification was drafted as if that had been the case. Mr Park signed on the last page, presumably went back to bed, and awoke the next day facing the risk of personal liability.

CNH eventually took Mr Park to court, claiming under the rectified agreements. In the Particulars of Claim, which were supported by a statement of truth, CNH said that "... *The mistake was rectified by Deed of Rectification … by which it was agreed that all references to [the non-existent Park Hall Farms company] …* " meant Mr Park personally, trading under his own name. Mr Park represented himself in these first proceedings by CNH. He filed a handwritten Defence, in which he only said that he did not clearly remember signing any 'indemnity', and that this document had certainly not been explained to him. He then failed to file a witness statement in accordance

with an unless order. Mr Park's Defence was struck out and default judgment in CNH's favour was entered. Mr Park ran out of remedies under the CPR to set aside this default judgment, and he eventually brought fresh proceedings on the basis that the default judgment had been obtained by fraud. That claim was struck out at first instance as an abuse of process.

Careful when signing a Statement of Truth

The Court of Appeal allowed Mr Park's appeal against that decision. Andrews LJ agreed that even though this was a default judgment, given without hearing any argument or submission, CNH had deceived the Court. The deception was found in the Particulars of Claim, which stated that the parties had agreed, as they had always intended, that CNH's counterparty in the hire purchase agreements should be Mr Park. This had, the Court held, been untrue. Entering a default judgment is an administrative process, and "*… necessarily involves the court trusting in the truth of representations made in his Particulars of Claim which are material to his cause(s) of action, which will not have been examined by a judge and tested at trial. Those representations are fortified by the statement of truth indorsed on the Particulars of Claim.*"

The Court of Appeal did not accept CNH's explanation that they believed they had good grounds for rectifying the agreements in the manner alleged, and then subsequently bringing a claim based on the Deed of Rectification. CNH's original mistake had been to insert the name of a non-existent limited company as counterparty in the hire purchase agreements. Mr Park had signed as a director on behalf of that entity – a legal nullity. CNH had also asked him for, and he had given, a personal guarantee for the liabilities of a completely different company with which he had no connection. It could not therefore have been CNH's intention that Mr Park was always meant to have been the counterparty, as a sole trader, and neither could it have been Mr Park's intention, because amidst all the confusion he signed only as a director and a guarantor.

The Court of Appeal concluded that on CNH's account, following termination of two contracts and at a time when Mr Park and CNH had already been in dispute, Mr Park would had to knowingly sign a document which quite wrongly said he was always going to be personally liable. CNH's case assumed that Mr Park signed a document containing such a false statement, without raising any questions or objections, in circumstances where CNH also well knew that there had been no such 'original intention'. The Court of Appeal did not believe this, and noted that Mr Park had strong grounds for arguing that his signature on the Deed of Rectification had been procured by fraud:

> "*It is theoretically possible for parties to enter into a contract on the basis that something which to their knowledge is untrue, is true, though one would expect there to be a very good reason why they would make such a bargain. In the unlikely event that they do enter into such an agreement, and do so with their eyes open, it will be valid and enforceable. In deciding whose evidence about this late-night encounter to accept, a judge would consider what possible motive Mr Park would have had in the circumstances for agreeing to take on a personal liability as the hirer, on the false basis that this was what the parties had always intended, even though he intended that POFL should have been the named hirer, and he knew that he never traded as a sole trader under the name "Park Hall Farms" or any other name. No motive has yet been suggested by CNH.*"

Following in the footsteps of Lord Sumption

Andrews LJ also found that the deception relating to the Deed of Rectification was an operative cause of the default judgment. The Deed of Rectification was based on there being a common intention that Mr Park should be liable personally, and there was not. Without this contract and the underlying common intention, CNH had no

claim against Mr Park (because the guarantee was never rectified). Turning to CNH's allegation that Mr Park's case was an abuse of process, the Court of Appeal dismissed this, too. Andrews LJ relied on Lord Sumption's statements in *Takhar*, noting that:

> "*A person cannot take a deliberate decision not to rely on evidence of fraud, unless he is not only aware of that evidence, but knows that he can rely on it to plead fraud in answer to the case brought by his opponent.*"

She found that Lord Sumption's proviso did not apply here. At the time Mr Park served his defence, he did not know the effect of the document he had signed late at night, and remained without legal representation when he did so realise. Mr Park (represented by counsel) did try at the last minute to forestall the default judgment by an application of relief from sanctions, but this was dismissed and the default judgment was entered against him. The result was that the fraud allegation was never adjudicated upon, and the evidence never tested.

Finzi* v *Jamaican Redevelopment Foundation

Park v *CNH* was the latest decision at the English appellate level when the Privy Council came to decide *Finzi* v *Jamaican Redevelopment Foundation*. Mr Finzi's fight against the Jamaican Redevelopment Foundation ("**JRF**") began almost more than 20 years ago and led to numerous orders and judgments in the Jamaican Court – by and large all in JRF's favour. The fight seemed to have come to an end with a settlement agreement signed in 2012. However, in 2017, Mr Finzi brough fresh proceedings alleging that a number of judgments against him, and the settlement agreement itself, had all been procured by fraud. Mr Finzi's fraud case was seriously flawed in numerous ways which need not be set out in detail. It was duly thrown out as an abuse of process, but based on there being a 'reasonable diligence' requirement in Jamaican law, following the English Court of Appeal's decision in *Tahkar*. As we have seen, the Supreme Court subsequently overturned that decision, holding that there was no such requirement in English law, save for Lord Sumption's statements that a claimant who deliberately decided not to rely on evidence of fraud that was available to him would still be precluded from raising it in the later proceedings. This change in English law gave Mr Finzi's case a further lease of life, as it became necessary confirm precisely why it should be thrown out.

Briefly, Mr Finzi's original debt had been acquired by the Jamaican Financial Sector Adjustment Company ("**FINSAC**"). FINSAC was established in the 1990s when interest rates in the country were extremely high, and the financial market suffered from volatility. FINSAC acquired a number of non-performing loans, including a loan that had been made to Mr Finzi personally. Later on, in 2002, FINSAC sold a loan portfolio to JRF. At the heart of Mr Finzi's fraud claim was an allegation that when FINSAC sold his loans to JRF, he had already paid back one particular secured loan by which Mr Finzi had purchased a property, but JRF dishonestly acted as if that debt was still outstanding. He argued that JRF subsequently acted fraudulently when they enforced against that property, and he also accused them of deliberately charging interest that was not due, deliberately claiming US$ when the principal sums had been in Jamaican Dollars, and deliberately miscalculating interest. Mr Finzi said that he received the information that now enabled him to advance that fraud claim as recently as 2011, when someone at FINSAC had written to him with a spreadsheet of all the various loans of Mr Finzi's that FINSAC had sold to JRF.

JRF argued that all Mr Finzi's new claims amounted to an abuse of the process of the court. By the time the matter was heard before the Privy Council, counsel for JRF accepted that there was no requirement for Mr Finzi to have acted diligently in the original proceedings, but took the point that this was not fresh evidence. Mr Finzi's counsel relied on Lord Sumption's statements, claiming that the evidence was 'fresh', in the sense that it had not been deployed at any previous hearing, and the evidence was that Mr Finzi had not taken any 'deliberate decision'

not to use the evidence. Mr Finzi's counsel noted that the Court of Appeal in *Park* v *CNH* had approved Lord Sumption's statements, so that this was now the law.

Back to basics

The Privy Council considered that while *Park* v *CNH* was correctly decided, their Lordships could not agree with the approach adopted by Andrews LJ – and Lord Sumption's statements in *Takhar* could not bear the weight of authority that was being put on them. Lord Leggatt gave a useful reminder (which some readers might remember from their undergraduate law degree) of how one has to interpret common law decisions:

> "*It is important not to lose sight of the basic tenets of common law reasoning that every judgment must be read in context, by reference to what was in issue in the case, and that it is only the ratio of the decision which establishes a precedent and not obiter dicta. All too often advocates treat the analysis of cases as if it were simply an exercise in looking at the language used by judges, forgetting that it is not particular verbal formulations that make the common law but the principles on which the actual decisions in cases are based.*"

When *Takhar* reached the Supreme Court, the only point of law to be decided was whether Ms Takhar was required to have acted with reasonable diligence in investigating and discovering the fraud. The question of whether a claimant could still set aside a judgment based on evidence of fraud that he or she already had available to them had not been before the Supreme Court, and so Lord Sumption's comments were a classic example of an *obiter dictum*.

Lord Sumption's statements scrutinised

Lord Leggatt however went to consider Lord Sumption's reasons behind making those statements. He drew an analogy with the law of misrepresentation. A claimant cannot set aside a contract for fraudulent misrepresentation where he or she did not in fact rely on that statement. Lord Sumption's test would be similar, because in his example the claimant had taken a deliberate decision not to investigate or 'rely on' the fraud (in the sense of advancing the available evidence at trial). But if only a deliberate decision – which suggested a subjective review of the would-be claimant's reasons for not using available evidence of fraud – was enough to make the second claim an abuse of process, what then of the principle of finality of litigation? Should there not be a more stringent limit on when a claimant could attack a judgment based on evidence he or she already had at the time of the trial? While fraud could not be excused, and fraudulent judgments could not be allowed to stand, because of a negligent failure to investigate the fraud, due account also had to be taken of the burden and expense involved in litigation and defending new or subsequent allegations of fraud. Another consideration that merited judicial notice was the fact that some disappointed litigants might be more inclined to bring a fresh action for fraud than on any other basis:

> "*The risk of a party being vexed by allegations of fraud which amount to "wasteful and potentially oppressive duplicative litigation" is as at least as great as the risk as regards other types of new claim. In fact, it may be considered greater, as the jurisdiction to set aside a judgment or settlement agreement for fraud creates the potential for using allegations of fraud as a pretext for relitigating the dispute supposed to have been finally determined. … The same applies with equal, if not greater force, in the familiar situation where a party who has entered into a compromise agreement afterwards regrets having done so and attempts to re-open the litigation.*"

An objective test

Lord Leggatt held that whatever the motivations for a claimant not deploying available evidence of fraud might be, they ought to be considered on the basis of an objective test, rather than asking whether, subjectively, there had been a deliberate decision not to make use of the material. Whether such evidence 'should' have been advanced ought not in the eyes of the law depend on subjective views or beliefs. In addition, since the reasons behind any such decision might be veiled by legal professional privilege (as a party may well have acted on legal advice), the burden of proof to establish why previously-available evidence should nevertheless be allowed to support a challenge of a judgment should be on the claimant. The claimant will have to prove:

> "*(1) that the evidence is new in the sense that it has been obtained since the judgment or settlement, or (2) if the evidence is not new in this sense, any matters relied on to explain why the evidence was not deployed in the original action. Furthermore, where the evidence is not shown to be new in this sense, the claim is likely to be regarded as abusive unless the claimant is able to show a good reason which prevented or significantly impeded the use of the evidence in the original action.*"

Available evidence of fraud thus ought to be used straightaway, since that is what the law expects a reasonable person to do both in their own interest and in the interest of the efficient conduct of litigation, absent good reasons for not doing so. On the facts of the case, Mr Finzi's failure to lead evidence based on the allegedly new material was an abuse of process for numerous reasons, including the absence of any explanation of why he made no mention of it, and the fact of him having adopted contradictory positions in the earlier proceedings whilst being legally represented.

Conclusion

Fraud unravels all, except when it does not. It seems right to expect litigants to advance a properly arguable fraud claim as soon as they obtain the evidence that allows them to do so. If they choose not to do so for whatever reason and suffer an adverse outcome, then they will have to come up with a good explanation of why they kept their cards close to their chest before being allowed to challenge the judgment. The Privy Council struck the right balance between the two competing legal principles, as defending fraud claims tends to be costly. Parties often wish to leave no stone unturned when their good name and reputation is on the line. Claimants making baseless allegations of fraud after a litigation loss or after looking at a settlement agreement in the cold light of day may not always be good for the costs that they occasion by so doing, so a robust approach to striking out unmeritorious claims is to be welcomed. As a postscript, Lord Leggatt also noted that one can have regard to the apparent strength of an allegation of fraud, without conducting a mini-trial.