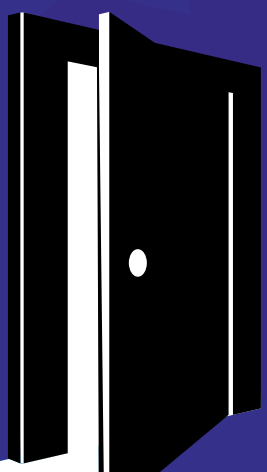
SETTING ASIDE JUDGMENTS FOR FRAUD: NOT AN "OPEN SESAME" FOR REPEAT LITIGATION



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It has long been "well-established" that a judgment that would otherwise have res judicata effect "can be impugned if it was obtained by fraud".[1] The English appellate courts have nonetheless recently had occasion to clarify the circumstances in which a party may set aside a domestic judgment[2] where a claimant can show that it was procured by fraud, and in particular, where it will be an abuse process to seek to do so.

The basic principles are well-known. First, there must be a "conscious and deliberate dishonesty". Second, the fresh evidence proving that dishonesty must be "material". This requirement will be met if "the fresh evidence would have entirely changed the way in which the court approached and came to its decision".

In other words, to establish materiality, the fresh evidence must show that the fraud was "an operative cause of the court's decision".[3]

If a party dissatisfied with a judgment can prove both elements, a free-standing cause of action in fraud will lie to impeach the impugned judgment.

In 2019, the Supreme Court had occasion to consider this cause of action in Takhar v Gracefield Developments.[4]

1 This note does not address the circumstances in which a foreign judgment can be set aside on grounds of fraud.
2 DPP v Humphrys [1977] AC 1, 21.
3 Royal Bank of Scotland plc v Highland Financial Partners LP [2013] 1 CLC 596, para 106. On the test for materiality, see also Tinkler v Esken Ltd [2023] EWCA Civ 655; [2023] Ch 451.
4 [2019] UKSC 13; [2020] AC 450.

In that case, the claimant sought to set aside a judgment on grounds of fraud, relying on evidence that the defendants had forged her signature. The defendants applied to strike the claim out as an abuse of process on the basis that the claimant could have obtained the fresh evidence of forgery before trial, had she used reasonable diligence. The key question before the Court was whether a requirement of reasonable diligence should be imposed on a party seeking to set aside a judgment. Both Lord Kerr and Lord Sumption, giving the leading judgments, held that there was no such requirement.[5] In particular, Lord Kerr considered that

"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".[6]

There was no issue before the Court about what constitutes fresh evidence for the purpose of this cause of action. This was because the relevant evidence of forgery was obtained after the trial. For this reason, Lord Kerr's statement of the test assumed that "no allegation of fraud had been raised at trial".7

However, Lord Kerr and Lord Sumption both expressed views (by way of obiter dicta) about the result that would pertain if the fraud was raised at the original trial. Lord Kerr's provisional view was the Court would have a discretion as to whether to proceed in such circumstances; whereas Lord Sumption considered that the position would remain the same. If the fraud was unsuccessfully raised at the original trial, and new evidence was later deployed that decisively established it, his provisional view was that the cause of action would 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".[8]

It was not until the recent case of Finzi v Jamaican Redevelopment Foundation [9] that this lingering question of whether and in what circumstances it may be an abuse of process to seek to set aside a judgment for fraud based on evidence that was known at the time of trial was decisively resolved.

In Finzi, the claimant had unsuccessfully sought to set aside certain Jamaican court judgments and consequential settlements on the basis that they had been procured by fraud. The judge dismissed that claim as an abuse of process for the reason that the claimant had all the information on which he was relying to substantiate his fraud claim at the time that he concluded the critical final settlement agreement. The Jamaican Court of Appeal was similarly unpersuaded, refusing permission to appeal. Despite granting leave to appeal, the Privy Council likewise advised that the claimant's appeal be dismissed. In doing so, the Board of the Privy Council took the opportunity to consider the correctness of the dicta in Takhar (in particular, Lord Sumption's provisional views set out above, which had since been endorsed by the Court of Appeal).[10]

5 See in particular, para. 54 (Lord Kerr) and para. 63 (Lord Sumption).
6 Para. 52.
7 Para. 54.
8 Para. 55 (Lord Kerr) and para. 66 (Lord Sumption).
9 [2023] UKPC 29; [2024] 1 WLR 541.
10 See Park v CNH Industrial Capital Europe Ltd (trading as CNH Capital) [2021] EWCA Civ 1766; [2022] 1 WLR 860.

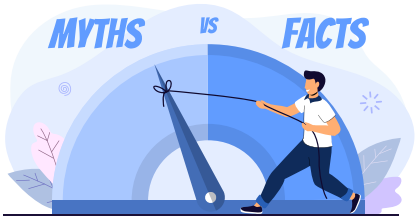
In general terms, the Board criticised the Court of Appeal's reliance on Lord Sumption's statements in Takhar and the tendency of advocates generally to place undue weight on obiter dicta:

"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." [11]

In the case of Takhar, as the Board pointed out, neither Lord Sumption nor the other members of the Supreme Court had applied their minds to the question of whether it is an abuse of process to set aside a judgment for fraud relying solely on evidence that the claimant had at its disposal when judgment was given.[12]

Like the leading judgments in Takhar, the Board recognised that "fraud is not excused by negligent failure to expose it".[13]

But, in contrast to Lord Sumption, the Board emphasised the strong public interest in achieving finality in litigation and the possibility of vexatious allegations of fraud in this context.[14] Allegations of fraud were "not to be regarded as some kind of open sesame"for a new round of litigation."[15]



Ultimately, the Board did not conclude that a party's prior knowledge of matters on which it later relied to impugn a judgment or settlement would bar an action. Instead, where a claimant relies on evidence not adduced at trial to prove fraud, it must prove (i) that the evidence is new, in that it has been obtained since judgment, or (ii) if it is not new, the matters on which the claimant relies to explain why the evidence was not originally deployed. Insofar as the second category is concerned, the Board indicated that a claim will likely be an abuse of process if the claimant cannot show a "good reason" why it was prevented or significantly impeded from using the relevant evidence at trial. Further, the Board observed that the strength of the fraud claim (i.e., conspicuous strength or conspicuous weakness) may be a factor in the Court's assessment. [16]

Although it is not strictly binding on the English courts, the Board's decision provides helpful guidance as to the circumstances in which a domestic judgment or settlement agreement can be set aside on grounds of fraud and confirms the enduring relevance of the doctrine of abuse of process. As one High Court decision has observed, since 2019, the Supreme Court's judgment in Takhar has been

"regularly invoked in circumstances where it has no proper application". [17]

After the Board's decision in Finzi, prospective claimants should think twice about whether they have a proper basis to impugn a judgment for fraud, particularly where the evidence was available before judgment.

11 Finzi v Jamaican Redevelopment Foundation [2023] UKPC 29; [2024] 1 WLR 541, para. 60.
12 Paras 61-62.
13 Para. 67.
14 See paras 65 and 67-69 in particular.
15 Para. 76.
16 Paras 72-73.
17 El Haddad v Al Rostamani [2024] EWHC 448 (Ch), para. 108.