Supreme Court decides when judgment can be set aside for fraud (Takhar v Gracefield Developments Ltd)

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Dispute Resolution analysis: John Wardell QC and Andrew Mold, barristers at Wilberforce Chambers, examine the Supreme Court's decision in Takhar v Gracefield Developments Ltd, that a person who applies to set aside an earlier judgment on the basis of fraud does not have to demonstrate that the evidence of this fraud could not have been obtained with reasonable diligence before the earlier trial.

Takhar v Gracefield Developments Ltd and others [2019] UKSC 13, [2019] All ER (D) 94 (Mar)

What are the practical implications of the judgment?

The decision in *Takhar v Gracefield Developments Ltd* underlines the special status afforded to claims in fraud and affirms the court's commitment to maintaining the integrity of its own process. In establishing the test for setting aside judgments on the grounds of fraud, the Supreme Court has clarified long-standing and uncertain caselaw that had caused a number of first-instance judges (and the Court of Appeal in the present case) to err in their approach. The Supreme Court has also brought the law of England and Wales more into line with the jurisprudence in Australia and Canada.

Although, by allowing the appeal, the Supreme Court rejected the imposition of a reasonable diligence requirement on a party seeking to set aside an earlier judgment for fraud, one should not think that this will make it easy to challenge an earlier judgment for fraud. There are still very stringent requirements to do so, namely that:

- there must be shown to be conscious and deliberate dishonesty in relation to the relevant evidence given, or action taken, statement made, or matter concealed
- the relevant evidence, action, statement or concealment must be material
- 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 decision might be made if the claim were to be retried on honest evidence

In *Takhar v Gracefield Developments Ltd*, Lord Kerr approved this summary of the principles which had been set out by Aikens LJ in *Royal Bank of Scotland PLC v Highland Financial Partners LP and others* [2013] EWCA Civ 328, [2013] All ER (D) 65 (Apr). Therefore, the Supreme Court's decision is unlikely to lead to a flood of previous judgments being set aside.

It would also be wrong to think that parties should hold back or deliberately decide not to investigate potential fraud allegations the first time around in the expectation that they could have a second go by later applying for the earlier judgment to be set aside. Without deciding the point, Lord Kerr considered that in those circumstances, the court might have a discretion whether or not to allow an application to set aside the judgment.

What was the background?

The appellant and the third respondent are cousins. In 2004, they became reacquainted having not seen each other for many years. The appellant was the owner of a number of properties. In 2005, it was agreed between the appellant, the third respondent and the second respondent (who was the latter's husband) that legal title to the properties would be transferred to the newly formed first respondent company, of which they were directors and shareholders.

The parties subsequently disputed what else was agreed at this time.

The appellant claims that the properties were to be renovated, initially at the cost of the second and third respondents, and then let out with the rent used to meet the costs of the renovations. However, she was to remain as beneficial owner of the properties.

On the other hand, the second and third respondents say that the properties were to be sold after they had been renovated and the appellant was to receive an agreed value for the properties and any additional profit would be divided equally.

In 2008, the appellant issued proceedings in relation to the ownership of the properties, claiming—among other things—that the properties had been transferred as a result of undue influence. At the trial before HHJ Purle QC, an important piece of evidence was a copy of a written profit share agreement (PSA), apparently signed by the appellant. The PSA was relied upon by the second and third respondents in support of their case. Before the trial, the appellant had applied for, but been refused, permission to obtain evidence from a handwriting expert. At trial, she said that she could not say that the signature on the PSA was not hers, albeit she could not explain how it had got there. HHJ Purle QC rejected her claim and relied on the PSA in accepting the second and third respondents' evidence.

Following the trial, the appellant engaged a handwriting expert who expressed the conclusive view that the appellant's signature on the PSA had been transposed from an earlier document.

In 2013, the appellant issued the current proceedings seeking to have HHJ's Purle QC's judgment set aside on the ground that it had been obtained by fraud. The second and third respondents maintained that the claim was an abuse of process. This point was tried as a preliminary issue before Newey J, who did not consider that the claim was an abuse but should proceed to trial. The Court of Appeal allowed the respondents' appeal.

What did the Supreme Court decide?

The question for the Supreme Court was whether a person who applies to set aside an earlier judgment on the basis that it was obtained by fraud was required to show that the evidence of the fraud could not have been obtained with reasonable diligence at the earlier trial (the 'reasonable diligence requirement'). In unanimously allowing the appellant's appeal, a seven-justice bench held that there was no reasonable diligence requirement in the test for setting aside a judgment for fraud.

As Lord Briggs explained, the appeal turned on the outcome of a 'bare-knuckle fight' between two principles of public policy, namely, fraud unravels all and finality of litigation. In the present case, the fraud principle should prevail. Lord Kerr explained that it was contrary to justice that a fraudulent individual should profit because their opponent failed to act with reasonable diligence. A person who obtained judgment through fraud had perpetrated a deception not only on their opponent but also the court and the rule of law. Further, Lord Sumption noted that a reasonable person was entitled to assume honesty in those with whom he dealt.

Given that the existence or non-existence of fraud had not been decided by HHJ Purle QC, the current claim did not involve re-litigation of the same claim and therefore there was no cause of action or issue estoppel. As Lord Sumption held, an action to set aside an earlier judgment for fraud was not a procedural application but a cause of action which was independent of the cause of action asserted in the earlier proceedings.

The Supreme Court's approach towards affording the prevention of fraud (or denying fraudsters their spoils) a special status is consistent with the general law that there is no defence of contributory negligence to claims for rescission based on fraud. It is also consistent with the recent Supreme Court decision of *Hayward v Zurich Insurance Company plc* [2016] UKSC 48, [2016] 4 All ER 628, in which a balance had to be struck between the prevention of fraud and the policy of encouraging settlements by not re-opening compromises. In *Zurich*, the Supreme Court held that parties could re-open a compromise that had been induced by a fraudulent misrepresentation without having to prove that they had believed the representation to be true.

John Wardell QC and Andrew Mold appeared for the appellant in this case.

Interviewed by Robert Matthews.

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