Setting aside judgments on the basis of fraud

A bare-knuckle fight between the principles (1) that fraud unravels all, and (2) that there must come an end to litigation?

Takhar v Gracefield Developments Ltd [2019] UKSC 13

Summary. On 20 March 2019 the Supreme Court clarified the law in relation to what a party has to establish to set aside a judgment on the ground it was obtained by fraud. The case was one in which the fraud in question was not pleaded or otherwise in issue in the original claim. In such a case, once the evidence of fraud is discovered, a party does not have to show that it was not available at the first trial and could not have been obtained with reasonable diligence prior to that trial. Provided there was a sufficiently material fraud there is an unqualified right to set the judgment aside.

The facts. This was a dispute between the claimant and the defendants about the terms upon which the claimant had transferred certain properties to the first defendant. The claimant brought a claim ("the first claim") alleging the properties had been transferred as a result of undue influence or other unconscionable conduct. The defendants denied this and contended the properties had been transferred under a joint venture agreement ("the JVA"). They produced what purported to be a copy of the JVA apparently bearing the claimant's signature. At a late stage the claimant sought permission to obtain a report from a handwriting expert in relation to that signature but the court refused the application. At trial the claimant's case was that she did not sign the JVA and had never seen it until the dispute arose but she could not say the signature on the JVA was not hers, and was unable to explain how it got there.

The judge, the late HHJ Purle QC, dismissed the first claim. He placed considerable weight on the JVA which he found reflected the parties' agreement.

Subsequently, the claimant obtained expert handwriting evidence which concluded the signature on the JVA had been transposed from a letter to the defendants' solicitors which the claimant had signed.

The claimant then brought a second claim ("the second claim") to set aside the judgment on the first claim as obtained by fraud. That was met by a plea that the second claim was an abuse of process as she could and should have raised the issue of fraud in the first claim and had not exercised reasonable diligence in advancing the issue.

First instance decision. Mr Justice Newey decided the question of abuse of process as a preliminary issue. He held that in order for the second claim to proceed it was *not* necessary for the claimant to show that it was not possible even with reasonable diligence to have obtained the evidence indicative of fraud by the time of the trial of the first claim. There was therefore no abuse of process.

Court of Appeal decision. The Court of Appeal allowed an appeal. There was no cause of action or issue estoppel (fraud was not in issue in the first action) but the wider policy considerations embraced by *Henderson v Henderson* (1843) 3 Hare 100 were in play. The claimant had to establish that the evidence of fraud was not available at the time of the trial of the first claim and could not have been obtained with reasonable diligence. As she could not do so the second claim was an abuse of process.

Supreme Court decision. A 7-judge panel of the Supreme Court allowed the claimant's appeal. She did not have to establish that the evidence indicating fraud could not have been obtained with reasonable diligence at the trial of the first claim, the second claim was not an abuse of process and should continue.

Reasoning of the Supreme Court. All the judges agreed the appeal should be allowed but there were clear differences as to how to reconcile the competing policy considerations (1) that fraud unravels all; and, (2) that there should be finality in litigation, and as to the circumstances in which a challenge to an earlier judgment on the grounds of fraud would be abusive.

The principal judgment was given by Lord Kerr. He reasoned that where the alleged fraud was not an issue in the first claim, there was no justification for applying the principle in *Henderson v Henderson* that a party should not be allowed to raise in a later case a point which could and should have been raised in earlier proceedings: the issues were different in each case. Furthermore, the policy arguments for allowing that party to impeach a judgment on the grounds of fraud were compelling. The law did not expect people to arrange their affairs on the basis that others may commit fraud and there was no justification for withholding a right to set aside a judgment obtained by fraud just because the fraud might have been exposed at an earlier stage had the victim taken more care. The defrauder had also perpetrated a deception not just on his opponent but upon the court and the rule of law.

On the other hand, the position might be different if an allegation of fraud *had* been made in the earlier action and a party was seeking to adduce *further* evidence to make *that* allegation good, or if a party made a deliberate decision not to investigate the possibility of fraud in the earlier action. In those cases, it was suggested, the court *might* have a discretion whether to entertain the claim to set aside the earlier judgment (such that, presumably, it could have regard to a range of considerations including any failure to exercise reasonable diligence in exposing the fraud).

The claimant's claim did not fall into either of those last categories. Whilst she had not accepted that she had signed the JVA in the first claim she had not positively asserted fraud, and whilst she had suspected fraud she had not deliberately decided not to investigate. She had done what she could by applying, unsuccessfully, to rely on expert evidence, which could have exposed the wrongdoing if obtained. Hence, there was no justification in her case for imposing an obligation to show that the fraud could not have been discovered before the original trial with reasonable diligence.

Lord Sumption gave a concurring judgment. He emphasised that the cause of action to set aside a judgment for fraud is a different cause of action to that in the earlier proceedings, that there could therefore by no cause of action or issue estoppel, and that once it was established that there had been a fraud, there was a right to have the judgment set aside. The only exception was where, in reliance on *Henderson v Henderson*, it could be said that a party could and should have raised the issue of fraud earlier, but parties were entitled to suppose other parties were acting honestly and it was only where a claimant deliberately decided not to investigate a suspected fraud, or not to rely on a known fraud, that that principle could apply.

Lord Briggs advocated a more flexible approach. He considered that there should be 'a fact-intensive evaluative approach' to enable a court to decide whether the application to set aside an earlier judgment on the basis of fraud was abusive. That was necessary given the spectrum of cases which could arise and the desirability of the court being able to balance the rival policy considerations as they applied in the individual case. That would enable a court to weigh the gravity of the particular fraud against the seriousness of the lack of due diligence and any other relevant considerations, whilst remaining mindful that victims of fraud should not be deprived of a remedy just because they are careless.

Lady Arden also disclaimed any absolute requirement that reasonable diligence had to be demonstrated, but she too would have preferred a more flexible approach.

Comment

It is suggested the decision of the Supreme Court is important for four reasons.

First, where the fraud was not in issue in the earlier proceedings it is now clear that a party can set aside an earlier judgment obtained by fraud even if that party could with reasonable diligence have raised the issue in the earlier proceedings. In contrast, where that issue of fraud *was* live in the earlier proceedings, or where a party deliberately abstains from investigating fraud, it is likely that the court can have regard to a range of considerations including whether reasonable diligence was exercised when deciding whether the application to set aside a judgment is an abuse of process.

Second, a narrow view is to be taken of whether the fraud relied upon was previously in issue. Thus, the claimant did not recollect signing the JVA and did not accept she was bound by it or that it governed the parties' dealings, but she did not allege forgery and hence fraud was not in issue.

Third, this is the latest in a series of judicial interventions which evince a determination that dishonest litigants should not get away with misusing the court process. There are many instances of this. They include the current willingness of courts to entertain applications for contempt of court where dishonest evidence has been given, and to imprison where serious contempts are proven. And see also *Perry v Raleys* [2019] UKSC at [27] where it was observed that a claimant with a 'lost litigation' claim against his solicitors could not be heard to say that he had suffered loss and was entitled to compensation for the lost opportunity to bring a claim he could not honestly have brought. The Supreme Court drew the moral there that "*…the court simply has no business rewarding dishonest claimants*".

Finally, this decision may lead to an increase in parties seeking to set aside judgments on the grounds of a fraud not previously in issue. But the difficulties should not be underestimated. There has to be a new claim to establish the fraud, and even if that second claim succeeds the judgment in the first claim will disappear but it may still be possible for the underlying claim to be resurrected. There may ultimately be three actions. Furthermore, it still has to be shown that the fraud played a material role if a judgment is to be set aside. In that respect the Supreme Court endorsed the guidance of Aikens LJ in *Royal Bank of Scotland Plc v Highland Financial Partners LLP* [2013] 1 CLC 596, at [106]: there has to have been conscious and deliberate dishonesty in relation to material matters such that the fraud was an operative cause of the first court giving judgment as it did; in other words the fresh evidence has to be such as would have entirely changed the way the first court arrived at its decision.

Nevertheless, in this bare-knuckle fight (the reference is that of Briggs JSC) between the principles (1) that fraud unravels all; and (2) that there must be an end to litigation, it seems, in this context at least, that the first principle has emerged victorious.

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