Neutral Citation Number: [2018] EWCA Civ 2422

Case No: A2/2017/2011

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HONOURABLE MRS JUSTICE LAING DBE
[2017] EWHC 1176 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2018

Before :

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HAMBLEN
and
MR JUSTICE HENRY CARR

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Between :

DANIEL TERRY	**Appellant**
- and -	
(1) BCS CORPORATE ACCEPTANCES LIMITED **(2) BCS OFFSHORE FUNDING LIMITED** **(3) JOHN TAYLOR**	**Respondents**

Simon Stafford-Michael and Sam Jarman (instructed by **Martin Cray & Co**) for the **Appellant**
David Mohyuddin QC and Professor Mark Watson-Gandy (instructed by **Akin Palmer**) for the **Respondents**

Hearing date: 16 October 2018

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Judgment Approved

Lord Justice Hamblen :

Introduction

1. This is the judgment of the Court.

2. This appeal concerns the appropriate procedure to be adopted where it is alleged that a judgment has been obtained by fraud.

3. It is well established that in such circumstances a fresh action may be brought to set aside the judgment – see, for example, *Jonesco v Beard* [1930] AC 298.

4. In an appropriate case, an appeal may also be brought seeking to rely on fresh evidence and to obtain an order for a retrial – see *Noble v Owens* [2010] EWCA Civ 224, [2010] 1 WLR 2491.

5. In the present case it is contended by the Appellant/Defendant that an alternative available procedure is an application to strike out the claim for abuse of process under CPR 3.4 and/or the court's inherent jurisdiction in reliance on the Supreme Court decision in *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004.

6. Further or alternatively, it is contended that a first instance court may set aside a judgment allegedly obtained by fraud pursuant to CPR 1 and 3 and, in particular, CPR 3.1(7).

Factual and procedural background

The Claimants' claims

7. As set out in their Particulars of Claim issued on 30 November 2012, the first and second Claimants are companies in the business of providing commercial loans. The third Claimant is the director and sole beneficial owner of the first and second Claimants.

8. The Defendant held himself out as being a representative of various funding/securitisation organisations including Hardy & Bros. Pte Limited ("Hardy") and Europa Investec Commercial Mortgage Section ("Europa").

9. The Claimants paid premiums totalling £1,982,652.70 and Euro 578,701 to the Defendant for the procurement of corporate financial guarantee bonds and to secure a credit facility. These were never provided. It was further alleged that Hardy and Europa were sham organisations with no assets and that certified documentation emanating from them were forgeries.

10. The Claimants' claim was for the full amount of the premiums paid and damages for breach of contract, fraud and misrepresentation.

Default judgment

11. Despite the Defendant obtaining extensions of time for service of his defence, no defence was served and the Claimants obtained judgment in default of defence on 21 February 2013.

12. The Defendant applied to set aside the judgment, but this application was dismissed by Master Kay QC on 21 February 2014 on the grounds of (i) excessive delay and (ii) failure to put forward a defence with a real prospect of success.

13. Applications for permission to appeal against the decision of Master Kay QC were dismissed by Andrews J on 28 April 2014 and, following an oral renewal hearing, Hickinbottom J on 15 May 2014.

14. On 29 July 2015 Master Kay QC ordered the Defendant to pay damages assessed in the sums of £1,982,652.70 and Euro 578,701, together with costs.

15. On 17 December 2015 the Claimants obtained a worldwide freezing order against the Defendant. This was continued as against the Defendant by order of May J on 11 March 2016.

The Defendant's application

16. On 18 November 2016 the Defendant issued an application for "an order to strike out the Claimants' claims under CPR 3.4 and a stay of all proceedings for abuse of process (*Fairclough v Summers* application)". The application also sought a "consequential order" of setting aside the default judgment.

17. It is alleged that the Claimants' claim is "wholly fraudulent" and made to deceive the French courts before which the third Claimant is apparently being prosecuted for an advance fee fraud. It is said that Europa was the vehicle of the third Claimant and not the Defendant, that "nothing material to the claim is true" and that the "only real question" is who is behind Europa. A lengthy witness statement from the Defendant's solicitor, Mr Pullen, is relied upon.

18. The Claimants have not put in any evidence in response, but all allegations of dishonesty and fraud are denied by them.

The hearing and judgment below

19. On 8-9 May 2017 there was a hearing before Laing J. There were four applications before her:

    (1) the Defendant's applications:

        a) for directions in relation to his application to strike out the Claimants' claims;

        b) to set aside

            (i) the world-wide freezing order granted against him; and

            (ii) the Claimants' application to commit him for contempt of court arising from alleged breaches of the freezing order of May J; and

    (2) the Claimants' applications for security for the costs of the Defendant's strikeout application.

20. In a judgment dated 30 June 2017 the judge dismissed the Defendant's applications, including its application to strike out the claim. Had she not dismissed that application she would have ordered the Defendant to provide security for costs in the sum of £275,000.

21. The dismissal of the strike out application is mainly addressed in two paragraphs of the judgment as follows:

> "41. I do not consider that the court can strike out a 'claim' after judgment has been given and any cause of action, and thus the claim, has merged in the judgment. Nothing in the reasoning in *Summers* begins to suggest that the court has such a power. This application is misconceived. This conclusion is consistent with the principle of finality. If the Defendant's submission is correct, a dissatisfied litigant can require the court to re-open any judgment, without any permission, or other filter, and the court would be required to conduct (as is envisaged here) a new trial of matters which have been settled in a judgment (albeit in this case, a judgment which was a consequence of the Defendant's failure to file a defence). The Defendant suggested that the application could be heard and decided without any oral evidence. I regard that as a fanciful suggestion, since the wide-ranging allegations against the third Claimant which the Defendant wishes to ventilate would require the cross-examination of the Defendant, of his witnesses, and of the Claimant. If oral evidence were given, the application could, it was agreed, take 12 days. I note that the Defendant has already spent over £1 million preparing it.
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> 42. If the Defendant considers that he has fresh, credible evidence, which could not have been obtained with reasonable diligence for use at the application to set aside the judgment in default, and the evidence, if given, would probably have had an important influence on the result, it is open to him to apply to the Master for permission to appeal out of time, invoking *Ladd v Marshall* [1954] 1 WLR 1459. The Master would have to be persuaded that the material which the Defendant relies on arguably satisfies the *Ladd v Marshall* criteria. Mr Stafford-Michael accepted that this 'alternative' was open to the Defendant, but preferred to rely on the strike-out application, no doubt because (on his case) it could be made as of right, and was not conditional on the court's permission. He referred to 'certain tactical reasons to do with the evidential filter in *Ladd v Marshall*, if one applies *Ladd v Marshall* ruthlessly'. I record that his case, however, is that none of the material on which he relies would be shut out by the decision in *Ladd v Marshall*."

Permission to appeal

22. Permission to appeal was granted by Gloster LJ on 2 January 2018 who considered that it was arguable that the judge should have adopted a more flexible procedural approach to the applications. Gloster LJ also raised the possibility of an application to set aside the judgment being made under CPR 3.1(7).

23. Various ancillary applications have been made to the court, as a result of which it is clear that this court is not concerned with any of the factual issues raised by the Defendant's application. In an order dated 23 May 2018 Longmore LJ observed as follows:

> "Gloster LJ only intended that the court on this appeal consider the issues of principle namely (1) whether the court has power to strike out a judgment which a defendant can show was obtained by fraud and (2) whether, if not, the Judge should have made any directions to progress the matter; she did not intend the court to become embroiled in deciding matters of fact and noted that Laing J had not concluded that the fraud allegations were unarguable."

The issues on the appeal

24. The issues which arise on the appeal may be summarised as follows:

(1) Whether the judge was wrong to conclude that she had no jurisdiction to strike out a claim after final judgment.

(2) Whether an application to set aside the judgment could be made under CPR 1 and 3 and, in particular, CPR 3.1(7).

(3) Whether the judge should have made directions to progress the matter rather than simply dismissing the applications before her.

Means of challenging judgments allegedly obtained by fraud

25. There are well established procedures for challenging a judgment allegedly obtained by fraud.

26. The primary means of doing so is by bringing a fresh action seeking the equitable relief of setting aside the judgment – see *Flower v Lloyd* [1877] 6 Ch D 297; *Hip Foong Hong v H Neotia & Company* [1918] AC 888.

27. In the leading case of *Jonesco v Beard* [1930] AC 298 the unsuccessful defendant appealed against a judgment given against him on the grounds that it had been obtained by the fraudulent withholding of relevant documents. The Court of Appeal considered that a prima facie case of fraud had been made out, set aside the judgment and ordered a retrial. The House of Lords held that this was the wrong procedure and that an action should have been brought.

28. In giving the lead judgment Lord Buckmaster stated as follows at p200:

> "Viewed simply as a matter of procedure the course taken was irregular. It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires."

29. It was recognised that there might be special reasons for departing from this "established practice" in certain cases, but, if so, "the necessity for stating the particulars of the fraud and the burden of proof are no whit abated and all the strict rules of evidence apply" (at p201).

30. In *Noble v Owens* Smith LJ at [22] explained the "rationale" underlying the *Jonesco* decision as follows:

> "… the defendant should not lose his favourable judgment without clear evidence of fraud. He should not lose it merely on account of a plausible allegation of fraud. The interest in finality of litigation should hold sway unless and until the judgment is shown to have been obtained by fraud. In that case, it is clear that the fraud was not conceded and the evidence was far from incontrovertible…"

31. The other established means of challenging a judgment obtained by fraud is by appealing and seeking to adduce fresh evidence in accordance with the conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489, namely that the evidence:

(1) could not have been obtained with reasonable diligence for use at the trial;

(2) is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(3) is apparently credible, though it need not be incontrovertible.

32. In *Noble v Owens* the Court of Appeal considered the tension between the *Ladd v Marshall* line of cases, which involve an appeal and a retrial without proof of fraud, and the *Jonesco* line of cases, which involve a fresh action being brought to prove the fraud. This tension was described by Smith LJ in the following terms at [16]:

> "16. It appears to me that there is an inconsistency between the two lines of authority upon which the opposing parties to this appeal rely. On the one hand there is *Ladd v Marshall* [1954] 1 WLR 1489 which suggests that, where fresh evidence is properly admitted and it appears to the court that it might, if admitted, have had an important effect on the trial, the right course is to send the case back for retrial. That should be done, apparently even if the new evidence suggests that a deceit was practised on the court below: see *Hamilton v Al Fayed* [2001] EMLR 394. On the other hand, *Jonesco v Beard* [1930] AC 298 suggests that, where it is alleged that there was deceit in the court below, the proper course is to leave the aggrieved party to commence a new action, save where the Court of Appeal either determines the issue of fraud itself—in effect where it is admitted—or the evidence is incontrovertible. How are these two lines of authority to be reconciled?"

33. Smith LJ, with whom Elias LJ agreed, answered this question as follows at [27]:

> "In my judgment, the true principle of law is derived from *Jonesco v Beard* and is that, where fresh evidence is adduced in the Court of Appeal tending to show that the judge at first instance was deliberately misled, the court will only allow the appeal and order a retrial where the fraud is either admitted or

> the evidence of it is incontrovertible. In any other case, the issue of fraud must be determined before the judgment of the court below can be set aside."

34. In summary, unless the fraud is admitted or the evidence of it is incontrovertible, the issue of fraud must be both properly particularised and proved. This will usually require a fresh action, although in *Noble v Owens* the Court of Appeal adopted what they regarded as being a more proportionate procedure of referring the trial of the fraud issue to a High Court judge pursuant to CPR 52.20(2)(b).

35. In order to succeed in setting aside the judgment it will be necessary not only to prove the alleged fraud but also that it involved "conscious and deliberate dishonesty" and that it was "material" to the decision reached – see the Court of Appeal decision in *Royal Bank of Scotland Plc v Highland Financial Partners LP & Others* [2013] EWCA Civ 328 at [106].

36. In the *Royal Bank of Scotland* case the test of materiality was expressed in terms of being causative of the judgment being obtained in the terms that it was, which is to be considered by reference to its impact on the evidence supporting the original decision.

37. In *Hamilton v Al Fayed (No 2)* [2001] EMLR 14 the Court of Appeal set out a less stringent test of materiality. It said at [34]:

> "Where it is clearly established by fresh evidence that the court was deliberately deceived in relation to the credibility of a witness, a fresh trial will be ordered where there is a real danger that this affected the outcome of the trial."

38. In the recent case of *Salekipour v Parmar* [2017] EWCA Civ 2141, [2018] QB 833 the Court of Appeal expressed a preference for this approach, but did not decide the issue. It is equally not necessary for this Court to do so, but we too would share that preference.

39. As the law stands, it will also be necessary to establish that the evidence which is relied upon to establish the fraud could not with reasonable diligence have been obtained for the trial (the "reasonable diligence condition") – see *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147, [2018] Ch 1. It is to be noted, however, that an appeal against this decision has recently been heard in the Supreme Court.

40. It is accordingly apparent both that there are established procedures for setting aside a judgment obtained by fraud and that there are strict requirements which have to be met in order to do so. This is highly relevant to the argument that there are parallel but wider powers conferred under the CPR or under the court's inherent jurisdiction. In particular, the existence of these established procedures undermines the Defendant's general argument that it is consistent with the overriding objective and the need to deal with cases justly for there to be such powers.

Issue (1) - Whether the judge was wrong to conclude that she had no jurisdiction to strike out a claim after final judgment.

41. It is clear from the application form and the transcript of the hearing before Laing J that the Defendant was seeking an order to strike out the claim as an abuse of process under CPR 3.4(2) in reliance on *Summers v Fairclough.* The case advanced was that such an application can be made at any time, even after final judgment.

42. The argument was made that such an application did not require the reasonable diligence condition to be met. It was also submitted that the application could be heard and decided without oral evidence.

43. Fundamental to the argument of Mr Stafford-Michael for the Defendant is the proper analysis of the Supreme Court judgment in *Summers v Fairclough*. It was contended that this decision establishes that the court may strike out a claim, even after final judgment. It was not suggested that there is any other authority in which it was decided or stated that the court has such a power.

44. In *Summers v Fairclough* a personal injury claimant who had obtained judgment on liability was found at the assessment of damages trial to have dishonestly exaggerated the extent of his injuries. It was contended at the damages trial that the claim should be struck out in its entirety as an abuse of process even if, as was held, the claimant would otherwise be entitled to some damages. The Court of Appeal held that they had no power to deprive a person of a judgment for damages to which he was otherwise entitled on the grounds of abuse of process, following earlier Court of Appeal decisions in *Ul-Haq v Shah* [2009] EWCA Civ 542, [2010] 1 WLR 616 and *Widlake v BAA Limited* [2009] EWCA Civ 1256.

45. The principal issue on the appeal to the Supreme Court was described by Lord Clarke, who gave the judgment of the Court, as follows at [1]:

> "…whether a civil court has power to strike out a statement of case as an abuse of process after a trial at which the court has held that the defendant is liable in damages to the claimant in an ascertained sum and, if so, in what circumstances such a power should be exercised."

46. The Supreme Court held that the court had such a power, but that it would only be exercised in very exceptional circumstances. In the light of its importance to the arguments advanced on the appeal it is necessary to cite from the judgment at some length. The most relevant passages are as follows:

> "33. We have reached the conclusion that, notwithstanding the decision and clear reasoning of the Court of Appeal in *Ul-Haq v Shah* [2010] 1 WLR 616, the court does have jurisdiction to strike out a statement of case under CPR r.3.4(2) for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of both liability and quantum. However, we further conclude, for many of the reasons given by the Court of Appeal, that, as a matter of

principle, it should only do so in very exceptional circumstances.

….

The pre-CPR authorities established a number of propositions as follows.

….

(iv) Although it appears clear that in the vast majority of cases in which the court struck out a claim it did so at an interlocutory stage and not after a trial or trials on liability and quantum, the cases show that the power to strike out remained even after a trial in an appropriate case. The relevant authorities, such as they are, were considered by Colman J in *National Westminster Bank plc v Rabobank Nederland* [2007] 1 All ER (Comm) 975, paras 27, 28, where he summarised the position thus:

> 27. In my judgment, there can be no doubt that the court does have jurisdiction to strike out a claim or any severable part of a claim of its own volition whether immediately before or during the course of a trial. This is clear from the combined effect of CPR rr 1.4, 3.3 and 3.4 as well as 3PD 1.2, and by reason of its inherent jurisdiction.
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> 28. However, the occasion to exercise this jurisdiction after the start of the trial is likely to be very rare. The normal course will be for all applications to strike out a claim or part of a claim on the merits to be made under CPR rr 3.4 or 24.2 and determined well in advance of the trial.

(v) We agree with Colman J….

36. As we see it, the present position is that, whether under the CPR or under its inherent jurisdiction, the court has power to strike out a statement of case at any stage on the ground that it is an abuse of process of the court, but it will only do so at the end of a trial in very exceptional circumstances. Some assistance is to be derived from *Masood v Zahoor (Practice Note)* [2010] 1 WLR 746, where the judgment of the Court of Appeal (comprising Mummery, Dyson and Jacob LJJ) was given by Mummery LJ. It had been argued that the judge should have struck the claim out as an abuse of process on the ground that some at least of the claims were based on forged documents and false written and oral evidence. (emphasis added)

37. The Court of Appeal referred extensively to the decision of the Court of Appeal in *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 and held, at para 71, that it was authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. It noted that in the Arrow case, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. It held that the question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It added that it was not necessary to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised. It then referred to what this court agrees is a valuable discussion by Professor Zuckerman in a note entitled "Access to Justice for Litigants who Advance their case by Forgery and Perjury" in (2008) 27 CJQ 419.

38. The Court of Appeal expressed its conclusions of principle as follows [2010] 1 WLR 746, paras 72–73:

> 72. We accept that, in theory, it would have been open to the judge, even at the conclusion of the hearing, to find that Mr Masood had forged documents and given fraudulent evidence, to hold that he had thereby forfeited the right to have the claims determined and to refuse to adjudicate upon them. We say 'in theory' because it must be a very rare case where, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way.
>
> 73. One of the objects to be achieved by striking out a claim is to *stop* the proceedings and *prevent* the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Once the proceedings have run their course, it is too late to further that important objective. Once that stage has been achieved, it is difficult see what purpose is served by the judge striking out the claim (with reasons) rather than making findings and determining the issues in the usual way. If he finds that the claim is based on forgeries and fraudulent evidence, he will presumably dismiss the claim and make appropriate orders for costs. In a bad case, he can refer the papers to the relevant authorities for them to consider whether to prosecute for a criminal offence: we understand that this was done in the present case.

39. In para 74, the Court of Appeal stressed the importance, if possible, of making an application to strike out at an early stage in order to preserve court resources and save costs. However, it also appreciated that in a complex case it might not be possible to avoid a full trial.

40. We can summarise what we see as the correct approach in this way.

41. The language of the CPR supports the existence of a jurisdiction to strike a claim out for abuse of process even where to do so would defeat a substantive claim. The express words of CPR r 3.4(2)(b) give the court power to strike out a statement of case on the ground that it is an abuse of the court's process. It is common ground that deliberately to make a false claim and to adduce false evidence is an abuse of process. It follows from the language of the rule that in such a case the court has power to strike out the statement of case. There is nothing in the rule itself to qualify the power. It does not limit the time when an application for such an order must be made. Nor does it restrict the circumstances in which it can be made. The only restriction is that contained in CPR rr 1.1 and 1.2 that the court must decide cases in accordance with the overriding objective, which is to determine cases justly. (emphasis added).

42. Under the CPR the court has a wide discretion as to how its powers should be exercised: see eg *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926. So the position is that the court has the power to strike out a statement of case for abuse of process but at the same time has a wide discretion as to which of its many powers to exercise. The position is the same under the inherent jurisdiction of the court, so that in the future it is sufficient for applications to be made under the CPR. We can see no reason why the conclusion reached should be any different, whether the application is made under the CPR or the inherent jurisdiction of the court.

43. We agree with the Court of Appeal in *Masood v Zahoor* [2010] 1 WLR 746, para 72, quoted above that, while the court has power to strike a claim out at the end of a trial, it would only do so if it were satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined. The Court of Appeal said that this is a largely theoretical possibility because it must be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way. We agree and would add that the same is true where, as in this case, the court is able to assess both the liability of the defendant and the amount of that liability.

44. We have considered whether the possibility is so theoretical that it should be rejected as beyond the powers of the court. However it was ultimately accepted on behalf of the claimant that one should never say never. Moreover we are mindful of Lord Diplock's warning in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, quoted at para 35 above, that it would be unwise to limit in advance the kinds of circumstances in which abuse might be found. See also the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31.

….

61. The test in every case must be what is just and proportionate. It seems to us that it will only be in the very exceptional case that it will be just and proportionate for the court to strike out an action after a trial. The more appropriate course in the civil proceedings will be that proposed in both *Masood v Zahoor* and *Ul-Haq v Shah*. Judgment will be given on the claim if the claimant's case is established on the facts. All proper inferences can be drawn against the claimant. The claimant may be held entitled to some costs but is likely to face a substantial order for indemnity costs in respect of time wasted by his fraudulent claims. The defendant may well be able to protect itself against costs by making a Calderbank offer. Moreover, it is open to the defendant (or its insurer) to seek to bring contempt proceedings against the claimant, which are likely to result in the imprisonment of the claimant if they are successful. It seems to us that the combination of these consequences is likely to be a very effective deterrent to claimants bringing dishonest or fraudulent claims, especially if (as should of course happen in appropriate cases) the risks are explained by the claimant's solicitor. It further seems to us that it is in principle more appropriate to penalise such a claimant as a contemnor than to relieve the defendant of what the court has held to be a substantive liability.

62. We note two points by way of postscript. First, nothing in this judgment affects the correct approach in a case where an application is made to strike out a statement of case in whole or in part at an early stage. As the Court of Appeal put it in *Masood v Zahoor*, para 73 (set out above) in a passage with which we agree, one of the objects to be achieved by striking out a claim is to stop proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Secondly, nothing in this judgment affects the case where the fraud or dishonesty taints the whole claim. In that event, if the court is aware of it before the end of the trial, judgment will be given for the defendant

> and, if it comes to light afterwards, it will be open to a defendant to raise the issue in an appeal."

47. We have underlined the passages particularly relied upon by Mr Stafford-Michael. It was said that these passages state and mean that such an application can be made at any time, and that includes after final judgment. It was submitted that no bright line can or should be drawn between the exercise of the power after a trial (which is clearly recognised) and after judgment following a trial.

48. We would reject the Defendant's case for a number of reasons.

49. First, whilst it is correct that some of the statements made in the judgment are expressed in general and seemingly unqualified terms, they must be considered in their context. That context was the court being faced at the end of a trial with a choice between striking out a claim in its entirety on the grounds of abuse of process and upholding such parts of the claim as were held to have been proved.

50. The Court of Appeal had held in *Ul-Haq v Shah* that the power to strike out could not be used in these circumstances for reasons summarised at [28] by Lord Clarke's judgment as follows:

> "It is the policy of the law and the invariable rule that a person cannot be deprived of a judgment for damages to which he is otherwise entitled on the ground of abuse of process".

51. The Supreme Court held that there was no such rule and that in "very exceptional circumstances" [36], such as where the abuse was so serious that the claimant "had thereby forfeited his right to have the claim determined" [43], the claim could be struck out. As Lord Clarke stated at [49]:

> "…The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small."

52. In reaching this conclusion Lord Clarke agreed with the approach of the Court of Appeal in *Masood v Zahoor* [2010] 1 WLR 746 and cited passages from the judgment in that case at [38]. Those passages recognised that "in theory" a judge could conclude at the end of hearing that the abusive behaviour was so serious that the judge could hold that the claimant "had thereby forfeited the right to have the claims determined and to refuse to adjudicate upon them". Lord Clarke agreed with this at [43], whilst recognising that this would be a "very rare case".

53. The time at which the exercise of the power to strike out was being considered in *Summers v Fairclough* was therefore before final determination of the claim; a time at which there remains a choice between strike out and complete or partial dismissal of the claim. That is not the case once final judgment has been given.

54. Secondly, the power to strike out a claim under CPR 3.4 is a case management power, as the title to Part 3 makes clear. As such, it is predicated on there still being a case before the court to case manage. Once a judgment has been perfected and entered there is no case before the first instance court since it is *functus officio* and a party's rights under the CPR are those of appeal. The "only restriction" on the power to strike out is said by Lord Clarke to be that "the court must decide cases in accordance with the overriding objective, which is to determine cases justly" [41]. That presupposes that there is still a case to be "decided" and "determined".

55. Thirdly, if Lord Clarke had contemplated that the power to strike out a statement of case could be exercised after judgment he would have needed to address and would have addressed the status of the claimant's cause of action following judgment.

56. Laing J observed that, once judgment has been given on a claim, the claimant's cause of action merges in the judgment. She referred to *Halsbury's Laws of England* Vol 12A (2015) at para. 1594:

> **"Merger of cause of action in judgment.** When judgment has been given in a claim, the cause of action of which it was given is merged in the judgment and its place is taken by the rights created by the judgment…"

57. A recent and authoritative summary of the doctrine of merger is to be found in the judgment of Lord Sumption in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, [2014] AC 160 at [17] in a paragraph addressing the general principles of *res judicata:*

> "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. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B)…"

58. The relevant passage from Parke B's judgment in *King v Hoare* (1844) 13 M & W 494, 504 is as follows:

> "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, "transit in rem judicatam,"—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two…."

59. Some academic commentary suggests that the effect of merger is more limited than is suggested by its characterisation in *Halsbury* and that it only operates as against a claimant. It is said that the effect of merger is to prevent the claimant from reasserting it against the defendant, because the underlying cause of action has been superseded by the judgment - see Spencer Bower and Handley on *Res Judicata* (4th ed) at [19.02] where the authors discuss merger as an aspect of the doctrine of former recovery, which prevents a cause of action which has already proceeded to final judgment from being reasserted by a claimant, and Barnett on *Res Judicata, Estoppel and Foreign Judgments* at [1.41], where the author concludes that merger is only concerned with former recovery, and therefore only operates against a party in whose favour a final judgment has been given.

60. In *Virgin Atlantic*, Lord Sumption said that its effect was to treat a cause of action as extinguished once judgment has been given upon it and the claimant's sole right as being a right upon that judgment. The passage cited from *King v Hoare* suggests that the judgment is a bar to the original cause of action because it would be "useless and vexatious" to subject the defendant to another suit for the purpose of obtaining the same result - see also *Thoday v Thoday* [1964] P 181 at 197–198 per Diplock LJ, and *Republic of India v India Steamship* [1993] A.C. 410 at 417 per Lord Goff.

61. For the purposes of this appeal, it is unnecessary to decide whether merger is a concept that applies only against a claimant or whether, even if merger did not apply against the defendant, cause of action estoppel would prevent a defendant from applying to a judge at first instance to strike out a claim based on that judgment. The important point for present purposes is that these are issues which the Supreme Court would have had to address had it been suggested or contemplated that the strike out power could be used after judgment.

62. In any event, the Defendant did not challenge the judge's conclusions on the effect of merger on the appeal. Mr Stafford-Michael's sole point was that merger does not prevent a judgment obtained by fraud from being set aside. That is no doubt correct,

but unless and until the judgment is so set aside it remains a regular judgment, with all the attributes of such a judgment.

63. The Supreme Court in *Summers v Fairclough* would also have had to address how the continued existence of a power to strike out after judgment is to be reconciled with rights of appeal, and the limitations on such rights.

64. The reality is that *Summers v Fairclough* was concerned with whether the power to strike out could be exercised at or after a trial. Whether that could be done after a judgment was not in issue. Neither the arguments nor the speeches address that issue, nor the case law relevant to such an issue. The whole focus of the discussion in the judgment and of the decision reached is in relation to the power to strike out at or after a trial; not after a judgment.

65. Finally, if there could be any doubt about this, it is laid to rest by Lord Clarke's observation at [62] that "nothing in this judgment affects the case where the fraud or dishonesty taints the whole claim" and that if that comes to light after judgment "it will be open to a defendant to raise the issue in an appeal." There is no suggestion that it would be open to a defendant in such circumstances to apply to strike out.

66. The present case is one in which it is alleged that fraud taints the whole claim. As Lord Clarke makes clear, nothing in *Summers v Fairclough* affects such a case.

67. For all these reasons, we agree with the judge that the stated basis of the application to strike out, *Summers v Fairclough*, does not support or justify the making of such an application, nor does any other authority. In these circumstances, we agree with her conclusion that she had no jurisdiction to strike out a claim after final judgment.

Issue (2) - Whether an application to set aside the judgment could be made under CPR 1 and 3 and, in particular, CPR 3.1(7).

68. CPR 3.1(7) provides:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

69. This rule was not specifically relied upon before the judge, but its potential relevance was noted by Gloster LJ in giving permission to appeal and it is now relied upon, although this aspect of the appeal was barely developed in oral argument.

70. As observed in the *White Book 2018* Commentary at 3.1.17, it is to be noted that the rule refers to "order" and not to "judgment or order". This is in contrast to a number of CPR Rules which make it clear that a judgment may be set aside such as Rule 3.6 (automatic judgment following striking out of statement of case following non-compliance with court order); Rule 39.3(3) (judgment where a party does not attend a trial); Rule 13.2 and 13.3 (default judgments); Rule 40.9 (third parties directly affected by a judgment); PD24 para.8 (summary judgment given in absence of a party).

71. The *White Book* Commentary draws a distinction between varying or revoking an "interim" order (an order which is not final) and a "final" order ("an order which

determines between the parties the issues which are the subject of their litigation and which give rise to a cause of action estoppel between them").

72. Many of the relevant authorities are reviewed in the judgment of Rix LJ in *Tibbles v SIG Plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591 at [28]-[38]. The conclusions he drew from his consideration of the cases included the following:

> "(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR r 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.
>
> (iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.
>
> ….
>
> (vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

73. That "curtailment" of the apparently open discretion does go further in relation to final orders is supported by the decision of the Court of Appeal in *Roult v North West Strategic Health Authority* [2009] EWCA Civ 444, [2010] 1 WLR 487. In that case a claimant sought to vary or revoke a personal injury settlement that had been approved by the court. It was held that it was not appropriate to do so and that the main two grounds recognised in the case law for invoking Rule 3.1(7) did not apply to a final

order disposing of a case. The lead judgment was given by Hughes LJ, with whose judgment Smith and Carnwath LJJ agreed. He stated as follows at [15]:

> "15. There is scant authority upon rule 3.1(7) but such as exists is unanimous in holding that it cannot constitute a power in a judge to hear an appeal from himself in respect of a final order. Neuberger J said as much in *Customs and Excise Comrs v Anchor Foods (No 2)* The Times, 28 September 1999. So did Patten J in *Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen* [2003] EWHC 1740 (Ch). His general approach was approved by this court, in the context of case management decisions, in *Collier v Williams* [2006] 1 WLR 1945. I agree that in its terms the rule is not expressly confined to procedural orders. Like Patten J in the *Ager-Hanssen* case [2003] EWHC 1740 I would not attempt any exhaustive classification of the circumstances in which it may be proper to invoke it. I am however in no doubt that CPR r 3.1(7) cannot bear the weight which Mr Grime's argument seeks to place upon it. If it could, it would come close to permitting any party to ask any judge to review his own decision and, in effect, to hear an appeal from himself, on the basis of some subsequent event. It would certainly permit any party to ask the judge to review his own decision when it is not suggested that he made any error. It may well be that, in the context of essentially case management decisions, the grounds for invoking the rule will generally fall into one or other of the two categories of (i) erroneous information at the time of the original order or (ii) subsequent event destroying the basis on which it was made. The exigencies of case management may well call for a variation in planning from time to time in the light of developments. There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue—an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to reopen any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part. And it especially does not apply where the order is founded upon a settlement agreed between the parties after the most detailed and highly skilled advice. The interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist."

74. In *Kojima v HSBC Bank Plc* [2011] EWHC (Ch), [2011] 3 All ER 359 Briggs J helpfully summarised the effect of the decision in *Roult* as follows at [29]-[30]:

> "29. My conclusions are as follows. First, although Mr Stone has in his favour the description in its headnote of the Court of

> Appeal's decision in *Roult* as one about jurisdiction, I do not read the judgment of Hughes LJ (with which Carnwath and Smith LJJ agreed) as going quite that far. Nonetheless it does in the passage which I have quoted, clearly establish that, to the extent that there exists any jurisdiction in the court to review its own final order, that is not to be justified on the alternative grounds first enunciated by Patten J, and approved in *Collier v Williams,* in the context of procedural or other non-final orders.
>
> 30. In my judgment once the court has finally determined a case, or part of a case, considerations of the type first identified by Patten J in Lloyds v. Ager-Hanssen will generally be displaced by the much larger, if not indeed overriding, public interest in finality, subject of course to the dissatisfied party's qualified right of appeal."

75. In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality. An example is provided by cases involving possession orders made when the defendant did not attend the hearing where CPR 39.3 may be relied upon by analogy – see *Hackney London Borough Council v Findlay* [2011] EWCA Civ 8, [2011] HLR 15. Another example is the use of powers akin to CPR 3.1(7) to vary or revoke financial orders made in family proceedings in relation to which there is a duty of full and frank disclosure and the court retains jurisdiction – see, for example, *Sharland v Sharland* [2015] UKSC 60, [2016] AC 871 and *Gohil v Gohil (No 2)* [2015] UKSC 61, [2016] AC 849.

76. Mr Stafford-Michael sought to place reliance on *Sharland v Sharland* and submitted that it showed that where it is alleged that a judgment has been obtained by fraud this could be raised either by a fresh action or by an application to a judge at first instance. In giving the lead judgment of the Supreme Court in that case Lady Hale stated as follows:

> "Procedural issues
>
> 37. The fact that this order had not yet been perfected makes no difference. The principles applicable in this sort of case are the same whether or not the order agreed on by the parties and the court has been sealed.
>
> 38. However, the fact that the order had not been sealed means that in this particular case the procedural problem about how such challenges to the final order of a court in family proceedings can be brought does not arise. The trial judge was able to revisit his order: see *In re L (Children) (Preliminary*

Finding: Power to Review) [2103] 1 WLR 634. This and other procedural issues do, however, arise in *Gohil v Gohil (No 2)* [2016] AC 849, which was heard at the same time as this case. In *L v L* [2008] 1 FLR 26, Munby J described this problem as "a procedural quagmire": para 39. There are three possible routes: (i) a fresh action to set aside the order; (ii) an appeal against the order; or (iii) an application to a judge at first instance in the matrimonial proceedings. The difference is that permission is required for an appeal, and it may be required long after the time limit for appealing has expired, whereas the other two routes do not require permission. A further difference is that an appeal is not the most suitable vehicle for hearing evidence and resolving the factual issues which will often, although not invariably, arise on an application to set aside.

39. In *Livesey* [1985] AC 424, the matter was dealt with by way of permission to appeal out of time. But that was a simple case where the facts were clear. A fresh action would be the normal route in ordinary civil proceedings to challenge a final judgment on account of fraud: see *Jonesco v Beard* [1930] AC 298. This route is also available in matrimonial proceedings: see *de Lasala v de Lasala* [1980] AC 546. Indeed, in that case, the Judicial Committee of the Privy Council held that, there being no power to vary the matrimonial financial order which had been made by consent, where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside": p 561.

40. However, it has not been clear whether in matrimonial proceedings such a fresh action can be brought by making an application in the matrimonial proceedings themselves or whether an entirely separate application has to be brought. In *Gohil v Gohil (No 2)* [2015] Fam 89, the wife had issued a summons in the matrimonial proceedings rather than a separate application, but the Court of Appeal approached the case as if Moylan J had been hearing a fresh application to set aside for material non-disclosure: para 61. In my view there is jurisdiction to entertain such an application within the matrimonial proceedings. Unlike ordinary civil proceedings, it has always been the case that the divorce court retains jurisdiction over a marriage even after it has been dissolved. While it is now possible for the court to achieve a clean break between the parties, the issue raised by an application to set aside for fraud, mistake or material non-disclosure is whether it was consistent with the court's statutory duties so to do."

77. Mr Stafford-Michael submitted that these passages show that an application to a first instance judge to set aside a judgment on the grounds that it was obtained by fraud support may be made in civil proceedings generally, not just in matrimonial proceedings. In our judgment they provide no support for the existence of such a jurisdiction outside matrimonial proceedings. The decision itself concerned matrimonial proceedings only; Lady Hale was astute to draw a distinction between matrimonial proceedings and "ordinary civil proceedings" [39], and she explained the important distinction between them, namely that "unlike ordinary civil proceedings, it has always been the case that the divorce court retains jurisdiction over a marriage even after it has been dissolved" [40].

78. The present proceedings are "ordinary civil proceedings", not matrimonial proceedings. The final judgment obtained did not involve any duty to make full and frank disclosure. Nor is it a case in which the Defendant did not attend the hearing. Having allowed judgment to be entered in default, the Defendant applied under CPR 13.3 to set aside the judgment and unsuccessfully sought to appeal against the Master's judgment refusing to do so. No proper or sufficient grounds have been identified for taking the wholly exceptional course of setting aside the court's final judgment under CPR 3.1(7).

79. There is in any event a further hurdle facing an application under CPR 3.1(7), namely that the proper procedure under the CPR for challenging a default judgment is the specific procedure set out in CPR 13.3, not a general power such as CPR 3.1(7).

80. This was an issue considered in *Samara v MBI & Partners UK Ltd* [2016] EWHC 441. In that case, as here, there was an unsuccessful application to set aside a default judgment under CPR 13.3. A further application to do so was then made in reliance upon CPR 3.1(7) on the grounds of further evidence which had subsequently come to light. It was held that there was no power to consider a second application under CPR 13.3, that this could not be circumvented by reliance upon CPR 3.1(7) and that CPR 13 is a self-contained regime for the variation or setting aside of default judgments. We agree with that approach.

81. For all these reasons, in so far as the Defendant's application is to be treated as including an application to set aside the judgment under CPR 3.1(7), we do not consider that there were or are any grounds to support such an application.

Issue (3) - Whether the judge should have made directions to progress the matter rather than simply dismissing the applications before her.

82. Mr Stafford-Michael made the forensic point that no jurisdictional objection had been made to his application by the Claimant or by the court during the earlier hearing before Green J. He pointed out that his application to Laing J was for directions only and that it was unfair for it simply to be dismissed.

83. As he acknowledged, however, the critical issue on the appeal is whether Laing J was right to conclude that she had no jurisdiction to strike out a claim after final judgment. If, as we have held, she was, then she was entitled and indeed bound to dismiss the strike out application before her.

84. It is right to observe that whilst the judge referred both at the hearing and in her judgment to the possibility of appealing out of time, she made no reference to the possibility of bringing a fresh action to set aside the judgment. There was, however, no indication before her of any intention to bring such an action. Indeed, the rationale of bringing the strike out application was said to be to avoid the time and costs which would be involved in a full trial.

85. The Defendant's position before the judge was that he had provided extensive evidence to support his allegations of fraud and that no rebuttal evidence had been put in by the Claimants. In those circumstances it was submitted that the issue of setting aside the judgment for fraud could be decided on the papers or, possibly, with limited oral evidence.

86. The Defendant's allegations of fraud are neither admitted nor incontrovertible. The Claimants' position was and is that they are denied. The Claimants were fully entitled to take the stance that they would not put in evidence unless and until it was clear that the application was to go ahead and security for costs had been provided. In these circumstances the suggestion that the allegations of fraud could be decided without oral evidence was rightly described by the judge as "fanciful".

87. Given that the explained purpose of the application being made before the judge was to avoid the time and expense of a full trial, she cannot possibly be criticised for failing to raise the possibility of bringing a fresh action which would lead to such a trial. Even if she had raised such a possibility, it would have made no difference to the appropriateness of dismissing the application as made before her, or to the central issue on this appeal, namely whether she was right so to do.

88. Mr Stafford-Michael submitted that the judge could have given directions for the trial of the fraud issue and that it was not necessary for a fresh action to be commenced. The jurisdictional basis for so doing in an action which has proceeded to final judgment was unexplained. It is correct that in *Noble v Owens* the Court of Appeal directed that there be a trial rather than requiring a fresh action to be brought but that was pursuant to the specific power of an appeal court under CPR 52.20(2)(b).

89. In any event, in the circumstances of the present case the only difference which Mr Stafford-Michael could identify between there being an order for a trial of the fraud issue and bringing a fresh action was the issue fee, a minor matter in the context of the significant costs already incurred in this litigation, which are said to be over £1 million.

90. For all these reasons, we conclude that the judge cannot be criticised either for dismissing the application before her or for failing to give directions.

Conclusion

91. For the reasons outlined above, we dismiss the appeal. There is no good reason why the Defendant should not have adopted one of the well-established means of challenging a judgment allegedly obtained by fraud. His attempts to do so by other means, and to seek to do so without the need properly to plead and prove fraud, are, as the judge concluded, "misconceived".