

Neutral citation number: [2024] EWHC 689 (Ch)

IN THE HIGH COURT OF JUSTICE

Claim No. BL– 2023 - 001576

BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

BUSINESS LIST (ChD)

MASTER MARSH (sitting in retirement)

Rolls Building

Fetter Lane

London EC4A 1NL

BETWEEN

MOHAMED RAZEEM

Claimant

and

VIBHUTIBEN DESAI

Defendant

JUDGMENT

ALPER RIZA KC appeared for the **Claimant** (by direct access)

STEPHEN GOODFELLOW appeared for the **Defendant** (by direct access)

Hearing 27 February 2024

Judgment handed down remotely on 2 April 2024

1. This judgment deals with two applications made by the defendant. The first is an application issued on 2 June 2023 to strike out the claim and the second is an application issued on 5 June 2023 seeking security for costs based upon the condition set out at CPR rule 25.13(2)(g).

2. There have been multiple previous claims and applications involving the parties and for simplicity I will refer to the claimant as Mr Razeem and the defendant as Mrs Desai.

3. This claim (“the 2023 claim”) was issued in the County Court at Medway and was transferred to the ICC List in the Business and Property Courts of England and Wales on 31 August 2023 because there had been proceedings concerning the Mr Razeem’s bankruptcy in that court. However, when the claim came before an ICC Judge an order was made transferring the claim to the Business List and the applications came before me for hearing on 27 February 2024. I will refer to Mr Razeem’s bankruptcy later in this judgment.

4. In the 2023 claim Mr Razeem seeks to set aside four judgments obtained against him by Mrs Desai on the ground that they were obtained by fraud.

Background

5. In 2012 Mr Razeem’s company, MR Multi Business Limited, sold a newsagent’s shop trading as Newline at 115 Week Street, Maidstone to Mrs Desai. The business was intended to be operated by her husband. In late 2014 the parties reached a further agreement for the business and premises to be sold back by Mrs Desai to Mr Razeem.

6. Subsequently, Mrs Desai brought a claim in the County Court at Maidstone – claim B37YJ287 – and she obtained judgments in her favour on 13 September and 31 October 2016. They are two of the judgments Mr Razeem says were obtained by fraud and so it is necessary to be clear about what was, and what was not, in issue in the claim.

7. The claim related to the terms upon which the resale of the business took place. Mrs Desai’s case, about which there was no real dispute, was that Mr Razeem had agreed to pay her £88,000 for the business in monthly instalments of £2,500. These terms appear from a written agreement made between Mr Razeem (described as Landlord) and Mrs Desai (described as Tenant) which is undated. Paragraph 1 of the agreement provided that:

“... the lease of newline 115 Week Street, Maidstone, Kent ME14 1RB to the Tenant be cancelled and returned to the Landlord.” [sic]

8. In her claim Mrs Desai sought £5,000 for unpaid instalments under the written agreement and a further £2,120.14 to reimburse her for accounts held with Menzies and Western Union. In addition, Mrs Desai sought £78,460.38 on the basis that Mr Razeem had orally agreed to pay that sum for stock in addition to the purchase price.

9. However, as a matter of background, paragraph 1 of Mrs Desai’s particulars of claim refers to the original purchase of the business by her in November 2012 and she asserted that Mr Razeem had agreed to grant her a lease of the property for 15 years. She went on to say in paragraph 2 that:

“No further steps were taken towards completion of a new Lease until September 2014 when the Defendant’s Solicitors sent the Claimant a draft lease for a term of five years. The Claimant reminded the Defendant of his agreement to grant a 15 year term

but the defendant said that the Claimant could have a five year term or give up occupation of the Property. The Claimant agreed to give up occupation and the parties entered into a written agreement on the 1st December 2014.”

10. It is clear from the agreement that the parties were in no doubt that there was a lease of the premises, albeit the term and date of the lease were not specified. They expressly agreed that the lease was to be surrendered.

11. On 13 September 2016 DJ Sullivan entered judgment in favour of Mrs Desai for the unpaid instalments of £2,500 up to that date on the basis there was no defence to that part of the claim and struck out part of the defence. The remaining live issue between the parties in the claim was whether the sum of £88,000 Mr Razeem agreed to pay for the business included or excluded the value of stock. The written agreement made no mention of stock.

12. After conducting a trial on 13 and 14 September 2016 as to the balance of the claim the District Judge handed down a judgment on 31 October 2016. She found that there was an oral agreement about stock that was separate to the agreement to pay £88,000. Consequent upon the District Judge’s decision, a further judgment was entered in favour of Mrs Desai for the agreed sum payable for stock. Mr Razeem was ordered to pay Mrs Desai’s costs and an order was made for a payment on account of £15,000.

13. Two further claims were brought by Mrs Desai against Mr Razeem. The first was claim number C1QZ3Y2 in which Mrs Desai sought payment of the remaining instalments of £2,500 which had not been paid by Mr Razeem. On 24 July 2017 Mrs Desai obtained judgment on an application made under CPR rule 24.2 for £55,000 plus costs.

14. In that claim Mr Razeem made a counterclaim dated 22 December 2016 with three elements. He claimed (1) rent allegedly due to him under the 2012 agreement; (2) unpaid sums of £88,000 and £14,214.56 also under the 2012 agreement and (3) £62,834.75 for the value of stock allegedly removed by Mrs Desai after she gave up occupation in November 2014. The counterclaim was struck out and Mr Razeem was ordered to pay £2,500 as a contribution to Mrs Desai’s costs. DJ Sullivan’s written judgment dated 24 July 2017 makes it clear that she regarded the counterclaim as an abuse of the court’s process on the basis that all three claims comprised in the counterclaim could and should have been dealt with at the trial in 2016.

15. The third paragraph of the counterclaim contains the claim by Mr Razeem for the value of stock allegedly removed by Mrs Desai in late 2014. It asserted that:

“Around October, 2014 Claimant’s husband was charged for child sex offence and then the Claimant gave up occupation on November 2014. [sic]

16. There is also an unsigned Amended Particulars of Counterclaim which were referred to at the hearing before me. (Mrs Desai filed a version shortly before the hearing which includes a statement of truth relating to a witness statement signed by Mr Razeem. It is not clear how and when that statement of truth was inserted but despite Mr Razeem’s attempt to rely upon it as evidence of fraudulent conduct by Mrs Desai for the purposes of the applications before me nothing turns on whether that statement of truth was inserted recently.) It is not clear whether the Amended Particulars of Claim were before DJ Sullivan on 24 July 2017. However, for completeness, paragraph 6 pleads:

“6. Shortly after the written lease had been signed by the Parties, [Mrs Desai] acting by her husband approached [Mr Razeem] in November 2014 with the news that due to her husband being charged with a criminal offence she wished to sell the “Newline” business and give premature notice under the written lease she had signed.”

17. The final claim issued by Mrs Desai, claim number s D2QZ580J, sought payment of the remaining sums due under the 2014 agreement. On 7 July 2020 Mrs Desai obtained summary judgment against Mr Razeem for £76,000 plus £20,408 interest. On that occasion the application was unopposed.

18. Mr Razeem has taken numerous steps either to set aside these judgments or to sidestep the effect of them. In doing so he has regularly accused Mrs Desai of having acted fraudulently in relation to the claims she made. From the incomplete set of documents provided to the court the following summary can be extracted:

(1) On 16 May 2017 HHJ Simpkins refused permission to appeal against the orders dated 13 September and 31 October 2016. Both applications were declared to be totally without merit.

(2) Mr Razeem then brought proceedings for judicial review against the County Court at Maidstone challenging HHJ Simpkins’ decision. On 16 October 2017 permission to apply for judicial review was refused by Nicholas Vineall QC sitting as a Deputy High Court Judge. On 23 November 2017 the renewed application for permission to apply for judicial review was refused by Mr Jonathan Swift QC sitting as a Deputy High Court Judge.

(3) On 5 December 2017 DJ Venn made an order dismissing Mr Razeem’s application to set aside a bankruptcy demand based upon three judgments obtained by Mrs Desai. He was refused permission to appeal by Henry Carr J on 12 April 2018.

(4) On 12 September 2017 Mr Razeem issued proceedings in the County Court at Medway (claim number D46YM113) against Mrs Desai claiming rent of £15,725 for the period between November 2012 and November 2014 and £88,000 for the unpaid leasehold price. That claim was struck out by DJ Eyley on 16 April 2018.

(5) On 2 July 2018 HHJ Simpkins made a civil restraint order against Mr Razeem preventing him from issuing claims or making applications in any County Court relating to the subject matter of the proceedings before the court. The order remained in effect until 7 June 2020.

(6) On 12 April 2019 HHJ Sullivan made an order, the terms of which are uncertain. However, on 2 May 2019 Mr Razeem applied to set aside the order. The application relied upon evidence from Forensic Services India to suggest that Mrs Desai had forged documents in the claim that was tried by DJ Sullivan in 2016. Mr Razeem asserted that the judgment was unfounded.

(7) On 11 July 2019 HHJ Simpkins struck out the application dated 2 May 2019 declaring it to be totally without merit. The judge recorded in the order that the report from Forensic Services India did not comply with the CPR and was inadmissible. He also noted that the report merely referred to the similarity between samples of Mrs Desai’s signature and the signature on the documents said to have been forged.

(8) On the same date HHJ Simpkins dismissed an application by Mr Razeem dated 15 June 2019 and declared it to be totally without merit.

(9) On 15 July 2019 Mr Razeem applied to set aside the orders made by HHJ Simpkins on 11 July 2019. The application was supported by a witness statement made by him. In the witness statement he made numerous allegations against Mrs Desai of forgery and falsehoods relating to the trial before DJ Sullivan in September and October 2016. He relied upon four reports from Forensic Services India seeking to demonstrate his case that Mrs Desai had forged documents. He also alleged that Mr Desai had given perjured evidence to the court. At some stage the application dated 15 July 2019 was struck out.

(10) On 4 February 2020 HHJ Simpkins made a further civil restraint order for a period until 3 February 2022. The order was made of the court's own volition and was based upon Mr Razeem having made applications on 2 May 2019 and 15 July 2019 that were struck out as being totally without merit and that the applications had been made without permission. (There is an error in the order which cannot be resolved. It refers to an order striking out on 2 July 2019 an application made on 15 July 2019)).

(11) On 17 February 2020 Mr Razeem applied to set aside the order dated 4 February 2020. On this occasion Mr Razeem had instructed solicitors and a witness statement from Kumarlo Menns was filed in support of the application. Again, evidence from Forensic Services India was relied upon together with a report from Mr Paul Craddock, a handwriting examiner. Mr Razeem was seeking to establish that Mrs Desai had signed the five year lease of the shop, that documents had been forged and that there were discrepancies in some of the ledgers relied upon by Mrs Desai. It is not clear whether this application has been dealt with.

(12) On 27 February 2020 Mr Razeem was declared bankrupt.

(13) On 13 May 2020 Mr Razeem applied to annul the bankruptcy.

(14) On an unknown date the application was dismissed by DJ Johns QC on the basis that it lacked any merit. The order records his reasons for dismissal as including that "b) the material now relied upon is insufficient to show that the judgments were obtained by and,". [sic] From the context and the background to the application, the missing word is almost certainly "fraud".

(15) On 7 July 2020 DJ Whitfield entered judgment against Mr Razeem in favour of Mrs Desai for £76,000 plus interest. It appears that the court was aware of the bankruptcy.

(16) The extended civil restraint order expired on 3 February 2022.

On 1 March 2022 Mr Razeem applied to set aside the judgment entered by DJ Sullivan on 31 October 2016 on the ground that it was obtained by fraud.

On 2 February 2023 HHJ Parker sitting in the County Court at Maidstone made an order of the court's own volition. The order sets out a review of the various claims affecting Mr Razeem and Mrs Desai. It required the parties to state the position in relation to a number of applications. Importantly, the parties were required to (a) explain how a claim against Mr Razeem could be pursued following his bankruptcy and (b) to state in relation to Mr Razeem's application dated 1 March 2022:

“Whether it is possible to apply for the judgment of 31 October 2016 to be set aside on grounds of fraud other than by bringing a fresh claim. Any submissions must address paragraph [60] of *Takhar v Gracefield* [2019] UKSC 13.”

(17) HHJ Parker provided a note to all the relevant parties dated 24 April 2023 and on the same date, having considered Mr Razeem’s response, the application dated 1 March 2022 was struck out.

2023 claim

19. Mr Razeem’s next step was to issue the 2023 Claim in the County Court at Medway on 30 May 2023 seeking to set aside the four judgments obtained against him by Mrs Desai on the grounds of fraud. The particulars of claim state that:

“5. The main target of these proceedings is the judgment of 31 October 2016 ... although if that judgment is set aside on the ground that it was obtained by fraud it would have a knock-on effect on the other judgments ...”.

20. Mr Razeem’s particulars of claim were settled by Mr Alper Riza KC who also appeared for Mr Razeem at the hearing. Having introduced the background and set out the four judgments that Mr Razeem seeks to set aside, Mr Razeem states, correctly, that at the trial DJ Sullivan preferred Mrs Desai’s evidence over Mr Razeem’s evidence. At paragraph 12 to 22 of the particulars of claim Mr Razeem says: [the shorthand C and D appears in the original]

“12. What C did not know at the time and what was not disclosed to the court was the true reason why D sold back “Newsline” and that made the sale price of £88,000.00 exclusive of stock highly improbable.

13. It was not because the parties fell out for the reasons set out in paragraphs 1 and 2 of D’s particulars of claim dated 13 February 2015

14. The falling out was not because D was offered a 5-year lease instead of a supposed 15-year lease that had been promised in 2012 and for which D claimed she had paid £88,000. In fact, D had signed the 5-year lease ... on 20 October 2014.

15. D and her husband were not given the choice of the 5-year lease or to give up occupation and chose to give up occupation as D claimed in her particulars of claim but rather gave up the business because in about the middle of November 2014 the husband was convicted of a serious sexual offence on a child on the premises of “Newsline” that made operating it as a corner shop untenable.

16. C discovered the true reason on 11 April 2018 when his attention was drawn to an old newspaper report from the Kent Messenger that in about the middle of November 2014, after they had signed the 5-year lease, D’s husband was convicted of a sexual offence against a minor committed on the “Newsline” premises ... for which he was sentenced 14 months imprisonment suspended for two years with supervision, 200hrs unpaid work and for his name to appear on the Sex Offenders Register.

17. D failed to disclose that her husband who ran the shop had been convicted of a sexual offence on a child on the shop’s premises which was adverse documentary evidence that should have been disclosed because it was relevant and admissible to show inter alia that D and her husband could no longer operate the shop as the true

reason for the sale-back rather than the false claim that they had paid £88,000 on the promise of a 15-year lease as they claimed.

18. C is also now in a position to prove by expert evidence and by the production of a chronology attached to statement of truth made by D on 4 October 2020 ... that her denial, that she had agreed a 5-year lease was a forgery, as was her pleaded case, and that she had paid £88,000 pursuant to an earlier agreement for a 15-year lease, was untrue.

19. D failed to disclose her husband's conviction the effect of which was highly material to the court's evaluation of the probability of a sale-back as high as £88,000.

20. The high cost of the sale back was dealt with by the judge at paragraph 74 as follows "*it seems odd that the sale price exclusive of stock was so much higher than the previous sale price, but here may be very many reasons for that and, as I say, it was not explored in evidence, and it is not for this court to speculate.*"

21. That was a conclusion the judge would not have reached had she known of the conviction of the husband for a sexual assault on a child on the shop's premises a month prior to the sale-back, given the nature of the offence and the local publicity. Such knowledge would also have given much credence to C's claim that the £88,000 was inclusive of £78,468.38 for stock.

22. Furthermore, D fraudulently failed to inform C of the conviction which must have taken place around the middle of November 2018 [sic], contrary to the obligation contained in paragraph 7.7.7 of the 5-year lease which had been signed by D and was at the time in effect." [the year is clearly intended to be 2014]

21. The particulars of claim in the 2023 Claim continue for an additional 44 paragraphs beyond the section set out above initially under the heading "Claim In Fraud On The Court In Detail" (paragraphs 23 to 28) and then under the heading "Particulars Of Fraud On Court That Were Key To Its Decision" (paragraphs 29 to 66). The pleading is prolix, repetitive and hard to follow. It also includes much reference to the expert evidence upon which Mr Razeem intends to rely which he has relied upon in previous proceedings. It repeats, without adding particulars, the allegations that are set out in paragraphs 12 to 22.

22. The additional allegations of fraud that can be distilled from the remainder of the particulars of claim are (the paragraph references are to the particulars of claim):

(1) Mrs Desai had signed the 5-year lease, despite her alleged assertion to the contrary and that was the lease she was returning, not a 15-year lease. [Paragraphs 24 and 37]

(2) Mrs Desai misled the court when saying that her signature on the 5-year lease was a forgery. [Paragraph 35,36,37,39,40 and 41]

(3) Mrs Desai lied to the court when she said she paid £88,000 for the business including a 15-year lease. [Paragraph 26,32,39,40,42 and 47]

(4) Mrs Desai denied that she had signed the Memorandum of Sale in 2012. [Paragraphs 44,45 and 46]

(5) A handwritten record of payments submitted by Mrs Desai's husband comprising £51,099 paid to MR Multibusiness Limited to support the claim for £88,000 was fraudulently tampered with by him. [Paragraph 27]

(6) The stock taking notes that formed the basis of the agreed price for stock were fraudulent and Mr Desai gave false evidence about them. [Paragraphs 61 and 62]

23. It hardly needs to be said that all the allegations of fraudulent conduct by Mrs Desai and her husband are very serious. It is of concern that they are contained in a statement of case that is poorly drafted and hard to follow.

24. Before turning to the legal principles it is worth noting that:

(1) Although it is right that Mrs Desai's particulars of claim in claim no B37YJ287, tried by DJ Sullivan in 2016 assert that under the 2012 agreement she was to receive a 15 year lease, the failure to grant such a lease is not a matter of any significance in the judgment. All the District Judge says is: "8. Following on from November 2012, the parties entered into further negotiations in relation to a lease of the premises at Week Street but they were unable to agree on the terms of a formal lease of the premises and, at some stage during the latter part of 2014, further negotiations took place between the parties and in December 2014 in effect [Mrs Desai] sold the business back to [Mr Razeem]." The District Judge does not make any finding about whether Mrs Desai signed a lease for five years. And there is no mention of Mrs Desai denying that she had signed a lease. As I have mentioned already, there was no dispute about there being a lease in some form, hence paragraph 1 of the agreement made in 2014.

(2) The District Judge observes that the terms of the 2012 agreement were not material to her decision. She did not make any findings of fact about the 2012 agreement because it was not necessary for her to do so. The issue she tried concerned solely the terms of the 2014 agreement: did the price agreed include or exclude stock.

(3) The key assertion upon which the 2023 claim is based, that Mrs Desai failed to reveal her husband's conviction, is impossible to reconcile with the case previously put forward by Mr Razeem. Mr Razeem was able to say in his counterclaim that Mr Desai told him in October 2014 that he had been charged with a child sex offence. The date is put at November 2014 in the amended counterclaim and the charge is merely stated to be "a criminal offence". The difference between being charged and being convicted is clearly significant but on any view Mr Razeem's case as it pleaded in paragraph 16 of his particulars of claim in the 2023 claim is unsustainable. Mr Razeem was aware as a minimum of Mr Desai being charged well before the 2014 agreement was entered into, let alone before the trial at which it is said that Mrs Desai deceived Mr Razeem.

Strike out application

25. Under CPR rule 3.4(2) the court has power to strike out a statement of case where (a) it shows no reasonable grounds for bringing the claim (b) the statement of case is an abuse of the court's process and (c) there is a failure to comply with an order, rule or Practice Direction. Mrs Desai principally relies upon grounds (a) and (b). Indeed Stephen Goodfellow

who appeared for Mrs Desai sought to establish that because Mr Razeem's conduct of previous proceedings had been an abuse of the court's process the court should strike out this claim. For reasons I shall elaborate, I do not consider such an approach is open to the court. As to ground (c) there are aspects of the particulars of claim that lack coherence. However, the application was not advanced relying upon ground (c) and it would not be right to consider whether there was a failure to comply with the requirements set out in CPR rule 16.4(1)(a) and Practice Direction 16 paragraph 8.2(1) as they have been explained in the authorities.

26. It is well established ground (a) requires the court to be satisfied that the claim is 'bound to fail' or that it is 'unwinnable'. In some circumstances it will be appropriate to give the claimant an opportunity to amend the claim. However, that was not a request made in this case. The principles are set out in Civil Procedure 2023 at 3.4.2 and in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266. They were discussed recently in *MF Tel SARL v Visa Europe Ltd* [2023] EWHC 1336 (Ch) which is referred to in the notes in Civil Procedure 2023.

27. Mr Riza submitted that Mr Razeem is at a disadvantage facing an application to strike out his claim before seeing Mrs Desai's defence. However, the submission is misconceived. The essence of an application to strike out a claim under CPR rule 3.4(2)(a) is that the court focusses upon the particulars of claim without regard to the defendant's case. The claim stands or falls with the case pleaded in the particulars of claim. The only difference in this claim is that the earlier proceedings lie at the heart of the claim and the court is entitled to look at what happened, and in particular at judgments delivered, by the court whose judgment is said to be tainted by fraud.

28. As to ground (b), although it is obvious that Mr Razeem's conduct of earlier proceedings has been abusive, hence the making of two Civil Restraint orders and numerous orders striking out applications, the issue of the 2023 claim may not be an abuse if Mr Razeem can show reasonable grounds for bringing the claim. There is a danger of conflating his very obvious abusive behaviour in previous proceedings with whether the 2023 claim shows reasonable grounds.

29. This approach finds support from the decision of the Supreme Court in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13. Lord Sumption emphasised in his judgment at [60-61] that:

"The cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute. There can therefore be no question of cause of action estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parties: *Director of Public Prosecutions v Humphrys* [1977] AC 1, 21 (Viscount Dilhorne). If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment. It follows that *res judicata* cannot therefore arise in either of its classic forms."

30. It follows that the issue for this court is whether the 2023 claim is bound to fail. And to a large extent that question needs to be answered putting aside the earlier abusive behaviour unless it is directly material to whether the particulars of claim in the 2023 claim show a claim that is viable. The fact that Mr Razeem has made allegations of forgery and dishonestly previously which have been struck out does not preclude him from pursuing the correct course of action which is to bring a fresh claim seeking to set aside the judgments. His cause of action, as it is now understood, is akin to a claim in fraud and must be brought in a new claim. I therefore do not consider it is necessary to review the extensive authorities that have considered the *Henderson v Henderson* abuse principles, as discussed at 3.4.3 to 3.4.11 of Civil Procedure 2023. If the court concludes that the 2023 claim is bound to fail, the issue of the claim clearly was an abuse of the court's process but it does not help to look at the position through the abuse lens.

31. Following the Court of Appeal's decision in *Tinkler v Esken Ltd (formerly Stobart Group Ltd)* [2023] EWCA Civ 655 it is now clear that the approach to a claim to set aside a judgment based upon fraud as explained in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328 (per Aikins LJ) is to be preferred to the approach in *Hamilton v Al-Fayed (No. 4)* [2001] EMLR 15 (per Lord Phillips MR).

32. In *RBS v Highland Financial* at [106] Aikens LJ said:

"The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence 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."

33. In *Tinkler* Sir Geoffrey Vos MR put the position in the following way:

"In modern terms, we can perhaps regard the action to set aside a judgment for fraud as akin to an action for deceit. The only significant differences are that the court, rather than the opposing party to the first action, has to be shown to have been deceived, deliberate dishonesty is required, and materiality rather than simple reliance must be shown. If the elements are made out (misrepresentation or misleading conduct, made or undertaken fraudulently, with reliance for deceit and materiality for an action to set aside a judgment), the contract or the judgment can be rescinded or set aside."

34. Furthermore, he endorsed the observations by the authors of Grant and Mumford on *Civil Fraud* (First Edition, 2018) at 38-17 as to the role of the second court when dealing with materiality:

“However, the requirement of materiality does not extend to the second court having to re-try the question of the liability of the parties or to see whether the fresh evidence or new facts are material to the final result in the sense of influencing what the decision would be if the matter were to be retried with honest evidence; indeed the second court should not undertake such an exercise. The purpose of a second action to set aside an earlier judgment is to take the parties back to the position as it was before the trial so that a new trial on honest evidence can then take place. Nonetheless, in practice it will be difficult for a judge in deciding the question of materiality not to trespass at least to some extent on to such matters.”

35. These remarks apply with even greater force to an application to strike a claim of this type under CPR rule 3.4(2)(a). However, it is legitimate for this court to consider the 2023 claim in the context of the earlier claims and to decide whether the claim put forward in the statement of case is bound to fail. In doing so, the normal starting point is to assume in favour of the claimant that the pleaded facts are true. It is not the role of the court to make findings of facts unless facts that are asserted are wholly unsustainable. It is in this context that the court may derive some assistance from the conclusions reached by previous judges about Mr Razeem’s conduct although if he had been a victim of fraud his protests about the judgment and his conduct might be at least to some extent understandable.

Security for costs

36. Mrs Desai relies upon ground (g) that:

“the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.”

37. CPR rule 25.13(1)(a) requires the court to be satisfied that it is just to make an order for security.

38. Where a claimant asserts that an order for security will stifle a claim, the burden lies on the claimant to provide evidence to support that assertion: see *Goldtrail Travel Ltd v Aydin* [2017] UKSC 57 at [15].

Disposal

39. I have already remarked that the particulars of claim in the 2023 claim are unsatisfactory. Their weakness is both from an excess of pleading and repetition and a failure to provide sufficient particulars of the cause of action that is relied upon. In addition, there are elements that are hard to follow.

40. Mr Razeem’s principal complaint is based upon the alleged failure by Mrs Desai to disclose her husband’s conviction. That is the way his claim is pleaded and the way in which Mr Riza KC presented Mr Razeem’s response to the application to strike out the particulars of claim. He did not mention the other complaints of fraud either in his skeleton argument or in oral submissions. It is reasonable for the court to conclude that they are of much less significance. Paragraph 5 of the particulars of claim states that the principal target of the

claim is the judgment obtained on 31 October 2016 and setting aside that judgment will have a knock on effect on the other judgments. The mechanism that that 'knock on' in relation to the judgment that pre-dates 31 October 2016, based upon the pleadings is not explained. Equally, it is not explained how the two later judgments will suffer a domino effect.

41. The assertion that Mrs Desai concealed the criminal proceedings with which her husband was involved has no substance. Mr Razeem positively asserts that he was told about the charge by Mr Desai. There is clearly a difference between being charged and being convicted. However, two points can be made:

(1) Mr Razeem asserts that the Kent Messenger Maidstone reported the conviction and sentence on 14 November 2014 and Mr Razeem relies upon an extract from the newspaper bearing that date. It is reasonable to infer that the conviction occurred shortly before that date. Mr Razeem's case in his counterclaim in claim C1Q23Y2Q is that he was told about the charge in either October or November 2014.

(2) The fact that Mr Desai told Mr Razeem about the charge takes the sting out of the allegation of fraud. Even if it were assumed in favour of Mr Razeem that he only knew of the charge and not the conviction, he knew about it well before reaching agreement with Mrs Desai for the sale-back and nearly two years prior to the trial before DJ Sullivan in 2016. It would have been easy for him to have enquired information about a conviction, which is a matter of public record. It is impossible for Mr Razeem to show conscious and deliberate dishonesty.

42. Furthermore, Mr Razeem's case is based upon a deception by Mrs Desai in failing to disclose documents relating to the conviction in the course of disclosure in claim B37YJ287. The way it is put in paragraph 17 of the particulars of claim in the 2023 claim is that the conviction "...was adverse documentary material that should have been disclosed because it was relevant and admissible...". Mr Razeem does not refer to there having been an order for disclosure under CPR rule 31, Mrs Desai's disclosure statement or the test for standard disclosure.

43. This court has been provided with Mrs Desai's particulars of claim but not Mr Razeem's defence. There is no basis for inferring that the reason Mrs Desai chose to re-sell the business was an issue in the claim. There is a very brief mention of the background to the re-sale in 2014 in paragraph 8 of the judgment. The fact there was an agreement to re-sell was not in dispute (hence Mrs Desai obtaining summary judgment on the unpaid instalments prior to the trial). The focus of the trial was whether the agreement included or excluded stock. There is therefore no basis for saying that there was an obligation to disclose documents relating to the conviction, such as communications with the Probation Service about Mr Desai's supervision, his unpaid work and appearance in the Sex Offenders Register.

44. The particulars of claim in the 2023 claim appear to assume that any such document would be relevant because they were adverse to Mrs Desai's claim to recover the sum agreed for stock. However, there is no freestanding obligation in CPR rule 31 to disclose adverse documents unless (a) there is an order for disclosure and, if no other type of order for disclosure is made, (b) they fall within the test for standard disclosure as documents which adversely affect the disclosing party's case or another party's case. In other words, they must relate to an issue between the parties in the claim. Mr Razeem does not plead that the

conviction was relevant to any issue in the claim. It is trite that documents relating only to cross-examination as to credit and to no other issue in the trial are outside the scope of standard disclosure: see *Favor Easy Management Ltd v Wu* [2010] EWCA Civ 1630.

45. It follows that Mr Razeem's case based upon the failure to disclose Mr Desai's conviction is hopeless and is bound to fail. It fails as a matter of fact, given the disclosure of the charge, and it fails as to materiality on both the first and second limbs of the materiality test in *RBS v Highland Partners*.

46. I turn to the remaining allegations that can be extracted from the particulars of claim as summarised in paragraph 22 of this judgment. It is right that this court needs to be cautious about reaching a firm view about materiality without the case being tested. On the other hand, the court has the benefit of two judgments that were handed down by DJ Sullivan. The way the issues are framed in the judgment and the choices made by the judge about evidence that was worthy of mention are very clear pointers to relevance and materiality. If the judge states that an aspect of the case is not material, or states that an area of evidence did not need to be considered, these are strong pointers towards the alleged conscious and deliberate dishonesty not being causative of the impugned judgment having been obtained by fraud. And in this case, the court was left with the very clear impression that the case stands or falls with what is said to be a failure to reveal the criminal conviction.

47. Taking the six allegations in turn:

(1) Mr Razeem alleges that Mrs Desai signed a five year lease, that she was wrong to claim she was entitled under the 2012 agreement to a 15 year lease. At the trial, nothing turned on whether Mrs Desai signed a lease for five years. They agreed in writing to surrender the lease and there was no material dispute at the trial about this term of the 2014 agreement. It does not form part of the judge's review of the evidence or her decision making process.

(2) Mr Razeem says Mrs Desai asserted that her signature on the lease was a forgery. This point is not mentioned in the judgment and was irrelevant to the decision the judge had to make which concerned only whether the agreed figure of £88,000 included or excluded stock.

(3) Mr Razeem asserts that Mrs Desai was wrong to say that the original agreement made in 2012 included an entitlement to a 15 year lease. The judge made it clear that she did not consider the terms of the 2012 agreement to be relevant to the issue she had to decide (paragraph 62 of the judgment). Furthermore, the main terms of the 2014 agreement were not in dispute and they included the surrender of whatever lease was in place. Mrs Desai did not pursue a claim for breach of the 2012 agreement. It is therefore unsurprising that her entitlement or otherwise to a 15 year lease does not feature in the judgment.

(4) Mr Razeem says that Mrs Desai denied that she signed the memorandum of sale. This was not a pleaded issue and moreover the judge referred to the memorandum of sale at paragraph 7 of her judgment which was in the trial bundle. If it were the case that there was a dispute about signature of the memorandum, a point that is not mentioned in the judgment, nothing turned on it.

(5) Mr Razeem alleges that a handwritten record of payments comprising £51,099 paid to MR Multibusiness Limited was tampered with to support the claim of

payment of £88,000 for a 15 year lease. This allegation lacks basic coherence. It is not disputed that the 2012 Memorandum recorded the purchase price at £51,099 and that the sale back price in 2014 is recorded in the written agreement as being £88,000. The allegation, such as it is, does not go to any part of the dispute before the court in 2014. (6) The stock taking note were fraudulent. This was an allegation expressly made at the trial in 2014 and dealt with in paragraphs 32 to 35. The judge records that Mr Razeem asserted the stock notes dated 15 and 17 December 2014 were fabricated. This contradicted what Mr Razeem said in his statement. He then provided further new evidence at the trial saying the stock notes which he had prepared had been removed by Mrs Desai. Mr Razeem's willingness to change his case at the trial, and the fact that the judge gave his allegations careful consideration, renders the case he now wishes to put forward to be hopeless. He is unable to make out for the purpose of his pleaded case the three essential elements of the cause of action.

48. I am satisfied that Mr Razeem's claim is hopeless and is bound to fail. The additional allegations he makes, to the extent they are coherent, do not allege dishonesty that is relevant or material. I will therefore make an order striking out his particulars of claim and the claim form. It is therefore unnecessary to consider the application for security for costs.

Mr Razeem's bankruptcy

49. At the hearing I invited counsel to provide written submissions about whether Mr Razeem had title to bring the claim to set aside the judgments based upon fraud. I was unaware that his trustee in bankruptcy had instructed Irwin Mitchell to write to the court about this point on 20 September 2023. The letter explained that the trustee took a neutral position about Mr Razeem's claim but was an interested party in respect of orders for costs.

50. In light of the outcome of the application to strike out the claim and the position adopted by the trustee in bankruptcy, I do not need to consider the point any further. I am however grateful to counsel for their submissions.