Trinity Term
[2023] UKPC 29
Privy Council Appeal No 0016 of 2020

JUDGMENT

Winston Finzi (Appellant) *v* Jamaican Redevelopment Foundation Inc and others (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
27 July 2023

Heard on 21 March 2023

Appellant
Lord Anthony Gifford KC
Terri-Ann Guyah Tolan
Aisha Thomas
(Instructed by Guyah Tolan & Associates (Jamaica))

Respondents
Sandra Minott-Phillips KC
M. Maurice Manning KC
(Instructed by Myers Fletcher & Gordon (London))

LORD LEGGATT:

Introduction

1. In this action, begun in 2017, the claimant and appellant, Mr Winston Finzi, seeks to reverse the results of extensive litigation between himself and the first respondent, the Jamaican Redevelopment Foundation, Inc ("JRF"), which took place between 2003 and 2014. He does so by alleging that a series of judgments given and settlements reached in that litigation were all obtained fraudulently. The judge (Laing J) granted summary judgment dismissing the claim as an abuse of process. The Court of Appeal refused permission to appeal from that decision. But Mr Finzi has been granted leave to appeal to the Privy Council against the order refusing him permission to appeal to the Court of Appeal. He contends that the courts below erred by finding that failure to exercise reasonable diligence in uncovering and alleging fraud rendered his claim an abuse of process. He argues that the decision of the United Kingdom Supreme Court in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450, handed down after the Court of Appeal heard his application for permission to appeal, shows that there is no such requirement at common law. This appeal also raises questions about whether Mr Finzi's claim is based on any "fresh" evidence and what constitutes "fresh" evidence for the purpose of a claim to set aside a judgment or settlement for fraud.

2. Although two individual employees or agents of JRF are also respondents to the appeal, no scenario has been suggested in which an appeal in relation to them could succeed if the appeal in relation to JRF cannot. In these circumstances it is unnecessary to consider their position separately and this judgment will focus throughout on the claim against JRF.

The historical background

3. The historical background to the litigation between Mr Finzi and JRF is described in the judgment of Laing J:

> "It is a matter of historical record that the 1990s in Jamaica was characterised by a period of extremely high interest rates. The reasons for this will be debated for years to come, but what is undeniable is that this high interest rate regime wreaked havoc on and/or led to the financial ruin of a

> number of individuals and businesses who became debtors and who were unable to service their debts. There was also what has been termed a financial meltdown of various financial institutions of various sizes and in 1997 the Government of Jamaica established the Financial Sector Adjustment Company (FINSAC) whose mandate was to restore stability to the financial sector. In pursuance of this mandate FINSAC acquired a number of non-performing loans, debts, liabilities and securities which belonged to those financial institutions which had accepted the intervention and assistance of FINSAC."

4. A large portfolio of debts acquired by FINSAC was later sold to JRF. These debts were assigned to JRF by a deed of assignment dated 30 January 2002. They included a loan of JA$30.9m odd made to Mr Finzi personally, as well as loans made to companies that he controlled for which he had given personal guarantees.

5. Attempts made by JRF to recover these debts resulted in a series of lawsuits, two of which are chiefly relevant for present purposes.

The 2004 action

6. In November 2004 JRF began a lawsuit against Mr Finzi ("the 2004 action") claiming repayment of a loan of US$464,472 (plus interest) made by Mutual Security Merchant Bank and Trust Company Ltd ("MSMB") to Mr Finzi in March 1995.

7. The background to the loan was that one of Mr Finzi's companies, Avalon Investments Ltd ("Avalon"), had entered into an agreement in 1987 to purchase property in Providence Estate, Montego Bay ("the Providence property") for the sum of US$464,472. The vendors failed to complete the sale and Avalon sued for specific performance of the sale agreement. This action ultimately resulted in a consent order made in December 1994 for specific performance of the agreement. Mr Finzi borrowed the sum required to pay the purchase price from MSMB on terms set out in a letter dated 10 March 1995. Avalon had in fact been struck off the register of companies in 1991, which no doubt explains why the loan was not made to Avalon but to Mr Finzi personally. He agreed to provide as the principal security for the loan a first registered mortgage of the Providence property.

8. The loan money was disbursed and used to complete the purchase, but the instrument of transfer provided by the vendors was in the name of Avalon. MSMB requested Mr Finzi's attorneys to have the title transferred into the name of Mr Finzi. However, this was not done and MSMB was not registered at that time as a mortgagee, although copies of the title deeds were deposited with MSMB.

9. The claim made by JRF in the 2004 action for repayment of the loan was supported by a detailed affidavit setting out the history of the loan and exhibiting relevant documents, including documents evidencing the assignment of the loan to FINSAC and then to JRF. This evidence identified the loan as the debt of JM$30.9m owed by Mr Finzi which was assigned to JRF by the deed of assignment (see para 4 above).

10. In an amended defence in the 2004 action Mr Finzi admitted the terms on which MSMB agreed to make the loan to him, that the loan was made and that he had not repaid it. Insofar as his amended defence gave any reason for denying that he was liable to repay the loan, his case appeared to rest on the fact that the title to the Providence property was not in his name.

11. JRF applied for an order striking out the amended defence, granting summary judgment for the amount claimed and declaring that JRF had an equitable mortgage over the Providence property for this amount. Following a contested hearing, McIntosh J made such an order on 15 July 2005. Her reasons were given in a written judgment in which she summarised the substance of Mr Finzi's defence as follows:

> "In effect he is claiming that since the title [to the Providence property] is not in his name he has no obligation to repay a loan which he obtained to complete the purchase and which resulted in the completion of the purchase with the certificate of title available to him to effect transfer into his name. As long as he does not do what he should do then the claimant is not entitled to payment of interest nor it seems even to repayment of the principal."

The judge went on to say that she knew of no principle of law which would allow Mr Finzi or any defendant to avoid liability on this basis. She concluded that nothing in the amended defence disclosed a reasonable defence to the claim and that nothing had been put forward which disclosed any reasonable possibility of evidence becoming available to Mr Finzi which might give his case any prospect of success.

12. Mr Finzi filed a notice of appeal against the judge's order, but he did not pursue the appeal and in May 2006 he paid the judgment debt to JRF.

The 2005 action

13. The second relevant action ("the 2005 action") was begun by JRF in December 2005. In this action JRF sued Mr Finzi on a personal guarantee of loans made by MSMB to one of his companies, Jamaica Beach Park Ltd. This action followed three lawsuits in which Mr Finzi had tried, unsuccessfully, to prevent JRF from appointing receivers over some property on which the loans to Jamaica Beach Park Ltd were secured and from exercising powers of sale. The property was ultimately sold at auction in June 2005 for US$6m and the net proceeds of sale were applied to reduce the company's indebtedness. But JRF claimed in the particulars of claim that Jamaica Beach Park Ltd remained indebted in sums totalling some US$6m and JA$64.8m.

14. On 2 May 2006 JRF applied for in the 2005 action, and was granted, a freezing order over Mr Finzi's assets. The freezing order was discharged a few days later by a consent order made on 11 May 2006. Under the terms of the consent order, it was agreed that, after Mr Finzi had paid the judgment debt in the 2004 action (which he paid by a cheque dated 11 May 2006), JRF would retain its equitable mortgage over the Providence property as a continuing security for the amounts claimed in the 2005 action.

15. There were no further relevant developments in the 2005 action until December 2011, when a meeting between the parties took place to discuss settlement. Following this meeting, JRF sent a letter to Mr Finzi dated 25 January 2012. This letter reviewed in detail the history of the loans to Jamaica Beach Park Ltd and contained fresh calculations of the outstanding balances. The letter explained that these calculations:

> "were computed specifically for purposes of this letter and may not match previous statements and calculations that you have been provided. However, in all instances the calculations provided herein will be lower than balances that you have previously been provided. These calculations were prepared with an eye toward settlement, and are provided without prejudice and are subject to revision."

The calculations showed a total outstanding principal amount of US$1,897,538 plus interest of some US$2.6m, making a total sum claimed of some US$4.4m.

16. On 4 June 2012 judgment was entered against Mr Finzi in the 2005 action (it is unclear on what basis, but it appears to have been because of a procedural default) for a sum of US$3,761,908. This sum comprised the principal amount of US$1,897,538 claimed in the letter of 25 January 2012 but with a lower amount of interest added than had been claimed in that letter. Mr Finzi immediately issued an application to have this judgment set aside.

The settlement agreement

17. Before the application was heard, the parties negotiated a settlement. The terms agreed were embodied in a written settlement agreement (described as a "settlement endorsed on counsel's brief") signed by the parties and their attorneys on 28 August 2012. On that date an order was also made by consent setting aside the judgment in favour of JRF granted on 4 June 2012 and recording that the matter had been settled in accordance with the terms "endorsed on counsel's brief".

18. Under the terms of the settlement agreement, JRF agreed to accept the sum of US$1,050,000 in full and final settlement of its claim provided that this sum was paid by 31 July 2013. For his part Mr Finzi agreed that, if this sum was not paid by 31 July 2013, JRF would be entitled to enter judgment against him in the sum of US$3,761,908 (plus interest on the principal sum of US$1,897,538 from 1 May 2012). The parties also agreed that, in this event, JRF would be entitled to enforce the equitable mortgage provided as security for its claim by the consent order dated 11 May 2006 and that Mr Finzi's interest in the Providence property would be sold to recover the judgment sum. The settlement agreement also included a mutual release of all claims, causes of action etc in connection with any claims that had been filed or litigated between the parties and any related mortgages, loans and events associated with those claims.

19. Mr Finzi did not pay the sum of US$1,050,000, as he had the opportunity to do, by 31 July 2013. Consequently, judgment for US$3,761,908 (plus interest) was entered against him and in March 2015 the Providence property was sold, with Mr Finzi's consent, for US$7m. After payment of expenses and discharge of the judgment debt, there was a remaining balance of some US$2.165m, which was paid over to Mr Finzi. At the request of Mr Finzi's attorneys, JRF provided a detailed statement of account by a letter dated 30 April 2015.

The claim In this action

20. That appeared to have brought the litigation between the parties finally to an end. But it proved to be only a temporary respite. Some 4 ½ years after the settlement agreement was concluded, Mr Finzi returned to the fray. In February 2017 he commenced this action against JRF and seven other defendants, seeking to reverse the effect of the series of judgments previously entered against him and settlements previously reached and to have those judgments and settlements set aside on the ground that they were procured by fraud.

21. Mr Finzi's particulars of claim, although lengthy and liberally sprinkled with allegations of fraud and deceit, do not articulate a clear or focused case, let alone give any proper particulars of matters relied on to justify accusing various individuals who acted for JRF of dishonesty. In outline, however, the principal allegations made are these:

(i) The loan made to Mr Finzi by MSMB to fund his purchase of the Providence property was in fact repaid in or about August 1996 from proceeds of sale of properties owned by one of his companies (Mahoe Bay Company Ltd).

(ii) No loans were made to Jamaica Beach Park Ltd in Jamaican dollars, but interest on the US dollar loans made to that company was computed in Jamaican dollars and debited to Jamaican dollar accounts.

(iii) On an unspecified date "when the interest rates started to sky rocket" the National Commercial Bank Jamaica Ltd, which had acquired all the assets and liabilities of MSMB, consolidated all the Jamaican dollar interest accounts of Jamaica Beach Park Ltd (which were secured on property) into a single, unsecured overdraft facility of JM$30.9m extended to Mr Finzi personally.

(iv) This loan (and not the loan made to Mr Finzi to finance the purchase of the Providence property) was the personal debt of JM$30.9m acquired by FINSAC and later assigned to JRF pursuant to the deed of assignment dated 30 January 2002.

(v) Further, the loans assigned to JRF by the deed of assignment were for principal sums only, but JRF fraudulently claimed that it was entitled to claim interest on those sums from 1997.

(vi) In the 2004 action JRF fraudulently represented that the loan of JM$30.9m assigned to JRF was the loan which financed the purchase of the Providence property, when it knew that this was in fact a separate unsecured overdraft facility. The summary judgment granted by McIntosh J was obtained by this fraud.

(vii) As the loan which financed the purchase of the Providence property had been repaid, there was no mortgage debt at the time of the 2004 action and no remaining equitable mortgage. However, when JRF obtained a freezing order against him in the 2005 action, Mr Finzi was compelled "under great strain and duress" to enter into the consent order dated 11 May 2006 (which made his interest in the Providence property available as security for the amounts claimed in the 2005 action) and subsequently to enter into the settlement agreement concluded in August 2012.

(viii) In the 2005 action JRF put forward various false and fraudulent statements of account showing sums allegedly owed by Jamaica Beach Park Ltd which (as its representatives knew) were far greater than those actually owed.

22. It is unnecessary to dwell on the many shortcomings and difficulties apparent in this case, but the following points are worth making:

(i) The assertion that the loan made to Mr Finzi to finance the purchase of the Providence property was repaid in 1996 is not supported by any evidence; nor has he explained why, if this were so, he admitted in his amended defence in the 2004 action that he had not repaid that loan.

(ii) The assertion that the (secured) Jamaican dollar debts of Jamaica Beach Park Ltd were replaced by an unsecured loan made to Mr Finzi personally is likewise not supported by any evidence; nor has he explained why, if this was the debt of JA$30.9m assigned to JRF, he did not say so when he was defending the 2004 action.

(iii) The deed of assignment dated 30 January 2002, by clause 2, assigned to JRF all of the seller's rights, title and interest in and to all the assets described in the exhibit to the deed and "all interest and other monies (if any) now due and subsequently to become due in respect of such assets". The allegations that only the principal sums borrowed were assigned to JRF, and that JRF acted fraudulently in claiming interest, are therefore untenable.

(iv) Although the word "duress", as well as fraud and deceit, is used in the particulars of claim, no argument has been developed, or could reasonably be made, that applying successfully for a freezing order in May 2006 was a form of illegitimate pressure capable in law of founding a claim that the subsequent consent order was vitiated by duress, let alone that such pressure somehow extended to the settlement agreement concluded in August 2012. The reference to duress can therefore be put to one side.

Summary judgment

23. JRF (along with the other defendants on whom the claim was served) applied for summary judgment dismissing the claims against them. The application was heard over several days by Laing J. By an order dated 28 July 2017, the judge granted summary judgment in favour of the defendants. In relation to JRF (and the two individuals who are also respondents to this appeal), the judge did so on the basis that the proceedings against them were an abuse of the court's process, as the allegations of fraud on which the claims are based could and should have been raised in the earlier proceedings before Mr Finzi entered into the settlement agreement which put an end to all outstanding claims.

24. Laing J approached the matter on the footing that the allegations of fraud are complicated and that, rather than reach any conclusions on whether or not the claim of fraud had a real prospect of success, he would assume that the claim had been substantiated and would focus on the issue whether on that assumption the claim is nevertheless an abuse of process. Based on his analysis of case law, Laing J concluded that an action which seeks to have a settlement or judgment set aside on the ground that it was procured by fraud will be an abuse of process unless it satisfies two requirements:

(i) the evidence of fraud must be new evidence in the sense of not having been previously available to the litigant at the time of the settlement or judgment (the fresh evidence condition); and

(ii) the new evidence of the fraud must be evidence that could not have been discovered with reasonable diligence in advance of the settlement or judgment (the reasonable diligence condition).

25. In concluding that the "reasonable diligence condition" forms part of Jamaican law, Laing J relied principally on what he identified as "the current English position" reflected in the decision of the Court of Appeal of England and Wales in *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147, [2018] Ch 1.

26. It is clear from his judgment, however, that on the facts the judge considered that Mr Finzi's claim of fraud does not satisfy the "fresh evidence condition", let alone the "reasonable diligence condition". His critical finding was that it was "beyond question" that, when Mr Finzi entered into the settlement agreement on 28 August 2012, "he had all the information which he is now saying supports his claim for fraud." (para 101). Laing J concluded that on this basis, and in circumstances where the parties had acted on the settlement agreement and the Providence property had been sold with Mr Finzi's concurrence and the proceeds distributed in accordance with the settlement agreement, the claim to set aside the settlement agreement for fraud is an abuse of process.

The decision of the Court of Appeal

27. Mr Finzi's application for permission to appeal from the judge's decision to the Court of Appeal was refused by the judge and, subsequently, by the Court of Appeal following an oral hearing held over four days. In a written judgment the Court of Appeal held (1) that the judge could not be faulted for finding that a "reasonable diligence condition" applies and (2) that Mr Finzi has no real chance of success in challenging the judge's exercise of discretion in finding that the claim is an abuse of process.

This appeal

28. In England and Wales no appeal lies from a decision of the Court of Appeal either granting or refusing permission to appeal from another court: *Lane v Esdaile* [1891] AC 210; and see now section 54(4) of the Access to Justice Act 1999. No similar restriction applies, however, to such a decision of the Court of Appeal of Jamaica where special leave is sought for an appeal to the Privy Council: see *Campbell v The Queen* [2010] UKPC 26, [2011] 2 AC 79. Mr Finzi applied for leave to appeal to the Privy

Council from the decision of the Court of Appeal refusing permission to appeal from the order of the judge in this case.

29. By the time he made this application, the decision of the Court of Appeal of England and Wales in *Takhar*, on which the judge had relied in holding that there is a "reasonable diligence condition", had been reversed by the UK Supreme Court: see *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450. Counsel for Mr Finzi relied on this development to argue that the challenge to the judge's decision raises a question of public importance for which leave to appeal to the Privy Council should be given pursuant to section 110(2)(a) of the Constitution.

30. The Court of Appeal rejected that submission and refused leave to appeal. They accepted that the decision of the UK Supreme Court in *Takhar* would provide powerful guidance in future cases but did not accept that the judge's decision that the claim in this case is an abuse of process depended on whether there is a "reasonable diligence condition". As explained by P Williams JA (para 44):

> "[the decision of the UK Supreme Court in *Takhar*] does not take away from the fact that the finding by the learned judge, in relation to this issue that was largely dispositive of this aspect of the matter, was that the information that enabled the applicant to reach the conclusion that there was fraud committed by the respondents was received by him prior to his entering into the settlement agreement. There was no new material but rather the same material already available to the applicant being used to form the foundation of another claim."

31. The Board, however, granted leave to appeal.

Abuse of process

32. The doctrine of res judicata in its narrow sense prohibits a party from relitigating a decision in earlier proceedings that a cause of action does or does not exist (cause of action estoppel) or an issue decided in earlier proceedings (issue estoppel). There is also a broader principle, first stated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, which precludes a party from raising in subsequent proceedings matters which were not, but which could and should have been, raised in

earlier proceedings. This principle is wider than the narrow res judicata doctrine in two respects: it applies, not to matters decided by a court, but to matters which could have been decided but were not; and it applies to parties to the subsequent proceedings even if they were not parties to the earlier proceedings (or their privies). Like the narrow doctrine of res judicata, however, this broader principle also rests on the public interest in the finality of litigation. As stated by Sir Thomas Bingham MR in *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, 260:

> "[The *Henderson* principle] is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

33. In general, the question whether a matter which could have been raised in earlier proceedings "should" have been raised in those proceedings depends on a "broad, merits-based judgment" that takes account of all the public and private interests involved and all the facts of the case and focuses on "the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before": *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31 (Lord Bingham of Cornhill). As a matter of law, there is no distinction to be drawn between cases where the original action concludes by judgment and where it concludes by settlement: *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748, para 11. The *Henderson* principle applies equally to both.

Setting aside a judgment or settlement for fraud

34. The legal principles to be applied in deciding whether a judgment must be set aside because it was obtained by fraud were summarised by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328, [2013] 1 CLC 596, para 106, in a passage approved by the courts at all levels in *Takhar*:

> "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."

Takhar

35. In *Takhar* the defendants in the original action had relied at trial on a written agreement which they said that Mrs Takhar had signed. She could not remember signing the agreement and suspected that it might have been forged but had no evidence which would justify pleading fraud. The trial judge found that the signature was hers and relied heavily on the document in finding for the defendants. Mrs Takhar subsequently obtained evidence from a handwriting expert that her signature had indeed been forged by transposing it from a letter she had sent to the defendants' solicitors. She brought a new action seeking to have the judgment set aside. The defendants applied to have this claim struck out as an abuse of process. The court directed that the question whether the new action was an abuse of process should be decided as a preliminary issue.

36. The judge who tried the preliminary issue concluded that Mrs Takhar had a real prospect on the basis of her new evidence of satisfying the requirements outlined in *Royal Bank of Scotland* and that her new action was not an abuse of process: [2015] EWHC 1276 (Ch). He rejected the argument that it was necessary to show that the new evidence could not with reasonable diligence have been discovered in time to adduce it at the original trial. On the appeals to the Court of Appeal and the Supreme Court the only issue was whether or not there is such a reasonable diligence requirement.

Subject to that point, the defendants did not challenge the judge's reasoning: see [2018] Ch 1, para 30.

37. As already mentioned, the Court of Appeal held that there is such a requirement and that, as it had not been satisfied, the action was an abuse of process. In reaching that conclusion, the Court of Appeal treated as dispositive a statement of Lord Bridge of Harwich in *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 483, a decision of the House of Lords. Lord Bridge had said it was "the common law rule" that:

> "the unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered."

Weight was also placed on a similar statement by Lord Templeman in *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44, 48, a decision of the Privy Council.

38. The further appeal to the Supreme Court was heard by a panel of seven Justices who unanimously reached the opposite conclusion on the disputed issue and restored the decision of the judge. The two leading judgments were given by Lord Kerr and Lord Sumption. Lords Hodge, Lloyd-Jones and Kitchin agreed with both judgments. Lord Briggs and Lady Arden each gave a separate judgment but neither attracted the agreement of other Justices and it is unnecessary to consider their different approaches. Both Lord Kerr and Lord Sumption held that, in the words of Lord Kerr at para 54:

> "where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment."

39. Lord Kerr reviewed the earlier authorities and concluded that they did not justify the existence of a reasonable diligence requirement. In particular, he addressed, at paras 40-42, the statements in the two *Owens Bank* cases on which the Court of Appeal had relied. He pointed out that the context in which those statements were

made was that the issue of fraud had been raised in the original action and determined against the party seeking to set aside the judgment. That party was therefore attempting to relitigate an issue which had already been decided. That was not the position in Mrs Takhar's case, where no allegation of fraud had been raised in the original action.

40. Lord Kerr also considered policy arguments against the imposition of a reasonable diligence requirement, which he regarded as "overwhelming": in particular, he described "[t]he idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent" as "antithetical to any notion of justice" (paras 52-53).

41. This reasoning was all that was necessary to decide the appeal. But Lord Kerr expressed, obiter, at para 55, some provisional views about what the position would be in two other situations: (a) where fraud was raised at the original trial and new evidence of the fraud is now relied on and (b) where a deliberate decision was taken not to investigate the possibility of fraud in advance of the original trial, even if it was suspected. He suggested that in each case the court would have a discretion whether to allow the fraud claim to proceed but emphasised that the question did not arise on the appeal and that he was not expressing any final view. Lord Kerr did not address a situation where the party seeking to set aside the judgment for fraud had the evidence now relied on but did not deploy it in the earlier proceedings.

42. Although his judgment also commanded the support of a majority of the court, Lord Sumption's reasoning differed somewhat from Lord Kerr's. The nub of it, at para 63, was that:

> "proceedings of this kind are abusive only where the point at issue and the evidence deployed in support of it not only could have been raised in the earlier proceedings but should have been … The 'should' in this formulation refers to something which the law would expect a reasonable person to do in his own interest and in that of the efficient conduct of litigation. However, the basis on which the law unmakes transactions, including judgments, which have been procured by fraud is that a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are. That is

> why it is not a defence to an action in deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in: *Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99, 120 (Lord Chelmsford); *Redgrave v Hurd* (1881) 20 Ch D 1, 13-17 (Sir George Jessel MR). It follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he 'should' have raised it."

43. Lord Sumption also commented on the situation "where the fraud was raised in the earlier proceedings but unsuccessfully". While saying that he would leave the question open, he observed, at para 66:

> "My provisional view is that the position is the same, for the same reasons. If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material."

JRF's position on this appeal

44. In light of the decision of the UK Supreme Court in *Takhar*, counsel for JRF have not sought to maintain on this appeal that there is a reasonable diligence requirement under the law of Jamaica. Rather, they adopt the reasoning of the Court of Appeal in the passage of their judgment refusing leave to appeal quoted at para 30 above. They submit that the judge's decision to grant summary judgment did not depend on there being a reasonable diligence requirement but turned on his finding that, when Mr Finzi entered into the settlement agreement on 28 August 2012, he had all the information on which he now relies to support his claim that the settlement agreement (and judgments in the earlier proceedings) were obtained by fraud. In other words, the claim failed to satisfy the "fresh evidence" requirement. Counsel for JRF argue that this finding and the conclusion based upon it that the claim is an abuse of process are not realistically open to challenge.

No new information

45. The allegations of fraud pleaded in Mr Finzi's particulars of claim are said to be based on "the information received from FINSAC." This is a reference to information received by Mr Finzi from Mr Errol Campbell, the General Manager of FINSAC, in a letter dated 9 August 2011. As set out in the particulars of claim and confirmed in an affidavit sworn by Mr Campbell for the purposes of these proceedings, that letter was sent in response to a request by Mr Finzi for the disclosure of information under the Access to Information Act 2002. Mr Finzi asked for details of all the loan accounts acquired by FINSAC and sold to JRF in the names of Mr Finzi and his "related entities", including Avalon and Jamaica Beach Park Ltd. According to the particulars of claim, this request was made in furtherance of an audit conducted by Mr Finzi of the loan accounts of Avalon and Jamaica Beach Park Ltd in connection with the claim against him in the 2005 action.

46. Having searched the FINSAC database, Mr Campbell compiled a spreadsheet which he enclosed with his letter to Mr Finzi of 9 August 2011. This spreadsheet listed debts acquired by FINSAC from National Commercial Bank (which had itself acquired all the assets and liabilities of MSMB) as at 30 September 1998 and debts transferred to JRF as at 30 January 2002. Both lists included the debt of Mr Finzi in a principal amount of JA$30.9m referred to earlier and five US dollar loan accounts of Jamaica Beach Park Ltd. Neither list included any debt of Avalon nor any debt of Jamaica Beach Park Ltd denominated in Jamaican dollars.

47. It is hard to see how this information, taken at its highest, justifies alleging fraud. But, assuming that it does, the difficulty for Mr Finzi's case is that he received this information in August 2011, a year before he entered into the settlement agreement. Any inferences which can be drawn from the information must therefore have been evident then. Mr Finzi has not explained what use, if any, he made of the letter from Mr Campbell in his negotiations with FINSAC nor, if he did not rely on it at that time, why not. What is clear is that, in the letter dated 25 January 2012 referred to at para 15 above, JRF set out in detail the balances and calculations on which its claim was based, which included five Jamaican dollar loan accounts for Jamaica Beach Park Ltd as well as all the accounts listed in Mr Campbell's spreadsheet. It is apparent from that letter that Mr Finzi was disputing the amount of the indebtedness of Jamaica Beach Park Ltd to JRF. But there is no evidence to suggest - and Mr Finzi has not suggested - that he asserted or believed at that time that JRF had acted or was acting dishonestly.

48. The only material relied on in support of Mr Finzi's pleaded case of fraud which came into existence after the settlement agreement was concluded in August 2012 is the letter from JRF's attorneys dated 30 April 2015 enclosing a statement of account (see para 19 above). This letter is said in the particulars of claim to be "central to proving the fraud committed by the defendants". On analysis, however, the only material difference between the information contained in this letter and the information contained in the letter dated 25 January 2012 is that the calculations had been updated, first to adjust the amount of interest claimed downwards to the amount incorporated in the settlement agreement and, second, to show how the proceeds of sale of the Providence property had been accounted for. No issue is taken with that accounting. Mr Finzi does not dispute in this action that the proceeds of sale were disbursed in accordance with the settlement agreement. His case is that he did not owe the amount which he agreed to pay under the settlement agreement and that he was induced to enter into the settlement agreement by fraud. The letter from JRF's attorneys dated 30 April 2015 provides no support for either allegation.

49. Having examined all the material referred to in the particulars of claim, the Board is satisfied that there is no reasonable basis for impugning the judge's finding that, when Mr Finzi entered into the settlement agreement on 28 August 2012, he had all the information on which he is relying to allege fraud in these proceedings.

Mr Finzi's alternative argument

50. Counsel for Mr Finzi advanced a further and alternative argument that it does not follow from this finding that his claim in these proceedings is an abuse of process. The argument is that, as a matter of law, it is sufficient to satisfy the "fresh evidence" requirement that the material relied on to plead fraud is "fresh" in the sense that it was not deployed in the earlier proceedings even if the claimant was aware of it then, unless the claimant took a deliberate decision not to rely on the material - which is not a finding made in this case. This argument is based on the observations of Lord Sumption in *Takhar* quoted at paras 42 and 43 above and the decision of the Court of Appeal of England and Wales in *Park v CNH Industrial Capital Europe Ltd (t/a CNH Capital)* [2021] EWCA Civ 1766, [2022] 1 WLR 860 ("*Park*").

Park* and *Elu

51. In that case Mr Park, as director of the company through which he ran his farming business, entered into four hire-purchase agreements with a finance company to finance the purchase of farm equipment. However, by mistake, the finance

company when completing the agreements inserted the wrong name and registered number for Mr Park's company. When hire payments were not made on time, the finance company terminated two of the agreements. A representative of the finance company obtained Mr Park's signature to a deed of rectification, which provided that all references in the agreements to the wrongly named company, which did not exist, were references to him personally. The finance company then sued Mr Park for sums due under the agreements. Mr Park, who was acting in person, put in a handwritten defence denying liability; but he later failed to file a pretrial check list by the date required and then to comply with an 'unless' order, with the result that his defence was automatically struck out. His application for relief from sanctions was refused and the finance company obtained a default judgment against him.

52. Mr Park brought a new action to set aside the default judgment, alleging that it had been procured by fraud and that he had been tricked into signing the deed of rectification. His evidence was that he was only presented with the final page of the document to sign and was told that it was a document to release any claim over some of the equipment to enable it to be sold. He would never knowingly have signed the deed of rectification, as the party to the hire purchase agreements was always intended to be his company and not Mr Park himself.

53. On an application by the finance company, the county court judge struck out the new action as an abuse of process on the ground that the facts on which it was based were known to Mr Park at the time of the original action. However, the Court of Appeal allowed Mr Park's appeal.

54. Andrews LJ, who gave the sole substantive judgment, found there was a strong arguable case that Mr Park was deceived into signing the deed of rectification and "an overwhelming case" that the finance company had consciously and deliberately deceived the court and that the deception was an operative cause of the judgment in default being entered (see paras 49 and 53). She identified the key issue in the appeal as being whether, given these findings, the judge was nevertheless right to find that Mr Park's claim to set aside the judgment for fraud was an abuse of process because the circumstances in which he came to sign the deed were known to him before the default judgment was entered (para 53). Her answer to this question was that the judge failed to follow *Takhar* and, in so doing, reached the wrong conclusion.

55. In *Elu v Floorweald Ltd* [2020] EWHC 1222 (QB), [2020] 1 WLR 4369, paras 151-156, Linden J had concluded, based on a careful and thorough analysis of the judgments of Lord Kerr and Lord Sumption in *Takhar* and other earlier authorities, that

a claim to set aside a judgment for fraud must be based on evidence that is "fresh" or "new", not merely in the weak sense that it was not adduced in the original proceedings, but in the stronger sense that it was not known at that time to the party now alleging fraud. Among the earlier authorities considered was *Birch v Birch* [1902] P 130, where the Court of Appeal held that, in order to maintain an action to set aside a judgment on the ground of fraud, the claimant must adduce evidence of facts discovered since the judgment which raise a reasonable probability of the action succeeding. Linden J did not rule out the possibility that there may be exceptional cases where the evidence of fraud was known to a party and in its possession before the judgment was given but could not be deployed (for example, because it emerged at a very late stage), and the second action is nevertheless permitted to proceed. But he rejected the submission that the judgment of Lord Sumption should be read as establishing a general rule that it is only when there has been an entirely free choice not to rely on known evidence of fraud that the second claim will be prevented from proceeding (para 156).

56. Linden J's conclusion on this point went further than was necessary for his decision, as in *Elu* allegations of fraud had been raised by the defendant in the earlier proceedings, almost all the evidence relied on to set aside the judgment for fraud was known to the defendant and in its possession then, and yet the defendant (apparently for tactical reasons) had chosen to deploy only some of that material. Linden J found that the defendant's failure to bring forward its whole case was a result of deliberate and not merely negligent decisions and that it would amount to unjust harassment of the other party if the action were allowed to proceed.

57. In *Park* the Court of Appeal distinguished *Elu* on this basis and suggested that the case "should be treated with some caution" (see paras 70-72). Andrews LJ considered that Linden J's analysis could not be reconciled with what Lord Sumption had said in *Takhar*. She thought it clear from their judgments that both Lord Kerr and Lord Sumption used the expression "new evidence" or "fresh evidence" to denote evidence that was not deployed in the original action, not just evidence that had only come to light since then (see para 61). She accepted that Lord Kerr said nothing about what the position would be if the evidence of fraud later relied on had been obtained during the original action (para 71). But she derived from the passages in paras 63 and 66 of Lord Sumption's judgment quoted at paras 42 and 43 above the proposition that an action to set aside a judgment for fraud will *only* be abusive if in the original action the claimant deliberately decided not to investigate a suspected fraud or rely on a known fraud. With regard to the latter possibility, Andrews LJ said, at para 60:

> "A person cannot take a deliberate decision not to rely on evidence of fraud, unless he is not only aware of that evidence, but knows that he can rely on it to plead fraud in answer to the case brought by his opponent."

58. That was not the situation in Mr Park's case. On his version of events, at the time when his defence was served Mr Park had no reason to know that a document he had signed was a deed of rectification which made him personally liable under the hire-purchase agreements; and even when he did discover this, he had no legal representation (para 63). He did not know that he could rely upon the circumstances in which the deed of rectification was signed as a defence to the claim until very shortly before his application for relief from sanctions was heard. Unless and until that application succeeded, he could not amend his defence to raise an allegation of fraud: he was debarred from defending the claim. By the time he sought to raise the allegation, it was too late, as the judgment had already been entered against him (para 65).

Lord Sumption's dicta in *Takhar*

59. The Board does not doubt that *Park* was rightly decided on its facts but would not adopt the approach of the English Court of Appeal in that case to the question of abuse of process. The sole basis for that approach was what was said by Lord Sumption in *Takhar*. In the opinion of the Board, the statements of Lord Sumption on which the Court of Appeal relied in *Park* do not bear the weight put on them.

60. It is important not to lose sight of the basic tenets of common law reasoning that every judgment must be read in context, by reference to what was in issue in the case, and that it is only the ratio of the decision which establishes a precedent and not obiter dicta. All too often advocates treat the analysis of cases as if it were simply an exercise in looking at the language used by judges, forgetting that it is not particular verbal formulations that make the common law but the principles on which the actual decisions in cases are based. As Mark Leeming, a judge of the New South Wales Court of Appeal, has observed in a perceptive note on the *Takhar* case, Lord Kerr's judgment is an excellent example of how cases should be read, in his careful exposition of how the statements in the two *Owens Bank* cases did not bear on what was actually in issue in those cases: see M Leeming, "Has the golden age of fraud passed?" (2019) 19 Oxford University Commonwealth Law Journal 298, 302.

61. In *Takhar* the claimant was seeking to show that the judgment against her was procured by fraud by relying on evidence obtained after the trial. Thus, there was no issue about whether the evidence in question was "new" or about what constitutes "new" or "fresh" evidence for the purpose of a claim to set aside a judgment for fraud: the evidence was "new" on any view of the matter. The only issue in the appeal was whether there was a requirement to show that the new evidence could not have been discovered with reasonable diligence in time to be deployed in the earlier proceedings (see para 37 above). No question arose as to whether it is or may be an abuse of process to attempt to set aside a judgment for fraud relying solely on information which the claimant had when the judgment was given.

62. Accordingly, the Supreme Court did not receive argument on nor have to apply their minds to that question, let alone decide it. The judgments must be read in this light. Lord Sumption, at para 65, distinguished between "(i) the proposition that an action to set aside a civil judgment must be based on new evidence not before the court in the earlier proceedings," and "(ii) the proposition that that evidence must not have been obtainable by reasonable diligence for the earlier proceedings". While rejecting the second proposition, he described the first as "well established". But nowhere in his judgment did Lord Sumption distinguish between and consider separately (i) the proposition that the evidence on which the action to set aside the judgment is based must have been obtained since the earlier proceedings, and (ii) the proposition that the evidence must be "new" only in the sense that it was not adduced in the earlier proceedings even though the claimant already had it. It is a mistake in these circumstances to treat what Lord Sumption said as authority on a point that he did not need to, and did not, address.

63. It is still relevant to examine the reasoning which led Lord Sumption to express the view, obiter, that an action to set aside a judgment for fraud can only be an abuse of process if, in the earlier proceedings, "the claimant deliberately decided not to investigate a suspected fraud or rely on a known one". This was said by Lord Sumption, at para 63, to follow from "the basis on which the law unmakes transactions, including judgments, which have been procured by fraud" - namely, that "a reasonable person is entitled to assume honesty in those with whom he deals" and "is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are". He said that this is "why it is not a defence to an action in deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in". For the latter proposition Lord Sumption cited two cases. The first was *Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99, 120, where Lord Chelmsford said:

> "… when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry."

The second case was *Redgrave v Hurd* (1881) 20 Ch D 1, 13, where Sir George Jessel MR said:

> "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.'"

Sir George Jessel MR, at pp 14-17, distinguished the decision of the House of Lords in *Attwood v Small* (1838) 6 Cl & F 232, where one of the grounds on which a claim by a purchaser to rescind a contract of sale for misrepresentation failed was that the purchaser had not relied on the representation having made his own inquiries and indeed acquired actual knowledge of the facts before entering into the contract.

64. Leaving aside the difficulties created by the decision of the UK Supreme Court in *Zurich Insurance Co Plc v Hayward* [2016] UKSC 48, [2017] AC 142, Lord Sumption's reasoning is an orthodox statement of the test for rescission of a contract for misrepresentation. But his discussion appears to leave no separate space at all for the *Henderson* principle - or what he had aptly described as "the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion": see *Takhar* at para 62. In effect, the approach suggested by Lord Sumption amounts to saying that an action to set aside a judgment for fraud will only be an abuse of process in circumstances where there is a good defence to the claim anyway because the claimant did not rely on the fraudulent misrepresentation having taken a deliberate decision either not to investigate a suspected fraud or not to rely on a known one. On this approach the new action should only be prevented from proceeding if it would have no real prospect of success at trial because the fraud, even if proved, was not an effective cause of the judgment.

65. In the Board's view, this approach gives insufficient weight - indeed on analysis it gives no weight at all - to the strong public interest of achieving finality in litigation. Where the transaction which the claimant is seeking to unmake is the entry of judgment by a court or the making of a settlement agreement, there is a wider principle at stake than in the ordinary case of a claim to rescind a contract. In the case of an ordinary contract the only principle at stake is that agreements should be kept. But a settlement agreement engages not just this principle but the principle of finality in litigation, since its very purpose is to put an end to further disputation in the same way as a judgment. One way in which the principle of finality is protected is by means of the court's procedural power to prevent abuse of its process. The Board can see no justification for exempting actions alleging that a settlement or judgment was obtained by fraud from the scope of that protection in cases where the evidence relied on was already known to the claimant at the time of the settlement or judgment.

66. Nor, it should be noted, does the *Zurich* case, problematic as it is, provide any support for such a view. It was expressly conceded by the insurers for the purposes of the appeal in that case that, whenever and however a legal claim is settled, a party seeking to set aside the settlement for fraud must prove the fraud by evidence which it could not have obtained by due diligence at the time of the settlement (see para 73). Although that concession has been shown by the decision in *Takhar* to have been incorrect, it meant that abuse of process was not in issue. In particular, the question did not arise whether it is or may be an abuse of process to bring an action seeking to prove fraud by evidence which the claimant already had at the time of the settlement.

The risk of vexatious fraud claims

67. When once it has been established, or if it is incontrovertible, that a judgment or settlement agreement was obtained by fraud, it cannot - as Lord Sumption pointed out - be a reason to allow the judgment or settlement to stand that the victim of the deceit was negligent in failing to recognise or allege fraud in the earlier proceedings. Clearly fraud is not excused by negligent failure to expose it. Or, as it was put in a pithy statement quoted by Lord Kerr in *Takhar*, at para 50, "a knave does not escape liability because he is dealing with a fool" (*Gould v Vaggelas* (1985) 157 CLR 215, 252, per Brennan J). Yet what this reasoning leaves out of account is the burden and expense involved in litigating allegations of fraud. If a new action in which fraud is alleged proceeds to trial and the allegation is not made out, the mischief which the power to prevent abuse of the court's process is designed to prevent will have been incurred. As Lord Briggs pointed out in his separate judgment in *Takhar*, at para 75:

> "In particular cases the fraud allegation may be a weak one, just passing the summary judgment test, whereas the invasion of the finality principle in such a case will not merely be a risk but an expensive and time-consuming actuality."

68. The risk of a party being vexed by allegations of fraud which amount to "wasteful and potentially oppressive duplicative litigation" is as at least as great as the risk as regards other types of new claim. In fact, it may be considered greater, as the jurisdiction to set aside a judgment or settlement agreement for fraud creates the potential for using allegations of fraud as a pretext for relitigating the dispute supposed to have been finally determined. The Board would endorse in this context the observation of Coulson J in *Seele Austria GMBH Co v Tokio Marine Europe Insurance Ltd* [2009] EWHC 255 (TCC), [2009] BLR 261, para 107, that:

> "the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again."

The same applies with equal, if not greater force, in the familiar situation where a party who has entered into a compromise agreement afterwards regrets having done so and attempts to re-open the litigation.

69. It is by no means unknown for disappointed litigants, looking back at proceedings which resulted in an adverse judgment or a settlement that with hindsight seems to them disadvantageous, to come to believe that, to achieve such an outcome, their opponent must have engaged in deceit. Conduct and intentions not originally seen as fraudulent may now be perceived in a malign light. Such a change of perception cannot, in the Board's opinion, provide an adequate basis for allowing a party to bring fresh proceedings relying on material it already had when the earlier proceedings were taking place but which is now rebranded as evidence of fraud.

70. If the matters relied on to support a claim that a judgment or settlement was obtained by fraud were known to the claimant during the earlier proceedings but were not relied on (or not as evidence of fraud) in those proceedings, the reasons why fraud was not alleged in those proceedings will not generally be within the knowledge of the other party, who can only speculate about what those reasons might have been. In principle, there is a variety of possibilities. One is the possibility just mentioned that it

did not occur to the claimant at that time that the matters in question showed fraud but the claimant now sees them differently. Another is that the claimant suspected fraud but did not think at that time that there was a case of fraud worth pursuing. A third possibility is the one canvassed by Lord Sumption that the claimant knew the other party was acting deceitfully but took a deliberate decision not to allege fraud - perhaps for tactical reasons. In reality, there is no sharp divide between these possibilities, which are better conceived as points on a continuum.

71. Which of these possibilities, if any, however, accounts for why the material now said to show fraud was not deployed in the original action is unlikely, in the Board's opinion, to have much bearing on whether the claim is an abuse of process. The question whether the material "should" have been deployed in the original action is an objective one, which in principle should not depend on the subjective beliefs and motives of the party now alleging fraud. In answering the question, a central consideration must be whether there was any significant impediment to using the material to advance a case of fraud in the original action. If there was not, then prima facie at least deploying the material to advance such a case on that occasion is, applying Lord Sumption's formulation, something which the law would expect a reasonable person to do in his own interest and in that of the efficient conduct of litigation. Moreover, given that the questions of what information the claimant had during the earlier proceedings and why any such information was not deployed are matters peculiarly within the claimant's knowledge (and often veiled by legal professional privilege), fairness requires that the burden of proving such matters should lie with the claimant.

72. The Board thus considers that, where a claimant relies on evidence not adduced in the original proceedings to allege that a judgment or settlement in those proceedings was obtained by fraud, the burden is on the claimant to establish (1) that the evidence is new in the sense that it has been obtained since the judgment or settlement, or (2) if the evidence is not new in this sense, any matters relied on to explain why the evidence was not deployed in the original action. Furthermore, where the evidence is not shown to be new in this sense, the claim is likely to be regarded as abusive unless the claimant is able to show a good reason which prevented or significantly impeded the use of the evidence in the original action.

73. In some cases it may also be relevant to take account of the apparent strength of the case of fraud. As on other interim applications, the court will naturally be concerned to avoid a detailed examination of the merits of the claim. Holding a mini-trial is not an efficient use of resources. But if the pleaded case of fraud is on its face conspicuously strong or conspicuously weak (even if not so weak that it cannot be said

that the claim has no real prospect of success), this potentially affects the justice or otherwise of allowing the new claim to proceed to trial.

The issue of abuse of process in this case

74. In *Park*, it was significant that Mr Park had attempted to raise the issue of fraud in the original proceedings but was prevented from doing so because a procedural default had resulted in an order debarring him from defending the claim. Furthermore, to enter a default judgment in this situation, the finance company had had to represent to the court that the facts stated in its particulars of claim were true. The Court of Appeal made positive findings that (1) the particulars of claim contained statements which the finance company knew to be untrue and (2) when the finance company represented to the court that it was entitled to enter judgment in default based upon the untruthful representations in its particulars of claim, it must have known that it was not entitled to do so (see paras 43-52). The default judgment which Mr Park was seeking to have set aside was therefore one which the Court of Appeal expressly found was obtained by dishonestly deceiving the court. In these circumstances bringing an action to set aside the judgment clearly could not be regarded as an abuse of the court's process. On its facts, therefore, the conclusion reached by the Court of Appeal in *Park*, even though not the reasoning derived from Lord Sumption's dicta in *Takhar*, was entirely justifiable.

75. By contrast, in this case the following circumstances are relevant:

(i) The earlier proceedings were protracted, extending over many years, and Mr Finzi had all the information on which he now relies at least a year before he entered into the settlement agreement by which he released all present and future claims.

(ii) Although judgment was entered against Mr Finzi on 4 June 2012 in the 2005 action apparently because of a procedural default, that judgment was set aside by consent, and nothing has been identified which can be said to have prevented or impeded Mr Finzi from making such use as he saw fit of the information on which he now relies in the 2005 action.

(iii) Mr Finzi was legally represented in the proceedings and, as recorded in the settlement agreement, at clause 24, had the benefit of legal advice before deciding "freely and voluntarily" to enter into the settlement.

(iv) No explanation has been offered for why Mr Finzi did not in the earlier proceedings make any of the allegations of fraud and deceit which he now advances.

(v) No explanation has been offered for why he advanced a case in the 2004 action which was inconsistent with his case in this action.

(vi) Although it is being assumed for the purposes of the application for summary judgment that the allegations of fraud have been substantiated, the Board has seen nothing which suggests that there is in fact any substance in the allegations.

Conclusion

76. There are sayings, mentioned in *Takhar*, that fraud "is a thing apart" and that fraud "unravels all". But allegations of fraud are not to be regarded as some kind of open sesame which have only to be uttered to enable a party to engage in a new round of litigation of disputes that have been compromised or decided. In this case it is clear that, well before he entered into what was meant to be a final settlement of all outstanding claims, Mr Finzi had all the material on which he now relies to allege fraud, and that he had ample opportunity to deploy it in the earlier proceedings if he had thought fit to do so. He has offered no explanation of any merit for the fact that he did not. The Board is satisfied that the judge made no relevant error of law and that in the circumstances there is no real prospect of disturbing the judge's assessment that this action is an abuse of process.

77. The Board will therefore humbly advise His Majesty that the appeal should be dismissed.