



20 March 2019

## PRESS SUMMARY

### **Takhar (Appellant) v Gracefield Developments Limited and others (Respondents) [2019] UKSC 13** *On appeal from [2017] EWCA Civ 147*

**JUSTICES:** Lord Kerr, Lord Sumption, Lord Hodge, Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Kitchin

#### **BACKGROUND TO THE APPEAL**

The appellant (“**Mrs Takhar**”) and the third respondent (“**Mrs Krishan**”) are cousins. The second respondent (“**Dr Krishan**”) is Mrs Krishan’s husband. Mrs Takhar and Mrs Krishan became reacquainted in 2004. At this time, Mrs Takhar was suffering from some personal and financial problems, arising mainly from the condition of a number of properties which she owned.

In November 2005, it was agreed that the legal title to the properties would be transferred to Gracefield Developments Limited (“**Gracefield**”). This was a newly formed company, of which Mrs Takhar and the Krishans were to be the shareholders and directors. Mrs Takhar claims that it was agreed that the properties would be renovated, initially at the cost of the Krishans, and then let. She says that the rent would be used to meet the costs of the renovations but that she was to remain the beneficial owner of the properties. The Krishans’ case is that Gracefield was set up as a joint venture company and the properties were to be sold after they had been renovated. They say Mrs Takhar was to receive an agreed value for the properties and that any additional profit would be divided equally between Mrs Takhar and the Krishans.

On 24 October 2008, Mrs Takhar issued proceedings claiming that the properties had been transferred as a result of undue influence or other unconscionable conduct on the part of the Krishans. At a trial before His Honour Judge Purle QC (“**HHJ Purle**”), a significant item of evidence was a scanned copy of a written profit share agreement, apparently signed by Mrs Takhar, which supported the Krishans’ case. In advance of the trial, Mrs Takhar applied for leave to obtain evidence from a handwriting expert. That application was refused. At the trial, she said that she was unable to assert that the signature was not hers but that she was unable to say how it had come to appear on the document. In the absence of an explanation from Mrs Takhar, HHJ Purle accepted the Krishans’ evidence and rejected Mrs Takhar’s claim.

Following the trial, Mrs Takhar engaged a handwriting expert, who stated conclusively that the signature on the agreement had been transposed from an earlier document. On receipt of this report, Mrs Takhar sought to have HHJ Purle’s judgment and order set aside on the ground that it had been obtained by fraud. The respondents claimed that this application was an abuse of process because the documents on which the expert report was based were available to Mrs Takhar before the trial before HHJ Purle.

This matter was tried as a preliminary issue. Mr Justice Newey did not agree that the claim was an abuse of process. The Court of Appeal allowed the respondents’ appeal, holding that a person who seeks to have a judgment set aside on account of fraud had to show that the fraud could not have been discovered by reasonable diligence. Mrs Takhar now appeals to the Supreme Court.

#### **JUDGMENT**

The Supreme Court unanimously allows the appeal. It decides that a person who applies to set aside an earlier judgment on the basis of fraud does not have to demonstrate that the evidence of this fraud could not have been obtained with reasonable diligence in advance of the earlier trial. Lord Kerr, Lord Sumption, Lord Briggs and Lady Arden all write judgments.

## REASONS FOR THE JUDGMENT

Lord Kerr (with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agree): The existence or non-existence of fraud had not been decided by HHJ Purle. It is therefore a new issue which does not involve the re-litigation of an identical claim [21].

The former House of Lords and Privy Council authorities on which the respondent relied are not authority for the proposition that, in cases where it is alleged that a judgment was obtained by fraud, it may only be set aside where the party who makes that application can demonstrate that the fraud could not have been uncovered with reasonable diligence in advance of the judgment [54].

It is a basic principle that the law does not expect people to arrange their affairs on the basis that others may commit fraud [44]. Australian and Canadian courts have both recognised a special place occupied by fraud in the setting aside of judgments and the reasoning in these cases is compelling [48 – 52]. It is contrary to justice that a fraudulent individual should profit because their opponent fails to act with reasonable diligence. A person who obtains a judgment through fraud deceives not only their opponent but also the court and the rule of law. It would also seem wrong if a person could be sent to prison for fraudulent conduct and yet remain able to enforce a judgment they obtained because of that fraud [52].

Lord Sumption (with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agree): An action to set aside an earlier judgment for fraud is not a procedural application but a cause of action [60]. This cause of action is independent of the cause of action asserted in the earlier proceedings and there can therefore be no question of cause of action estoppel. There is also no question of issue estoppel, because the basis of the action is that the earlier decision is vitiated by fraud and cannot bind the parties [61].

Abuse of process is a concept relating to the court's procedural powers. Previous House of Lords cases have established that where a question could have been but was not raised in earlier proceedings, the court's power to restrain abusive re-litigation is subject to a degree of flexibility [62]. Re-litigation is abusive not only where the point could have been argued previously but where it should have been. A person is entitled to assume honesty on the part of others, so an application would only be abusive if a claimant deliberately decided not to investigate a suspected fraud or rely on a known one [63].

A more flexible and fact sensitive approach to these cases would introduce an unacceptable element of discretion into the enforcement of a substantive right. The standard of proof for fraud is high but, once it is satisfied, there are no degrees of fraud which can affect the right to have a judgment set aside [64].

Lord Briggs: This case involves a conflict between two important and long-established principles of public policy. Firstly, the principle that fraud unravels all and, secondly, the principle that there must come an end to litigation. In this case, the fraud principle should prevail. However, instead of a bright-line rule, the court should apply a fact-intensive approach to the question of whether a lack of diligence in earlier proceedings really does render a future claim to set aside a judgment on the basis of fraud an abuse of process. This should start from the position that a litigant has a legal right to have set aside a judgment obtained by fraud which is not dependant upon having exercised reasonable diligence in the earlier proceedings. [68].

Lady Arden: There is no reasonable diligence rule barring fresh actions based on fraud [91]. Usually, a judgment obtained by fraud should be set aside. It is wrong in principle that a fraudster should retain the fruits of his fraud but there are some exceptions to this rule [92 – 93]. If a party suspected a fraud and did not investigate it, any restriction on access to court would have to be compliant with the European Convention on Human Rights, so any restriction on the claimant's rights could go no further than necessary [94]. There are factors on both sides. However, the reasonable diligence rule is illogical as it automatically imposes a sanction which could be wholly disproportionate to the lack of diligence [98]. There are already safeguards for the defendant and the Civil Procedure Rules Committee could consider whether further safeguards are needed [99 – 103].

*References in square brackets are to paragraphs in the judgment*

## **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.html>