Neutral Citation Number: [2023] EWCA Civ 655

Case No: **CA-2022-001530**

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Leech
[2022] EWHC 1375 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2023

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE SNOWDEN

Between:

WILLIAM ANDREW TINKLER	**Claimant/ Appellant**
- and –	
ESKEN LIMITED (formerly STOBART GROUP LIMITED)	**Defendant/ Respondent**

John Wardell KC and **James McWilliams** (instructed by **Clyde & Co LLP**) appeared on behalf of the Claimant/Appellant (Mr Tinkler)

Richard Leiper KC and **Daniel Isenberg** (instructed by **Rosenblatt**) appeared on behalf of the Defendant/Respondent (Esken or SGL)

Hearing dates: 24 and 25 May 2023

JUDGMENT

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

1. This appeal concerns the way in which the court should approach the trial of a claim to set aside a judgment allegedly obtained by fraud. The case concerned a boardroom dispute between Mr Tinkler, the former Chief Executive Officer of Esken (formerly Stobart Group Limited or SGL), and SGL and its other leading board members, his erstwhile colleagues, Iain Ferguson (Chair) and Warwick Brady (Chief Executive Officer), and Ian Soanes (together "the witnesses"). Mr Tinkler was summarily dismissed for alleged gross misconduct on 14 June 2018. After being re-elected as a director by SGL's shareholders, Mr Tinkler was again removed from office by all his fellow directors on 7 July 2018 under a power contained in article 89(5) of SGL's articles of incorporation. The validity of these actions was in dispute at the first trial which took place before HH Judge Russen QC in November 2018. Judge Russen delivered a 958-paragraph judgment broadly upholding SGL's claims and dismissing Mr Tinkler's cross-claims on 15 February 2019.

2. Mr Tinkler's pleaded case before Leech J (the judge) was that new evidence that had been deliberately withheld from Judge Russen would have been highly material to the issues he had decided. It demonstrated that the witnesses had lied to Judge Russen, and was consistent with the existence of a pre-meditated plan to oust Mr Tinkler, which had been alleged before Judge Russen. Had the new evidence been disclosed, it would inevitably have changed Judge Russen's approach to the evidence and the way he came to his decision. On 7 June 2022, the judge gave a 479-paragraph judgment dismissing Mr Tinkler's claim to set aside Judge Russen's judgment.

3. The judge described it as common ground that one party was entitled to have a judgment set aside for fraud if three limbs (referred to in the citation at [4] below) were established: (i) the successful party (or someone for whom it must take responsibility) committed conscious and deliberate dishonesty, (ii) the dishonest conduct was material to the original decision, and (iii) there was new evidence before the Court.

4. Despite this common ground, the primary ground of Mr Tinkler's appeal to this court turned on the correctness of the approach that the judge described at [33]-[35], where he explained why he thought his task had been to evaluate the new evidence to decide if it proved there had been fraud and, if so, to decide whether Judge Russen's judgment could stand in the light of it. It is important to set these paragraphs out in full:

> 33. In my judgment, Mr Wardell's [counsel for Mr Tinkler] approach involves looking through the telescope from the wrong end. My function was to hear and evaluate the new evidence and then decide whether [Judge Russen's] findings could stand in the light of it. It was not to hear and decide the same issues again with the benefit of both the old and the new material and then ask myself in the round whether the witnesses must have deceived [Judge Russen]. Moreover, there is a real danger of injustice in a second court reaching different conclusions based on hearing part only of the evidence before the Court. In the present case, Mr Tinkler did not give written evidence and was not cross-examined about most of the issues and documents put to SGL's witnesses.
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> 34. I therefore accept Mr Leiper's [counsel for SGL] submission on this issue. As Laws J pointed out in *Tuvyahu v Swigi* [26 October 1998, unreported], there is no burden on SGL to justify the Judgment or to prove that Judge Russen] got it right. In

> approaching the Judgment, therefore, I am entitled to assume that [Judge Russen] decided the issues correctly on the evidence before him in the absence of a successful appeal. The task for me then was to hear and evaluate the new evidence, decide whether Limb 1 is satisfied and, if so, whether the Judgment could stand in the light of that evidence by applying the test under Limb 2.
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> 35. Mr Leiper did not go so far as to submit that I could not evaluate or assess the overall credibility of the witnesses by reference to the evidence which they gave on the substantive issues or the quality of their answers and, in my judgment, he was right not to do so. I make it clear, therefore, that in evaluating the evidence of the witnesses I have set out below and taken into account their evidence on all issues in deciding whether the test under Limb 1 is met. Mr Leiper's submission (which I accept) was not that I should ignore that evidence but that I should not embark on deciding the substantive issues again and then decide whether to set aside the Judgment because I was tempted to reach different conclusions from the Judge. As he submitted, this would clearly offend against the principle of the finality of judgments.

5. When the judge came to undertake the exercise that he had described at [33]-[35], he explained what he was doing at [219]-[221]. In essence, he dealt with the 16 primary findings of fact that Mr Tinkler had invited him to make. He acknowledged that four of those findings (numbered 1, 2, 3 and 5) involved him making similar, though not identical, findings of fact to those made by Judge Russen. He recorded, however, that SGL had not submitted he would be wrong to decide them or that there was an issue estoppel. The main factual finding that Mr Tinkler sought was explained by the judge as being: "[t]he existence of a premeditated plan [which] provided the motive which [Mr Tinkler] attributed to the witnesses for their willingness to give false evidence to [Judge Russen]". Many of the other factual issues asked specific questions concerning the new documents and whether certain witnesses had lied.

6. Perhaps most controversially, the judge said at [221] that he was going to address all the factual issues in 4 stages: (i) identifying any relevant findings made by Judge Russen, (ii) identifying the new documents or other evidence on which Mr Tinkler relied, (iii) considering whether limb 1 (conscious and deliberate dishonesty) "was satisfied and, in particular, whether the new documents or evidence (including cross-examination), [provided] cogent evidence of dishonest conduct", and (iv) considering whether the new documents or evidence (including cross-examination) were material. Mr Tinkler submitted before us that this approach was wrong in law. It placed inappropriate reliance on what Judge Russen had decided when the whole point of the fraud action was to demonstrate that his findings were unsafe. It excluded the "old evidence" that was before Judge Russen, when that evidence, taken together with the new evidence, would have established the premeditated plan to dismiss Mr Tinkler that the witnesses had denied.

7. SGL submitted that, whatever the judge had said, he had appropriately considered the old evidence where necessary, and that the judge had been right to think that any other approach would have been unworkable. Ultimately, he had undertaken a meticulous exercise to ascertain whether Judge Russen's decision was vitiated by fraud, and had decided correctly that it was not.

8. Mr Tinkler was granted permission to appeal (by Arnold and Snowden LJJ) on the following two additional grounds:

i) The second ground was that the judge had adopted the wrong test for materiality. The judge had wrongly followed *Royal Bank of Scotland plc v. Highland Financial Partners LP* [2013] EWCA Civ 328, [2013] 1 CLC 596 (*Highland*) at [106]. Aikens LJ said there that the fresh evidence (a) must demonstrate that the concealment of documents or previous evidence was "an operative cause of the court's decision to give judgment in the way it did" or (b) "would have entirely changed the way in which the first court approached and came to its decision". The judge ought to have applied the test adumbrated by Lord Phillips MR in *Hamilton v. Al Fayed (No. 2)* [2001] EMLR 15 (*Hamilton*) at [26] and [34] to the effect that it had to be shown that there was a real danger that the dishonest conduct had affected the outcome.

ii) The third ground was that the judge had wrongly followed [46] of Tugendhat J's judgment in *Coghlan v. Bailey* [2014] EWHC 924 (QB) (*Coghlan*) where he had said:

> In an action to set aside a judgment on the ground that it has been obtained by fraud the question is how, if at all, would the conclusions of the trial judge have been affected if the witness alleged to have been fraudulent had given the trial judge the information which the claimant … alleges he concealed? The question is not how would the judge's conclusions have been affected had he known that that witness was not a straightforward and frank witness?

Mr Tinkler submits that the judge ought to have followed Aikens LJ in *Highland*, where he said that "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". The judge's approach had been wrongly to consider what decision Judge Russen might have made if the claim had been retried on honest evidence.

9. On the second ground, SGL submitted that, whilst the judge had preferred the *Highland* test for materiality at [23], he had said at [22] that he was not satisfied that there was a real distinction in practice between that and the *Hamilton* test. Moreover, when the judge decided materiality, he expressly decided the matter on the basis of both the possible tests.

10. On the third ground, SGL submitted that the judge did not, in fact, blindly follow *Coghlan*. He accepted at [29] that there might be cases where the credibility of a witness might be material (e.g. where a person claimed to be a solicitor, having been struck off). In any event, Mr Tinkler did not suggest that he could win on ground 3 unless he succeeded also on ground 1.

11. As both parties have acknowledged, the resolution of this appeal is assisted by an understanding of the *dicta* of Lord Sumption at [60]-[61] in *Takhar v. Gracefield Developments Ltd* [2020] AC 450 (*Takhar*):

> 60. An action to set aside an earlier judgment for fraud is not a procedural application but a cause of action. As applied to judgments obtained by fraud, the historical background was explained by Sir George Jessell MR in *Flower v Lloyd* (1877) 6 Ch D 297 [*Flower*], 299-300. Equity has always exercised a special

> jurisdiction to reverse transactions procured by fraud. A party to earlier litigation was entitled to bring an original bill in equity to set aside the judgment given in that litigation on the ground that it was obtained by fraud. Such a bill could be brought without leave, because it was brought in support of a substantive right. If the fact and materiality of the fraud were established, the party bringing the bill was absolutely entitled to have the earlier judgment set aside. In this respect, an original bill differed from a bill of review on the basis of further evidence, which was essentially procedural and did require leave. After the fusion of law and equity in the 1870, the procedure by way of original bill was superseded by a procedure by action on the same juridical basis.
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> 61. 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.

12. 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.

13. The precise analogy is not important. It is, however, important to understand what the court is doing in trying a free-standing action to set aside a judgment for fraud. It is quite different from an application to adduce fresh evidence after judgment under the principles enunciated in *Ladd v. Marshall* [1954] 1 WLR 1489 (*Ladd v. Marshall*). Sir George Jessell MR explained the position in *Flower* at pages 299-300 where he said that the old procedure was not affected by the Judicature Act 1873. As Sir George put it, citing Lord Redesdale's treatise (5th edition at pages 112-3): "If a decree has been obtained by fraud, it may be impeached by original bill. … The fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of a decree can be investigated. And where a decree has been so obtained the Court will restore the parties to their former situation, whatever their rights may be". James LJ agreed, adding this:

> … in the case of a decree (or judgment as we call it now) being obtained by fraud there always was power, and there still is power, in the Courts of Law in this country to give adequate relief. **But that must be done by a proceeding putting in issue that fraud, and that fraud only. You cannot go to your adversary and say, "You obtained the judgment by fraud, and I will have a rehearing of the whole case" until that fraud is established**. The thing must be tried as a distinct and positive issue; "you" the Defendants or "you" the Plaintiff "obtained that judgment or decree in your favour by fraud; you bribed the witnesses, you bribed

> my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside on the ground of fraud." **That would be tried like anything else by evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried**. That was the old course of the law, and there seems to be no reason why that should not be now followed; and if it is true that there was a fraud practised upon the Court, by which the Court was induced to make a wrong decree, the way to obtain relief will be to bring a fresh action to set aside the decree on the ground of fraud [emphasis added].

14. The judgments in *Flower* show, as Lord Sumption in *Takhar* also made clear, that it is the fraud and the materiality that need to be proved (see also Lord Buckmaster in *Jonesco v. Beard* [1930] AC 298 at pages 300-1). It must be shown that the judgment was obtained by the fraud, and that the court was induced to make a potentially wrong judgment by the fraud. The party that lost as a result of the fraud must prove the fraud "wholly free from … any of the matters originally tried".

15. It may intellectually be possible to separate the question of whether there was fraud from whether that fraud was material, but as the authorities show, those two questions often become inextricably linked. It is partly that linkage that has given rise to the problems in this case.

16. What happened here was that Mr Wardell's oral opening invited the judge to decide afresh the main factual question resolved by Judge Russen, namely whether or not there was a premeditated plan by the witnesses to oust Mr Tinkler. That was **not** the approach adopted in Mr Tinkler's pleading (see [2] above). The judge acceded to that invitation, because SGL did not object to the course suggested (as he recorded at [220]). Mr Tinkler submitted to us that that was inevitable in this case because the fraud alleged amounted to the concealment of critical documents that evidenced the plan and lying to Judge Russen about the existence of the plan. It was, he submitted, only when the new documents were placed alongside the old documents that it could be seen that there had been a plan and, therefore also a fraud on the court. Mr Tinkler argued that the judge had prevented himself from considering his (Mr Tinkler's) case fairly, because he (the judge) thought he could only look at the new documents to see if there was a fraud. Plainly, if there had in fact been a plan, the fraud was proven and materiality was established, because Judge Russen had reached the wrong judgment, when he decided there had been no plan.

17. As will appear from the rest of this judgment, I have decided that Mr Tinkler's appeal must fail. It is true that the judge approached his task in a somewhat unorthodox way, in that he started his treatment of each factual question by stating what Judge Russen had found as to that question. But he did not do so because he thought himself bound by what Judge Russen had decided, save where there was no new evidence on the point. He did so perhaps because he thought that Judge Russen's findings provided a convenient starting point for each of the factual findings that Mr Tinkler had invited him to make. The judge had anyway to consider Judge Russen's findings in order to determine materiality. Effectively, though, the judge put the cart before the horse. He considered (without retrying) the factual issues that Judge Russen had tried rather than starting with a consideration of the fraud issues that had been pleaded. The factual issues tried by Judge Russen ought only to have been re-considered in detail if the fraud action had succeeded before the judge, if Judge Russen's judgment was set aside, and

when a new trial of those issues was ordered (see *Flower* at [13]-[14] above). But it was the parties' fault that this error occurred.

18. The question is whether it now lies in the mouth of Mr Tinkler to seek a retrial of the fraud action on the basis that SGL and the judge acceded to his own request as to the process he should adopt. I do not think it does. The judge was right to baulk at retrying the issues before Judge Russen on different evidence (as he said at [33] set out above). His task, as he said more than once, was "to hear and evaluate the new evidence and then decide whether [Judge Russen's] findings could stand in the light of it".

19. In the event, no damage was done by the unorthodox course urged upon the judge. It can be seen from a careful reading of the judge's treatment of the 16 issues that he fairly considered whether the allegedly critical documents had been deliberately concealed from the court, and whether the witnesses had perjured themselves (which, in both cases, he found they had not). In doing so, he considered the evidence that the parties had asked him to consider, including, where necessary, evidence that had been before Judge Russen. When the court asked Mr Wardell to provide examples of where the exercise the judge had undertaken had led to the wrong result, he was unable to provide a single compelling submission.

20. On the second ground of appeal, I have concluded that the judge was justified in preferring the formulations of the materiality test enunciated in *Highland* over that in *Hamilton*. The preponderance of decided cases support what was said in *Highland*, and the cases that express a preference for *Hamilton* were *obiter*. Moreover, the hurdle of materiality which enables a party to defeat a final judgment must be set high (see the *Ampthill Peerage Case* [1977] AC 547 per Lord Wilberforce at page 569D-E). Even if the judge was right to think that in this case there was no practical difference between the formulations (which I consider below at [52]-[53]), the judge expressly considered both tests. Finally, even if Mr Tinkler were right to submit that the judge ought to have asked the materiality questions on the premise that he was wrong about the fraud, that has no effect on the outcome, now that this court has upheld the judge's findings that no fraud was proved.

21. As will later be seen, the cases on materiality demonstrate the linkage between the nature of the fraud perpetrated and its impact on the judgment which is sought to be impugned. That was an acute problem in this case because Mr Tinkler said that the fraud demonstrated there was a premeditated plan. On that basis, the judge had to decide whether any fraud established was "material" without retrying the question of whether there was a plan on part only of the available evidence.

22. As to the third ground, Mr Tinkler accepted that it only had any relevance on the premise that he succeeded on the first ground. Since he has not, it is not useful for me to say anything further about *Coghlan*.

23. With that introduction, I will deal briefly with (i) the essential factual background, (ii) the further authorities that inform the question of whether the judge ought to have re-tried issues before the first judge and/or considered all the evidence before Judge Russen in order to determine if there was a fraud, (iii) the first ground, (iv) the second ground, and (v) the third ground.

Essential factual background

24. The facts are set out at [38]-[211] of the judge's judgment, to which reference should be made for the detail. This section contains only a short summary of the essential events.

25. Mr Tinkler was a founder, director and substantial shareholder of SGL. He was its Chief Executive Officer for almost 10 years. He stepped down from that role in 2017 to dedicate half his time to feeding in investment ideas through a new entity, Stobart Capital Limited (SCL). Mr Tinkler owned 50.1% of SCL. Mr Soanes owned the remaining 49.9% of SCL.

26. Between September 2017 and mid-2018, Mr Tinkler became disaffected with SGL's senior management and was concerned about SGL's strategy and direction. SGL's management was frustrated by Mr Tinkler, and believed him to be concerned principally with his own remuneration. On 8 June 2018, Mr Tinkler wrote to shareholders encouraging them to vote against Mr Ferguson as chairman of SGL at the annual general meeting. He forwarded his letter to all SGL's employees the following day.

27. On 14 June 2018, SGL purported summarily to dismiss Mr Tinkler as an employee for gross misconduct and to remove him as a director of SGL. On 6 July 2018, Mr Tinkler was re-elected to the board by the shareholders of SGL. On the following day, the other directors removed him by exercising a power in article 89(5). On 15 June 2018, SGL commenced proceedings against Mr Tinkler, and Mr Tinkler counterclaimed declarations that he was not validly dismissed as an employee or removed as a director. His case was that the board had purported to dismiss him for improper purposes.

28. The central question before Judge Russen was as to the lawfulness of Mr Tinkler's dismissal and removal as a director, overturning the majority of SGL's shareholders. SGL's case was that Mr Tinkler had conducted a campaign in breach of his fiduciary duties, and as part of an unlawful means conspiracy, to oust Mr Ferguson. Mr Tinkler contended that, in fact, Mr Ferguson and Mr Brady, the new Chief Executive Officer, wanted Mr Tinkler off the board to preserve their own positions, rather than because of any wrongdoing on the part of Mr Tinkler.

29. In February 2019, Judge Russen dismissed SGL's claim that there had been an unlawful means conspiracy. He upheld SGL's principal claim that it had been lawfully entitled to dismiss and remove Mr Tinkler and that its decision to do so had not been taken for any improper purpose. Mr Tinkler had been in breach of his contractual and fiduciary duties by (i) speaking to the shareholders and criticising the board's management and SGL's business and agitating for the removal of Mr Ferguson, (ii) improperly sharing confidential information, (iii) writing letters to shareholders and employees, and (iv) orchestrating a petition.

30. On 6 June 2019, Flaux LJ dismissed Mr Tinkler's application for permission to appeal. On 13 November 2019, Males LJ dismissed an application to re-open the permission to appeal application. On 20 March 2020, Mr Tinkler and SGL settled the proceedings on the terms of a confidential schedule to a Tomlin order.

31. On 3 May 2018, Mr Soanes had brought proceedings against Mr Tinkler and SCL, arguing that he (Mr Soanes) had been constructively dismissed from SCL. On 27 April 2020 the Employment Tribunal unanimously dismissed Mr Soanes's claim holding that,

whilst Mr Soanes had been constructively dismissed, he had not been automatically unfairly dismissed. The decision of the Employment Tribunal caused Mr Tinkler to re-review the disclosure material provided by Mr Soanes. That led Mr Tinkler to discover that allegedly material documents, including email, WhatsApp and Telegram exchanges between Mr Soanes and Mr Brady, had not been disclosed by SGL in the case before Judge Russen.

The further authorities that inform the question of whether the judge ought to have re-tried issues before the first judge and/or considered all the evidence before Judge Russen in order to determine if there was a fraud

32. Mr Tinkler suggested that there was no authority for the approach the judge adopted. In fact, the question of whether the judge should re-try the factual questions before the first judge has been considered in several cases (starting in modern times with *Flower*, with which I have dealt at [13]-[14] above).

33. In *Highland* itself, Aikens LJ considered the position at [140]-[141] under the heading of the issue he was considering:

> What is the effect of the judge's conclusion … that it would be pointless to set aside the liability judgment because, if the case were retried, the same result would follow in relation to both liability and quantum?
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> 140. Mr Nicholls submitted that Burton J was testing, with the benefit of hindsight, whether, at the time of the summary judgment hearing, there was in fact a compelling reason why the issue of liability should be disposed of at a trial and the judge rightly concluded that, given what happened subsequently, there was no other compelling reason to have had a trial. This was, in his submission, a legitimate exercise and demonstrated that, even assuming that there were a deliberate, conscious and dishonest misstatement or concealment on behalf of RBS, it did not operate on the liability judgment.
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> 141. I cannot accept this argument. In my view it is necessary to concentrate on the only judgment that is said to be impeachable by virtue of a fraud by RBS, viz. the liability judgment. If, as I have concluded, the revelation of RBS's misconduct in the way it dealt with the 36 Loans and conducted the sham-auction would entirely have changed the basis on which RBS might have applied for summary judgment, then, logically, the liability judgment has to be set aside. The fact that, subsequently, the judge was able to conduct the quantum trial on proper (although not full) evidence and reach certain conclusions on the effect of what he subsequently called 'the suppressed fact' in terms of the parties' respective liabilities is not to the point for three reasons. **First, I agree with the analysis of Langley J in Sphere Drake Insurance plc v The Orion Insurance Co plc [11 February 1999, unreported] [*Sphere Drake*] at page 174–175 that the materiality of the fresh evidence, or the new facts, relates to whether the original judgment is thereby impugned. It is not for the judge considering this issue to re-try the question of the liability of the parties or to see whether the fresh evidence or new facts is material to the final result in the sense of what the decision might be if the matter were to be retried with honest evidence**. So the fact that it 'all came out in the wash' subsequently in the quantum trial is not relevant. Secondly, it seems wrong in principle to permit a party to keep the fruits

> of a judgment that has been found to have been obtained by fraud; it would be profiting from its own wrong. Thirdly, the judge found in the quantum judgment that if there had been full disclosure then there would have been agreement on the market values of the 36 and 52 loans. In the May 2012 judgment he found that SG had hoped, indeed anticipated that the case would settle between the liability judgment and the quantum hearing. The inference must be that if the full facts had been apparent before the liability hearing, the whole claim would have been compromised, probably less advantageously to RBS than the terms of the quantum judgment. It would be unjust now to permit RBS to have the fruits of the quantum judgment, even though obtained on the full facts, if it would not have had that advantage if the full facts had been revealed when they should have been [emphasis added].

34. I find compelling (as Aikens LJ did, at least in part) Langley J's carefully reasoned analysis of the competing authorities under the heading "the Materiality Issue" in *Sphere Drake* (which I have not set out here as it runs to some 10 pages). It is to be noted that Langley J explained there why he thought that the *Highland* test of materiality was to be preferred to the *Hamilton* test (which he was considering on the basis of its expression by Phillips LJ in *Gaillermar Sarl v. McClelland* (19th February 1996, unreported) (*Gaillermar*), since *Hamilton* itself was yet to be decided). For reasons I explain under ground 2, I think that the *Highland* test (at [106] in that case) is, to be preferred to the *Hamilton* test in a case of this kind. The two streams of authorities that Langley J described can, I think, be understood as applying primarily to different kinds of case.

35. Moreover, Langley J relied on the House of Lords decision in *Hunter v. Chief Constable of the West Midlands* [1982] AC 529 (*Hunter*) for support. But, contrary to Mr Tinkler's submissions, *Hunter* has not been overruled by *Takhar* on the materiality point. First, *Takhar* at [56] and [67] expressly referred with approval (albeit *obiter*) to Aikens LJ's formulation at [106] in Highland:

> 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.

36. Secondly, on proper analysis, *Hunter* is distinguished both by Lord Kerr at [33]-[42] and by Lord Sumption at [65]-[66] in *Takhar* on the question of whether a decision could be impugned only on the basis of new evidence that was not reasonably

discoverable before the trial. Thirdly, it is worth noting that *Hunter* itself was a civil case, even if the finding that was challenged was made in criminal proceedings.

37. In the context of this case, it is important also to note that, when Langley J in *Sphere Drake* came actually to decide the materiality issue (which he did not strictly need to do, because he had decided that there was no fraud), his treatment illustrated the difficulty with which the judge in this case was faced:

> I have stated that in my judgment the test in law which I must apply is that even if Mr Sage did commit the alleged perjury it would not entitle Sphere Drake to an order setting aside the judgment in the First Action unless the evidence was such that it entirely changed the aspect of the case. **The relevant aspect of the case was whether the April 1975 agreement gave rise to a legally binding agreement**. Despite the narrow compass of the alleged perjury, in my judgment, had it been established, this test would have been satisfied. My reasons are that:
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> (1) The documents, in particular the Flint Note and the Russell Record, were not conclusive and contained material on which both "sides" could properly rely. The "probabilities" also seem to me to have been nicely balanced.
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> (2) The oral evidence, apart from Mr Sage's evidence, was either neutral or self-cancelling.
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> (3) Reading the judgments of Hirst J and Lloyd and Mann LJJ **the focus of the trial** and even more the appeal **was upon the reliability of the evidence Mr Sage gave that it was understood at the meeting that the discussions were not to result in a legally binding agreement**. The allegation of perjury is of course directed to that issue, and the length and existence of Mr Sage's recollection became an important part of the attack on his reliability.
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> (4) The consideration of the documents and the probabilities by Hirst J and the majority of the Court of Appeal not only led them to different conclusions about whether the parties were aiming for finality but was substantially in the context of testing, and reaching an assessment of Mr Sage's reliability. It would be artificial to suggest that a lie about the length of his recollection would not have affected an assessment of the fact of recollection itself. **Nor, as I have said, can I accept Mr Grabiner's submission that even without Mr Sage's evidence the outcome of the First Action would have been the same**.
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> (5) Whilst it is not conclusive it is persuasive that Moore-Bick J, having concluded that Mr Sage had been untruthful about his recollection, reached the opposite conclusion to Hirst J as to the binding nature of the agreement [emphasis added].

38. As I have already said and these passages demonstrate, the questions of (a) establishing whether there was a fraud, and (b) materiality, are inter-related. I would endorse the description of the position in [38-017] of Grant and Mumford on *Civil Fraud* (first edition, 2018) as follows:

> 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.

Ground 1: Did the judge adopt the correct approach to the fraud action, to the consideration of new evidence and to the findings made by Judge Russen?

39. Under the heading of his first ground, Mr Tinkler makes three complaints about the judge's approach. First, he says that the judge failed to adhere to Lord Sumption's injunction in *Takhar* to treat Mr Tinkler's claim as an independent cause of action in fraud rather than a procedural application in the claim before Judge Russen. Secondly, Mr Tinkler contends that, in deciding the factual questions he put forward, the judge considered only the new evidence and excluded the old evidence that was before him and Judge Russen. Thirdly, he says that the judge wrongly regarded himself as bound by Judge Russen's findings of fact.

An independent cause of action

40. I can deal with this complaint very briefly. It is clear from a fair reading of the judgment as a whole that the judge understood quite clearly that he was dealing with a free-standing cause of action in fraud aimed at impeaching the validity of Judge Russen's decision. As I have already said, the judge repeatedly said that his task was to "hear and evaluate the new evidence and then decide whether [Judge Russen's] findings could stand in the light of it". The judge explained that the leading authority in the field was *Takhar*, which was the very case that Mr Tinkler relied upon as showing that the claim was a free-standing action in fraud.

Considering only the new evidence

41. There are two parts to this challenge to the judge's reasoning. The first is the contention that the proper approach is for the judge to have considered all the evidence before him and before Judge Russen on the issues affected by the alleged concealment and perjury. The second is the question of whether the judge did indeed, as alleged, exclude all consideration of the "old evidence".

42. As I have already explained, the authorities make clear that it is not the task of the judge hearing the fraud action to retry the issues decided by the original judge. It would, as the judge himself stated, be wrong and unfair to do so. As the judge put it at [33]: "there is a real danger of injustice in a second court reaching different conclusions based on hearing part only of the evidence". There is, however, as Grant and Mumford pointed out, some difficulty in practice for a judge to decide the question of materiality without trespassing to some extent on the issues the original judge had to decide. That was particularly acute in this case, where the parties agreed that the judge should decide factual issues, some of which had been before Judge Russen, such as the issue of whether there was a premeditated plan.

43. In this case too, Mr Tinkler did not plead what aspects of the "old evidence" indicated that there had been such a plan, when read alongside the new evidence. That is not the strongest point for SGL, since SGL disavowed taking any pleading point before us, and Mr Tinkler did indeed plead at [77] of his Re-re-amended Particulars of Claim that the critical undisclosed documents showed that each of the witnesses had given false evidence before Judge Russen.

44. In my judgment, however, the judge was right to concentrate on his consideration of whether the alleged concealment and the new evidence established that that there had been a fraud practised on the court. As Aikens LJ put the matter in the above passages from *Highland*, the judge's task is to see whether the new evidence impugns the judgment, whether it shows that the previous evidence or concealment was an operative cause of the court's previous decision or would have entirely changed the way in which the first court approached and came to its decision. Moreover, that was the way that Mr Tinkler had pleaded his case. He had pleaded, as summarised at [2] above, that the new evidence that had been deliberately withheld demonstrated that the witnesses had lied, was consistent with the existence of a pre-meditated plan and would inevitably have changed Judge Russen's approach to the evidence and the way he came to his decision. As the judge said he was doing at his third stage (at [221]), he considered whether the new documents or evidence, including the cross-examination of the witnesses before him, provided cogent evidence of dishonest conduct.

45. I suggested to Mr Wardell, counsel for Mr Tinkler, in the course of argument that it was obvious that the judge had to look at the old evidence if that was necessary to understand how the new evidence showed that the first court had been misled. Mr Wardell gave us a number of examples of where he said the judge had considered only the new evidence to the exclusion of the old. But in none of those examples was he able to show that the judge had misunderstood the concealment or fraud alleged or its relevance to the way Judge Russen decided the case. In short, whilst I accept that the judge needed to look at old evidence alongside new evidence if they showed together that the first court was misled, that was precisely what the judge actually did (see for example [236] of the judgment).

46. One further example will suffice. The first issue that the judge considered was whether, by the start of 2018, Mr Brady had concluded that Mr Tinkler could not remain on the Board as an executive director and had begun to devise a plan to remove or otherwise neutralise him. He concluded at [255] that the new documents did not demonstrate such a plan for the following main reasons:

    i) None of the new documents contained clear evidence that Mr Brady had such a plan or how to implement it. It was common ground that Mr Brady was not aware of article 89(5) until February 2018.

    ii) The only document in which Mr Brady expressly referred to a plan was his text message to Mr Soanes of 19 January 2018, which referred to a plan to deal with Mr Soanes, not Mr Tinkler.

    iii) The judge accepted Mr Brady's evidence that his plan for the medium term was to get Mr Soanes and Mr Tinkler to work together. The new documents were consistent with Mr Brady's explanation to the judge, which was itself consistent with the evidence he gave to Judge Russen. Mr Brady's preferred solution was

that Mr Tinkler should resign from the board of SGL and contribute through SCL. It was in that context that he had talked about "normalising" the board in relation to Mr Tinkler in his New Year's resolution note of 1 January 2018.

iv) The judge also accepted the evidence of Mr Brady and Mr Soanes that they did not discuss working together to remove Mr Tinkler as a director or employee of SGL at the meeting on 13 February 2018. None of the new documents suggested otherwise.

v) Moreover, the formulation of the first issue reflected a critical change in Mr Tinkler's case. His pleaded case was that there was a premeditated scheme on the part of not only Mr Brady, but also Mr Ferguson, to oust Mr Tinkler. The new documents provided no evidential basis for reaching such a conclusion and were never put to Mr Ferguson.

47. Mr Wardell tried to submit that some old documents would have affected these findings, but the documents he referred to had been set out by the judge in other parts of his judgment. In my view, the exercise the judge performed was in accordance with the authorities I have mentioned. The new documents and the concealment did not, in the judge's view, show there had been a plan. It was the alleged plan that was the critical element in Mr Tinkler's case.

48. Accordingly, it is my conclusion on this part of Mr Tinkler's challenge that: (a) the judge approached his consideration of the evidence appropriately; he did not have to consider all the evidence before Judge Russen on the issues affected by the alleged concealment and perjury in order to determine the fraud case before him, and (b) the judge did not, as alleged, inappropriately exclude consideration of the "old evidence" (i.e. the material properly before him in addition to the new documents).

Did the judge consider himself bound by Judge Russen's findings?

49. This contention did give me some pause for thought because, as I have already said, it seems controversial to have started his treatment of each factual issue by stating Judge Russen's findings as to it, when the issue before him was whether those findings were vitiated by fraud. As I have also said, however, it can be seen from a fair reading of the judge's whole judgment that he did not do so because he thought himself bound by what Judge Russen had decided, except where there was no new evidence on the point. He seems instead to have thought that Judge Russen's findings provided a convenient starting point for the factual findings he had been asked to make. And he had to consider those findings anyway in relation to materiality. It was not perhaps the most logical order in which to deal with the matters he had been asked to decide, but no harm was done. As I have explained the judge asked himself the correct questions. He identified the new documents or evidence relied upon, then considered whether conscious and deliberate dishonesty had been established, before considering whether the new documents or evidence were material. This was the exercise the parties had agreed he should do in accepting there were three limbs to the process (see [3] above). He just did it in a slightly different order. It would perhaps have been better if the parties had agreed that the process to be followed was limb 3 (new evidence) first, followed by limb 1 (conscious and deliberate dishonesty) followed by limb 2 (materiality) – at which stage he could have considered Judge Russen's findings so far as necessary.

50. This then disposes of the first ground of appeal. The judge adopted a satisfactory course. He adhered to Lord Sumption's injunction in *Takhar* to treat Mr Tinkler's claim as an independent cause of action in fraud. He correctly focussed on the alleged concealment and the new evidence in deciding whether there was conscious and deliberate dishonesty that had a material effect on Judge Russen's decision, but he did not exclude consideration of the old evidence where appropriate. He was right not to seek to re-try on incomplete evidence the issues that Judge Russen had tried. He certainly did not regard himself as bound by Judge Russen's findings of fact on the issues the parties agreed he should decide.

Second ground: Did the judge wrongly follow the materiality test in *Highland* in preference to that in *Hamilton*?

51. I have already explained why, in my judgment, the materiality test adumbrated in *Highland* seems to me to be founded on good authority. That said, however, I accept that two recent Court of Appeal cases have suggested *obiter*, without deciding, that the test in *Hamilton* might be preferable (see *Salekipour v. Parmar* [2017] EWCA Civ 2141; [2018] 2 WLR 1090 at [93] to [94] per Sir Terence Etherton MR, and *Terry v. BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 at [37]-[38] per Hamblen LJ giving the judgment of the court including me and Henry Carr J).

52. I would note first that the *Highland* formulation at [106] has been approved *obiter* in *Takhar*. Secondly, I think that it is necessary to understand Phillips MR's formulation in *Hamilton* in the context explained by Langley J in *Sphere Drake v. Orion*. In the earlier case of *Gaillermar*, Phillips LJ had dealt with a case in which a defendant had lied to the court. The appeal challenged the holding that the fraud had to be **the** effective cause of the first judgment. It was argued that the fraud "need do no more than relate to a material matter". Phillips LJ (giving the judgment of the court) said this at pages 10G to 12A of the transcript:

> In the comparatively few cases where actions to set aside judgments on the grounds of fraud have succeeded, the fraud has been blatant and its effect on the judgment obvious. But I do not think it is clear on the authorities that the parties seeking to set aside a judgment **must go so far as to show that on the balance of probabilities the judgment would not have been given but for the fraud**.
>
> What is the proper test to be applied? In my judgment, **the fraud must be such as at least to put the validity of the judgment in doubt before it can so taint the judgment as to justify setting it aside** [emphasis added].

53. These earlier *dicta* demonstrate, in my judgment, that the judge may have been right to think that **in this case** there was not, in practice, much difference between the *Highland* and *Hamilton* formulations. Aikens LJ in *Highland* was not requiring that it be shown that, but for the fraud, the first judgment would, on a balance of probabilities, not have been given (which Phillips LJ had deprecated in *Gaillermar*). Such a conclusion (i.e. that, but for the fraud, the first judgment **would not** have been given), it may be noted in the context of this case, could probably not have been safely reached without retrying the issues that the first judge decided. Aikens LJ was merely requiring that the fraud was **an** operative cause of the judgment or would have entirely changed the first court's approach (see also *Park v. CNH Industrial Capital Europe Ltd* [2021] EWCA Civ 1766; [2022] 1 WLR 860 per Andrews LJ at [50]). It is to be noted also that Mr Tinkler had

actually pleaded that, had the new evidence been disclosed, it would inevitably have changed Judge Russen's approach to the evidence and the way he came to his decision, which is very close to the *Highland* formulation. But Mr Tinkler also set out to prove that the fraudulent concealment of the new evidence and the perjury had put the validity of the first judgment in real doubt.

54. In cases like this, where the main issue in the first case was whether there was a premeditated plan, the second judge cannot, as I have said, retry that issue. All he can do is to decide whether fraud has vitiated that judgment on the basis of his analysis of the new evidence, looked at where appropriate in the light of any evidence already before the first judge. That is what the judge in this case, as it seems to me, was trying to do.

55. Moreover, *Hamilton* was not itself an action claiming that a judgment should be set aside for fraud. It was an application to adduce new evidence under the newly applicable Rules of Court. This was made clear by Lord Phillips MR at [26]. The second *Ladd v. Marshall* test for the admission of new evidence had always required that the new evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. The formulation of the test by Lord Phillips in *Hamilton* at [36] requiring a "real danger" that the outcome of the trial had been affected was, against that background. This was not an application to adduce new evidence either under *Ladd v. Marshall* or under the Rules of Court. It was a free-standing fraud action to which, in my judgment, the approach explained in *Highland* applied.

56. For the reasons I have given, I would, therefore, reject the second ground of appeal. The judge was right to regard the test of materiality in *Highland* as applicable here. In any event, the judge sought to apply both the *Highland* and the *Hamilton* tests and came to the same conclusion whichever he applied.

57. I acknowledge that the Judge did not generally (at least expressly) approach the question of materiality on the basis that the alleged fraud had been proved. Instead, he asked himself whether the new evidence would have led the Judge to change his other findings and, if so, the overall outcome. This may, in truth, be a distinction without a difference, because the judge knew that he would only have reached the task of asking whether the new evidence (presumptively obtained by fraud) was material to the original decision, if the fraud were proven.

The third ground of appeal: Did the judge wrongly follow *Coghlan*?

58. Mr Tinkler accepted that he could not succeed on the appeal on the third ground alone. In that circumstance, I do not think it is useful to determine whether the *dictum* of Tugendhat J in *Coghlan* is accurate. I have already adequately explained the task of the judge in a fraud action of this kind.

Conclusion

59. For the reasons I have given, I would dismiss this appeal.

Lord Justice Popplewell:

60. I agree.

Lord Justice Snowden:

61. I also agree.