

Neutral Citation number: [2020] EWHC 2791 (Ch)

IN THE HIGH COURT OF JUSTICE

Case No: B30BM297

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)

BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
The Priory Courts, 33 Bull Street
Birmingham B4 6DS

Date: 23 October 2020

Before:

MR STEVEN GASZTOWICZ QC

sitting as a Deputy High Court Judge

Between :

BALBER KAUR TAKHAR

Claimant

- and -

(1) GRACEFIELD DEVELOPMENTS LIMITED

(2) DR KEWAL SINGH KRISHAN

(3) MRS PARKASH KRISHAN

Defendants

Mr John Wardell QC and Mr Lee Jia Wei (instructed by **Tanners Solicitors LLP**) for the **Claimant**

Mr Joseph Sullivan (instructed by **Gowling WLG (UK) LLP**) for the **Defendants**

Hearing dates: 9-11 September 2020, 29 September 2020, 1 October 2020

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR STEVEN GASZTOWICZ QC:

Background

In this action the Claimant seeks to set aside a judgment obtained against her by the Defendants in 2010 in an earlier action in this court (in case number 8BM30468), which I shall call 'the original action'. The background is as follows.

I: The Parties to the Actions

1. The Third Defendant is the cousin of the Claimant. The Second Defendant is the husband of the Third Defendant.
2. The First Defendant ('Gracefield') is a company that was incorporated in November 2005. The Second and Third Defendants, and initially the Claimant, were directors and shareholders. The Claimant initially held 50% of the issued share capital and the Second and Third Defendants 25% each.

II: The Claimant's case in the Original Action

3. In February 2009 the Claimant served on the Defendants Particulars of Claim in the original action.
4. In them, the Claimant alleged, in essence, that five commercial properties in Coventry of which she was the registered proprietor had been transferred by her to Gracefield on trust for her (or Takhar Trading Company, a partnership on whose behalf she herself was said to hold them) on the basis that the Defendants would, through Gracefield, manage and renovate them, with reimbursement for monies spent by them being made out of rentals from the properties. Alternatively, she pleaded that the Defendants had procured the transfer of the properties to Gracefield by undue influence or that they represented unconscionable bargains. She also alleged that she had at some point been removed as a director as Gracefield and her shares transferred to the Second and Third Defendants without her knowledge.
5. The relief sought included declarations, the setting aside of the transfers, and damages, with allowance to be given to the Defendants for any monies spent on the properties.

III: The Defendants' Case in the Original Action

6. The Defence in the action was served on 27th March 2009.
7. The Defendants' case was that the properties had been transferred to Gracefield, both legally and beneficially, pursuant to an agreement with the Claimant in 2005 that the Second and Third Defendants would through Gracefield manage and renovate them with any expenses incurred by them coming back to them out of the company. Under it, the Claimant was to receive a purchase price of £100,000 by way of a credit for such sum being placed on a loan account in her favour with Gracefield, of which she was initially a director and a shareholder, with this amount and a further £100,000 (which was subsequently clarified to be £200,000) by way of deferred consideration being paid to her out of the proceeds of sale of the properties in due course. The net sale proceeds after the payment of this sum and all expenses were (via the company) to be split 50% to the Claimant and 50% to the First and Second Defendants. They denied any wrongdoing in relation to any aspect of the matter and contended the Claimant was always fully aware of what was going on. They stated that the Claimant had agreed to resign as a director and to transfer her shareholding to the Third Defendant because the bank was reluctant to give Gracefield finance with her involvement shown as she had a poor credit rating, although her agreed entitlement to 50% of the net proceeds was unaffected.

IV: The 'Profit Sharing Agreement' Document before the court at the trial of the Original Action

8. Having set out what the Defendants contended were the terms of the agreement between themselves and the Claimant, the Defendants said in paragraph 29 of the Defence,

“An agreement was drafted by [X – the Defendants' firm of accountants], which was signed. Whilst the draft contained some of the terms of the agreement set out above [in the Particulars of Claim], it did not in any event comprehensively deal with all that had been agreed as set out. This agreement is headed Profit Sharing Agreement and is purportedly dated 1st April 2006”.
9. The document in question began, “THIS PROFIT SHARING AGREEMENT is made on 1 April 2006 BETWEEN Balber Takhar....of one part and Gracefield Developments Limited...of the other part”. After stating that the Claimant had sold the properties to Gracefield, the document in summary stated in clause 1(a) that “the company covenants that” the sum of

£100,000 purchase price would be placed on a loan account within the company and paid to the Claimant on the sale of the properties as there set out; in clause 1(b) that a further £200,000 would be paid to the Claimant as deferred consideration “for an uplifted value of the properties at the time they were transferred to the company”; and in clause 1(c) (the final clause) that the Claimant “shall also receive 50% of the profits on the sale of each site. The treatment of the payment of these profits will be discussed at the relevant time and take into account Mrs Takhar’s personal taxation position”.

10. The document thus supported the essence of the Defendants’ case, namely that there was a profit sharing agreement and referred to the Claimant getting 50% of the net proceeds, in accordance with the agreement the Defendants said had been reached.
11. However, it did not spell out that the other 50% when received by Gracefield was to be passed to the Second and Third Defendants. As the Claimant was to have 50% of the net proceeds and Gracefield would have the other 50%, given that the Claimant held half the shares in Gracefield, this looked at alone could effectively give her half of that 50% as well, leaving just 25% of the net proceeds to the Second and Third Defendants.
12. The Defendants were careful to make clear in the Defence, however, that what was stated in the document was merely intended to be reflective in part of an oral agreement that had been reached, and they referred to it as a “draft” (para 29) which had “not been completed” (para 19), though they said it had been signed.
13. The document was said by the Defendants at the trial of the action to have been drafted by Mrs A, as I shall call her, a member of a firm of accountants I shall call “X”, acting for them, following a meeting with the Claimant and the Second and Third Defendants on the basis of her understanding of the arrangement but omitting reference to the 50% of the net proceeds of sale left in Gracefield, after the Claimant had received her 50%, being intended to be passed on to the Defendants.
14. At the time the document was drawn up, because the Claimant then held half the shares in Gracefield, the omission of the agreement that the 50% left in the company was to belong to the Defendants would obviously not have assisted them, even if it could be argued they should receive that other 50% based on the reference to the Claimant receiving 50%. By the time the Defence in the original action was filed, however, the shareholding in Gracefield

had in fact been altered, so that all the shares were held by the Defendants. Accordingly, the 50% of the net proceeds left in Gracefield would go to them even if the strict wording of the document was followed.

15. The Profit Sharing Agreement document was referred to by the Defendants in support of their case in pre-action correspondence.
16. In paragraph 24 of the Particulars of Claim the Claimant denied having entered into the Profit Sharing Agreement document as alleged in correspondence and noted that only an unexecuted draft of it had been produced.
17. A photocopied/scanned copy of the document purportedly bearing the Claimant's signature (as well as a separate copy bearing the Defendants' signatures) was produced by the Defendants' side only after the action had been commenced, in circumstances which I shall later describe. No original has ever been produced.

V: The Trial of the Action

18. Shortly before trial of the action in June 2010, the Claimant sought permission to instruct and call a handwriting expert to give evidence on the question of whether her purported signature on the copy of the Profit Sharing Agreement document which had emerged was truly hers. This application was made at a late stage and was refused on 9th April 2010. No appeal was made against that decision.
19. In her evidence in the original action, the Claimant said that she had not signed the Profit Sharing Agreement document and had never seen it until the dispute arose. However, without expert evidence she could not go as far as alleging and proving forgery.
20. The trial was held before HH Judge Purle QC sitting as a High Court Judge over several days in June and July 2010. On 28th July 2010 he gave judgment for the Defendants and dismissed the claim. A transcript of his judgment is before this court. I shall refer to parts of it in due course.

Subsequent Handwriting Evidence

21. Subsequently, the Claimant, through new solicitors, instructed a handwriting expert, Mr Robert W Radley. On 4th October 2013 he provided his report that is now before me. In it, he reported that there was conclusive evidence that the Claimant's signature on the Profit Sharing Agreement document had been forged, having been transposed from a true copy of the Claimant's signature on what has been called the 'Whiston letter'. This was a letter sent by the Claimant to Mr S Whiston, a solicitor with Pitt & Cooksey, the Defendants' then solicitors, dated 24th March 2006 and signed by her.

The Current Action

22. As a result, the Claimant brought the present action to set aside the judgment. In the Particulars of Claim dated 3rd January 2014 she alleged that the Defendants were responsible for forging her signature on the Profit Sharing Agreement document. She alleged that this forgery was material in relation to the judgment obtained by the Defendants in the action tried before Judge Purle, "in that the existence of the Profit Sharing Agreement purportedly bearing the Claimant's signature and the evidence given by the Defendants in relation to the Profit Sharing Agreement and associated matters were an operative cause of the decision which the Judge reached as embodied in the Judgment and reflected in the Order" (paragraph 38 of the Particulars of Claim).
23. The Claimant also alleged in her Particulars of Claim that certain other documents were forged, namely her signature on a 2006 "ISV account enquiry form" of NatWest Bank, and on 2007 and 2011 ISV account enquiry forms on which the signature had been transposed from that on the 2006 ISV form. This was also based on Mr Radley's report. Again, the Claimant alleged these forgeries were material. It was said that if the trial judge had been aware that these documents had been forged it was probable, or at least possible, that "this would have influenced the view which he took of the matters pleaded in paragraphs 38 and 39 above [which related to the question of whether the Claimant had entered into the oral profit sharing agreement alleged] and of the Defendant's propensity to forge documents to suit their own ends". It is a curious feature of this litigation that no-one was able to tell me at trial exactly what 'ISV' stood for or the precise purpose of the forms.

24. The Defence filed in response asked primarily for the action to be struck out as an abuse of process, on the basis that the documents on which Mr Radley's report was based had been available to the Claimant and her legal team since at least 12th July 2009 (almost a year before the trial before Judge Purle). It then put the Claimant to proof as to whether or not she had signed the documents alleged to have been forged and denied that the Defendants were responsible for any forgeries.
25. The question of whether the claim to set aside the judgment amounted to an abuse of process was ordered to be tried as a preliminary issue.
26. In February 2015 Newey J held that a party who seeks to set aside a judgment on the basis that it was obtained by fraud does not have to demonstrate that he or she could not have discovered the fraud by the exercise of reasonable diligence. Accordingly, he found that the present claim was not an abuse of process and should not be struck out.
27. The defendants appealed. In March 2017 the Court of Appeal allowed the appeal on that basis that, contrary to the decision of Newey J, a due diligence condition needed to be satisfied.
28. The Claimant appealed that decision to the Supreme Court. In March 2019 the Supreme Court held that where it could be shown that a judgment had been obtained by fraud, and no allegation of fraud had been raised at the trial which led to that judgment (as it had not been here, following the refusal of permission for expert handwriting evidence), a party seeking to set aside the judgment was not required to show that the fraud could not with reasonable diligence have been uncovered in advance of the judgment. Accordingly, the Court allowed the appeal against the decision of the Court of Appeal and ordered that Newey J's order refusing the Defendants' strike-out application be restored.
29. The set-aside action therefore proceeded and is now before me. The evidence at trial was given at an in-person hearing in Birmingham on 9th – 11th September 2020, followed by submissions delivered remotely on 29th September 2020 and 1st October 2020.

The Nature of this Action and the Court's Task

30. I bear carefully in mind that my task is not to re-decide the original action. It is, in this separate action, solely to decide whether the judgment given in the original action should be set aside. If it is, then a fresh trial must take place in due course on the basis of all the available evidence.
31. The essential questions in the present action, as set out in the Case Summary, are as follows:
- (1) Was the Claimant's signature on (a) the Profit Sharing Agreement document and/or (b) any of the ISV documents forged?
 - (2) If so, do the Defendants have responsibility for that?
 - (3) What is the correct test for materiality as a condition for setting aside a judgment on the grounds of fraud?
 - (4) Do the matters referred to in paragraphs 38 and 40 of the Particulars of Claim meet the test of materiality determined in accordance with issue (3) above?
 - (5) In the circumstances, should the Order of 28 July 2010 of HHJ Purle QC be set aside?

The Law

32. It is common ground that if I find that the Claimant's signature was forged on any document, that the Defendants have responsibility for that, and that the forgery was material to the outcome of the original claim, I must set aside the judgment. This is in line with the decision of the Supreme Court in this case.
33. In relation to the question of whether the Defendants are responsible for any such forgery, a suggestion has been made by the Defendants in the course of the present action that the Claimant's signature on the profit sharing agreement document may have been made by members of their accountants' firm, X, without their involvement.

34. I shall return to that shortly, but I note it here because it was contended in the Claimant's skeleton argument that even if X was responsible for the forgeries the original judgment should still be set aside because X would have committed the forgery as the Defendants' agent. It is right therefore to record that in the course of closing submissions this argument was abandoned.

35. Despite the case having already gone to the Court of Appeal and the Supreme Court, a legal issue remains for determination in relation to the appropriate test for materiality as referred to at paragraph 31(3) above, however.

36. As set out in the Case Summary, as amended and approved by HHJ Simon Barker QC sitting as a High Court Judge at a case management conference previously, the question is as follows:

(1) Is the correct test for materiality as a condition for setting aside a judgment on the grounds of fraud:

(a) that the fraud was an operative cause of the court's decision to give judgment in the way that it did and that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision (as set out by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328 at para 106 and contended for by the Defendants in the present case); or

(b) that there is a real danger that the fraud affected the outcome of the trial (as suggested by Sir Terence Etherton MR in *Salekipour v Parmar* [2017] EWCA Civ 2141 at para 93, referring to the approach of the Court of Appeal in *Hamilton v Al-Fayed (No 2)* [2001] EMLR 394 at para 34 and as contended for by the Claimant in the present case);
or

(c) something else, and if so, what?

37. The position in relation to this is in my judgment as follows.

38. In *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328 Aikens LJ said at para 106,

“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.”

39. In the Supreme Court judgments in *Takhar v Gracefield Developments Ltd* [2020] AC 450, Lord Kerr of Tonaghmore (with whom Lords Hodge, Lloyd-Jones and Kitchen JSC agreed) said at paragraph 57, “I agree that these are the relevant principles to be applied”.

40. Lord Sumption (with whom Lords Hodge, Lloyd-Jones and Kitchen JSC also agreed) said at paragraph 67,

“I recognise the risk of frivolous or extravagant litigation, but like other members of the court, I think that the stringent conditions set out by Aikens LJ in *Royal Bank of Scotland v Highland Financial Partners lp* [2013] 1 CLC 596, para 106, combined with the professional duties of counsel, are enough to keep it within acceptable limits”.

41. Lord Briggs said at paragraph 76,

“I agree that the dicta of Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners Ip* [2013] 1 CLC 596, para 106, cited by Lord Kerr JSC, provide some protection against the abusive use of fraud allegations as a way of re-opening decided cases”.

42. Lady Arden said at para 105,

“The statement of principles set out by Aikens LJ in *Royal Bank of Scotland v Highland Financial Partners Ip* [2013] 1 CLC 596 at para 106 approved by Lord Kerr JSC deals with the position at the trial of a rescission action....”

43. Accordingly, all seven members of the Supreme Court agreed that the statement in Aikens LJ quoted at paragraph 38 above was an accurate statement of the law.

44. It is to be noted that the reference by Aikens LJ in the passage in question was to the relevant evidence, action, statement or concealment being “*an operative cause*” (not necessarily “*the operative cause*”) of the court’s decision to give judgment “in the way that it did”.

45. Mr Wardell QC in his submissions on behalf of the Defendants said that though adopted as an accurate statement of the law by each of the Justices in *Takhar*, this was *obiter*, and so it probably is, as the JSC did not rely on it as the reason for their decision as such. However, not only are their views obviously to be accorded great weight, but they did rely on it as providing some protection against the abusive use of fraud allegations as a way or re-opening decided cases (see Lord Briggs at para 76, and the judgement of Lord Sumption, with whose judgment three other members of the Court agreed, at para 67).

46. However, in *Salekipour v Parmar* [2018] QB 833 the Court of Appeal, in a judgment given by Sir Terence Etherton MR, said as follows,

“88.Mr Letman relied on *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] 1 CLC 596, para 106 where Aikens LJ, with whom the other members of the Court of Appeal agreed, said that, where a party alleges that a judgment must be set aside because it was obtained by the fraud of another party,

the dishonest evidence, action, statement or concealment must be “material” in the sense that it was an operative cause of the court’s decision to give judgment in the way it did. Aikens LJ said that, 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.

89. There is a dispute between the parties as to whether that put the legal test too high. Mr Davies did not address this point in his oral submissions because we indicated that we did not need to hear him on the respondent’s notice. In his skeleton argument, however, he submitted the correct test was that stipulated by the Court of Appeal in *Hamilton v Al Fayed (sub nom Hamilton v Al Fayed (No 2))* [2001] EMLR 15, para 34:

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

90. As Mr Davies observed in his skeleton argument, the *Hamilton* case was not cited to the Court of Appeal in the *Royal Bank of Scotland* case and the test set out by Aikens LJ was agreed between counsel in that case.

91. Furthermore, in the *Sharland* case [2016] AC 871, para 32 Baroness Hale DPSC, citing *Smith v Kay* (1859) 7 HL Cas 750, said that “a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality”.

92. That statement was cited with approval by Lord Clarke of Stone-cum-Ebony JSC, with whom the other Justices of the Supreme Court agreed, in *Zurich Insurance Co plc v Hayward* [2017] AC 142, para 37.

93. In those circumstances, I am inclined to agree with Mr Davies that the test was over-stated in the *Royal Bank of Scotland* case and that the proper approach is that laid down by the Court of Appeal in the *Hamilton* case.”

47. It is to be noted in relation to this, however, that this was expressly said to be no more than an ‘inclination’ to this view, and that this inclination was prior to the endorsement of the *RBS* test by all members of the Supreme Court in *Takhar*. The same applies to the brief adoption of this inclination by the Court of Appeal in *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 at para 38.
48. Furthermore, whilst, as the Master of the Rolls said in *Salekipour*, the *Hamilton Case* was apparently not cited to the Court of Appeal in the *RBS* case, the *Hamilton* case was cited to the Supreme Court in *Takhar* and the court went on to nonetheless unanimously approve Aikens LJ’s ‘test’ in that case.
49. I would add here that the copy of the Supreme Court *Takhar* case produced to me in the agreed bundle of authorities was simply the approved transcript of the Supreme Court at [2019] UKSC 13. However, I drew attention to the fact that there is a report of the case in the official Law Reports at [2020] AC 450. I would point out for the benefit of those compiling bundles of authorities – and to others generally – that the requirement to produce and refer to such copies (in order of hierarchy) where available (as set out at [2012] 1 WLR 780) is not to be seen as a pointless one. Though there is no reference to *Salekipour* in the judgments of the Supreme Court, the authorities cited to the court are listed in the official Law Reports version (only), and can be seen to include *Salekipour*, and indeed *RBS* and *Hamilton*. It can also be seen from that report that relevant paragraphs were referred to in the course of argument. I was referred in the course of submissions before me to a decision of Chief Master Marsh in May of this year, in *Broomhead v National Westminster Bank plc* [2020] EWHC 1005 (Ch) in the course of which, in considering *Takhar*, he stated that “Neither *Salekipour* nor *Hamilton* were referred to in the judgments of the Supreme Court or cited in argument”. He no doubt did not have before him a copy of the Appeal Cases report which would have shown that both these cases were cited, and were before the court.
50. A fuller reading of the judgment of Baroness Hale DPSC in paras 32 – 34 of the *Sharland* case referred to in *Salekipour* is also illuminating. *Sharland* was a case where a matrimonial settlement agreement and consent order (made, but not yet sealed) were affected by fraud. It is rightly said by the Claimant’s counsel, Mr Sullivan, that this did not involve a claim to set aside a judgment obtained by fraud as such (as did not the *Zurich* case), but a settlement agreement (though in *Sharland* the court had approved it). However, it is not clear why the

test should be less where the court itself has been deceived rather than one of the parties to a case.

51. In *Sharland*, Baroness Hale stated as follows:

“32. It is clear from *Dietz* and *Livesey* that the misrepresentation or non-disclosure must be material to the decision that the court made at the time. But this is a case of fraud. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim. As was held in *Smith v Kay* (1859) 7 HL Cas 750, a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality. Furthermore, the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived. In my view, Briggs LJ was correct in the first of the three reasons he gave for setting aside the order.

33. The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the court of that must lie with the perpetrator of the fraud. It was wrong in this case to place on the victim the burden of showing that it would have made a difference.

34. In my view, the second and third reasons given by Briggs LJ for setting aside the order flowed from the first. Sir Hugh Bennett had been clear that the misrepresentation and non-disclosure as to the husband’s plans for the company was highly material to the decision made in July 2012. Indeed, it could not have been anything else. It had coloured both valuers’ approach to the valuation of the husband’s shareholding. That in turn had coloured the wife’s approach to the proportionality of the balance struck between her present share in the liquid assets and her future share in the value of the husband’s shareholding. Sir Hugh may have been right to say, with the benefit of hindsight, that had he known the truth then

he would have waited to see what transpired. But in doing so, he would have had to bear in mind the husband's ability to manipulate the timing and manner of any offer to the public in a way which suited him best. Be that as it may, it is enough that Sir Hugh would not have made the order he did when he did had the truth been known".

52. The reference by Baroness Hale in para 32 to Briggs LJ being correct in the first of the three reasons he gave for setting aside the order in his dissenting judgment in the Court of Appeal below, was (as is shown by para 15 of Baroness Hale's judgment) to para 35 of that judgment, which stated as follows:

"I consider that the now undisputed fact that the husband's conduct was fraudulent is a cardinal aspect of this appeal. The general principle that 'fraud unravels all' is, as far as I am aware, no less applicable to judgments and orders of the Court than to contracts. Although there has been long-standing debate about how it should properly be litigated, (for which see the useful summary of this court in *Owens v Noble* [2010] EWCA Civ 224), it has never been in doubt that once it is established that a judgment or order has been procured by a process involving material fraud, then the interests of justice require that the judgment be set aside. By 'material fraud' I mean fraud which, as in the present case, was material in the obtaining of the judgment sought to be set aside, in this case the consent order approved by the judge on 25th July 2012".

53. In this connection, it is to be noted that Briggs LJ, as Lord Briggs JSC, agreed, as I have already mentioned, at para 76 of *Takhar* that Aikens LJ's statement of principle at para 106 of the *RBS* case accurately summarised the principles governing the position in that they provided some protection against the abusive use of fraud allegations as a way of re-opening decided cases. This indicates that he considered "material" fraud to which he referred in *Sharland*, in giving reasons for his judgment with which Baroness Hale agreed, to be fraud which was material in the sense set out there by Aikens LJ.
54. Going back to the judgment of Baroness Hale in *Sharland*, she indicated that a party who has been fraudulent in relation to the obtaining of a consent order cannot deny the materiality of that, unless, as referred to in paras 33 and 34 of her judgment, the perpetrator of the

fraud satisfies the court that at the time when the consent order was made (a) the fraud would not have influenced a reasonable person to agree to it, and (b) had it known then what it knows now, the court would not have made a significantly different order.

55. It is to be noted first that this ties in with what was said by Aikens LJ at para 106 of *RBS* (as approved by the Supreme Court in *Takhar*), that “the question of materiality of the fresh evidence is” thus “to be assessed by reference to its impact on the initial decision, not by reference to its impact on what decision might have been made if the claim were to be retried on honest evidence”.

56. Second, if it is positively established that the fraudulent evidence (in the present case the forged document) would not have made any difference, then it could not be a contributing cause. However, this will be difficult to establish in most cases. If the relevant evidence (here the forged document) was something in the melting pot of the evidence before the court, whether relating directly to relevant facts or to relevant issues of credit, with all that is in the melting pot taken into account by it in coming to a judgment, whether or not one part is highlighted more than another, it will be “an” operative cause. As noted above, the reference of Aikens LJ in *RBS* was to “an” operative cause.

57. This is consistent with the position where a contract is induced by fraud, as set out in paragraph 33 of Lord Clarke of Stone-cum-Ebony’s judgment in the *Zurich* case mentioned in *Salekipour*, including the quotation there from the majority opinion of Lord Cross for the Privy Council in the case of *Barton v Armstrong* [1976] AC 104 said at p118,

“If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief . . . If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision . . . for in this field the court does not allow an examination into the relative importance of contributing causes . . .”

58. The Court of Appeal in *Hamilton v Al Fayed (No 2)*[2001] EMLR 15, as referred to at para 89 of *Salekipour*, said at para 34,

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

59. However, rather than being at odds with the position as I have set it out in paragraph 56 above, this appears to me to be not much different to shorthand for it. Unless it is shown that it would not have changed the way in which the court approached and came to its decision, so that it was not an operative cause of the order being made in the terms that it was (and could not therefore have made any possible difference to the order made), it was material to the making of it, and falls to be set aside. In this situation, though not proved that the fraud would in fact have made a difference to the order made, it may have done, as it was part of what was in the mix.
60. Read in this way, on a full consideration of the issue, I do not consider that the test was overstated by Aikens LJ in the *RBS* case, as the Court of Appeal in *Salekipour* at para 93 was inclined to think.
61. The legal position is in my judgment as I have set it out on the basis of a review of the cases. It is based on drawing all the relevant cases together. The comments of all seven Justices of the Supreme Court in *Takhar* itself cannot be lost sight of, however, in all this, in saying in clear terms that Aikens LJ’s statement of principle in para 106 of *RBS* is correct. As I have said, that in itself is of great weight, though *obiter*, notwithstanding it has been necessary to explore its meaning further, for application here, by reference to the other decided cases.

The Facts

1: Forgery

62. The first factual question to decide is whether the Claimant’s signature on (a) the Profit Sharing Agreement document and/or (b) any of the ISV documents was forged. Conveniently considered with this question is the second one of who, if so, is responsible for the forgery or forgeries.

63. The Defendants' case at this trial, consistent with their pleaded Defence, is that it is for the Claimant to prove that any document was forged, but that if it was, they were not responsible for the forgery.
64. In relation to the Profit Sharing Agreement document, the Claimant's handwriting expert, Mr Radley in his report of 4th October 2013 concluded that there was conclusive evidence of the copy of the Claimant's signature on the Whiston letter having been transposed onto the document. It matched exactly even though no individual signs a complex signature of the sort involved here in exactly the same way on more than one occasion. The Defendants' own expert, Mr Michael Handy, in his report dated 2nd July 2020 agreed there was conclusive evidence of this transposition. At trial, no doubt was cast on these conclusions; indeed, the Defendants through their counsel accepted the document had been forged in this way.
65. I accordingly find the Claimant's signature on the profit sharing agreement document to have been forged by her genuine signature on the Whiston letter having been transposed onto the document prior to it being photocopied/scanned.
66. In relation to the ISV account opening forms the position is as follows.
67. The handwriting experts' joint report concluded that the Claimant's purported signature on the copy of the 2006 ISV form that was available and her first (or 'upper') purported signature on an undated "Authorised Signatories sheet" for the Gracefield bank account with the same bank (not originally before Mr Radley) were the same, with one having been transposed from the other or both having been transposed from some other document.
68. The original of neither of these documents was available, and it was not possible for the experts to say which apparent signature, if either, was an original, used for the purposes of the transposition.
69. The experts' joint report indicated that this same signature of the Claimant had also been transposed onto the 2011 ISV form.
70. Mr Radley's final opinion, as set out in the joint report, was that there was "limited positive evidence" supporting the proposition that the Claimant did not sign the purported signature

that appears on the 2006 ISV form and the first (upper) copy of it on the Authorised Signatories Sheet (the signature on each being identical, having been transposed between the documents or from another document not before them). "Limited positive evidence" was explained in the report to mean that although it was in his expert opinion "more likely than not that the Claimant did not sign this signature, the evidence is only one level above inconclusive (albeit, inconclusive is a relatively broad band of opinion covering more than a 50-50 confidence level". This opinion (of "limited positive evidence") was a downward revision from Mr Radley's opinion in his original report that there was "strong evidence" the original signature was not written by the Claimant but was a copy of her general signature style. This downward revision was made because he had now seen many more comparison signatures of the Claimant, some of which showed features which were previously considered to be of, generally, a different nature to those in the questioned signature, though the rare features found in some of the comparison signatures were combined in the questioned signature in such a way that he considered would have to be a "considerable coincidence" if it was genuine (see para 21 of the joint report).

71. Mr Radley's Glossary to his report shows that "An alternative explanation for the facts may be a distinct possibility in representing the truth of the matter", however, and his conclusion was based on the fact that it would have to be a "considerable coincidence" for a combination of rarities found in her genuine signatures to be found in a single signature. That does not mean that it would be unlikely for it ever to occur, though.
72. Mr Handy's opinion as expressed in the experts' joint report was the same as originally, namely there was inconclusive evidence as to whether the signature was genuine or not, although he accepted there were some points of difference between the structure of the signature and the Claimant's known writings.
73. Both experts agreed in the joint report that the evidence was inconclusive as to whether the Claimant's lower signature on the Authorised Signatories Sheet was genuine or not.
74. Taking all relevant evidence before the court into account, I do not consider it to have been proved that the purported upper signature of the Claimant which appears on the Authorised Signature form and the 2006 ISV form is a forgery or that the transposition of the same signature onto one or both of those documents has been done by way of forgery.

75. First, there is no evidence before me as to what the “ISV Account Enquiry Forms” actually are – that is to say, their purpose within the Bank. In the absence of any evidence as to that, it is not possible to say that the Defendants would have had any reason to forge the Claimant’s signature on the first of them by writing it there themselves or by transposition of a forged signature from elsewhere.
76. Second, the Claimant was plainly willing to be a signatory to the Gracefield bank account, and the Defendants would have had no obvious reason to forge her signature on the Authorised Signature Sheet or any other bank document.
77. Third, in relation to transposition of signatures, it is inconceivable the Defendants did not have access to the Claimant’s genuine signature on some document (or could have obtained it given that on her own case she readily signed documents for them) – so would not need to transpose a forged signature which would simply increase their risks.
78. Fourth, there is no apparent reason why anyone within the bank itself should have forged the Claimant’s signature by writing it themselves on the Authorised Signatories Sheet or the 2006 ISV form. No such suggestion has been made by anyone. Any such act would not have been the act of the Defendants in any event, but there is nothing whatever to suggest this.

There is also no apparent reason for the bank, to have committed any act of forgery of the any of the ISV forms by transposition of the Claimant’s signature onto them from elsewhere – as opposed to honestly transposing it from elsewhere simply in order to have a copy of that signature on the ISV forms as well as elsewhere in its records.

79. Fifth, both experts’ evidence in their joint report shows the Defendants’ signatures on the ISV forms were also transposed between the forms and the Authorised Signatories Sheet as set out in the table in paragraph 10 of the report. There would obviously be no reason for the Defendants to attempt to forge their own signature on any document, by transposition or otherwise. This is consistent with the bank having honestly transposed signatures so that they appeared on more than one bank document.

80. Sixth, a separate “New Account Sanctioner Checklist” was completed by the Bank for each of the Claimant and the Second and the Third Defendant in relation to the opening of the Gracefield bank account. A copy of each of these forms is before me. With the form relating to the Claimant (in the copy obtained from the bank) is a copy of a council tax bill, landline telephone bill and passport identification page. The form contains at section 3 a “Declaration and signature of member of staff interviewing the customer” which is signed by a Mr Iain Turner, who also signed the Defendants’ forms. Box 2 on the form also states it is “for completion by member of staff interviewing the customer” and is duly completed, with answer to the questions set out.

In the last part of section 2 on the form it is stated “Number of new customers added to the account (if applicable)”, the box for which is blank, and, on the same line, “Exception code (if applicable)” against which “IR4902977” has been entered. On the next line the printed form says “Additional information (if applicable)” and it is stated “No override code needed as no error – chris@Ors support”.

It is speculated by the Claimant’s counsel that this may mean the Claimant was not present, but the form makes clear it is for completion by the member of staff *interviewing* the customer and even after the exception code box in section 2 makes clear in box 3 that the form is being completed by the member of the bank staff who has interviewed the customer, in this case the Claimant. It is simply not known what the exception code relates to, no member of the bank having been called to give evidence and no other information being available in relation to this. On the face of it, the Claimant was interviewed as part of the account opening process (wherever this was done, and whether she remembers it or not) and this would have included obtaining her signature.

Furthermore, even if not interviewed, there is no apparent reason why she should not have been willing to be a party to the bank account that Gracefield would obviously need to have, which would mean providing her signature to the bank; nor any reason why the Defendants would need to forge her signature for this purpose.

81. On balance, having regard to the matters I have referred to, I do not find it proved, as I have said, that the Claimant’s signature has been forged on the 2006 ISV form (or indeed the Authorised Signatories Form).

II: Are the Defendants responsible for the forgery of the Claimant's signature on the Profit Sharing Agreement document?

82. The Defendants in their witness statements for trial, which stood as their evidence in chief, denied that, if the Claimant's signature on the profit sharing agreement document was forged, they were responsible for that. They stated they had neither motive nor opportunity. They said, "the question that follows ...is, of course, if it was not us, then who did commit the forgery"? That seems a reasonable question. They indicated that they did not know who had carried out the forgery, if such it was, but that someone else had both motive and opportunity, namely Mrs A or someone else in their firm of accountants X. They described this as an "alternative theory".
83. The Profit Sharing Agreement document purportedly signed by the Claimant (and now known to have been forged) came forward as evidence as follows.
- (i) Ms B of X stated by e-mail to the Defendants' solicitor, Julia Lowe at Higgs & Sons, on 27th August 2008, copied to Mrs A, that the unsigned Profit Sharing Agreement form, as she described it, was handed to the Defendants and she had no record of its return.
 - (ii) An attendance note by Julia Rhodes dated 27th August 2008 records that Ms B also stated over the telephone to Julia Lowe the same day that "[X] did not act for Mrs Takhar. There is ...a profit share agreement dated 1st April 2006 and a note on the file to say it had been handed to the client was. There is no signed copy on the file".
 - (iii) In response to this, the Second Defendant stated by e-mail to Julia Lowe the same day, "The profit agreement is as in the agreement. As to what happened to it I am not sure but it was in 2005 and 2006 that it was agreed".
 - (iv) Julia Lowe asked him by further e-mail the same day "Was the agreement signed?"
 - (v) The Second Defendant replied to her later the same day, "As far as we know the agreement was signed. Not sure where it is or who has copies".
 - (vi) However, a little over two months later, on 30th October 2008, the Defendants' solicitors Higgs & Sons wrote to Challinors (the Claimant's then solicitors) saying, "we

are instructed that there is a signed copy of the agreement which will follow", though there is no evidence of X's position as set out at (a) above having changed.

- (vii) On the 7th November 2008 the Second and Third Defendants e-mailed Higgs & Sons saying "Did you get the signed copy agreement of [f] [Mrs A] or was it sent without the signed copy?"
- (viii) On 25th March 2009, the Second Defendant contacted Julia Lowe at Higgs & Sons by email, and told them that "*There is a signed Profit sharing agreement in place that [Ms B (of firm X)] says she has forwarded to you in the file so this needs to be confirmed and changed in the defence as it states there is not one that is signed.*"
- (ix) The next day (26th March 2009), the Second Defendant telephoned Mr Jamie de Souza at Higgs & Sons, and had a 30-minute conversation with him "re Defence", which is recorded in a handwritten attendance note of that date, which says "Notes were made on the attached sheets", but those sheets are have been heavily redacted and the only note visible states, "*Call [Ms B] – each signed copy and sent back to [X].*". This suggests that Dr Krishan's instructions were at this stage that the Claimant and the Defendants had each signed a copy of the profit sharing agreement document and sent it back to X so that Mr de Souza should ask Ms B for the signed copy.
- (x) The attendance note then records that Mr de Souza of Higgs & Sons telephoned Ms B regarding profit sharing agreement and that, "After searching through files, Ms B asked if she could call back once she has spoken to Mrs A".
- (xi) The attendance note then states, "B then returned JDS's call & confirmed that there was a signed back sheet from [the Claimant] but not Dr Krishan or Parkash".
- (xii) Ms B then e-mailed to Mr de Souza the copy of the Profit Sharing Agreement document with what has now been determined to be the Claimant's forged signature on it (transposed from the Whiston letter).
- (xiii) A little over three hours later, Mrs A e-mailed Higgs & Sons a copy of the signature page of the profit sharing agreement document signed by the Krishans, stating, "Apologies my colleague didn't send this over earlier with the copy of [the Claimant's] signature – I was holding it in a separate file".

84. The basis on which it is suggested (as set out in the Second Defendant's witness statement) that Mrs A, or someone else in X, may have forged the document by transposing the Claimant's signature on it from elsewhere is that Mrs A undoubtedly received a copy of the Whiston letter and she drafted the Profit Sharing Agreement document so presumably had access to a copy of that also, together with others in her firm. It is said (in paragraph 37 of the witness statement) that, "It is very possible that they thought they were responsible for losing a document that was now critical to the defence of the claims against us, and given the repeated requests for the documents, against the spectre of our frustration and possible allegations of negligence, someone at [X] panicked, and ill-advisedly decided to transpose the signature on the Whiston Letter that was in [X]'s possession onto the Profit Sharing Agreement".
85. Neither Mrs A nor Ms B nor anyone else from X has been called to give evidence addressing the suggestion they may have committed forgery, as an alternative possibility to the Defendants having done so. Because of this and the serious nature of the suggestion, I have referred to them by letters rather than identifying them in this judgment.
86. It seems to me most unlikely that Mrs A or anyone at X would have done this, however. It would elevate an act of negligence (which had never been alleged) into a serious fraud and attempt to pervert the course of justice (which if discovered would have been added on top of such negligence). Furthermore, if they had lost a copy which had been returned signed and wanted to behave dishonestly (rather than just saying so and supporting the Defendants' case in that honest way), they could simply have continued with the line that they had no copy of it, and said that it must therefore never have been returned, there being no documentary or other independent evidence to the contrary.
87. In contrast, the Defendants had every reason to forge the document. Although the Defendants have at this trial sought to minimise its importance on the basis that the agreement relied on was merely oral anyway, and that this document did not contain reference to the agreement that the 50% of the net profits remaining in Gracefield after sale of the properties, and due payments, being theirs, it was a document which, if signed, the Second Defendant's own witness statement describes as being seen as critical to the defence.
88. And it was, of course, of great value to the Defendants to be able to produce a copy of the draft signed by the Claimant. Such a document signed by her was likely to show the Claimant's

case that there was no agreement for profit-sharing to be fundamentally wrong, and the Defendants' case that there was such an arrangement to be fundamentally right.

89. The point is made by Mr Sullivan on behalf of the Defendants that at the time the document was drafted, the Claimant owned half the shares in Gracefield and that a term stating they were to get the 50% of the net proceeds remaining in the company after the Claimant was paid her 50% could have been inserted in a forged document if the Defendants were going to forge her signature. However, the profit sharing agreement document had been drawn up by Mrs A in the terms that it was, for whatever reason, and had been referred to in the Defence from the start, with no reference to any other document having been produced or signed. Forging the Claimant's signature on a copy of it would simply involve one addition and be entirely consistent with what the Defendants had said about the documentation there was. This would considerably assist the Defendants on the fundamental point that profit sharing had been agreed, leaving the Claimant's evidence discredited and the Defendants free to convince the court that the 50% net profit left in Gracefield was to be theirs - as in fact they subsequently did at trial. As mentioned above, they also in fact held all the share capital in their names by then.
90. In terms of opportunity for the Defendants to forge of the Claimant's signature by transposing her genuine signature on the Whiston letter onto a copy of the Profit Sharing Agreement document, this would only have been there if the Defendants had access to a copy of that letter.
91. A copy of the signed Whiston letter may well have been sent by Mr Whiston to the Defendants, when received by him. Aside from this, the evidence shows that a copy of the signed Whiston letter was certainly sent to the Defendants' new solicitors by Pitt & Cooksey in August 2008. The Defendants' solicitor, Julia Lowe at those solicitors, Higgs & Sons, then wrote to Challengers (the Claimant's solicitors) on 28th August 2008 a detailed letter setting out how the Second and Third Defendants had helped the Claimant and refuting allegations of fraud made by the Claimant in relation to their dealings with her, and attached a copy of the Whiston letter to it.
92. The Second Defendant went in cross-examination before me from saying that he "would" have been sent a copy of this letter by his solicitors to saying he positively remembered there had not been any attachments to it. He was obviously closely involved in the litigation and it

would seem surprising if he did not want to see relevant documents as referred to in that letter. Whether or not he read them in detail then, he would have been likely to have got and kept copies of them which would then have been available to him later, giving the opportunity of transposition of the signature from the attached Whiston letter onto the profit sharing agreement document. Taken with all the other evidence in the case which suggests transposition of the Claimant's signature from it by them, I am satisfied the Defendants did have access to the Whiston letter.

93. I would add here that if the Defendants had never had access to a copy of the Whiston letter used to forge the Claimant's signature on the Profit Sharing Agreement document, this is a point that one might expect to be stated out in their Defences in this action.

94. The basis for the Claimant's forgery claim was from the start, in paragraph 33 of the Particulars of Claim, that her purported signature on the Profit Sharing Agreement had "been transposed from the Whiston letter" which was described (in paragraph 3(2)). In paragraph 35 it was stated,

"It is to be inferred that the Defendants were responsible for the forgery of the Profit Sharing Agreement. In particular, as regards the opportunity to do so, it is to be inferred that they would have received a copy of the Whiston letter from Mr Whiston".

95. The response in paragraph 22 of the Second Defendant's Defence was,

"23.2 It is denied that the Second defendant had any responsibility for any such alleged forgeries.

23.3 It is further denied that the same can be inferred.

23.4 The Claimant is put to strict proof of the same

23.5 Save as aforesaid, ...paragraphs 35 and 36 are denied".

96. The response in the Third Defendant's Defence was,

"As to paragraph 35, it is denied that the Third Defendant had any responsibility for the alleged forgery of the Profit Sharing Agreement. It is denied the same can be inferred and the Claimant is put to strict proof".

97. When the Second Defendant was asked in cross-examination before me why if the Defendants had never had a copy of the Whiston letter this had not been said in the Defence, and when he had first said this, he said that "The Whiston letter was only looked at when this, someone said it [ie the Claimant's signature on the Profit Sharing Agreement document] had been lifted from that particular letter." However, that was said in clear terms in paras 3(2) and 33 of the Particulars of Claim, before, of course, the Defence was filed.
98. I do not place a great deal of weight on this because It is a matter of pleading, settled by lawyers, and it was certainly denied forgery had taken place or that it was to be inferred. However, the Second Defendant was careful to say (by e-mail on 25th March 2009) the draft Defence should be changed when it initially said the Profit Sharing Agreement document had not been signed, and whilst I do not place a great deal of weight on the absence of such an assertion, it does seem surprising and is part of the picture before the court.
99. It is not clear how the Second Defendant was able to instruct his solicitors to write to the Claimant's solicitors on 30th October 2008 that a signed copy of the letter would follow (as referred to at para 83(vi) above) when there is no evidence of X changing their position as expressed on 27th August that they had no record of the return of a signed copy of the Profit Sharing Agreement document. The Second Defendant said in his evidence when cross-examined about this that it was X that had told Higgs & Sons this (namely that there was a signed copy of the agreement which would follow) and that this was documented, but no such documentation has been identified. Further, the letter from the Defendants' solicitors does not say "We understand...." but "*we are instructed* that there is a signed copy of the agreement which will follow". On the evidence, only on 26th March 2009 did X say they had a copy of it. Had the Defendants themselves provided, or been intending to provide, a purportedly signed copy of the letter to X (which could then be produced by them to the Defendants' solicitors) they would obviously have been able to give such instructions, however.
100. It seems to me likely that that is what happened. It is borne out by the statements of Mrs A of X nearer to the time.
101. She e-mailed Mr Andrew Nugent Smith of Wragge & Co, the Defendants' then solicitors (who had taken over from Higgs & Sons), on 6th April 2010 stating,

“I do not have the original signature of Mrs Takhar – only a copy – we have never had sight of the original. *The signed document was passed from Mrs Takhar to Parkesh* [the Third Defendant] although I am not sure if Parkash had sight of the original or was simply supplied with a copy by Mrs Takhar”.

The emphasis is mine.

105. Subsequently, Mr Andrew Nugent Smith spoke to Mrs A of X on 24th May 2010 and wrote a note in handwriting on her witness statement in the original proceedings reflecting what he was told in relation to how the profit sharing agreement had come into Mrs A’s possession. This reads as follows,

“Check with PK. [Mrs A] says that *PK handed it to her in 2009. PK dug it out once in litigation*. SB thinks she might have received PK/KK signed PSA after the event. Did anyone ever sign the PSA at the time”.

Again, the emphasis is mine.

106. This handwritten annotation was made alongside Mrs A’s comment in her witness statement to the effect that she received a copy of the signed agreement from the Claimant some time and appears likely to be reliable as a note of what was said at that time by Mrs A, which was the same as she had said before.

107. When cross-examined at the original trial, Mrs A said (as recorded at p132 of the transcript of 10th June 2010),

“I do not know where that came from, I’m sorry. I don’t deal with the post so do not know where it came from”.

108. She was then asked,

“Q. You have not tried to ascertain where it came from?”

A. No. I do know for some reason when that was received it was actually misfiled on another client file, so it wasn’t on the Gracefield file. It was on a separate client file.”

109. This answer suggests that when Mrs A said in her witness statement that she “received a signed copy from the Claimant some time afterwards”, she meant she “received a copy signed by the Claimant sometime afterwards”. However, that she did not know where it had come from was at odds with her previous statements, both written and verbal that it had come from the Third Defendant, whether then put on the wrong file or not.
110. I consider it likely the Defendants provided the document to the firm after the litigation had commenced, by one means or another in order for it then to be produced as important documentary evidence apparently signed by the Claimant, of a type that would otherwise have been lacking.
111. The Defendants had the motive, and the probable opportunity, to do this, and it explains how the Second Defendant was able to assert to his solicitors on 30th October 2008 that a copy signed by the Claimant would be able to be produced subsequently, even though X had said at that time that they did not have any such copy.
112. The Second and Third Defendants gave evidence that they had not forged the signature, and of course I have carefully assessed this. However, their evidence was unsatisfactory in a number of respects.
113. As shown both in this trial and in the trial before Judge Purle, what has been called the “Balber Takhar Account” put forward by the Defendants to the Claimant during the course of their dealings contained deliberate untruths. It was demonstrably untrue for example in referring to the Second and Third Defendants having spent £556,000 from their own accounts management, professional fees, planning applications and surveys, etc. This document was prepared and presented to the Claimant by the Defendants with these false figures in it in order, as the Second Defendant described it to Judge Purle, to “get her off the fence and do something with these properties” (trial transcript for 15th July 2010 p73).
114. Such things were described by the Second Defendant at the trial before Judge Purle and before me as “exaggerations”. Later in his evidence he said the £556,000 was what was considered roughly due to the Defendants under the Profit Sharing Agreement. He still could not bring himself to accept they were deliberate untruths, though, despite it being obvious, and despite what Judge Purle had already found. He gave the impression this might be something which would mean loss of face and devalue his case.

115. The Third Defendant did not even accept the contents were an exaggeration, let alone deliberately untrue, and gave evidence before me that the way the document had been written had not been properly expressed and that although it gave details showing exactly how £556,000 had supposedly been spent on the properties by the Defendants it meant, and should have said, they the Claimant and Defendants would each get approximately £556,000 by way of net profits after the Claimant had received her £300,000 and expenses were paid. This was based on an estimate that the properties would fetch around £1.6m if sold then, which was a figure and scenario nowhere referred to in it. This evidence was not in any way credible.

116. Similarly, in order to try to persuade the Claimant to agree to sell the properties, the Defendants presented her with the "Options for Gracefield" document to try to achieve what they wanted. This also contained demonstrable untruths – for example in stating that a £60,000 corporation tax bill that would shortly need to be paid.

117. The Second Defendant had to accept in evidence that there was in fact no such bill, but sought unrealistically to say, on oath, that "Shortly there will be a £60,000 Corporation Tax Bill that will also need not be paid" meant that if one of the properties was sold this would need to be paid - though the amount of any tax would depend on which property was sold and at what price, and, in fact, the whole point of the document was to set out why one of the options at the bottom of the document needed to be taken. These were for the Claimant (1) to agree to sell the properties, or (2) to pay the Defendant costs and expenses to date and they would drop out of the picture, or (3), to find another business partner, it being said that the Defendants were now reluctant to develop any of sites due to "constant interference interfering with sound business plans". Plainly the statement that there was a £60,000 Corporation tax bill which would shortly need to be paid did not relate to the position if one of these options was exercised, but was to press her into exercising one of them because of the bills that needed to be settled. No such tax bill existed.

118. The Third Defendant in her evidence before me said that she did not know why the corporation tax bill was put down as she did not produce the document, but that she thought that "there was a concern that if we did sell the properties that tax might be due", fitting in with her husband's evidence, which was, as I have said, plainly false in my view.

119. These documents were created by the Defendants in an attempt to persuade the Claimant to act on the basis of the untruths in them. That is by no means the same, and is very far from, producing a forged document to a court to try to pervert the course of justice.

120. However, this does show a measure of dishonesty and what they said in trying to explain away these untruths on oath does devalue their credit and the weight to be given to their evidence in asserting on oath before me that they did not forge the Profit Sharing Agreement document. Mr Sullivan submits that I should be slow, at the very least, to go beyond any findings of HHJ Purle at the original trial in relation to dishonesty by the Defendants (though by the same token accepts the Defendants are stuck with adverse findings made by him). However, not only must I assess the credibility of the Defendants' evidence on oath for myself at this trial but in relation to this aspect of the matter HHJ Purle at the original trial found that,

“There were two documents, one called the Balber Takhar account, the other the Gracefield Options, which clearly misstated the position, in my judgment deliberately so, in an endeavour to put pressure on Mrs Takhar”.

121. The judge described these as “unworthy and inappropriate steps” and referred to the question raised by counsel as to whether the “lies” had been told because what the Claimant was saying was true, namely that there was no agreement for profit sharing. However, he regarded the “contemporaneous evidence” - which included the Profit Sharing Agreement document (which he did not know, as I do, had been forged) - as “too compelling” on the central issue of whether there was such an agreement. I shall return to that in relation to the question of materiality shortly. He considered what was done in April and May 2008 in relation to the Balber Takhar Account” and the “Options for Gracefield” document to have been what he called “an exercise in frustration”, by which I think he meant “the result of frustration” by the Defendants with the Claimant’s attitude.

122. The Defendants’ evidence before me was also unsatisfactory in other respects. When asked directly about how the signed Profit Sharing Agreement document was returned, the evidence of both Defendants before me was that the Third Defendant had been told by the Claimant in front of independent witnesses that she had returned a signed copy to X.

123. Although the return to X of a signed copy of the Profit Sharing Agreement document was enquired into at the original trial (as the question and answer recorded at paragraph 108

above show), no mention was made by either of the Defendants of the Claimant having stated this in front of witnesses (who might potentially have been identified to prove or disprove that) then. Furthermore, although the question of whether a Profit Sharing Agreement document had ever been signed by the Claimant (which might for example have been lost by X who were panicked into forging another copy, as the “alternative theory” went) was brought into sharp focus in the present trial by the Defendants themselves in their witness statements, no mention was of her having said this in front of witnesses.

124. The closest it came at the original trial was that the Second Defendant said in oral evidence (as shown by the transcript of 15th July 2010 p14) as follows,

“Q. How did you know she had returned it to the accountants?

A. I didn’t actually until much later. I assumed she’d returned it because it –

Q. Did she tell you she had signed it?

A. Yes, she did somewhere along the line but I can’t precisely –

125. There was no mention in the Defendants’ witness statements for the current trial to them having been told by the Claimant that she had signed and returned the Profit Sharing Agreement document before witnesses. Nor in the Defendants’ correspondence, such as their solicitors’ letter responding to the letter before action, was there any reference to the Claimant having said she had signed the document, let alone that she had done so before witnesses, showing her agreement thereto. The conclusion I am drawn to is that these details are a recent fabrication designed to support their case in relation to the signing and return by the Claimant of a copy of the Profit Sharing Agreement document.

126. All this affects the view I have formed of the matter. I am satisfied, on the balance of probabilities, that not only did the Defendants have strong motive, and opportunity, to forge the document by transposition of the Claimant’s signature onto it from elsewhere (and that there is no evidence or sufficient reason to think that anyone at X did so), but that they did do so.

127. Based on all the evidence I have heard, the Defendants were in my judgment, on the balance of probabilities, responsible for the forgery of the signed profit sharing

agreement document by adding the Claimant's signature to a copy of it by transposition from the Whiston letter. This amounted, in the words of Aikens LJ in *RBS*, to "conscious and deliberate dishonesty".

128. I should add that the point was made by Mr Sullivan in submissions that the Defendants as professional people would not have forged the document, and also that they did not object to the Claimant's application for permission to call expert handwriting evidence made shortly before the trial before Judge Purle. However, though the court will naturally be slow to find fraud, it is not limited to the manual classes. On the second point, their non-objection to the application may have been an act of bravado, designed to avert suspicion, in a belief also that as the true signature of the Claimant had been transposed and only a photocopy document was available it would, if the application was allowed despite its proximity to the trial date, have gone undetected.

129. In relation to the point that the Defendants could have come up with a better version of the agreement if they intended to forge an agreement document, that point is covered by the observations I have made in paragraph 89 above.

130. That is so whether the Defendants carried out the forgery to bolster a false case, or a true case, which it is not for me to determine. People who lie to the court or create false evidence to bolster their case may do so because their case is false in the first place. Alternatively, they may do so because they consider they have a valid case and are worried that it may not otherwise succeed, and act out of, for example, the frustration of a genuine oral agreement being denied with no signed proof to the contrary. This is not to be lost sight of but will be a matter for the judge at the next trial to consider if the existing judgment is set aside on the basis I find that the forgery was "material" in relation to the judgment given, which is the question to which I now turn.

III: Materiality

131. In giving judgment in the trial of the action, Judge Purle noted at paras 21 and 22 in relation to the profit sharing (or "joint venture") agreement document as follows,

"21. Mrs Takhar's case is she didn't sign it at all and she has never seen the agreement until this dispute arose. However, no case of forgery is advanced.

22. In the absence of Mrs Takhar giving a coherent explanation as to how her signature came to be on the scanned copy, I conclude that the Krishans' evidence, which I believe anyway, should be accepted and that Mrs Takhar took the copy of the agreement that she was signed away, which was returned, probably by her in some way, duly executed to [Mrs A's] firm, which then ended up misfiled. At all events, I am satisfied that that was the agreement that was made. The properties were transferred by Mrs Takhar in to Gracefield's name before the written joint venture agreement was prepared, and the only credible explanation that I have heard is that they were so transferred on the terms subsequently set out in the joint venture agreement, which were previously agreed orally."

132. In paras 29 and 30 Judge Purle said,

"29. Following the objections that Mrs Takhar raised to the sale, she obtained the services of a Mr Matthews who looked into the history and suspected fraud. The Krishans claimed at that stage to have invested well over half a million pounds of their own money and appeared to be saying that Mrs Takhar could go back to square one if she wished but she would have to pay off the Krishans' costs which included the sum of, as I have said, in excess of half a million pounds. In fact, it is now said by the Krishans, that what they had in mind was that their anticipated profit share would amount to a sum in excess of half a million pounds. However, they clearly did not say that at the time. There were two documents, one called the Balber Takhar account, the other the Gracefield Options, which clearly misstated the position, in my judgment deliberately so, in an endeavour to put pressure on Mrs Takhar. These were unworthy and wholly inappropriate steps to take and Mr Burton pertinently asks: Why tell these lies? The only, or at least most compelling answer, he says, is because everything that Mrs Takhar previously has said is true. The Krishans were concealing from Mrs Takhar the true purpose of the transfers. She never regarded the properties as anything other than hers. Nor did the Krishans, and they were put in to Gracefield merely as a shell and not because of any joint venture agreement, which is an invention.

30. However, I regard the other evidence to be too compelling. I regard the contemporaneous evidence to point unerringly in the one direction of a beneficial transfer to Gracefield in return for a joint venture agreement, which cannot be castigated as unfair or inappropriate. I regard the responses which were given in April and May 2008, to Mrs Takhar's volte-face (which is what it was) to have been an exercise in frustration which, however understandable, were in truth inexcusable but did not alter the facts of the past".

133. The evidence now shows, as I have found, that the Profit Sharing Agreement (or "joint venture") document was forged, and forged, I have found, by the Defendants.

134. However, this document was part – and in my judgment a key part – of the contemporaneous evidence produced by the Defendants for trial and relied on by Judge Purle as pointing towards the Defendants' case that profit sharing had been agreed being right. This included, most notably, the Claimant having herself, on the face of the evidence before him, signed a written agreement showing that was so, with no explanation as to how her signature came to be on the document if she had not so agreed at the time.

135. That the Claimant attempted at trial to contend otherwise was disregarded by Judge Purle on the understandable basis of her not having any evidence or even "coherent explanation" as he put it in para 22, as to how otherwise her signature appeared on it.

136. No doubt Judge Purle as the trial judge came to the conclusion he did – that there was a transfer of beneficial ownership on the basis of a profit sharing agreement as the Defendants contended, not a wholly different arrangement as the Claimant contended - for a variety of reasons, as will often be the case in a trial. I have, of course, carefully considered the judgment as a whole. However, the signing of the Profit Sharing Agreement document by the Claimant as he believed it to be was undoubtedly one of them.

137. In any trial, and in a fraud trial in particular, the court is of course looking for independent and contemporaneous indicators of where the truth lies on crucial issues, such as in this case, whether there was a profit sharing (or "joint venture") agreement. The forged document clearly evidenced this in the absence of forgery of Mrs Takhar's signature on it. Had the Judge known that her signature on the copy of that before him had been forged, for which the Defendants were responsible (causing him also to weigh their oral evidence in the

light of that knowledge), that plainly would have (in the words of Aikens LJ in *RBS*) “entirely changed the way in which the first court approached and came to its decision” and it was plainly an “operative cause of the court’s decision to give judgment in the way that it did”.

138. Applying in full the test laid down by Aikens LJ and approved by the Supreme Court in *Takhar* itself - which in my judgment represents the law, as set out above – it was plainly material to the judgment given at trial.

139. *A fortiori*, were the legal test any lesser one in terms of “danger” in relation to the outcome of the original trial, though my analysis of the true position in relation to the applicable test is as I have set it out above.

140. The Defendants’ counsel contended that the position would be the same at a second trial on the basis that the arrangement put forward by the Defendants made sense and that it was obvious that the Defendants would only have acted as they did on the basis of a profit sharing agreement. There may or may not be force in that. The Claimants’ counsel contended on the other side of the argument that the Claimant would not have given away a half share of the eventual proceeds from the properties in return for such little work by the Defendants. There may or may not be force in that. As I have emphasised previously, the ultimate result of this dispute is not for me to determine but will be for a court to decide on the basis of all the evidence before it at a new trial following the existing judgment being set aside. As Aikens LJ said in *RBS*, 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”.

Conclusion

141. For the reasons I have given, this action succeeds and the order made by Judge Purle on 28th July 2010 in action number 8BM30468 in favour of the Defendants will be set aside.