Neutral Citation Number: [2023] EWHC 1498 (Ch)

Case No: BL-2022-001713

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/06/2023

Before :

SIR ANTHONY MANN

- -

Between :

BALJIT SINGH BHANDAL	**Claimant/ Respondent**
- and -	
(1) HIS MAJESTY'S REVENUE & CUSTOMS **(2) STEPHEN FREDERICK BROAD**	**Defendant/ Applicant**

- -
- -

Michael Kent KC (instructed by **Commissioners for HMRC**) for the **Defendant/Applicant**
Max Mallin KC (instructed by **A P Berkley Ltd**) for the **Claimant/Respondent**

Hearing dates: 24th & 25th May 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 21st June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ANTHONY MANN

Sir Anthony Mann :

Introduction

1. This is an application made by the defendants within this action which is a claim to set aside previous judgments on the footing that they were obtained by fraud. An outline of the circumstances is as follows.

2. On 18th July 2001 HMRC applied under section 77 of the Criminal Justice Act 1988 ("the Act") for a criminal freezing order ("the restraint order", or "RO") against the claimant, Mr Bhandal, based an allegation that he was guilty of large scale duty and VAT evasion in relation to trade in alcoholic drinks and a prosecution against him was to be commenced. Such an order was made. By 2006 no trial had taken place, and indeed no warrant had ever been served to commence proceedings (and there is a dispute as to whether one was ever issued) because Mr Bhandal was abroad, and in that year the order was discharged. Mr Bhandal then commenced proceedings in the Chancery Division against HMRC and others ("the Chancery Proceedings"), claiming that the restraint order proceedings were improperly started and maintained. One of those others was a particular HMRC officer, Mr Broad. Those proceedings were stayed by an order of Master Moncaster on 1st May 2008 on the footing that the appropriate claim in relation to the making of the restraint order was in the Administrative Court under section 89 of the Act. Those proceedings were eventually brought and decided against Mr Bhandal by Collins J on 11th March 2015. Permission to appeal was refused. In 2018 HHJ Jarman KC (sitting as a judge of the High Court) heard and dismissed an application to revive and amend the old Chancery proceedings, and he made an order striking out those proceedings.

3. In the present action, commenced on 3rd October 2022, Mr Bhandal challenges those decisions (Master Moncaster, Collins J and HHJ Jarman) on the footing that the decisions fall to be set aside because the orders in them were caused or obtained by fraudulent conduct on the part of HMRC and Mr Broad. That fraudulent conduct (as pleaded) is a failure to present to the court the proper background to the restraint order and a failure to disclose that an arrest warrant against Mr Bhandal was never actually issued and what HMRC have relied on as such a document is in fact a forgery. What he apparently seeks to do is to revive the Chancery Division proceedings, presumably so that he can pursue them to a trial and do better in them than he managed to do before Collins J. The present application is made by the defendants, (HMRC and Mr Broad) to strike this action out as an abuse of process on the basis (putting it shortly) that it is an impermissible collateral attack on previous decisions, and in particular on the decisions of Collins J and HHJ Jarman.

4. That summary disguises a lot of factual complexity in this matter, which I will have to set out. In the interests of clarity I will set out the history in three phases, as will appear. I shall refer to the Revenue throughout as HMRC, even though in the earlier phases of the story it was known by the acronym HMCE. HMRC and Mr Broad were represented by Mr Michael Kent KC, and Mr Bhandal was represented by Mr Max Mallin KC. Both counsel have extensive historical experience of all this litigation.

The restraint order to Master Moncaster

5. In the first part of this section I refer to HMRC's investigations into, and prosecutions of, various VAT and excise duty frauds allegedly perpetrated in the 1990s, and how the prosecution of Mr Bhandal fitted into that. This account is a shorter version of events, which are fully described in the judgment of Collins J with the neutral citation number [2015] EWHC 538 (Admin), to which reference should be made for more detail where necessary.

6. In the late 90s HMRC was investigating VAT and excise duty fraud relating to the improper removal of large quantities of alcoholic drinks from two bonded warehouses in London and the sale of the drink without accounting for VAT. A number of prosecutions were initiated and some convictions were obtained, some on the basis of guilty pleas. However, in the course of an appeal against one of the convictions in November 2001 it was disclosed that one of HMRC's sources of information was an employee at one of the warehouses, a Mr Allington. It became apparent that his activities as an informant, and associated activities of an HMRC employee called Mr Small, were matters which ought to have been disclosed to the defence in the various prosecutions but which were not. As a result a number of appeals from convictions were allowed and a number of other prosecutions not proceeded with. In late 2001 Butterfield J was asked to prepare a report about how these matters came about and to make recommendations as to the future organisation of such things, and he duly reported in 2003. He found misconduct, and his findings have been accepted by HMRC.

7. In this period one of the individuals whose activities came under scrutiny was Mr Bhandal and by 2001 a decision was taken to prosecute him for excise duty fraud and money laundering. In 1998 he had been on bail awaiting retrial on a long firm fraud but left the country on a false passport, eventually ending up in Los Angeles. He did not return to the UK until 2005, and in June 2005 he was convicted of attempted kidnap and sentenced to 8 years imprisonment (and 10 months imprisonment for breaching his bail) , being released in 2009. His absence from the country in and after 2001 was a significant part of the background to the events surrounding the restraint order.

8. The restraint order was sought and granted on 18th July 2021 at a without notice hearing before Newman J. The order restrained the disposal of assets and appointed receivers over Updown Court, Chertsey Road, Windlesham, Surrey, owned by a BVI company of which Mr Bhandal was the beneficial owner. The mortgagee of that property then appointed its own receivers over that property and in due course sold it for some £14m. Mr Bhandal claims that that was a massive undervalue, and that at least part of that was attributable to the making of the restraint order.

9. The restraint order was made on the footing that criminal proceedings were to be commenced against Mr Bhandal. At the heart of the dispute in the present matter is the question of whether they were commenced or not (by the issue of a warrant by a magistrate's court). Because Mr Bhandal was not in the jurisdiction he was not served with any warrant for his arrest, though the documentation clearly indicates that consideration was given to extraditing him. Apparently the US authorities resisted extradition on the footing that the particular offences concerned were not within the extradition treaty. So the extradition proceedings went nowhere, but reference to a warrant in correspondence about them suggests that a warrant was in existence at that time.

10. One part of the investigation of the tax frauds involved a bonded warehouse known as London City Bond - the LCB frauds. In November 2002 the prosecution decided to offer no evidence against the defendants in those frauds. However, the view had been taken that the case against Mr Bhandal (part of something known as Operation Kitsch) was effectively a different strand and plans to continue his prosecution (and others) continued. That went on until June 2003 when it was concluded that the cases within Operation Kitsch were likely to be tainted with the same problems as affected the LCB frauds and a decision was taken (and implemented) to offer no evidence in those cases as well. Because Mr Bhandal's was not an active case (because he was not served with an arrest warrant or arrested, still being abroad) his case was not one of those formally abandoned. Nonetheless some sort of decision seems to have been taken not to pursue him.

11. In 2005 Mr Bhandal came back into the jurisdiction. As I have pointed out, he was convicted and sentenced to terms of 8 years and 10 months in prison, being released in 2009. During this time he applied for his restraint order to be discharged and on 6th April 2006 Burton J discharged it without opposition from HMRC because its basis (the potential charge of VAT and duty fraud) was not being pursued. In his order Burton J directed that "any application, and supporting evidence" by the defendant for compensation be filed and served by 4pm on 5th June 2006. When I asked what the jurisdictional basis of such an order was, counsel surmised it was a case management direction, because an application for compensation would be anticipated to be under section 89 of the Act and within the restraint order proceedings.

12. At this point it will be convenient to introduce the terms of that Act, because its terms are central to the debate in this matter. It provides (so far as material):

> "89. Compensation
>
> (1) If proceedings are instituted against a person for an offence or offences to which this Part of this Act applies and either—
>
> (a) the proceedings do not result in his conviction for any such offence, or
>
> (b) where he is convicted of one or more such offences—
>
> (i) the conviction or convictions concerned are quashed, or
>
> (ii) he is pardoned by Her Majesty in respect of the conviction or convictions concerned,
>
> the High Court may, on an application by a person who held property which was realisable property, order compensation to be paid to the applicant if, having regard to all the circumstances, it considers it appropriate to make such an order.
>
> (2) The High Court shall not order compensation to be paid in any case unless the court is satisfied—
>
> (a) that there has been some serious default on the part of a person concerned in the investigation or prosecution of the offence concerned, being a person mentioned in subsection (5) below; and

> (b) that the applicant has suffered loss in consequence of anything done in relation to the property by or in pursuance of an order under this Part of this Act.
>
> (3) The Court shall not order compensation to be paid in any case where it appears to the Court that the proceedings would have been instituted or continued even if the serious default had not occurred.
>
> (4) The amount of compensation to be paid under this section shall be such as the High Court thinks just in all the circumstances of the case."

13. It was common ground that this section would apply where a restraint order under the earlier section was granted, and in due course, as will appear, Mr Bhandal made an application under this section which was dismissed on the merits. This was the provision which Burton J must have had in mind, and presumably it is said to be a case management decision because it was anticipated that the application would be brought (and judging by the action number was brought) within the original application for the restraint order.

14. However, instead of bringing proceedings under that section in time, Mr Bhandal brought proceedings (late) for compensation under the general law, and under the statute, in the Chancery Division (Action number HC07C01904), on 17th July 2007. This was outside the time prescribed by Burton J. The claim form sought:

> " …damages (including any damages/compensation payable under the Criminal Justice Act 1988) and other relief… for deceit, fraud, conspiracy, conversion, negligence, breach of trust, breach of fiduciary duties, trespass to property, trespass to goods, and wrongful interference with goods."

15. The Particulars of Claim pleads the following elements, germane to this present matter:

(a) The making of the restraint order.

(b) The sale of Mr Bhandal's property.

(c) That the evidence of Mr Broad in support of the without notice application for the restraint order was misleading in that he was actually or constructively aware that the leading prosecution witness in a series of duty diversion frauds, Mr Allington, had repeatedly perjured himself with the connivance of HMRC. It is said that he made no mention of the important factors surrounding Mr Allington in his evidence, and he should have done that.

(d) If Mr Broad and HMRC had complied with their duties of disclosure the High Court would have refused to grant the restraint order. HMRC obtained its order dishonestly and executed it unlawfully and in bad faith; and Mr Broad dishonestly misled the High Court.

(e) Compensation was claimed against HMRC, Mr Broad and a whole host of other defendants who are not relevant to the present matter.

(f) As well as claiming damages generally, paragraph 122 said:

> "122. And the Claimant seeks Compensation as against [HMRC and/or Mr Broad] as provided for by statute in the Criminal Justice Act 1988 in relation to improperly brought and subsequently discharged restraint proceedings."

16. Faced with these proceedings HMRC applied to have them struck out as disclosing no reasonable cause of action or for summary judgment or to have the proceedings stayed. The application came before Master Moncaster. He delivered a judgment on the matter on 1st May 2008. The Master declined to strike out on the basis of a defence that the action was defeasible on the basis of witness immunity from suit, but held he should stay the action (at least so far as HMRC, and I think Mr Broad, were concerned - the fate of the action against the other defendants is unknown to me). He did so on the basis that the proceedings were an abuse of process where Mr Bhandal, although initially intending to go down that route, "abandoned that intention" (para 10). HMRC submitted that section 89 was exhaustive of Mr Bhandal's rights in respect of the restraining order. The Master did not rule on that point, though expressed the view that the claims under general law were not going to be greater than under section 89. Accordingly, he stayed the proceedings to enable Mr Bhandal to go back to the Administrative Court to seek an extension of time for making his section 89 claim. If the extension were given:

> "… the judge will be able to decide what is proper to be done in relation to compensation." (para 13).

17. Thus were the Chancery Division proceedings stayed.

Master Moncaster to Collins J

18. Immediately before the hearing before Master Moncaster an event took place which is the important starting point of the whole of Mr Bhandal's approach to this matter. It appears that on the day of the hearing Mr Kent, appearing before HMRC, handed to Mr Bhandhal's solicitor, Mr Roche, a copy of the warrant which was said to have been issued for Mr Bhandal's arrest. The warrant was unsigned and there were only two pages of it (there ought to have been three). In due course when a signed warrant emerged Mr Bhandal maintained that it was a forgery, perpetrated by Mr Broad. The significance of this is said to be that that means that the section 89 proceedings, which require that "proceedings" be instituted, were not valid section 89 proceedings because of the absence of that pre-condition. If there was no genuine warrant issued then there never were "proceedings", so section 89 was not open to Mr Bhandal. That being the case, he ought to have been allowed, and ought to be allowed now, to pursue his Chancery Division proceedings. That is part of the chain of logic which drives Mr Bhandal. It is something of which Mr Roche was apparently aware from the date of Master Moncaster's hearing.

19. It is clear that a chain of inquiry about the warrant was put into operation on behalf of Mr Bhandal immediately after Master Moncaster's decision. A witness statement of one of Mr Bhandal's solicitors says that on 2nd May 2008 (the day after Master Moncaster's hearing and decision) she attended the apparently relevant Magistrates' Court (Uxbridge) to see if there was a record of the warrant in the court's files. There was no court file to be inspected, but the court register was said to have no record of it. Thus the issue of the effect of the contested validity of the warrant has apparently been in play, at least so far as Mr Bhandal was concerned, from that time.

20. Despite having had the opportunity to do so Mr Bhandal did not make an application to extend his time for making his section 89 application. On 1st March 2011 he applied to lift the stay of the Chancery Division proceedings and to amend the Particulars of Claim. The reason given in the application notice for the proposed lifting was that there was a question-mark over whether the criminal proceedings had ever been withdrawn (not whether they had ever been initiated) and that it might therefore be the case that the criminal proceedings were still live so the section 89 proceedings could not be

pursued. It was said in the application notice that "the underlying proceedings consist merely of a Warrant dated 18th July 2001". That application was subsequently withdrawn without its being heard.

21. On 4th March 2011 Mr Bhandal made an application for compensation under section 89; on 15th June 2011 it was amended to seek, so far as necessary, an extension of time for making it. That extension of time application came before Hickinbottom J and on 18th November he extended that time. In his judgment he had to consider a possible limitation defence, and for that purpose he had to consider when the warrant was returned to be cancelled. In paragraph 89 of his judgment he observed the following:

(a) It was common ground that the crucial fact for the commencement of a section 89 claim was that criminal proceedings against the applicant were concluded (para 29).

(b) It was also common ground that those proceedings were concluded when the warrant of arrest was cancelled (ibid).

(c) Both sides had been told that Uxbridge Magistrates' Court had no record of the warrant, either as to its issue or as to its cancellation (para 46).

(d) No explanation was given by HMRC (via Mr Broad) as to why the restraint order was not discharged when the warrant was cancelled; he said it must have been forgotten (para 52).

(e) Given the uncertainties of those matters, it was not clear that a limitation defence was a complete answer (para 53).

(f) In all the circumstances (having considered a lot more points than those just identified) Hickinbottom J extended Mr Bhandal's time for applying under section 89.

22. It should be noted for present purposes that it seems that the assumption on which this application was conducted was that there had been the issue of a warrant for the arrest of Mr Bhandal, even though Mr Bhandal had been aware since 2008, and as recorded in Hickinbottom J's judgment, that the Magistrate's Court seemed to have no record of its issue or cancellation. The original version of the Points of Claim are silent on the point, but interestingly paragraph 27.1 pleads that:

> "By its application for a Restraint Order, the Defendant instituted relevant proceedings for the purposes of section 89 …"

23. However, on 10th October 2014 they were amended (with permission from Ouseley J) and in paragraph 6 there is an express pleading of the issue of a warrant supported by an information sworn by Mr Broad (a copy of which was served with the pleading). The pleading goes on to tell the story of HMRC's alleged misconduct in allowing prosecutions to take place on the basis of misleading evidence involving Mr Allington. The amendments then go on to complain that no reference was made before Newman J to the "sensitivities" about the previous prosecutions; nor was any reference made to them in Mr Broad's information. Paragraph 18H positively pleads that HMRC considered "leaving the warrant for arrest extant" in the hope of an extradition from a jurisdiction from which extradition would be permitted. The remainder of paragraph 18 pleads (by amendment) a number of culpable non-disclosures in the restraint order proceedings, and the later paragraphs (again by amendment) plead bad faith and a "serious default" within section 89. The claim is (as it had to be) focused on the restraint order, but was plainly premised on the existence of a warrant.

24. Meanwhile and prior to the amendment of the Points of Claim, Mr Bhandal had filed and served a witness statement in the section 89 proceedings. The witness statement is dated 26th June 2013. It contained an extensive section (paragraphs 81 and following) in which Mr Bhandal set out his reasons for saying, or supposing, that the copy warrant which he had seen by then was not a genuine document. Among his challenges to the document were the fact that the magistrate involved (identified as a Mrs Buckledee) signed it on what would have been her last day in office, there were oddities about the dating and there were oddities about the Magistrates' Courts identified in the document, coupled with the absence of any record at the courts in question. He observed:

> " 113. The warrant of arrest and restraint order stand or fall together and if there was never a valid warrant of arrest (no records of one exist) that would make the misconduct of HMRC even more serious. In fact, if there never was a valid warrant of arrest, the serious default might then be so serious as to full *outside* the provisions of section 89 as I am advised proceeding must be *commenced* before section 89 statutory compensation can be awarded." (Mr Bhandal's emphasis)

25. The defendants sought to strike out those paragraphs from the witness statement by an application dated 28th October 2013, and in an order dated 13th May 2014 (stamped on 13th May 2014) King J acceded to that application and struck out those paragraphs (with others). I was not provided with a transcript of his judgment, so I have no clear indication of the basis of his decision, but Mr Kent (who seems to have been involved in this matter throughout its long history) told me that the basis on which it was struck out was that those points did not relate to any issue in the section 89 claim and that the paragraphs did not contain matters on which Mr Bhandhal could himself give evidence. His skeleton argument from the time (which was in the bundle) took the latter point clearly, and also took the point that misconduct points were alleged generally and not pleaded, and that the forgery point was contrary to the basis on which the matter had

been put before Hickinbottom J in which (as appears above) it was positively asserted that there was a warrant. The skeleton argument went on to say that if it were suggested that the matter could be put right by an amendment then those who would have to plead it would have to look to their professional obligations about pleading such matters. It should be noted that when an amendment subsequently came it averred the existence of the warrant; it did not challenge it (see above).

26. The application then came before Collins J on 20th January 2015, who heard it over 5 days and delivered his judgment on 11th March 2015. His judgment contained the following aspects:

(a) He set out in general terms the problems with other prosecutions which led to convictions being set aside and other prosecutions not being proceeded with. He recorded that following advice from leading counsel, the prosecutions against Mr Bhandal's co-defendants were withdrawn, but "At that stage, the charges against the claimant the RO remained" (para 9).

(b) In paragraph 15 he recorded:

> "It should have been obvious that in the circumstances the charges against the claimant could not proceed unless a different view was taken having regard to the allegations that he was the mastermind of the frauds. But no immediate steps were taken to withdraw the arrest warrant or the restraint order. Mr Broad, the officer having conduct of the case against the claimant, was unable to recall when he attended Uxbridge Magistrates' Court to return the warrant. This is material having regard to a limitation defence raised by the defendant."

The limitation point was the principle that the cause of action accrued when the arrest warrant was cancelled (para 17).

(c) in paragraph 17 he recorded that the Chancery proceedings were "clearly inappropriate since there was a statutory right to compensation contained in s.89 of the 1988 Act which was subject to the conditions therein contained.".

(d) In paragraph 19 Collins J considered statements from Mr Broad and Mr O'Donnell (a colleague in HMRC's solicitor's office) to the effect that Uxbridge Magistrates' Court could find no record of the issue or of the return or the cancellation of the warrant. Since the court destroyed records after 3 years, that

may be thought consistent with a cancellation in 2003. However, Mr Broad could not provide a specific date for the cancellation save to say he did not recall it as being as late as 2005. Paragraph 20 records that Mr Kent conceded that on the evidence HMRC would not be likely to succeed in establishing a limitation defence as a preliminary issue.

(e) Paragraph 21 records an allegation of serious default on the part of HMRC in relation to the investigation of proceedings and what was not disclosed to Newman J when the restraint order was granted, and in failing to have it discharged when it became apparent that there would be no prosecution.

(f) Collins J went carefully through the history of the deliberations about pursuing Mr Bhandal, based on privileged material which HMRC had chosen to disclose. In paragraph 48 he records counsel's advice given in conference on 17th July 2001, in which counsel indicated that there was a strong case of criminal conduct. Paragraph 48 goes on:

> "He set out the charges which he suggested should be brought. The arrest warrant followed then [presumably that should be "them"].

(g) Subsequent paragraphs contain material which Mr Mallin relies on as demonstrating the extent to which Mr Broad's credibility was in issue, and which he says would have been affected if it had been known he was the forger of the warrant. Those paragraphs include the following:

> "49. … Mr Broad himself was not party to any misleading evidence. He was, however, aware that there were problems in relation to LCB and the Allingtons. In evidence he said he did not recall hearing Alf Allington give evidence and in any event he was not made aware of his precise role. While unaware of the full extent of the problems, he said he was "loath to touch anything to do with LCB'. However, I have no reason to doubt that he informed Mr Mitchell [of counsel] of the problems and of his concerns to avoid LCB. He attended a conference on 1 February 2000 at which health Allington's role was supposed to have been identified by Mr Small.

> 51. ... As with Mr Broad, Mr Robertson knew that there was an issue with Mr Allington. He liked Mr Broad thought the problem related to disclosure not to an evidential trail.…
>
> 52. I have no doubt that both Mr Broad and Mr Robertson were entirely honest in the evidence they gave before me. There were inevitable difficulties in recollecting details of events occurring up to 15 years ago. I am satisfied that Mr Mitchell was fully informed of all that was known by then and in particular was aware of the likely disclosure difficulties of Alf Allington's position. There was in my judgment no default by either of them in connection with the institution of the prosecution..."

(h) Collins J then went on to consider the events post the restraint order and the belief or hope that Mr Bhandal could be extradited and concluded that the maintenance of the proceedings at that point amounted to no default and there was no need to go back to the judge. The maintenance of the proceedings carried on until advice from different counsel in June 2003 led to the conclusion that the prosecutions should be abandoned, and no evidence was offered against Mr Bhandal's co-defendants (at that point there was no question of offering no evidence in relation to Mr Bhandal because his absence in the USA meant that any prosecution against him had got nowhere). In paragraph 59 Collins J recorded:

> "But the arrest warrant and the RO against the claimant remained in being. However, by then any alleged loss had already been caused."

(j) In paragraph 60 he rejected the evidence in an unsigned witness statement of a Mr Smith which accused various officers (unspecified in the judgment) of "gross deceit" and the non-disclosure of Mr Allington's true rule. Collins J recorded:

> "Nothing in Mr Smith's statement indicated that Mr Broad or Mr Robertson were involved in any deceit."

And in paragraph 61 Collins J concluded:

> "61. I am satisfied that no officer concerned in the investigation or prosecution of Kitsch [the operation which concerned Mr Bhandal's activities] was guilty of any default let alone serious default."

(k) Collins J ended his judgment by concluding briefly that although he did not have to decide the point in the light of his conclusions on default, he nonetheless concluded that Updown Court, the property over which the restraint order operated, was acquired from the proceeds of crime, which barred Mr Bhandal (whose evidence he firmly rejected as being thoroughly unsatisfactory) from any claim under section 89 in any event.

27. Thus the proceedings in front of Collins J proceeded on the footing that there was an arrest warrant in existence. There seems to have been no question as to its existence, not surprisingly in the light of the positive pleading to that effect. Furthermore, despite the case which Mr Bhandal was minded to make about its validity, judging from his witness statement, there would seem to have been no cross-examination of Mr Broad about it or its validity. I rather think that that is because of a limit imposed after submissions made by Mr Kent at the outset, referred to in general terms by Mr Bhandal in recent evidence.

Collins J to HHJ Jarman

28. Mr Bhandal sought to appeal from the decision of Collins J. His application for permission came before Lewison LJ on paper who rejected it on 27th November 2015. I have not seen the Grounds of Appeal which were before Lewison LJ, but it would seem he rejected a complaint about hearsay evidence and held that the appeal foundered on the finding of no officer default. The civil burden of proof was correctly applied and allegations of bias were rejected. Nothing in that refusal of permission touches directly on the validity of the warrant. As a result of this decision Mr Bhandal sought to make an oral renewal of his application.

29. On 15th September 21016 Norris J heard a further application to set aside the stay order of Master Moncaster. This was the application (or one of them) which ultimately came before HHJ Jarman. Norris J adjourned it on the footing that it was not vacation business and it should not come on before the date of the renewed application for permission to appeal from Collins J, whose date had been fixed.

30. On the renewal of the application the forgery was certainly relied on. In Amended Grounds of Appeal dated 11th March 2016 Mr Bhandal sought to adduce fresh evidence relating to forgery of the application for the warrant and the warrant itself, suggesting that neither was genuine and both were forgeries created by or on behalf of Mr Broad. Paragraph 3 goes on:

> " … accordingly, the Appellant was and remains a victim of fraud. It will be submitted that the fraud perpetrated goes to the very jurisdiction of the Administrative Court to hear the claim for compensation pursuant to section 89 of the Criminal Justice Act 1988."

31. Paragraph 5 again took the jurisdictional point. The remaining paragraphs criticised the approach of Collins J without in terms referring to the forgery, but complaining of an absence of a finding of serious default by inter alia, Mr Broad.

32. The skeleton argument submitted in support referred to "other research conducted after the trial" which "has given rise to a compelling case for concluding that the Appellant was fraudulently inveigled into making a s89 CJA claim by Officer Broad and/or others under the aegis of the Respondent by false representations that a valid arrest warrant for the Appellant had been issued by Uxbridge Magistrates' Court on 18 July 2001, when in fact no such warrant had ever issued." Paragraph 5 of the skeleton complained that the evidence which Mr Bhandal sought to adduce in the Administrative Court was struck out on the ground that matters he referred to were matters about which he had no personal knowledge. Accordingly, Mr Bhandal was prevented from litigating the fraud issue. Paragraph 6 records:

> "Unfortunately, it was not until after the trial proceedings below that further evidence could be obtained in support of the significant doubts about the warrant. This was so despite many strenuous efforts to get to the bottom of what actually occurred with regard to the warrant situation. The Appellant's counsel was restricted to examining witnesses about the surrender of the warrant in connection with the issue of limitation alone, and not about the authenticity of the warrant documentation itself."

The skeleton argument then went on to rely on the forgery as going to jurisdiction and as going to the credibility of Mr Broad, on whose honesty Collins J had relied.

33. The renewed application for permission came before Longmore LJ on 18th October 2016 and it was rejected. In his judgment he observed that the grounds which were before Lewison LJ had been abandoned and new grounds were now proposed. He rejected the application to adduce fresh evidence. He observed that the fresh evidence was obtained only in May 2016, after Lewison LJ's rejection, when Mr Bhandal instructed an inquiry agent to try to track down the magistrate who purportedly signed the warrant. That was successful and the magistrate gave a witness statement which identified the signature as hers but not the dating or alterations which were not initialled. (A witness statement signed by her to that effect was shown to me.) Longmore LJ rejected the application to adduce fresh evidence on the grounds that it could have been obtained earlier with due diligence. Because he rejected that application he also rejected an application to amend the Grounds of Appeal to take the forgery point. He went on to say:

> "12. There is also, which follows from that, an application to adjourn this renewed permission to appeal application for the High Court to investigate these matters. That would be an entirely improper thing for this court to do. No doubt if an application is pursued to set aside the judgment as having been obtained by fraud, that will have to be dealt with in due course, but it would be quite wrong for this court to adjourn the application for permission to appeal in the light of that uncertain event."

34. Longmore LJ went on to consider other points which are not germane to the application before me. Mr Mallin understandably relies on what Longmore LJ said about an application to set aside the judgment, but in my view it has no direct relevance to what I have to decide because my issues were not before Longmore LJ.

35. Mr Bhandal's application to lift the stay of the Chancery proceedings was listed to come on in mid-February 2018. Shortly before that, on 5th February 2018, HMRC and Mr Broad applied within those proceedings, as a sort of counter-application, that they be struck out pursuant to CPR Part 3.4(2)(b) (abuse of process), and/or for summary judgment on the basis that the claim had no real prospect of succeeding. The accompanying witness statement suggests that this application was based on the fact that the issues had all been determined by Collins J in his proceedings. For his part Mr Bhandal added a proposed amended Particulars of Claim into the mix. A new paragraph 82 pleaded a civil conspiracy between HMRC and Mr Broad to injure by unlawful means, those means being the previously pleaded background involving Mr Allington and the abandonment of the criminal proceedings, and the forgery of the warrant. The old paragraph 122 seeks compensation under the 1988 Act, but then, oddly, a new paragraph 122.1 pleads:

> "By judgment of Collins J dated 11 March 2015 in proceedings in CJA 118 of 2001, neutral citation [2015] EWHC 538 (Admin), the issue of statutory compensation under the Criminal Justice Act 1988 has been determined and accordingly is no longer in issue in these proceedings."

I say "oddly" because Mr Bhandal's stance immediately prior to this document, and in the argument before me, has been that the section 89 proceedings were of no effect because of what Mr Bhandal described as the jurisdiction point.

36. In his skeleton argument in support of Mr Bhandal's application Mr Peter Knox QC submitted that the proceedings ought to be revived because there was no basis for the making of the restraint order because Mr Bhandal was not properly prosecuted, there was no res judicata which barred him and there was no *Henderson v Henderson* bar because the relief sought in the amended proceedings had not been adjudicated upon. He submitted that there was no prior allegation of forgery that was the subject of previous proceedings.

37. For their part, the defendants (HMRC and Mr Broad) relied on the findings of Collins J in determining the issues between the parties, as was said to be apparent from comparing the current Particulars of Claim and the Points of Claim in the Administrative Court proceedings. The decision of Collins J gave rise to an estoppel and the Court of Appeal had not allowed fresh evidence of the forgery. What Mr Bhandal was seeking to do was to have another bite of the cherry, and that also amounted to a collateral attack on a final judgment of the High Court. Other points were taken. It is unnecessary to set them out here.

38. The two applications came before HHJ Jarman QC (sitting as a judge of the High Court) who decided in favour of the defendants. In his judgment the judge recorded the position of Mr Knox as follows:

> "25. Mr Knox QC, for Mr Bhandal, realistically and properly accepted that in broad terms the present proceedings, if allowed to continue, will amount to a collateral attack on the judgment of Collins J, but submits that this is an unusual case where such proceeding should be allowed to continue. Mr Bhandal's case is now that the warrant and information were not validly signed 2001, but were created by Mr Broad in 2006 or 2008 when disclosure was being pressed for, to hide the fact that (perhaps by oversight) HMCE had not obtained them when it should have done."

39. He went on to accept that he should not make any evidential determination as to the validity of the warrant or information for summary judgment purposes (paragraph 29) and went on to the abuse question:

> " 30. However, the question remains as to whether such a claim amounts to an abuse. In my judgment, it does. The Administrative Court was competent to hear the section 89 application, because the application was put on the basis, as it had to be, that proceedings had been instituted against Mr Bhandal. As Mr Knox realistically accepted, by the time that application had been made, Mr Bhandal's advisors were well aware that there was evidence to suggest that the warrant had not been issued in the Uxbridge Magistrates Court on the date appearing on it. Such evidence included the statement dated 6 May 2008 (which was not disclosed to HMRC until 2013) of a solicitor in the firm then instructed by Mr Bhandal who attended the court office and was shown the register of warrants by an officer which did not, as it should have done, contain details of the disputed warrant on the date which appeared on its face."

40. Having acknowledged that the statement of the magistrate was not obtained until 2016, he went on:

> "32. As Longmore LJ observed, this evidence could and should have been obtained in or shortly after 2008, when Mr Bhandal's solicitors had evidence that the warrant had not been issued on the date which it brought. The fresh evidence does not entirely change the aspect of the case. I do not accept that he was misled by HMCE into making the section 89 application on the basis that the warrant and information were valid. It is true that that is what HMCE have always said and HMRC maintains. But Mr Bhandal's advisors had evidence to the contrary. He faced a choice, whether to proceed on the basis that proceedings had been instituted against him and to invoke a statutory procedure to apply for compensation on the basis of serious default on the part of the investigating officers, or to proceed on the basis which he now seeks to rely upon that the warrant and information had been created by Mr Broad later on.
>
> 33. He elected the former. In my judgment it is an abuse, after the application which he chose to make was dismissed as were his attempts to appeal that dismissal (including ultimately on the grounds of the forgery of the warrant and information), for him now to seek to pursue common law claims on the grounds of

> forgery which is the antithesis of the basis on which he pursued his section 89 application.
>
> ...
>
> 36. The case of forgery could not have been raised in the Administrative Court proceedings, because the basis of those proceedings was that proceedings had been instituted against Mr Bhandal. However, Mr Bhandal made an election, in full knowledge of evidence that the warrant had not been issued as it purported on its face. In my judgment, it would be oppressive for HMRC and Mr Broad to face these further proceedings. Looking broadly at the merits, the claim should be struck out on the basis that it is an abuse of process, whether as currently formulated or as proposed to be amended. It follows that the other applications are dismissed."

41. The final step in the story is an application to the Court of Appeal by Mr Bhandal for permission to appeal from the decision of HHJ Jarman. That was dealt with by David Richards LJ on 10 August 2018 when he dismissed it on the footing that there was no real prospect of a successful appeal. He observed that the issues of fact were decided against Mr Bhandal by Collins J after a full trial and Mr Bhandal would have to overturn many of those findings to succeed in the Chancery proceedings. He went on:

> "By the time that the Chancery proceedings were stayed, the applicant had given serious consideration to alleging that a warrant for his arrest had not been issued on the basis of material then in his possession. Longmore LJ held, when refusing permission to appeal against the dismissal of the CJA claim, that with reasonable diligence he could have obtained the further material on which he relied before Longmore LJ.
>
> Notwithstanding the availability of this material, the applicant pursued the CJA claim. Having in these circumstances pursued the CJA claim he cannot now launch a collateral attack on the findings made by Collins J on the basis of an allegation that, by virtue of such material, he is not bound by those findings because there was no basis for the CJA claim. As the judge said, he chose to pursue that claim despite having, or being able with due diligence to obtain, the material on which he now relies.

> It was open to him to pursue alternative claims: the CJA claim on the basis that a warrant had been issued and other claims on the basis that a warrant had not been issued.
>
> In all the circumstances it would be an abuse of process to proceed with the Chancery action."

The claim brought in this action

42. Against that background I can now set out the basis of the present claim which the defendants seek to strike out. The Particulars of Claim trace the following path.

43. Paragraph 7 identifies the key judgments which it is said were procured by the fraud of HMRC and Mr Broad – the orders of Master Moncaster, the order of Collins J and the order of HHJ Jarman QC. Paragraphs 10 to 13 set out the "serious misconduct" of HMRC in relation to the investigation and prosecution of various offences, resulting in prosecutions being halted and existing convictions being quashed when full disclosure of HMRC's "unlawful conduct" finally emerged. Paragraphs 10 to 20 plead the making of the restraint order. It would have been necessary to satisfy the judge that there was some real prospect of securing a conviction as a result of the intended proceedings but the defendants were well aware that any subsequent prosecution was likely to be so tainted by HMRC's own impropriety as to have no realistic prospect of success. The defendants failed to satisfy themselves that there was such a prospect and in the circumstances the application for the restraint order was made for an improper purpose and in bad faith. This amounted to a "serious default" in the investigation and prosecution of Mr Bhandal.

44. Paragraphs 21 to 24 plead shortly the "raid" on the property which was the subject of the restraint order which seriously tainted the property and led to the sale by mortgagee at an alleged undervalue.

45. Paragraph 26 pleads the first Chancery proceedings commenced in 2007. Paragraph 27 pleads the application to strike out relying on the jurisdiction of the Administrative Court to award compensation under section 89. Paragraph 28 pleads:

> "28. The abuse element of HMRC's Strike-Out Application necessarily proceeded on the premise that a relevant warrant of

> arrest had been issued against Mr Bhandal because, pursuant to section 89(1)(a) of the 1988 act, the power to order compensation under Section 89 was only exercisable "if proceedings are instituted against a person for an offence or offences to which this part of this Act [sic]".

46. The paragraph goes on to plead that criminal proceedings under the 1988 Act are instituted when a JP issues a summons or warrant, a proposition of law which Mr Kent accepted before me.

47. Paragraph 29 pleads that notwithstanding the fundamental importance of establishing that a warrant of arrest had, in fact, been issued, the supporting witness statement for HMRC made no mention of any arrest warrant having been applied for and obtained whether on 18 July 2001 or otherwise.

48. Paragraph 31 pleads that immediately before the hearing before Master Moncaster Mr Kent for HMRC handed to counsel for Mr Bhandal an incomplete two-page version of the warrant which was presented as being a partial version of the real thing. Paragraph 32 pleads that it is to be inferred that HMRC provided only two of the three pages because the absence of a signature on the final page would have undermined the value of the document to Mr Broad and HMRC. The incomplete warrant was admitted by the Master. Paragraph 35 then pleads:

> 35. Master Moncaster could not have stayed the Chancery Proceedings as he did unless he had been satisfied by the Incomplete Warrant of Arrest and/or other false representations made and/or evidence provided by HMRC and Mr Broad that an arrest warrant had, in fact, been issued."

49. That representation is then pleaded as being false. Paragraph 37 pleads that on 7 May 2008 HMRC sent what purported to be a complete version of the warrant signed by the JP on the third page and the following paragraphs go on to plead that that document was a forgery, having been deployed before the Master in order to show that criminal proceedings had, in fact, been commenced.

50. The next section pleads the circumstances of the issue of the section 89 proceedings. It is pleaded (paragraph 43) that at all material times HMRC and Mr Broad continued to falsely represent and/or act on the basis that a warrant of arrest had in fact been issued

on 18 July 2001. Particular reliance is placed on Hickinbottom J's statement as an uncontroversial fact as to the information being laid (quoted above) and on HMRC's advancing a limitation defence that relied on submissions as to the date on which the warrant of arrest had been cancelled by Mr Broad. Paragraph 2(f) of the Points of Defence in those proceedings are said to aver that a warrant of arrest had been obtained by Mr Broad on 18 July 2001 following an information sworn by Mr Broad. Paragraph 45 pleads the judgment of Collins J and paragraph 46 pleads that each of Collins J's conclusions "depended crucially on the oral evidence at trial of Mr Broad and Mr Robertson, including their denials that they had knowledge as at 18 July 2001 that would have led to the conclusion that no prosecution could properly have been brought against Mr Bhandal or that they had withheld anything from counsel.

51. Paragraph 48 starts a section headed "HMRC's and Mr Broad's fraud", and pleads that "as set out above" since at least April 2008 they have represented to Mr Bhandal and the court that criminal proceedings had been commenced against Mr Bhandal by the laying of the information and the warrant of arrest, knowing that was not true.

52. Section F refers to "The Consequences of HMRC's and Mr Broad's fraud". In summary, it is pleaded that the consequences were as follows:

(a) The order of Master Moncaster was procured by the fraud because he was led to believe that the warrant had been issued and a warrant was a necessary requirement of section 89 proceedings.

(b) The order of Collins J was procured by fraud in that:

(i) the order of Master Moncaster was procured by fraud; and but for that order Mr Bhandal would have continued with his Chancery proceedings.

(ii) If the fraud had not been perpetrated it was "self-evident" that Mr Bhandal would not have commenced his section 89 proceedings.

(iii) Had HMRC and Mr Broad been honest and admitted Mr Broad's fraud, it was inconceivable that Collins J would have found Mr Broad to be an honest witness and could not have found there was no serious default by HMRC. Furthermore, Mr Robertson's evidence would have come under closer scrutiny and would have been undermined. Collins J would not have found that the prosecution would have been initiated anyway and would not have made his obiter observations about criminal conduct on the part of Mr Bhandal.

(iv) In the premises the entire basis on which Collins J arrived at his conclusions would have been fatally undermined.

(c) The order of HHJ Jarman was procured by fraud in that it relied fundamentally on the judgment of Collins J which was in turn procured by fraud. But for the fraud, HHJ Jarman could not have concluded that Mr Bhandal's allegations of forgery were oppressive.

(d) Since the section 89 proceedings had to be brought by an application within relevant criminal proceedings commenced by a warrant, and since there never was a warrant and therefore no such proceedings, the section 89 proceedings were a "nullity".

53. The prayer seeks a declaration that the order of Collins J is a nullity, declarations that the orders of Master Moncaster, Collins J and HHJ Jarman be set aside and some consequential relief.

The basis of the strike-out application

54. The principal ground of the strike-out application as described in Mr Kent's skeleton (though not in his application notice, which is silent as to particulars, as is most of the evidence in support) is that they amount to a collateral attack on adverse findings of courts of competent jurisdiction and an unwarranted attempt to repeat allegations for which the claimant has "repeatedly" been refused permission to pursue. There is also an alternative ground based on a failure to pay a previous costs order, but that issue has been parked pending the delivery of this judgment, as has an application for an extended civil restraint order. This judgment is therefore concerned solely with the abuse point.

55. The main point behind Mr Kent's submissions in support of his application is that in this action this court will be asked to reconsider matters which have been considered before, and the principle of finality mean that that should not be allowed; or if there are issues which have not actually been considered then that is because Mr Bhandal had an opportunity to raise them and failed to take it. Mr Bhandal would seek to revive (and doubtless amend) the Chancery proceedings in order to complain about the making of the restraint order, but all the issues raised in those proceedings were the same issues as have already been decided by Collins J in the section 89 application and Mr Bhandal

should not be allowed a collateral attack on that decision. David Richards LJ was right to observe that what Mr Bhandal was seeking to achieve was an impermissible collateral attack at that time, and the same applies now. Insofar as it might be said that new material has emerged which should justify that attack, that is not true because there is no real new material, or not such as to make any material difference. Furthermore, HHJ Jarman in his decision has effectively decided whether any otherwise undecided forgery points (and their consequences) should be allowed to be run, and he decided that it would be oppressive to allow that to happen. What Mr Bhandal now seeks is a second bite at that particular cherry.

56. He pointed out that the history of the matter clearly demonstrated that Mr Bhandal knew he had a claim or point based on the non-existence, and indeed forgery, of the warrant, and had actually tried to introduce it into section 89 proceedings in his evidence without a proper pleading. When that failed he actually positively pleaded that the warrant existed (see his amendments in those proceedings) and proceeded on that basis. It was now too late to resile from that, and if necessary he was estopped by convention from trying to do so.

57. Mr Kent also sought to attack the fraud claim on the basis of causation. He submitted that the judgment of Collins J against Mr Bhandal was sustainable independently of the alleged fraud because he made determinations which did not depend on the frauds alleged. He also made submissions on the poverty of the forgery allegation when looked at realistically against the proper factual background.

58. For his part Mr Mallin submitted that detailed questions of causation, or going to the merits of the forgery allegation, were not matters for this application. He pointed out that the defendants had not sought summary judgment and had not properly challenged causation matters in a manner which flagged them up for evidential attention on Mr Bhandal's side. Furthermore, Mr Kent's case did not properly address Mr Bhandal's chain of causation. It starts with the alleged fraud which meant that Master Moncaster was induced to believe that section was available when it was not; and it continued into the section 89 proceedings in two respects - it undermined what he described as the jurisdiction of the court (which required that criminal proceedings be commenced when they had not been) and it went to the credibility of Mr Broad as a witness which was critical to the assessment of misconduct.

59. He submitted that what Mr Bhandal sought to do in these proceedings was not a collateral attack as that expression has been used in the authorities which bar such things, but a permissible challenge on the basis that previous decisions had been procured by fraud. While that might be viewed as a collateral attack, as a species it was an attack which was permitted in principle (though of course the facts had to justify it). What had happened in this case was that all the major decisions were tainted by fraud.

There was in effect a chain. But for the fraud, the section 89 proceedings would not have been commenced and the Chancery proceedings would have been continued. The section 89 proceedings were brought about by the same fraud (pretending there was a warrant when there was not), and the trial itself was tainted because the fraud (forgery) was hidden and was therefore not available to challenge the evidence of Mr Broad. Once the Collins proceedings are set aside, the decision of HHJ Jarman fell to be set aside because it depended completely on the integrity of the Collins J decision. Mr Bhandal was not barred by what the previous judges had decided because they were deciding different things - whether fresh evidence should be admitted on an appeal, or whether introducing the forgery/fraud allegations into the existing proceedings was an impermissible collateral attack. There was no question of an estoppel preventing Mr Bhandal from bringing the present claim because the requirements for it were missing.

The nullity point

60. There is one relatively small point to dispose of before turning to more substantial ones, and that is the plea that the decision of Collins J is a nullity because the Administrative Court had no jurisdiction to take the section 89 case in the absence of a prosecution commenced by the issue of a warrant. Even if there is no warrant that plea is misplaced.

61. A High Court order is not a "nullity" in any meaningful sense in this sort of context (or probably at all). As Lord Diplock said in *Isaacs v Roberton* [1985] AC 1 at p 103H:

> "The contrasting legal concepts of voidness and voidability form part of the English law of contracts. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies."

62. Accordingly even if, which I tend to doubt, a jurisdictional attack can be made on the section 89 proceedings if there were no prior criminal proceedings, the order was still not a nullity. It stands until set aside on an appeal or on some other application (such as the present action). That is a small point in the context of the present action, and it does not really make any difference to the case because if there was a fraud Collins J's decision will be set aside without reference to concepts of nullity but it is as well to get it out of the way before a consideration of the major point which arise on this application.

The relevant law applicable and its application to the issues in this case

63. The present action is one which seeks to set aside previous orders on the basis that they were obtained by fraud, one of the qualifications to the finality principle which normally prevents the re-running of decided matters. The Supreme Court has recently given consideration to this type of case in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13. In that case (in paragraph 56) Lord Kerr (with whom a majority agreed) approved the short formulation of the requirements for such an action as appearing in *Royal Bank of Scotland plc v Highland Financial Partners* [2013] 1 CLC 596 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."

64. Before me there was no real dispute about those principles. *In Tinkler v Esken Ltd* [2022] EWHC 1375 (Ch) there was a debate as to whether the test for materiality was what is set out there or whether it was a lesser test proposed in other Court of Appeal authority (see paragraph 20). Leech J was inclined to the view there was little difference, but if there was he confined himself to the *Highland* test (see paragraph 23). If it matters (which I doubt that it does) I propose to do the same.

65. Mr Kent's attack on the present proceedings did not amount to his saying that Mr Bhandal's present case could not be fitted within that formula. Indeed, he accepted that

if Mr Broad had been found to have committed a forgery within Collins J's proceedings that would have been capable of going to his credibility, which credibility seems to have been a material basis of Collins J's decision on the misconduct point. He did say that the part of Collins J's judgment on whether the restrained property represented the proceeds of crime was separate, and that there was an estoppel in relation to that, but he would still have to deal with the bare allegation that the section 89 proceedings, in which that point was decided, were premised on there being an outstanding warrant. He also sought to say that, on analysis, the material relied on by Mr Bhandal for saying that there was a forgery was weak and had been, or could be, explained away in manner inconsistent with forgery, but he accepted that only went to discretion (whatever that might mean in this context) and did not seek to challenge the evidence in a manner which he might have done had this been a summary judgment application.

66. Like Judge Jarman, I shall not embark on a consideration of the merits of the forgery allegation. While there are weaknesses in the case, it cannot be dismissed at this stage as being too weak to survive an attack on the merits, or so weak as somehow to affect decisions that I have to make. It is, for present purposes, an arguable case. That does not, of course, pre-judge the procedural abuse arguments that Mr Kent seeks to run.

67. Mr Kent's substantive attack on the present proceedings is more based on the procedural history of the evolution of the forgery case, the extent to which it is an impermissible collateral attack on prior decisions and the extent to which it has been raised, or not raised, or dealt with by the courts.

68. Principles of finality in litigation, reflected in the doctrines of estoppel (issue estoppel, cause of action estoppel and the rule in *Henderson v Henderson)* are well established. They are also reflected in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 259 which said this of collateral attacks:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made." (page 541B, per Lord Diplock)

69. However, the lines of authority dealing with collateral attacks and estoppel give way to the impact of fraud when it is said (and established) that a judgment or order has been

obtained by fraud. It is no answer to an action to set aside a judgment said to have been procured by fraud that it is a collateral attack on that previous decision. In one sense it is not, because the action is not an attempt to re-litigate issues which have already been decided as such because the causes of action are different, as pointed out by Lord Sumption in *Thakar* at paragraph 61, in which he pointed out that estoppels arising from the previous action are of no relevance to the action to set aside. However, insofar as it might otherwise be viewed as a collateral attack, it is one which the law allows because of the significance of the fraud and the policy reasons which should prevent a party from using deceit together with court proceedings in order to procure an advantage. At Lord Kerr said in *Thakar*:

> " 52. Newey J found the reasoning in the Australian and Canadian cases compelling. I also. The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice. Quite apart from this, the defrauder, in obtaining a judgment, has perpetrated a deception not only on their opponent and the court but on the rule of law. Newey J put it well when he said, at para 37 of his judgment:
>
> > 'Supposing that a party to a case in which judgment had been given against him could show that his opponent had obtained the judgment entirely on the strength of, say, concocted documentation and perjured evidence, it would strike me as wrong if he could not challenge the judgment even if the fraud could reasonably have been discovered. Were it impossible to impugn the judgment, the winner could presumably have been sent to prison for his fraudulent conduct and yet able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud.'
>
> 53 . I agree with all of that. It appears to me that the policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming."

70. So the extent to which the second action may be thought to be a collateral attack on findings in the first (the impeached) decision is irrelevant. What remains relevant, however, is the extent to which the present action is somehow a relevant collateral attack on the decision of HHJ Jarman, which said nothing about whether there was a fraud but said much about whether it was right to allow the allegations to be raised again in the particular procedural context in which the allegations were raised. That makes it closer to the sort of decision which it might be said is being collaterally attacked.

71. As already pointed out, the present action arises out of the following elements:

(a) The decision of Master Moncaster was procured by fraud relating to the pretence of an existing warrant.

(b) The decision of Collins J was procured by fraud because the pretence that there was a pre-existing warrant brought about the section 89 proceedings which were predicated on the existence of such a warrant. It was also procured by fraud in that the dishonesty of Mr Broad was not penetrated and his credibility was wrongly accepted.

(c) The decision of HHJ Jarman was procured by fraud, or should be so treated, because it flowed from the previous decisions (and particularly that of Collins J) which were procured by fraud.

72. For the reasons given above, the present action cannot, per se, be properly viewed as a collateral attack on Master Moncaster's decision, for the reasons just given. It is no more a collateral attack on that decision than was the second action in *Thakhar* or any other action in which an earlier action is sought to be impeached for fraud. By the same token, there is no impermissible collateral attack on the decision of Collins J because a fraud action such as the present is permissible, and not a collateral attack, for reasons given above.

73. So if Mr Kent has a collateral attack the point has to be directed at the decision of HHJ Jarman. He did not decide an issue to which the fraud went directly. He decided an issue going to whether the fraud should be allowed to be raised in further proceedings. That is a point which might be closer to being collaterally attacked in a further set of proceedings which seek to raise the fraud again (the present proceedings). If what that judge decided was in effect that no more claims at all could be brought on the basis of the forgery and fraud (or at least none in litigation of which the present case is an example) then it can be said that the present action is an abuse as being a collateral attack on that decision, or otherwise impermissibly inconsistent with it. If he did not go that far then it cannot be relied on by Mr Kent as being a decision which stands in the way of the present action. If it does not stand in the way of it then the present action can be run, complaining about fraud in relation to the decision of the Master and Collins J, with a consequential attack on HHJ Jarman's decision not to allow the revival of the proceedings.

74. So the crucial question becomes whether the present proceedings are an abuse as a collateral attack on the decision of HH Jarman about the impermissibility of Mr Bhandal raising the fraud/forgery allegations. That depends on what he actually decided. He decided that Mr Bhandal knew he had a potential forgery attack which would have been relevant to the section 89 proceedings and elected not to pursue it. As a result he found it would be oppressive and an abuse for him to seek to raise it in revived Chancery proceedings. His reasoning would have applied to separate proceedings in the same form as the proposed revived Chancery proceedings. That was the all-important legal context of his decision.

75. The question of abuse of the kind primarily alleged by Mr Kent therefore comes down to considering whether what HH Jarman decided was the same point as would apply in an action to set aside a judgment for fraud. That involves deciding whether his election point is the same point as would apply in a fraud action. If it was, then the present action would be a collateral attack on that decision. If it was not then the present action is not such a collateral attack.

76. Looking in more detail at Judge Jarman's decision, it becomes apparent that he reached his decision on abuse by treating Mr Bhandal as some sort of collateral attack on previous decisions. He disallowed the fraud attack on the footing that the point could have been raised earlier, that Mr Bhandal elected not to raise it but to pursue his application on the footing that there was a warrant, and that "The fresh evidence does not entirely change the aspect of the case.". That is a phrase which emanates from a leading case on collateral attacks in second actions - *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801 at p 814. It tends to confirm that what Judge Jarman was dealing with was collateral attacks in second actions, and that is the context in which Mr Kent quoted the phrase (without its source) in paragraph 13 of his skeleton argument before Judge Jarman. It is also reflected in the judge's recording counsel's acknowledgment that what was being done was an attempt do something that was a collateral attack on a previous decision but that that should be permitted because of the exceptional circumstances of that case.

77. The two types of action (one seeking the same relief as sought before on fresh material, and the other seeking to set aside for fraud) are not the same. This was pointed out by Lord Kerr in Takhar. In considering *Phosphate*, he observed:

> " 35. The contrast with the present case is immediately obvious. This is not an instance of the appellant seeking to adduce evidence of facts "going in the same direction" as facts previously stated, because Mrs Takhar had not asserted that the Krishans had been guilty of fraud, merely that she had no recollection of having signed the profit share agreement. The

> relief that she seeks now is quite different from that which she had earlier claimed. Previously, she sought to avoid the effect of the agreement because of undue influence and unconscionability on the part of the Krishans. Now she claims that the agreement on which they rely was, in its written form, a forgery.
>
> 36. Now, it is true that Earl Cairns had also said in the *Phosphate Sewage* case, at p 814, that "the only way in which [new evidence] could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before." But the essential context of this observation is set by the earlier passage quoted above. It is where precisely the same relief as had previously been claimed is sought again. In my view, it is not appropriate to lift the requirement of reasonable diligence out of the context in which it appears and to import it into a different scenario, namely, where a changed basis for success for the appellant is advanced."

78. Since they are not equivalent legal situations, it does not follow that the concepts and operation of any doctrine of election necessarily apply straight from one to the other. That can be illustrated from one of the steps in the present litigation. Longmore LJ held that the due diligence principle barred Mr Bhandal from raising the forgery/fraud allegations via fresh evidence in an appeal; but *Takhar* makes it clear that an absence of due diligence in discovering or raising fraud is not a defence in an action to set aside a decision for fraud. So due diligence applied to one type of attempt to re-run an issue, but not to another. One has to consider carefully whether principles applicable to one type of action or procedure should be transferred in the same form to set aside actions.

79. Accordingly one cannot simply and automatically take principles of election applicable to Judge Jarman's case and apply them to the present matter. That is what Mr Kent's submissions would have me do. He would have me say that Judge Jarman has decided that Mr Bhandal cannot now challenge the Collins J decision (or Master Moncaster's decision) on the basis of fraud because HHJ Jarman has already decided that he cannot because of his election. As he put it, Mr Bhandal can only have one go at challenging for fraud, and he had it and failed in front of Judge Jarman. That is an end of the matter.

80. Those submissions and their conclusion would be correct if it could be demonstrated that the "election" made by Mr Bhandal and found by Judge Jarman would also bar the present claim. That has not been demonstrated. Indeed, there was no attempt to demonstrate before me the extent to which an election can arise in such a way as to bar a set aside for fraud action, and to apply those principles to the facts of the present case. The point is not dealt with in *Takhar* or in any case cited to me, and the judgments in

Takhar demonstrate the tenderness with which the courts should approach fraud actions and the understanding which will be extended to victims of fraud. That is demonstrated by the decision itself (absence of due diligence is no bar).

81. There are some limits but in *Takhar* the court approached possible exceptions to their principle with some care. After Lord Kerr had ruled against a due diligence requirement in relation to the uncovering of the fraud he considered some potential limits, but was careful not to embark on a consideration of them:

> "55. Two qualifications to that general conclusion should be made. Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application. Since that question does not arise in the present appeal, I do not express any final view on it. The second relates to the possibility that, in some circumstances, a deliberate decision may have been taken not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected. If that could be established, again, I believe that a discretion whether to allow an application to set aside the judgment would be appropriate but, once more, I express no final view on the question. In Mrs Takhar's case, she did suspect that there may have been fraud but it is clear that she did not make a conscious decision not to investigate it. To the contrary, she sought permission to engage an expert but, as already explained, this application was refused."

Lord Sumption addressed the point more firmly. He said:

> "63 .,.. The reason is that proceedings of this kind are abusive only where the point at issue and the evidence deployed in support of it not only could have been raised in the earlier proceedings but should have been: see *Johnson v Gore-Wood & Co*, at p 31 (Lord Bingham of Cornhill) and *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*, para 22 (Lord Sumption). As Lord Bingham observed in the former case, it is "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive." The "should" in this formulation refers to something which the law would expect a reasonable person to do in his own interest and in that of the efficient conduct of litigation. However, the basis on which the law unmakes transactions, including judgments, which have been procured by fraud is that a reasonable person is entitled to

> assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are. That is why it is not a defence to an action in deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in: *Central Railway Company of Venezuela v Kisch* (1867) LR 2 HL 99, 120 (Lord Chelmsford); *Redgrave v Hurd* (1881) 20 Ch D 1, 13-17 (Jessell MR). It follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he "should" have raised it."

82. A consideration of the scope of any election which might have been made involves venturing into territory which Lord Kerr did not actually traverse. An election of the kind said to have been made in the present case is closer to the limit envisaged by Lord Sumption, but it will obviously be a fact-sensitive issue. Furthermore, it will be a fact-sensitive issue against the background of a fraud, with the additional care and consideration which that involves.

83. With those points in mind I come back to the decision of HHJ Jarman. I have already observed that he was considering an election in a different procedural context which did not necessarily attract the same considerations as arise in considering whether an impeaching action such as this is an abuse. It would therefore be wrong to decide that the election which he found operated for all purposes and in particular for the purposes of assessing an abuse in the present action. For that decision to be made it would have to be established that the election operated without more on the same principles, and it has not been. For my part I am confident that as a matter of principle a claimant could be held to have conducted himself/herself in such a way as to be held to have elected not to pursue a fraud claim so as bar a later impeachment action, whether the conclusion is framed in terms of an election or in terms of the sort of estoppel suggested by Lord Sumption; but that would have to be properly established in the light of the particular considerations applying to fraud actions which are referred to by their Lordships in *Takhar*.

84. HHJ Jarman's decision has not approached the matter from the point of view an action to set aside, or necessarily applied the considerations which would arise in that context. He was deciding something different. Therefore it cannot be established that the impermissibility of taking the fraud point in set aside action has been decided by his decision, which means the point is still open. While it remains open it remains possible for Mr Bhandal to challenge Master Moncaster's and Collins J's decisions without being accused of an impermissible collateral attack on anything. For the sake of completeness I should add that the decision of David Richards LJ on the permission to appeal application adds nothing to Mr Kent's case on this point. It was merely confirming the correctness of Judge Jarman's decision in its own procedural context.

A possible preliminary issue

85. Having said that, I should add that there really does seem to me to be something in the election point which underpins Mr Kent's case. Without in any way pre-judging it, it is reasonably apparent that most of the relevant facts said to justify the present pleading (including the identity of the magistrate) were known to Mr Bhandal before the Collins J trial, and probably before he started his section 89 proceedings. Before the trial before Collins J Mr Bhandal had material which he said pointed to the non-existence of a warrant and in his witness statement he expressed himself to be "concerned about the authenticity of the documents themselves (the information as laid by Mr Broad and the warrant of arrest obtained by Mr Broad)" (witness statement paragraph 81). I have already quoted paragraph 113 in which Mr Bhandal indicates an awareness of the fact that a warrant was necessary for section 89 proceedings. His witness statement indicates that he had at that time got a copy of the warrant showing the name of the magistrate (contrary to a later statement that the name was only discovered later, made in order to explain why the magistrate was not contacted until after the Collins J trial) and was aware of what were said to be oddities on emendations and additions and the identity of the Magistrate's Court out of which the warrant was issued. He raised copious other points.

86. In his witness statement served in connection with the present application Mr Bhandal pointed out that he tried to raise the fact that the warrant might be a forgery but was prevented from adducing his evidence by the decision of King J. In those circumstances, he said, he decided not to pursue the forgery allegations because he was advised that suspicion was not enough and he was concerned that he had not got enough disclosure from HMRC to enable him to pursue it to the required standard. He was also hopeful that he would be able to explore the issue at the trial but was prevented from doing so by submissions made by Mr Kent at the outset. He decided to pursue the allegation when "by chance" he discovered the name of the JP involved and a private investigator tracked her down and got her statement.

87. This seems to me to be good material capable of supporting a clear allegation (if HMRC and Mr Broad seek to make it clearly enough) that there is the sort of abuse of process that Lord Sumption referred to, or an extension of the instances left open by Lord Kerr. In other terms, it might be said that there was some sort of election. Knowing that he had an apparently arguable case on fraud, and with (it might be said, and is probably said by Mr Kent) almost the same material as is now relied on in the present action (any subsequently discovered supporting material might be said not to add much more for these purposes) he chose to persist in a claim which was inconsistent with his present stance on the validity of the warrant and which actually pleads the warrant. However, I cannot decide the present application on that basis because it was not sufficiently articulated as being made on that basis and it was therefore not properly dealt with either in terms of evidence (though Mr Bhandal's witness statement goes a long way in that area) or submission. As I have already pointed out, when the application was made its basis was not really articulated at all either in the application notice or in the defendants' supporting evidence. Mr Kent's skeleton argument did not fully articulate

or address this point either. It, and his submissions, were more focused on abuse arguments based on collateral attack.

88. Although I have not heard submissions on the point, it would seem to me that prima facie this issue would benefit from being determined as a preliminary issue, if the defendants wished to pursue the point. It would prima facie be undesirable to have a trial in which both that point and the actual fraud were in issue. If the parties agreed with that I would be minded to make directions for the hearing of a preliminary issue on or after the consequentials hearing which will have to follow this judgment. If there is a dispute about its appropriateness I will hear it and, if it remains appropriate to do so after argument, make those directions then. However, what I will not do on this application is decide that the present proceedings are an abuse as being a collateral or otherwise impermissible attack on a prior decision. The material has not been presented which enables me to do.

Conclusion

89. I shall therefore make no order on the present application, save that I shall order that the pleading of "nullity" shall be struck out as legally and conceptually unsustainable. So far as appropriate, however, I would be minded to give directions for the trial of a preliminary issue on whether the facts surrounding the commencement and pursuit of the section 89 proceedings make the current proceedings an abuse on the basis of an election or some other form of complete answer to these proceedings.