Neutral Citation Number: [2020] EWHC 1222 (QB)

Case No: QB/2018/0333

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE LEWES COUNTY COURT (HHJ COLTART)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2020

Before:

MR JUSTICE LINDEN

- -

Between:

	MS FRANCESCA ELU	**Claimant/ Respondent**
	- and -	
	FLOORWEALD LIMITED	**Defendant/ Appellant**

- -
- -

Mr George Mallet (instructed by **Girlings Solicitors**) for the Claimant
Mr Philip Jones (instructed by **Mackrell**) for the Defendant

Hearing dates: 24 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 15th May 2020 at 10.30am.

MR JUSTICE LINDEN

....

The Honourable Mr Justice Linden:

INTRODUCTION.

1. Ms Elu, who I will refer to as "the claimant", is the former owner of the leasehold on a flat at 8 Burch Road, Gravesend. From 8 August 2014 Floorweald Limited, to which I will refer as "the defendant", was the owner of the freehold of 8 Burch Road and owed the claimant obligations to keep the building in a reasonable state of repair.

2. On 14 August 2015 and on 27 July 2016, having sold the leasehold in an auction on 22 July 2016, the claimant brought claims in the County Court alleging breaches of its repair obligations by the defendant ("the Claim"). Following a trial before HHJ Coltart at Lewes County Court on 19 and 20 November 2018, she was awarded £62,834.25 plus interest plus costs on an indemnity basis by Order dated 20 November 2018 ("the Order").

3. In its Notice of Appeal, dated 11 December 2018, the defendant challenges the Order on various bases. However, at the heart of its appeal is an allegation that the Claim was dishonest in that it was based on false evidence given by the claimant and on forged or doctored documents, and that the Order was therefore procured by fraud ("the fraud issue"). Accordingly, pursuant the principles set out by the Court of Appeal in *Noble v Owens* [2010] EWCA Civ 224; [2010] 3 All ER 830, on 21 May 2019 Andrew Baker J ordered that the appeal be stayed whilst the fraud issue is tried as a preliminary issue in the Queen's Bench Division. To this end, he required the defendant to set out its case on the fraud issue in a statement of case as if it was a fresh claim to set aside the Order. Particulars of the fraud issue ("the Statement of Case") were therefore served by the defendant on 14 June 2019.

4. The defendant's allegations of fraud are and always have been denied by the claimant, and I am not required to decide this issue one way or the other. By application notice dated 21 November 2019 ("the Application") she seeks to strike out the Statement of Case on the basis that it raises matters which are res judicata and/or is an abuse of process and/or pursuant to CPR3.4(2)(b). Her position is that the allegations of fraud which are made in the Statement of Case were made in the course of the proceedings before the County Court and were either abandoned by the defendant at or before trial, or adjudicated in her favour in the course of the interlocutory proceedings and/or by HHJ Coltart at trial. She also says that the fraud issue is not based on fresh evidence: virtually all of the evidence on which the defendant wishes to rely was within its knowledge at the time of trial, albeit the defendant had not been permitted to deploy all of that evidence because it had failed to comply with the court's directions as to exchange of witness statements and had then failed to obtain relief against sanctions.

5. For its part, the defendant denies res judicata on the basis, it contends, that the issues which were adjudicated in the course of the County Court proceedings were not the same as those which are pleaded in the Statement of Case. Although the Claim was disputed on the basis that the claimant had not actually incurred the losses for which she claimed to be compensated, and the authenticity of the documents which are said to be fraudulent was challenged, the defendant did not plead a positive case of fraud. Nor, the defendant contends on the basis of the decision of the Supreme Court in

Takhar v Gracefield Developments Limited [2019] UKSC 13; [2019] 2 WLR 984, is the Statement of Case abusive given that the allegation is that an order of the court was obtained by fraud and "fraud unravels all". Although much of the evidence on which the defendant seeks to rely was in its possession at the time of trial, the defendant argues that that evidence is fresh evidence in the sense that it was not deployed at trial.

THE HEARING BEFORE ME

6. I received helpful skeleton arguments together with electronic bundles of evidence and authorities for which I am grateful. I also heard argument using Skype for Business. The hearing lasted a day. It seemed to me that an important issue in this case is as to what constitutes "fresh" or "new" evidence for present purposes and I gave counsel the opportunity to make written submissions on this issue if they wished, as well as on the effect of the case of the decision of the House of Lords in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801 to which I refer below. They both took this opportunity and I have read their further written submissions carefully before coming to my decision. I am also grateful for the supplemental electronic bundle of authorities which Mr Jones provided.

THE RESULT

7. For the reasons given below, I allow the Application.

THE PROCEEDINGS IN THE COUNTY COURT

8. In the light of the parties' arguments in the Application it is necessary to summarise the proceedings before the County Court. I will do so with particular reference to the questions whether the issue of fraud was raised by the defendant and/or determined by the Court and whether/when the evidence on which the defendant seeks to rely in relation to the fraud issue was available to it prior to trial.

Outline of the Claim in the County Court and the relevance to that Claim of the oral and documentary evidence which are disputed in the Statement of Case

9. The claimant's case was set out in an Amended Particulars of Claim, dated 7 July 2017, which was drafted by counsel. This dealt with both of her claims as these had, by now, been consolidated. The statement of truth was signed by the claimant.

10. In broad summary the claimant claimed that various items of disrepair of 8 Burch Road, for which the defendant was liable, had led to her flat being very damp. Paragraph 18 of the Amended Particulars of Claim pleaded that:

> *"damage to the interior of the Claimant's Flat has occurred in the form of water ingress from the exterior, crumbling of sections of the interior wall, mould, condensation and problems with the internal walls, leading to them being constantly damp, damaging the Claimant's fixtures and fittings in the affected areas".*

11. The claimant claimed damages under three heads, which were pleaded at paragraphs 19(a)-(c) of the Amended Particulars of Claim.

Loss of rental income in the sum of £15,306 (paragraph 19(a))

12. This was claimed on the basis that the poor state of the building meant that the claimant's flat could not be rented out between March 2015 and 22 July 2016, when it was sold. At trial, the claimant gave evidence as to the state of the flat. As part of the documentary evidence which, she said, corroborated her evidence she relied on a check-out inventory dated 8 March 2015 ("the check-out inventory") which was signed by the claimant and outgoing tenants of the flat, and which described the condition of the flat as *"poor"* and referred to it being in poor decorative order and with significant maintenance and repair issues.

Repair and redecoration costs in the sum of £25,842.73 (paragraph 19(b))

13. This claim was made on the basis that, because of the damage caused to her flat by the damp, the claimant had had to redecorate and repair the interior of the flat. At trial, her evidence was that the works included repairs carried out by a Mr McDonnell on seven occasions between February 2015 and May 2016. The works included re-plastering, decorating, and replacing kitchen base units, carpets and light fittings. She produced seven invoices, each of which also included an acknowledgement of payment ("the McDonnell invoices"), as well as bank statements issued by Santander ("the Santander bank statements"), to support her evidence that the work had been done and that the sums claimed had been paid by her. She also relied on an email from Mr McDonnell, dated 6 October 2015, which referred to some of the works ("the 6 October email"), as further evidence that those works had been carried out.

14. At trial, there was also an open letter from a Mr Babatunde, dated 8 November 2018 ("the Babatunde letter"), which was not in the trial bundle but which HHJ Coltart asked to see when it was mentioned in the course of cross examination. Mr Babatunde was one of the new lessees of the flat and the letter gave evidence in support of the claimant's evidence that the kitchen units had been replaced.

15. The claimant also claimed that she had had to install a new boiler and an extractor fan in late 2014. At trial, she relied on two invoices from Fleetways Plumbing and Engineering Limited, dated 4 and 21 December 2014 ("the Fleetways invoices"), in support of her evidence that this work had been done and that she had paid £1,770 for it.

Loss on resale of leasehold in the sum of £21, 685.52 (paragraph 19(c)).

16. The claimant's case was that she had had to sell the property at auction to mitigate her losses. The sum claimed was said to be the difference between the price which the flat fetched when it was sold at auction on 22 July 2016 and a price which the claimant had previously been offered by a below market value property company.

17. The claimant attached a schedule of loss to the Amended Particulars of Claim. which itemised her claims for redecoration and repair costs and for loss of rental income ("the Consolidated Table of Costs").

The defendant's pleaded case

18. The defendant's pleaded case, as set out in its Amended Defence dated 16 August 2017, was signed by a Mr Tony Fischer who was one of the two directors of the defendant and whose brief was to deal with all property and legal matters, although he had no formal legal qualifications. As part of this brief he was tasked by Mr Vladimir Bermant, a fellow director and the owner of the defendant, with conducting the defence of the Claim.

19. The Amended Defence denied breach of the relevant covenants to keep the building in a reasonable state of repair. It also disputed the claimant's claims as to the damage which had been caused, the consequences of that damage and the losses which she had incurred.

    i) The plea to paragraph 18 of the Amended Particulars of Claim was that it was *"not admitted and denied by the Defendant and the Claimant is put to strict proof"*.

    ii) The plea to all three heads of claim under paragraph 19 of the Amended Particulars of Claim was that they were *"denied and not admitted by the Defendant and the Claimant is put to strict proof"*.

    iii) The plea to paragraph 19(a) was essentially that if the claimant had carried out the repair and redecoration works which she alleged then the flat ought to have been rentable.

    iv) The plea to paragraph 19(b) made points based on Mr Fischer's experience of plastering, and raised questions which cast doubt on whether the works which formed the basis of the claim for repair and redecoration costs could have been carried out, and/or had been carried out whilst the defendant was the owner of the freehold (i.e. after 8 August 2014), as the claimant alleged. A key theme was to ask why the claimant, as an astute businesswoman, would have had the flat plastered five times, and paid the sums claimed, in relation to a flat which she alleged was unrentable. This section of the Amended Defence concluded:

        "For the reasons given above, the Consolidated Table of Costs for £25,842.73 is denied and not admitted and the Defendant challenges the <u>*authenticity*</u> *of these items."* (emphasis added)

    v) Paragraph 19(c) was *"denied and not admitted"* amongst other things on the basis that, as the claimant alleged that she had had plastering work carried out in March and May 2016, the property ought to have been *"nicely presented for sale"*. Other points were taken, including that the reason for any difficulty in selling her flat was a history of one of the other flats in the building being used as a brothel and associated anti-social behaviour by customers of the brothel.

20. There was also a counterclaim for arrears of service charges in the sum of £1881.06.

Employment Judge Russell's directions

21. I note that, at the outset of the litigation, judgment in default was entered as the defendant did not enter defences. This was then set aside on application by the defendant.

22. The defendant then applied to strike out the Claim and this application was dismissed by DDJ Rahman on 24 March 2017. He listed the matter for a case management hearing on 15 June 2017.

23. On 15 June 2017 Employment Judge Russell, sitting at Dartford County Court, gave directions for trial. These included:

    i) Setting 3 November 2017 as the date for exchange of witness statements. The directions stated in clear terms that:

       "a) ....all parties must serve on each other copies of the signed statements of...all witnesses on whom they intend to rely...

       b) Oral evidence will not be permitted at trial from a witness whose statement has not been served in accordance with this order or has been served late, except with permission from the Court." (emphasis added)

    ii) Standard directions for a Single Joint Expert ("SJE") to address the issues between the parties. These included whether the state of repair of the building was capable of causing the defects to the interior which the claimant alleged, whether the work alleged by the claimant had been undertaken, the need for and costs of work to the flat and whether that work was reasonably undertaken, and the effect of the defects in the flat on the ability to rent it out and on its value at the date of sale.

    iii) A direction that the trial would take place in a window between 9 and 20 April 2018 with a time estimate of two days.

The development of the defendant's views on the bona fides of the Claim

24. According to Mr Fischer's witness statement dated 9 October 2018, which was submitted in support of its application for relief of sanctions (which I deal with below), he had suspicions that the Claim was dishonest from the outset of the litigation. When he received the Amended Particulars of Claim in July 2017 he then *"came to the conclusion that this was a dishonest claim"*. For reasons which Mr Fischer explained, he did not consider that it was plausible that the alleged repair and redecoration work would be carried out unless and until any problems with dampness had been addressed. Nor did he think it was plausible that the claimant had incurred the expense which she said she had incurred if the flat was in as poor a condition as she alleged, and therefore unrentable. Nor did he think it was plausible that she would incur these costs without seeking reimbursement as she went along, which he said she had not done. He also considered that there were inconsistencies in the claimant's statements of case as to her expenditure on these matters. As noted above, the Amended Defence served in mid-August 2017 therefore challenged the *'authenticity'* of these items.

25. After making further inquiries, Mr Fischer also concluded that the claimant was in arrears with her service charges and had *"forged"* a schedule which showed that she was up to date and which she had provided to the incoming leaseholder, Mr Babatunde. As noted above, the defendant therefore pleaded a counterclaim for arrears of service charges, albeit this was subsequently abandoned.

26. The claimant's disclosure included the McDonnell invoices. Having looked at them Mr Fischer considered them to be *"suspect"* for reasons which he explained in his 9 October witness statement but essentially because of alleged peculiarities on the face of the invoices themselves. Mr Fischer concluded that he had enough evidence to *"lay a complaint to the Police"*. His witness statement listed the offences which he had in mind but essentially he believed that she had attempted to obtain money by deception and to pervert the course of justice by making a fraudulent claim and by forging documents to support that claim. He therefore corresponded with, and met, with a DC Spencer *"around mid-September"* and he provided the police officer *"with a file of my evidence"*.

27. Mr Fischer also sought out Mr McDonnell and obtained a witness statement from him, which is dated 19 October 2017. According to that witness statement, Mr Fischer met with on Mr McDonnell on 12 and 26 September 2017. At these meetings Mr McDonnell told Mr Fischer that he had only done one piece of work for the claimant and that had been in February 2014, before the defendant had acquired the freehold of 8 Burch Road. Mr Fischer provided Mr McDonnell with copies of the McDonnell invoices and the 6 October email, and Mr McDonnell cast doubt on their authenticity. He also denied that he had been paid £25,000 by her and was concerned that he would be in trouble with HMRC for failing to declare these alleged payments.

28. Mr McDonnell's witness statement exhibited all seven McDonnell invoices and said in terms that they were forgeries. It also exhibited two invoices for the work which he accepted he had done in February 2014 and he stated in terms that the 6 October email was a forgery. He said that he remembered the email but it had not stated that he had done work on the flat on four occasions, as the claimant's version did, because he had only carried out work on one occasion, albeit over a period of six days.

<u>The defendant decides not to exchange witness statements on 3 November 2017 as directed</u>

29. According to Mr Fischer's witness statement he also consulted counsel at around this time in relation to his concerns about the claimant's disclosure. In particular, he wished to inspect certain documents personally and sought unredacted copies of others. He said he also considered that the SJE should not be instructed until these concerns had been addressed, as the documentation was relevant to the issues which the SJE was to address and needed to be provided to the SJE. Mr Fischer said he was advised to make an application to the court and not to instruct the SJE until the disclosure issues had been resolved. His witness statement does not say whether he sought counsel's advice as to whether to serve Mr McDonnell's witness statement but, by letter dated 24 October 2017, Mr Fischer notified the claimant's solicitors that he would not exchange witness statements "by 3 November 2017" given the issues relating to disclosure.

30. Instead of complying with EJ Russell's directions, pursuant to the advice which Mr Fischer apparently received, an application was made on 3 November 2017 which appears to have been for inspection. The application and Mr Fischer's witness statement in support of that application were not provided to me but I have been provided with a copy of the claimant's second witness statement, dated 15 November 2017. From this statement, I gather that Mr Fischer's witness statement, which was dated 5 November 2017, specifically stated that he had met with Mr McDonnell who denied that he had carried out the work. Mr Fischer apparently exhibited the two invoices for the work which Mr McDonnell accepted he had carried out and contrasted their format with the format of the seven invoices relied on by the claimant. He apparently also stated that he believed that the McDonnell invoices were forgeries.

31. The claimant's second witness statement noted that Mr Fischer was making *"an extremely serious allegation"* and said that she categorically refuted that allegation. She also exhibited the Santander bank statements to prove that the majority of her payments had been made to Mr McDonnell by bank transfer and she gave evidence that the remainder was paid in cash at his request. Furthermore, she exhibited and relied on the 6 October 2015 email.

<u>The defendant's decisions as to deployment of its allegation of fraud and the evidence of Mr McDonnell</u>

32. At this stage, the defendant was clearly in a position to plead a positive case of fraud, but it did not do so at any stage thereafter although, as noted above, it had pleaded that it denied the claimant's case and that it challenged the *"authenticity"* of the relevant items on the claimant's schedule of loss. As will be seen below, the defendant did however repeat its allegation that the Claim was fraudulent and made applications for orders on the basis of this allegation. It also declined to accept the view of the court, which was expressed more than once, that it ought to plead its allegations of fraud if it wanted orders to be made on the basis that fraud was alleged and if it wished to pursue this allegation at trial.

33. The evidence as to the reasons why the defendant did not serve the McDonnell witness in accordance with EJ Russell's directions or, at least, much sooner than it did, is unimpressive. Mr Fischer's 9 October 2018 witness statement in support of the application for relief against sanctions does not provide any specific explanation for the decision not to exchange although, as noted above, his letter of 24 October 2017 relied on the outstanding disclosure issues. Perhaps making a virtue of necessity Mr Bermant, whose witness statement was served in response to the Application, is very critical of Mr Fischer's conduct of the litigation. He says that Mr Fischer hoped to unearth additional evidence of fraud through the defendant's application for inspection. In the light of previous experience of the claimant withdrawing a witness statement when it was alleged to have been fabricated, Mr Bermant and Mr Fischer did not want to show their hand until the claimant had committed herself to a position from which she could not retreat. However, I note that the claimant had committed herself to her case and Mr Fischer apparently did reveal that he had spoken to Mr McDonnell in his witness statement dated 5 November 2017, to which Mr Bermant makes no reference in giving his account of the litigation.

34. At all events, the defendant's evidence is that the failure to exchange witness statements was a deliberate decision not to comply with the directions of the court, which was taken for tactical reasons. It wanted to keep the McDonnell witness statement up its sleeve. No evidence has been given as to why no application to re-amend the Defence was made, notwithstanding that advice was being taken from counsel from early November 2017 at the latest. Nor was Mr Jones able to provide any explanation when I asked him during the course of the hearing. As will be seen below, however, Mr Harris, who was counsel for the defendant at the hearings I will describe and at trial, maintained that there was no obligation to plead a more explicit case when this point was put to him, and it appears that the defendant decided not to do so despite the views of the court and despite it being made clear that this would potentially hamper its ability to develop and deploy its case.

The defendant's application for a bankers' books order and for inspection of the McDonnell invoices

35. In the light of the claimant's second witness statement, on 27 January 2018 the defendant made applications for an order that Santander provide its records and for the originals of the seven McDonnell invoices. Mr Fisher apparently provided a witness statement in support of the application which exhibited a handwritten note on a compliment slip, apparently written by a Santander employee at Mr Fischer's request when he made an unannounced visit to a branch of the bank. This apparently said that the statements relied on by the claimant were not bona fide Santander credit card statements.

36. As a result of the defendant's refusal to comply with EJ Russell's directions in relation to the instruction of the SJE, the trial dates in April 2018 were lost. On 20 June 2018 the defendant's applications, as well as an application by the claimant to resolve the issues relating to the instruction of the SJE, were considered at a hearing before DDJ Maughan at which both parties were represented by counsel. The defendant was represented by Mr Harris who made quite clear that it was the defendant's case that the Santander bank statements and the McDonnell invoices were forged. Counsel for the claimant, Mr Warboys', bases for resisting the defendant's applications included arguments that there was no pleaded fraud case and nor was there any evidence of fraud.

37. The defendant's applications were dismissed on the grounds that there was no, or no sufficient, evidence of forgery. The Deputy District Judge also gave directions which required the defendant to cooperate in the instruction of the SJE. It did not do so, and these directions therefore subsequently had to be reinforced by an Unless Order dated 11 July 2018.

38. DDJ Maughan held that the handwritten note relied on by Mr Fischer was wholly unreliable. This was not just because of the form which the evidence took but also because the note said that the statements were not bona fide credit card statements whereas the claimant had not claimed that the documents were credit card statements. She said that they were her current account statements.

39. The witness statement of Mr McDonnell was before the Court but it appears from the transcript of the hearing that it was produced by the defendant on the day of the

hearing. Indeed, Mr Harris said that he had seen it for the first time that day and that DDJ Maughan might therefore disregard it. The Deputy District Judge specifically asked Mr Harris why the McDonnell witness statement had not been served before now given that it was dated 19 October 2017, and Mr Harris said that he did not know although he understood that Mr McDonnell was a very reluctant witness and he speculated that this may be the reason.

40. The Deputy District Judge appears to have taken the view that the admissibility of the McDonnell witness statement would need to be resolved. There would also need to be oral evidence given the conflict between the evidence of the claimant and the evidence of Mr McDonnell, and the resolution of this conflict should take place at trial rather than by way of a preliminary hearing. She said that there would have to be an application for relief against sanctions in relation to the McDonnell witness statement and she specifically directed that if the defendant wished to rely on evidence of fact it would need to make such an application. That application was not made until 9 October 2018, as I explain below. It is not clear why it was not made immediately.

The paper determination of the defendant's application for permission to appeal

41. The defendant's application for permission to appeal the decision of DDJ Maughan was refused on the papers by HHJ Simpkiss on 2 August 2018. The Judge stated that the evidence of forgery of the invoices was vague and of no weight, and that there was *"no direct evidence from the plasterer"*, apparently on the basis that Mr McDonnell's statement was not admissible, as matters stood, but there was evidence from Mr Fischer as to Mr McDonnell's views on the issues.

SJE report of 13 September 2018

42. The SJE, Mr Stimpson, then provided a report dated 13 September 2018. This broadly supported the claimant's case on the issue of the disrepair of the building and the problem of damp but Mr Stimpson's opinions included that most, if not all of "*the hacking off and plastering work, with the associated redecorating was not carried out"* and that *"The prices said to have been paid for the [plastering] work seem to be extortionate."*. He also said that he had inspected the kitchen units and found them to be very old and in a poor condition. He said that, contrary to the claimant's case, he had *"no doubt at all"* that they had not been replaced for many years. He was, however broadly, neutral as to the replacement of the boiler and extractor fan and the carpets.

43. Mr Stimpson said that if the defects alleged by the claimant did occur, and the works alleged by her were carried out, then the flat may well have been unlettable, as she alleged, whilst the works were being carried out. He was also broadly supportive of the claimant's case as to loss of value.

Mr McDonnell's second witness statement, dated 2 October 2018

44. The defendant obtained a further witness statement from Mr McDonnell which is dated 2 October 2018. This dealt in detail with the claimant's evidence in her witness statement of 15 November 2017, by reference to her Santander bank statements, that

she had made various payments to Mr McDonnell. He denied that she had made the payments alleged and exhibited his own bank statements to support his denial.

The Pre-Trial Review on 3 October 2018

45. There was then a Pre-Trial Review before HHJ Simpkiss on 3 October 2018 at which the defendant was again represented by Mr Harris. At this stage, no formal application for relief against sanctions had yet been made despite DDJ Maughan's directions, although it appears that there was an attempt to apply informally at the PTR. The Judge directed that if the defendant intended to make such an application it should do so forthwith by way of a formal application with evidence in support, and the application should be served on the claimant by 10 October 2018. He also gave directions for the trial to be listed in the fortnight after 12 November 2018.

46. The application for relief against sanctions was eventually made on 9 October 2018, as I have noted.

The oral application for permission to appeal the decision of DDJ Maughan

47. On 24 October 2018 there was then an oral application for permission to appeal DDJ Maughan's refusal of a bankers' books order and for inspection of the originals of the McDonnell invoices. This application was dismissed by HHJ Venn, again on the grounds of insufficient evidence of fraud. Again, the defendant was represented by Mr Harris.

48. Unsurprisingly, the Judge was dismissive of the manuscript note of the Santander employee as a basis for alleging forgery of bank statements, particularly as it was addressing credit card rather than bank statements. In relation to Mr McDonnell, who was actually in court, she took the view that his statements were not in evidence until the question of relief against sanctions had been resolved. She suggested to the parties that logically this issue should be addressed before the question of permission to appeal but Mr Harris' position until very shortly before the end of the hearing was that the application for permission to appeal should be dealt with first. He then did a volte face, on instructions, at around 4.15pm but the Judge considered that it was too late to determine the application for relief given that the court building would close shortly, the application was not listed before her and it would require significant time to determine.

49. In the course of the hearing, HHJ Venn said more than once that she would have expected to see a pleaded case, with a statement of truth, which specifically alleged that the claim was dishonest and based on dishonest invoices and forged bank statements:

> *"because that's what you are saying….You are saying that [the claimant] has set about doing this deliberately to mislead the court. Right?...that's your case…That should be pleaded properly with a statement of truth"*.

50. Mr Harris respectfully disagreed that either the principles of pleading or his professional code of conduct required this. He argued that the defence was not based on fraud and that the defendant was doing no more than contesting the amount of damages sought. He maintained that a party did not need to do anything more than

plead that damages were denied which was what the defendant had done, indeed in closing he submitted that there was not even a requirement to plead a denial. He did not suggest, however, that the defendant could not plead its fraud case. As I have noted, it was in a position to do so from when Mr McDonnell signed his first witness statement a year earlier.

The hearing of the application for relief against sanctions

51. The defendant's application for relief against sanctions was then listed for 2 November 2018 before HHJ Simpkiss. The defendant, again represented by Mr Harris, sought permission to rely on both of Mr McDonnell's witness statements. It also relied on Mr Fischer's witness statement of 9 October 2018 which, as noted above, said that Mr McDonnell's evidence would support the defendant's case that the claim was dishonest and based on forged documents. The application was dismissed, with the consequence that the defendant was not permitted to rely on witness evidence at trial. Again, during the hearing there were exchanges between Mr Harris and the Judge about whether his allegations of fraud required to be pleaded, with the Judge suggesting that they did, and Mr Harris submitting that they did not, as the issues of fraud and forgery arose in the context of a dispute as the amount of damages claimed.

52. HHJ Simpkiss noted the decision of the Court of Appeal in *Gentry v Miller* [2016] EWCA Civ 141 that allegations of fraud do not give rise to an exemption from the application of *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] 1 WLR 3926 CA ("*Denton* principles") to applications relief against sanctions, even where those allegations have a reasonable prospect of success. He also cited paragraph 42 of the judgment of Vos LJ (with whom the Lewison and Beatson LJJ agreed):

> **"*42*** *I should not leave this aspect of the case without commenting on what may seem a harsh decision. In my judgment,* Mitchell's *case and* Denton's *case represented a turning point in the need for litigation to be undertaken efficiently and at proportionate cost, and for the rules and orders of the court to be obeyed. Professional litigants are particularly qualified to respect this change and must do so. Allegations of fraud may in some cases excuse an insurer from taking steps to protect itself, but here this insurer missed every opportunity to do so. It admitted liability before satisfying itself that the claim was genuine, perhaps because it mistakenly thought the claim was a small one. That does not excuse the months of delay that then followed. The insurer must in these circumstances face the consequences of its own actions."*

53. Applying the *Denton* principles, the Judge held that the defendant had not shown a good reason for what it admitted was a significant and serious failure to comply with the direction to exchange witness statements. Indeed, Mr Fischer's witness statement did not actually explain why he could not exchange Mr McDonnell's first witness statement on 3 November 2017, nor why no application for an extension of time had been made, nor why the application for relief had been made so late in the day despite the court having pointed out, on 20 June 2018, that one should be made if the defendant was to rely on witness evidence.

54. In relation to the third limb of *Denton*, consideration of *"all the circumstances of the case, so as to enable [the court] to deal justly with the application"* the Judge considered the relevant CPR provisions in relation to Mr Harris' argument that he need not plead fraud because all that his client was doing was putting the claimant to proof "as *to the amount of money claimed"* (see CPR 16.5.4) and that that the expenses which she said she had incurred were genuine. The Judge disagreed*:*

> *"In my judgement, the allegations that are made now as to wholesale forgery of documents, of presenting the Court with a completely false case, bolstering it with manufactured documents, and putting forward what is effectively a fraudulent claim and relying on positive evidence from Mr McDonnell requires a clear pleading. Anything else would deny the Claimant justice under Article 6 and the Court would be at a loss to know what exactly the claim was."*

55. He went on to say:

> *"There is no application to amend the pleadings, and it would not be, in my judgement, open to the Defendant to make a positive case of fraud against the Claimant. The degree to which the Claimant can be cross examined at the trial is a matter for the trial judge, and I will leave over that issue to that stage."*

56. The fact that no positive case of fraud was pleaded was said by the Judge to be a factor which was relevant to the exercise of the court's discretion,

> *"but it is only one factor, and <u>even if the pleading point was not a good one, it seems to me that the overall justice of this matter is one which requires the Court to exclude this evidence</u>. There is no reason why this witness statement could not have been exchanged last November, at the very least, in June. Nor is there any adequate explanation as to why the second witness statement could not been obtained much earlier. If there is, then it has not been articulated."* (emphasis added)

57. Regardless of the pleading point, then, the application for relief against sanctions failed under all three limbs of the *Denton* principles. The Judge concluded that *"there has been a disgraceful lack of engagement by the Defendant in this case and I dismiss the application"*. He also ordered that the defendant pay the claimant's costs of the application on an indemnity basis.

58. The decision of HHJ Simpkiss was not appealed and the matter therefore proceeded to trial.

<u>The defendant's skeleton argument at trial</u>

59. By the time of the trial the defendant had admitted breach of its repair obligations and had abandoned the counterclaim. Causation and quantum on the Claim were, however, in dispute.

60. Mr Harris' skeleton argument for the purposes of the trial stated that:

> *"The Defendants do not admit that there has been any significant water penetration through the roof and in particular do not accept that the Claimant… has sustained <u>any</u> damage".* (emphasis added)

61. Under the heading *"The Defence Case"* the skeleton went on to say that the claimant's evidence was *"<u>not truthful</u> and….also at variance with the available evidence."* (emphasis added)

62. Under the heading *"Plastering and Kitchen work"* the defendant relied on the opinion of the SJE, which was described as being that the work said to have been carried out by Mr McDonnell *"was never carried out at all."*.

63. Under the heading *"The documents"* the skeleton argument, said:

> *"The CPR suggests that when challenge is made to the <u>authenticity</u> of documentation it may be nonetheless convenient to have these challenged documents in the bundle, but subject to a reservation. The documents so challenged must then be specifically proved by the litigant. The documents in this case are…".* (emphasis added)

64. The McDonnell invoices, the 6 October 2015 email, the Fleetways Invoices and the check-out inventory were then specified as being the documents challenged. The skeleton argument then explained that there were two bundles before the court, but that the inclusion of a given document in the defendant's bundle did not involve any acceptance that *"these documents were sent or received <u>in accordance with their appearance</u>."*. (emphasis added)

65. I am told by Mr Mallinson in his witness statement in support of the Application, and I accept, that at the door of the court, Mr Harris stated that he was abandoning the challenge to the authenticity of the Fleetways Invoices and the check-out inventory but that he was now challenging the authenticity of the Santander bank statements. This third category of documents is identified in manuscript on Mr Mallet's copy of the skeleton argument and the word *"abandoned"* appears next to the first and second categories.

<u>The exchanges at the start of the trial</u>

66. There were then exchanges at the beginning of the trial as to what the defendant's case was in relation to the authenticity of the relevant documents. Mr Mallet, who was recently instructed for the claimant, submitted that Mr Harris was not entitled to challenge the authenticity of the documents given the ruling of HHJ Simpkiss (at that stage he had not seen the judgment on the application of relief so this submission reflected his (mis)understanding of the position) and given that no notice had been served under CPR 32.19. This provision deems the authenticity of a disclosed document to be admitted unless notice is served, within a seven day period which had long since passed, that the disclosing party requires the document to be proved.

67. Mr Harris correctly submitted that no such ruling had been made. He said that all that he sought to do was *"to put various documents to the claimant as a witness to ask whether she's seen them before."* although, in the event, he went rather further than that. His position was also that the requirements of CPR 32.19 had effectively been

complied with by the defendant's various applications and the witness statements of Mr Fischer described above.

68. The Judge said that he would allow questioning as the authenticity of documents. Without seeking a ruling, Mr Mallet put down a marker as to the propriety of alleging fraud without having reasonable credible material to support such an allegation. The trial proceeded.

The evidence and cross examination at trial

69. The claimant gave evidence at trial to prove her claim and relied on her first witness statement. I understand that her second statement, of 15 November 2017, was not formally adduced in evidence, but in the course of Mr Harris' cross examination he read out the passage from it in which the claimant categorically refuted the allegation of forgery of the McDonnell invoices and explained why. Mr Harris commented *"So she does say something about this but we contend that it's not true"*.

70. The claimant was cross examined in detail by Mr Harris for most of the first day. The SJE's report was in evidence but Mr Stimpson was not called. Although he did attend at the beginning of the second day of the trial and before closing submissions, having produced a supplementary report (both attendance and the report were at the defendant's request), no application to call him or to put in the supplementary report was made. The supplementary report responded to the claimant's evidence on the kitchen units and to the Babatunde letter, as I explain below. Similarly, Mr McDonnell attended on the second day at the defendant's request but no application was made to call him.

71. Relying on the SJE report and the documentary evidence which was before the court, Mr Harris challenged the claimant's evidence as to the condition of her flat, as to the works which she said had been carried out and as to the payments which she said had been made. The claimant was questioned about all of the documents which are said, in the Statement of Case, to be fraudulent.

72. Mr Harris put to her the SJE's opinion that the plaster work referred to in the invoices had not been carried out (including "*I must put this to you direct, the joint surveyor says that none of this work was carried out"*) and he asked her whether she paid for the work referred to in the invoices. He took her through the invoices in detail and asked her about the features of the invoices which, on the defendant's case, indicated that they were not genuine when compared with the invoices which it regarded as genuine. He also put to her that the invoices were inconsistent with what she had or had not said in various emails, and he put all of the reasons why the defendant and/or the SJE did not accept her evidence as to the effect of the disrepair of the building on her flat, as to the work she had carried out and the payments which she said she had made.

73. The claimant was also cross examined in detail about the Santander bank statements and whether she had made the alleged payments to Mr McDonnell, whether the entries matched up with the invoices, the alleged cash payments, discrepancies in the total sums, and so on. Mr Harris had prepared a detailed schedule for this purpose which he produced for the first time during cross examination and which he also put

to her. In the course of the questioning there was the following exchange (emphasis added).

"Q: You see what I'm suggesting to you, Ms Elu, and I'm sorry to have to say this, is that what you're saying isn't true, that these invoices that have been produced, ostensibly [Mr McDonnell's], and these ostensible bank statements are not reliable, are they? ....

JUDGE: are you saying, bank statements are not reliable?

HARRIS: Yes……..

JUDGE: Are you saying that they are forgeries?

HARRIS: Your Honour, I am not saying that. I simply say they are not reliable…

JUDGE: I cannot understand on what basis you are asking me to find they are not reliable other than that they are complete forgeries…

HARRIS: ...First of all, the amount of the invoices and the payments don't seem to correspond at all. They don't seem to have the pattern of somebody who was paying on account or paying round figures or anything like that. Secondly, the amount of indebtedness at various stages, given the rather arm's-length view of each other which this lady and Mr McDonnell had, seemed unlikely…..

JUDGE: I appreciate what you are saying, but how is it that the documents which constitute these bank statements, how are they unreliable?

HARRIS: Well, Your Honour, because we say that the transactions which they purport to evidence, have no reality.

JUDGE: Right. Well, I had better ask her, then….. Where did you get these bank statements from?

A: From Santander

JUDGE: Have you altered them or tampered with them?

A: No I havent't."

74. There was also cross examination about the 6 October 2015 email. Mr Harris relied on what he said was a different version of the same email, which he put to the claimant. He suggested to her that they were the same email but that the text was *'out of kilter'* and he asked her about the differences in the text. There were then issues as to whether it was indeed the same email and, if so, who had produced which one, with the claimant alleging that the version which was inconsistent with the version she relied on had emanated from the defendant (i.e. was suspect), and the defendant saying that it had emanated from her.

75. As far as the Babatunde letter is concerned, this said that when Mr Babatunde had moved in he had taken the new kitchen units out so that they would not be damaged by the damp. The letter was written to counter the SJE's opinion that the kitchen units

in the flat were old and that the claimant therefore could not have replaced them, as she said she had. The defendant had objected to the inclusion of this letter in the bundle but it was referred to in the course of cross examination on the issue of the kitchen units and the Judge asked to see it.

76. In relation to the Fleetways Invoices, there were 2 pairs of invoices for this work. The invoices relied on by the claimant were dated 4 and 21 December 2014 but the defendant's bundle contained what it said was different versions of the same invoices, which were dated 4 and 21 November 2014. The alleged discrepancy was put to the claimant with the question *"It's strange isn't it?"*. There was then the same issue as to who had produced the alleged inconsistent version. Mr Harris described it as a *"small point"* but the Judge did not agree. There was then the following exchange (emphasis added):

> *"JUDGE: Well, this is quite worrying because it looks as if somehow or other documents are being tampered with.*
>
> *HARRIS: It does, Your Honour, yes."*

77. There is then an entry attributed to Mr Mallet as follows: *"Your Honour, I say nothing more than the documents are unreliable. I leave it at that."* although this may well have been Mr Harris.

78. As far as the check-out inventory is concerned, the claimant relied on this to confirm her evidence that the premises were in *"poor"* condition. The document was dated 8 March 2015. Mr Bermant says that before trial, although he is unclear as to when, the defendant had discovered that the claimant had emailed the signed original of the document to the managing agents, ABC, on 9 March 2015 and that this showed the premises in *"good"* repair. In cross examination, Mr Harris suggested to the claimant that the word *"poor"* on her version looked to have been overwritten and asked the claimant whether she had had *"second thoughts about this"*. She said that she had not and that it had not said *"'good' originally"*. Mr Harris proceeded to ask her detailed questions as to the contents of the document and whether they were consistent with the evidence as to the repairs which had been carried out. It does not appear that he actually put the alleged original to the claimant but the effect of Mr Bermant's evidence is that he could have, as it was in the defendant's possession and Mr Bermant was aware of it.

The closing submissions

79. Mr Harris apparently put in written submissions although they have not been shown to me. In his detailed oral submissions he invited the Judge to reject the claimant's oral evidence and to hold that the key documents on which she relied were unreliable for the reasons which he had canvassed in cross examination. He argued that the claimant's evidence was implausible for reasons which reflected the views of Mr Fischer and the SJE summarised above, and that the evidence of the SJE should be preferred.

80. When he made submissions in relation to the 6 October 2015 email point, Mr Harris drew attention to the alleged discrepancies in the text and alleged oddities about the claimant's version and said:

> *"That email is written by Mr McDonnell, we are told, no doubt, to support the invoices produced by the claimant which is a very odd email and if this email is suspect of course, the kind of claims in it are also suspect….I don't have to make any assertions about how that did happen or could have happened and in fact, because of the rules of pleading they're assertions I can't make. But what I do say is these are the documents which the claimant relies on to try and support her case and if the documents themselves are suspect at worse then of course, that in my submission has a retrograde effect on her case as a whole…"* (emphasis added)

81. Mr Mallet then made detailed oral submissions in reply. At the outset he noted that the defendant's skeleton argument stated that the authenticity of certain documents was challenged and submitted that this was a collateral attack on the decision of HHJ Simpkiss. He said:

> *"But even if we've set that point aside, .. we'll consider what evidence my learned friend has, to support his submission that the documents are fraudulent, or forgeries, or whatever you want to call them. Of course, he has no evidence. There is no evidence that the invoices are forged. No evidence that the bank statements are forged. There is no pleaded defence… based on forgery, and as we have seen, the invoices are supported by contemporaneous emails…"*

82. He went on to defend the 6 October 2015 email and to note, without contradiction, that the defendant's question marks as to the authenticity of the Fleetways Invoices had been abandoned.

The Judgment of HHJ Coltart.

83. The Judge then made his decision and gave judgment that afternoon. Unfortunately, there is no transcript of his Judgment but I have been shown the parties' respective notes of what he said and these do not materially differ.

84. The claimant's note records the following overarching findings (with emphasis added):

> *"I heard C's evidence over several hours yesterday and the evidence was tested robustly but entirely properly. Having heard and assessed her answers. I found her to be a truthful and reliable witness. In fact, the longer the cross examination went on, the more I was convinced of her truthfulness.*
>
> *"But in the end, this case boils down to whether or not, on balance, I am persuaded that's case is truthful and made out. On all evidence. I am satisfied with that."*
>
> *"The second question is loss. Mr Harris, on instructions, sought to question the validity of the C's case on this going as far as suggesting that some documents cannot be regarded as completely genuine and they go as far as to raise a sufficient degree of scepticism so as to undermine C's case. Again, I have considered the submissions and questions with great care. Judges always have to be alert to this possibility. The documents may not be real, but in this case,*

having heard C, I am entirely satisfied that the documents are entirely genuine and have not been tampered with."

85. The Judge went on to deal with each of the key evidential issues for present purposes as follows (emphasis added).

i) In relation to the 6 October 2015 email, he noted that neither version was referred to in the List of Documents served by either party and said, *"I am not in a position to consider its authenticity"*.

ii) In relation to the Santander bank statements, the Judge said: *"I am entirely satisfied about [the claimant's] evidence that the statements came from Santander and have not been altered or tampered with*.".

iii) In relation to the McDonnell invoices the Judge said. *"There were a number of invoices from Mr McDonnell for plasterwork and it is claimed he carried out this work. This* was called into question by D. Again, having heard C's evidence, I am satisfied that all works were carried out and that C is in a position to say that they were, she having actually observed the works during and after the works were completed. It is clear from bank accounts that C paid him a considerable sum of money. Mr Harris sought to throw up that there was, not a direct tallying, but given the situation, it doesn't undermine C's overall case. He was the partner of a good friend of hers. She tells me she paid part bank transfer and part cash and highlighted cash withdrawals. They don't quite add up to the invoices, but that doesn't lead me to conclude it was a scam. I am satisfied that this work was carried out and paid for"*. (*The defendant's note on this point suggests that the Judge said that the invoices were called into question: *"Also invoices-also called into question, but…"*)

iv) The Judge also rejected the opinion of the SJE that the plasterwork had not been carried out. That opinion had partly been based on the Mr Stimpson's view that the type and colour of the plaster in the flat was no longer used and could not be replaced, which he had then accepted was wrong. The Judge said: "*I have to weigh up that against clear and persuasive evidence of C as to what happened. The SJE assessed after the event. I am not satisfied that the SJE's conclusions justify me saying that C has failed to prove her case*.".

v) In relation to the Fleetways Invoices the Judge said: *"Alongside these invoices, there were two invoices in respect of the boiler and fan. There is no doubt that they are in existence, and there seems to be no concerns that it was paid for by C. I am satisfied the work was done."*. He therefore appears to have understood that the challenge to the authenticity of these invoices had been abandoned, as it had been.

vi) In relation to the replacement of the kitchen units issue the Judge accepted the claimant's explanation that the new owner of the leasehold of the flat had taken out the new units and put back the old ones to avoid the new ones being damaged. He referred to the Babatunde letter and said: *"the letter was, quite rightly, not in the bundle as D did not agree to its inclusion, but D elicited it in cross examination and it is therefore now in evidence. I have to bear in mind its weight, which is not the same as if it had been a witness statement or given*

in cross examination, but it has some evidential value and, applied with C's evidence, I am satisfied on the balance of probabilities, that the matter has been explained."

vii) Finally, the Judge accepted that the claimant's evidence that the existing tenants vacated by March 2015 as they could no longer tolerate the condition of the flat and relied on the check-out inventory as one of the factors which persuaded him to do so.

86. As I have noted, the Judge also ordered costs on an indemnity basis. The application by the claimant relied on the history of the litigation and specifically complained that that the defendant had *"pursued an allegation of fraud that was not pleaded"*.

THE LEGAL FRAMEWORK.

Res judicata and abuse of process generally

87. It is worth outlining the framework of the law relating to res judicata and abuse of process before I go on to consider their application where it is said that a judgment has been procured by fraud. The decision of the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac* [2013] UKSC 46, [2014] AC 160 contains a survey by Lord Sumption, at paragraphs 16-26, on which I am not capable of improving and which I will not repeat in full. However, using this as my guide it may be useful to highlight certain points.

Henderson v Henderson

88. The famous dictum of Sir James Wigram V-C *Henderson v. Henderson* (1843) 3 Hare 100, 114–115, is an important statement of the underlying principle:

> *"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

89. In *Virgin Atlantic Airways Ltd v Zodiac* (supra), at paragraph 17, Lord Sumption said that this principle *"precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones."* (emphasis added).

Arnold v National Westminster Bank

90. In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 Walton J had ruled on the construction of a rent review clause in earlier litigation between the same parties. The question was whether the tenants were bound by that construction in litigation concerning subsequent rent reviews. The Court of Appeal had, in subsequent cases, cast doubt on Walton J's construction and the House of Lords therefore approached the case on the basis that, in effect, the law had changed since the earlier litigation.

91. Lord Keith defined cause of action estoppel as follows at 104E:

> "*Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment"*

92. At 105D-E he defined issue estoppel as follows"

> *"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."*

93. At 106B Lord Keith noted that, like cause of action estoppel:

> *"Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier."*

94. At 107D he said:

> *"It thus appears that, although Henderson v. Henderson, 3 Hare 100 , was a case of cause of action estoppel, the statement there by Wigram V.-C. has been held to be applicable also to issue estoppel. That statement includes the observation that there may be special circumstances where estoppel does not operate. The instant case is concerned with the nature of such special circumstances."* (emphasis added)

95. Lord Keith then noted that the cases suggested that special circumstances may exist where there is a default judgment and where there has been a material change in the factual circumstances. At 108 he rejected an argument that, like cause of action estoppel, in the case of issue estoppel the bar should be absolute where the point at issue had actually been raised and decided in the earlier proceedings, unless it was a case of fraud. At 109 he said:

> *""the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different"*

96. So issue estoppel is a more flexible concept. He went on to say:

> *"Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success."* (emphasis added)

97. Nor did Lord Keith accept that any exception should only be available in the case of the earlier judgment being a default or a foreign judgment. He therefore formulated an additional exception in the case of issue estoppel as follows:

> *"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result."* (emphasis added)

98. The House of Lords held that such further material was not confined to matters of fact but that, where a judge made a mistake and a higher court overruled him in a subsequent case, justice required that the party which suffered from the mistake should not be prevented from reopening that issue when it arose in later proceedings. It will be noted, however, that the material in question had to be material which was not available to the parties at the time of the first proceedings and which could not by reasonable diligence have been adduced in those proceedings.

Virgin Atlantic Airways Ltd v Zodiac

99. In *Virgin Atlantic Airways Ltd v Zodiac* (supra) the Supreme Court analysed *Arnold* in the context of a plea of res judicata in relation to a determination of the validity of a patent. At paragraph 21 Lord Sumption said that *Arnold* held that the difference between cause of action and issue estoppel was that:

> *"in the case of cause of action estoppel it was in principle possible to challenge the previous decision as to the existence or non-existence of the cause of action by taking a new point which could not reasonably have been taken on the earlier occasion; whereas in the case of issue estoppel it was in principle possible to challenge the previous decision on the relevant issue not just by taking a new point which could not reasonably have been taken on the earlier occasion but to reargue in materially altered circumstances an old point which had previously been rejected".*

100. At paragraph 22 Lord Sumption said:

> *"Arnold v National Westminster Bank plc.. is accordingly authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all*

points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

101. It is apparent from this formulation in the context of the reasoning in *Arnold* that the overarching test, if an exception is to be made in a case of issue estoppel, is whether there are special circumstances which mean that the operation of the principle would cause injustice. In cases where the point was not raised, the question whether the point could with reasonable diligence and should in all the circumstances have been raised will usually (but not always) be decisive of this overarching question.

102. Lord Sumption then rejected an argument that recent case law had recategorized the principle in *Henderson v Henderson* as being concerned with abuse of process, rather than res judicata, so that *Arnold* could no longer be regarded as the law. At paragraph 25 he said:

"Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank plc [1991] 2 AC 93, 110g, "estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process". (emphasis added)

Johnson v Gore Wood

103. As to abuse of process more generally, the classic statement of the modern position is that of Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1:

*"*Henderson v Henderson *abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not*

accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, 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. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

104. See, also, the helpful summary at paragraph 83 of the judgment of HHJ Bowsher QC in *Time Group Ltd v Computer 2000 Distribution Ltd* [2002] EWHC 126 (TCC) which emphasises, amongst other things, that it is a serious matter to dismiss a claim on the basis of abuse of process.

The application of these principles in fraud cases: the decision in *Takhar v Gracefield Developments Limited* [2019] UKSC 13; [2019] 2 WLR 984

Summary

105. As noted above, it is well established that the principles applicable to res judicata and abuse of process generally are modified where it is said that the judgment was obtained by fraud. In *Takhar* the Supreme Court considered the relationship between the public interest in finality of litigation and the public interest in litigants and the courts not being deceived. Lord Briggs strikingly described the case as follows at paragraph 68:

> *"68 This appeal turns on the outcome of a bare-knuckle fight between two important and long-established principles of public policy. The first is that fraud unravels all. The second is that there must come an end to litigation. I will call them the fraud principle and the finality principle"*

106. Mrs Takhar brought proceedings in the Chancery Division in which she alleged that certain properties had been transferred by her to Gracefield as a result of undue influence or other unconscionable conduct on the part of Dr and Mrs Krishan. One of the pieces of evidence relied on by the Krishans in defending her claim was a written profit share agreement which set out the terms as to payment of Mrs Takhar for the transfer of the properties. In summary, she was to be paid the sum of £300,000 and to receive 50% of the profits when the properties were sold. Mrs Takhar's signature appeared on a scanned copy of the last page of the agreement and it was alleged that the document reflected what had genuinely been agreed orally between the parties.

107. Mrs Takhar had concerns about the authenticity of the signature attributed to her and she applied for permission to obtain expert evidence from a handwriting expert, but this was refused. At trial, she gave evidence that she could not say that the signature was not hers, but nor could she explain how it got there. The trial judge (Judge Purle QC) noted that Mrs Takhar's case was that she did not sign the profit share agreement

and had never seen it before the dispute arose (see paragraph 7 of the judgment of Newey J [2015] EWHC 1276 (Ch)). But he also noted that *"no case of forgery is advanced"*. Judge Purle considered that Mrs Takhar had not been able to give a coherent explanation as to how her signature came to be on the scanned copy, and he accepted the Krishan's evidence *"which I believe anyway"* that the document faithfully reflected what had been agreed orally, was prepared for signature and was then taken away by Mrs Takhar and returned signed. He went on to dismiss Ms Takhar's claim and to hold that the transfer of the properties had been effective.

108. Mrs Takhar subsequently obtained a report from a handwriting expert whose opinion was that the signature on the profit share agreement had been transposed from a letter which she had sent to the solicitors for the Krishans, rather than her having in fact signed the agreement. On the basis of this expert report she issued proceedings in which she sought to have Judge Purle's judgment set aside on the grounds that it had been obtained by fraud. The defendant objected on grounds of abuse of process and this question was decided as a preliminary issue. Newey J held that the claim was not abusive: a party who seeks to set aside a judgment on the basis that it was obtained by fraud does not have to demonstrate that they could not have discovered the fraud by the exercise of reasonable diligence. The Court of Appeal disagreed, holding that, even in fraud cases, the matter could not be reopened if the alleged fraud could with reasonable diligence have been discovered.

109. The Supreme Court agreed with Newey J. Four judgments were given. The first was by Lord Kerr, with whom Lords Hodge, Lloyd-Jones and Kitchin agreed, and the second was by Lord Sumption, with whom they also agreed. There were then judgments given by Lord Briggs and Lady Arden who concurred in the result. The majority disagreed with the approach advocated by Lord Briggs.

110. It will be necessary to consider these judgments in detail given the arguments in the present case but it is clear from all of the judgments that the ratio of the decision, is accurately stated in the headnote in the Weekly Law Reports:

> *"where it could be shown that a judgment had been obtained by fraud, <u>and no allegation of fraud had been raised at the trial</u> which led to that judgment, a party seeking to set aside the judgment was not required to show that the fraud could not have been uncovered with reasonable diligence in advance of the obtaining of the judgment; that, therefore, an absence of reasonable diligence was not <u>of itself</u> a reason for staying as an abuse of process a claim to set aside a judgment on the grounds of fraud"* (emphasis added)

<u>A closer look at Mrs Takhar's case in relation to her alleged signing of the agreement</u>

111. In the light of the comparison which Mr Jones seeks to make between the relevant facts of *Takhar* and the facts of the present case, it is necessary to look more closely at Mrs Takhar's approach to the question whether she had signed the profit share agreement. These are set out more fully in the judgment of Newey J at first instance.

112. Proceedings were issued on 24 October 2008 and disclosure took place on 13 July 2009. Mrs Takhar's solicitors asked to inspect the originals of the profit share agreement and an account enquiry form on the basis that *"she cannot be sure that the said documents contain her signature"*. Mrs Takhar said, in a witness statement dated

16 December 2009, that she did not recollect signing the profit share agreement, did not have a copy and never had had one. Nor had any such agreement being discussed or agreed with her.

113. The application for permission to obtain the evidence of a handwriting expert was made on 31 March 2010 and was supported by a witness statement of her solicitor which stated that she had a *"genuine concern"* that the signatures on several documents. *"were not hers and could potentially have been forged"*. An attendance note of the hearing of the application recorded that Judge Purle *"felt the instruction of a handwriting analysis and a forensic linguist would not assist the Court a great deal and also the timing of the application considering the number of witnesses that would be required at trial is late."* .

114. The transcript of the exchanges at the trial, between leading counsel for Mrs Takhar and the Judge, about why handwriting expert evidence had been applied for recorded leading counsel as saying that it was because Mrs Takhar could *"not remember"* signing the documents. "*She has never said for sure. That is one of the reasons why it failed."* The Judge responded, "*That was one of my reasons, was it not? There is no positive case asserted."* The response was *"My Lord, yes. Yes, indeed."*

115. After Mrs Takhar had given oral evidence at trial her leading counsel had said *"from her cross examination now, <u>Mrs Takhar accepts it is her signature on the document.</u>"* (emphasis added). In fact, she was right to do so - it <u>was</u> her signature – her subsequent claim was on the basis that her signature had been transposed from another document which she had genuinely signed.

116. There were then the following exchanges between leading counsel and the Judge in closing submissions:

> *"[COUNSEL FOR MRS TAKHAR]: ... The [Profit Share Agreement], my lord, is a very odd document…. Mrs Takhar is adamant that she saw it for the first time in disclosure. My lord noted in the failed application for forensic handwriting experts that Mrs Takhar had been very candid, that <u>she had not suggested that documents had been forged when she was not able to do so</u>, and that is one of the reasons why her application for forensic handwriting evidence failed. She said she could not remember. She may have signed it. It might be her signature. It could not be her signature but on this one it is different. This one, she says, 'No, I did not see this' and being the amateur sleuth that I am, I have looked at her signature on this and on others and it does look a bit suspect but we do not have forensic document examination evidence and that is that, but we do have clear evidence from Mrs Takhar. She will not deny and allege a forged signature if she does not feel she is entitled to. She says she saw this for the first time. It is highly believable.*
>
> …
>
> *THE JUDGE: Your case is that your client did not sign anything?*
>
> *[COUNSEL FOR MRS TAKHAR]: Did not sign anything, yes. I know. My lord, I am bound by Mrs Takhar's evidence. Her evidence is that this is the first time she saw it. I have not put things to the Krishans I did not feel entitled to put.*

> *THE JUDGE: Well, you are not bound by her evidence. You are entitled to say she cannot remember it.*
>
> *[COUNSEL FOR MRS TAKHAR]: Yes. That is what she said.*
>
> *THE JUDGE: Assuming that she has forgotten it, then what?*
>
> *[COUNSEL FOR MRS TAKHAR]: Well, happily, it is not a problem for her case because, as you rightly identified, if she was willing to sign the TR1s, she–*
>
> *THE JUDGE: No. If she has forgotten it, then you say it is just another example of signing whatever is put before her without reading it.*
>
> *[COUNSEL FOR MRS TAKHAR]: My lord, it is but it just seems so odd…"*

117. In her evidence in the subsequent proceedings before Newey J Mrs Takhar accepted that:

> *"Mr Peter Matthews, from whom she received advice from 2008, suspected fraud."*

118. She went on to say:

> *"However, [Mr Matthews] is not a document examiner, nor an accountant, nor a valuer. He was merely a financial adviser. Whilst he had suspicions, he had no proof of fraud, as he was forced to accept in his evidence at the trial. For my part, I too was suspicious but had no proof and could not get any proof until after disclosure and receipt of a copy of the Profit Share Agreement with my signature on it together with the other suspect signatures produced by the Defendants."* (emphasis added)

119. The picture is therefore a mixed one. Clearly Mrs Takhar was not in a position to allege fraud and nor did she do so. She had her suspicions but ultimately her position at the trial was that she accepted that it was her signature on the scanned page but did not remember signing it. The possibility of transposition of her signature from another document does not appear to have been raised at all. The question whether she did sign it was, however, not necessarily of decisive importance as it was consistent with her case of undue influence and entering into an unconscionable bargain that she had signed whatever was put in front of her rather than truly agreeing to any of the transactions which were said to be evidenced by the documents.

Lord Kerr's analysis

120. Lord Kerr considered *Arnold* and the *Virgin Atlantic* case and held that the principles stated in those cases did not determine the issue in *Takhar*:

    i) Those cases were not considering the position where the subsequent claim alleges that the earlier judgment was obtained by fraud (paragraphs 27 and 28);

    ii) In any event, nor did they establish that even in relation to issue estoppel there is a rule that where the point was not raised it can only be raised if it could not with reasonable diligence have been discovered: Lord Sumption, at paragraph

22 of the *Virgin Atlantic* case, went no further than to say that this would *"usually"* be the case (paragraph 29)

iii) In any event, the Court of Appeal had accepted that *Takhar* was not a case of issue estoppel:

> "*this is not a case of commencing new proceedings where the same issues arise…the question of Mrs Takhar's signature having been forged had not been raised or decided in the trial before Judge Purle. The claimant does not seek to set aside Judge Purle's decision on any of the issues decided by him"* (paragraph 32).

121. On the basis of this, third, point Lord Kerr then distinguished three decisions which appeared to support the proposition that there was a reasonable diligence requirement in fraud cases where the issue of fraud had been raised and determined in earlier proceedings. These cases were *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, *Owens Bank Ltd v Bracco* [1992] 2 AC 443 and *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44 PC. Lord Kerr also held that the relevant passage in *Etoile* was obiter dicta (in fact both cases concerned foreign judgments, in relation to which the due diligence condition does not apply in any event) and he distinguished *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 on the basis that this case concerned a collateral attack on a criminal conviction and therefore engaged distinct policy considerations.

122. Lord Kerr then considered the cases on the effect of fraud, starting with the dictum of Lord Bingham in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349 at paragraph 15:

> *"..fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all … once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever': Lazarus Estates Ltd v Beasley [1956] 1 QB 702, 712 per Denning LJ. Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal."*

123. Lord Kerr emphasised the point that:

> *"This reflects the basic principle that the law does not expect people to arrange their affairs on the basis that others may commit fraud".*

124. He also cited Commonwealth authorities from Australia and Canada which rejected the reasonable diligence test in cases where it was alleged that a judgment had been procured by fraud. One such authority was the decision of the New South Wales Court of Appeal in *Toubia v Schwenke* [2002] NSWCA 34 which declined to follow the dicta in the *Etiole* and the *Bracco* cases. Lord Kerr cited paragraphs 37 and 38 of the judgment of Handley JA with approval:

> *"37. I would not follow the dicta in* Owens Bank Ltd v Bracco, Owens Bank Ltd v Etoile Commerciale SA … *because, with respect, the dicta are contrary to*

> *principle and earlier authority. The assumption is that the court and the losing party were successfully imposed on by the fraud of the successful party, but relief should nevertheless be denied and the judgment allowed to stand because the defrauded party was careless or lacked diligence in the preparation of his case … Contributory negligence is not a defence to an action for fraud whether the relief claimed is rescission or damages. As Brennan J said in* Gould v Vaggelas *(1985) 157 CLR 215, 252:* 'A knave does not escape liability because he is dealing with a fool.'
>
> *"38. Means of knowledge of the falsity of the representation without actual knowledge is no defence and a representee has no duty to make inquiries to ascertain the truth …"* (emphasis added)

125. Handley JA also said at paragraph 41:

> *"In an action for fraud, a plaintiff must prove that he was deceived but need not prove that he was diligent. Where the action seeks the judicial rescission of a judgment, the plaintiff must prove that he and the Court were deceived and he can only do this by showing that he has discovered the truth since the trial. Where this is done, and the fresh facts are material, fraud is established. Lord Buckmaster said [in* Hip Foong Hong v H Neotia and Co *[1918] AC 888] that if fraud was proved the judgment was vitiated, and he can only have meant that nothing else had to be proved apart from fraud. That means there is no need to prove due diligence as well."* (emphasis added)

126. Lord Kerr held that the principle that *'A knave does not escape liability because he is dealing with a fool.'* is antithetical to a requirement to exercise reasonable diligence in relation to the risk of fraud when conducting litigation, which would be implicit if the reasonable diligence condition applied. At paragraph 52 he also emphasised the public interest in the court not being deceived:

> *"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."*

127. At paragraph 54 he therefore rejected the proposition that:

> *"in cases where it is alleged that a judgment was obtained by fraud, it may only be set aside where the party who makes that application can demonstrate that the fraud could not have been uncovered with reasonable diligence in advance of the obtaining of the judgment"* (emphasis added)

128. He added:

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

129. At paragraph 55, however, he said this:

> "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."* (emphasis added)

130. Finally, Lord Kerr approved Aikens LJ's statement of the principles which govern applications to set aside judgments for fraud in *Royal Bank of Scotland plc v Highland Financial Partners lp* [2013] 1 CLC 596 at paragraph 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" (emphasis added)*

Lord Sumption's analysis

131. Lord Sumption's judgment began by agreeing with Lord Kerr *"Subject to what follows.."* .

132. He recalled that an action to set aside an earlier judgment for fraud is a cause of action rather than a mere procedural application:

> *".. A party to earlier litigation was entitled to bring an original bill in equity to set aside the judgment given in that litigation on the ground that it was obtained by fraud. Such a bill could be brought without leave, because it was brought in support of a substantive right. If the fact and materiality of the fraud were*

established, the party bringing the bill was absolutely entitled to have the earlier judgment set aside……After the fusion of law and equity in the 1870, the procedure by way of original bill was superseded by a procedure by action on the same juridical basis." (paragraph 60)

133. The cause of action to set aside a judgment for fraud is independent of the cause of action asserted in the earlier proceedings:

"It relates to the conduct of the earlier proceedings, and not to the underlying dispute. There can therefore be no question of cause of action estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parties…. If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment. It follows that res judicata cannot therefore arise in either of its classic forms." (paragraph 61)

134. In relation to *Henderson v Henderson* Lord Sumption reiterated what he had said at paragraph 25 of his judgment in the *Virgin Atlantic* case and added:

"Since the decisions of the House of Lords in Arnold v National Westminster Bank plc [1991] 2 AC 93 and Johnson v Gore Wood & Co [2002] 2 AC 1 it has been recognised that where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive relitigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case." (paragraph 62)

135. He explained that he rejected the reasonable diligence condition or a variant of it proposed by Lord Briggs because:

"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 [2002] 2 AC 1, 31 (Lord Bingham of Cornhill) and the Virgin Atlantic case [2014] AC 160, para 22 (Lord Sumption JSC). 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.." (paragraph 63, emphasis added)

136. He added:

> *"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."* (paragraph 63, emphasis added)

137. Lord Sumption did not refer specifically to *Phosphate Sewage* but he did distinguish *Hunter* on the basis that it did not apply to applications to set aside civil judgments. He said that the relevant passages in the *Etoile* and *Bracco* cases were both obiter and *"mistaken"*. It appears that even where the issue of fraud had been determined in earlier proceedings, he did not agree that the reasonable diligence test would apply. This disagreement was explained as follows:

> *"None of these judicial statements sufficiently distinguishes between (i) the proposition that an action to set aside a civil judgment must be based on new evidence not before the court in the earlier proceedings, and (ii) the proposition that that evidence must not have been obtainable by reasonable diligence for the earlier proceedings. The first proposition is well established. The second is not supported by any authority earlier than [Hunter].. and appears to me to be an insufficient answer to an allegation that a civil judgment has been obtained against the claimant by the deliberate fraud of another party"* (paragraph 65, emphasis added)

138. However, at paragraph 66 Lord Sumption said this:

> *"66 I would leave open the question whether the position as I have summarised it is any different where the fraud was raised in the earlier proceedings but unsuccessfully. My provisional view is that the position is the same, for the same reasons. If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material."*

The analysis of Lord Briggs.

139. Lord Briggs characterised Lord Kerr's ruling as follows

> *"69 Basing himself on that obvious principle of justice, Lord Kerr JSC proposes a clear rule that a judgment may always be set aside for fraud without regard either to the gravity of the fraud or to any lack of reasonable diligence by the alleged victim, unless either (i) fraud was actually alleged in the earlier proceedings, or (ii) there was a deliberate decision not to investigate a suspected fraud. Only in those cases should the finality principle either prevail, or at least give rise to a judicial discretion to apply it."*

140. The view of Lord Briggs, which he summarised at paragraph 68, was that the approach should be more flexible:

> *"But I have been unable to follow him all the way down a path which seeks to erect a reliable bright-line boundary between types of case where one principle or the other should clearly prevail. There will be too many cases where that supposed bright line is either invisible, or so technical that it fails to afford a basis for choosing between the two principles which accords with justice,*

> *common sense or the duty of the court to retain control over its own process, and thereby protect it from abuse. I would have preferred a more flexible basis upon which, recognising that many cases will straddle any bright line, the court can apply a fact-intensive evaluative approach to the question whether lack of diligence in pursuing a case in fraud during the first proceedings ought to render a particular claim to set aside the judgment in those proceedings for fraud an abuse of process. This approach would in particular seek to weigh the gravity of the alleged fraud against the seriousness of the lack of due diligence, always mindful of the principle that victims of a fraud should not be deprived of a remedy merely because they are careless."*

141. The facts of the present case tend to demonstrate the prescience of these remarks. But Lord Sumption disagreed with this approach at paragraphs 63 and 64 and, as I have noted, Lords Hodge, Lloyd-Jones and Kitchin agreed with Lord Sumption's judgment, as well as that of Lord Kerr.

Phosphate sewage Co Ltd v Molleson

142. I drew the decision of the House of Lords in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801 to the attention of counsel as it appeared potentially relevant. Here the Phosphate Sewage Company sought to lodge a claim in a Scottish bankruptcy for repayment of £65,000 which the company had paid to the bankrupt under a contract of sale that had been induced by fraud. An earlier claim for the moneys had been rejected by the trustee in bankruptcy but the company had subsequently obtained further evidence of the fraud which it had deployed in proceedings in the Chancery Division in England and on the basis of which the court had made a decree rescinding the contract of sale and ordering repayment of the purchase price. The company then lodged a new claim in the Scottish bankruptcy which was met with a plea of res judicata. The House of Lords held that the new allegations of fraud were based on facts within the company's knowledge at the time of the first proof in the bankruptcy proceedings so that the plea of res judicata succeeded.

143. Earl Cairns LC said:

> *"As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been, ascertained by me before."*

144. At first blush this passage seemed to me to be potentially binding authority on the position where the issue of fraud is raised and adjudicated but further evidence comes

to light. However, I note and adopt the reasons given by Newey J for deciding that this decision did not establish a reasonable diligence condition when he decided *Takhar* at first instance. At paragraph 32 he said:

> *"the case involved Scottish law rather than English and in any event was one where the "new" facts were not new: they had been discovered and could have been deployed in the earlier proceedings"* (emphasis added)

145. This observation is relevant to the arguments in the present case about what constitutes fresh evidence. I also note that *Phosphate Sewage* was not a case where there was an attempt to set aside the original decision in the Scottish bankruptcy proceedings. It was, therefore, a case in which the question of res judicata potentially arose.

The position after Takhar

146. The position is therefore that where the issue of fraud has not been raised or determined in earlier proceedings:

    i) *Takhar* is clear and binding authority for the proposition that a judgment may be set aside even if the fraud could, with reasonable diligence, have been discovered in the earlier proceedings.

    ii) According to Lord Kerr, however, there may be a discretion to refuse to entertain an application to set aside judgment where there has been a deliberate decision not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected.

    iii) According to Lord Sumption, if the issue "should" have been raised in the earlier proceedings the claim will be abusive, but it cannot be said that the point should have been raised "*unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one"*.

147. Where the issue of fraud has been raised in the earlier proceedings, but unsuccessfully, the Supreme Court left the position open:

    i) There are dicta to the effect that there is a reasonable diligence condition in such a case but the analysis of these cases in *Toubia* and the description of *Etoile* and *Bracco* as *"mistaken"* in the judgement of Lord Sumption, as well as his provisional view that the position is the same as where the point is not raised, indicates that these dicta do not apply in fraud cases.

    ii) Lord Kerr's obiter and provisional view is that there is a discretion to refuse a claim to set aside 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.

    iii) Lord Sumption's obiter and provisional view is that the position is the same as if the point had not been raised: if decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie *"irrespective of*

> *whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material".*

THE CASE WHICH THE DEFENDANT WISHES TO RUN

148. As noted above, the case which the defendant wishes to run is set out in the Statement of Case. At the heart of the fraud issue is a contention that the claimant's oral evidence was fraudulent, and the Judge ought to have found that she was an untruthful witness. Similarly, it is said that certain of the documents on which she relied to support her evidence, and to prove the costs which she said she incurred were forgeries. The Judge therefore ought not to have found that they were genuine (in so far as he did so) and therefore helped to prove her case. On the contrary, if he had appreciated that they were forgeries it is highly likely that he would have rejected her case on causation and loss as the claimant's credibility would then have been irretrievably damaged and she would have no proof that she had incurred the costs which she sought to recover.

149. In his skeleton argument, Mr Jones helpfully analyses the fraud issue by reference to the issues in the Application. His starting point is that no question of issue estoppel arises because, he says, no allegation of fraud was pleaded, made or adjudicated at trial and no final decision was made on this allegation at the interlocutory hearings which I have described. The Application, he says, is therefore based on an alleged abuse of process if it is anything whereas the decision of the Supreme Court in *Takhar* is fatal to such an argument. There is no requirement on him to show that the additional evidence on which he wishes to rely could, with reasonable diligence, have been put before the court. Nor, he argues, was there any deliberate decision not to investigate the matter or not to put that evidence before the County Court. Rather, the defendant was prevented from doing so.

150. Recognising the relevance of the question whether the fraud issue is based on "new" or "fresh" evidence, he identifies four allegations of fraud with particular emphasis on the impugned supporting documents, which he places in corresponding categories.

   i) The first category is the McDonnell invoices, the Santander bank statements and the 6 October 2015 email. The evidence on which the defendant seeks to rely in support of its case that these documents were forgeries is that which was set out in, and exhibited to, Mr McDonnell's witness statements of 19 October 2017 and 2 October 2018. Mr Jones submits that the McDonnell witness statements are new or fresh evidence in that they were not admitted in evidence before the County Court at any stage in the litigation. Far from the defendant deliberately deciding not to investigate the alleged fraudulent nature of the Claim which these witness statements suggest, the matter was investigated and attempts were made to put them before the Court, albeit what Mr Bermant characterises as the incompetent manner in which the proceedings were conducted led to the Court refusing to admit them in evidence.

   ii) The second category of document is the Babatunde letter. Mr Jones confirmed my understanding of paragraph 9 of his skeleton argument, namely that this point would only succeed if he succeeded in relation to the first category. He

confirmed that he accepted that in this event he could not necessarily show that the claimant forged the Babatunde letter, as Mr Babatunde may well have written it, but he argued that if Mr McDonnell had not installed new kitchen units, as the claimant alleged, then the evidence in the Babatunde letter, that he removed the new units and replaced them with the old ones, could not be true. Although Mr Bermant suggests in his witness statement that he would also wish to rely on the supplementary report of Mr Stimpson, as I have noted Mr Stimpson disputed that the kitchen units had been replaced in his 13 September 2018 report. His supplementary report, which gave his opinion that he did not believe what was said in the Babatunde letter, was in the defendant's possession on the second day of trial, but was not deployed and nor was there any application to call him to give evidence.

iii) The third category is the Fleetways Invoices. Here, as noted above, at the time of the trial, the defendant had in its possession two pairs of invoices for the same work, each pair with slightly different dates. Mr Bermant says in his witness statement that he is not in a position to dispute Mr Mallinson's evidence that the challenge to the authenticity of these invoices was abandoned. However, after the trial, he remained concerned about the discrepancies as to dates and also what, he says, appeared to be marks on the invoices from correcting fluid. He therefore contacted Mr Weedon of Fleetways by email and provided him with the two pairs of invoices. Mr Weedon immediately sent Mr Bermant copies of what he said were the true invoices. These were dated 22 April and 15 May 2014 (i.e. significantly before the defendant acquired the freehold of the building). Mr Weedon also confirmed that he had not carried out any other work at the flat and has also provided a witness statement. The post-trial evidence was obviously not before HHJ Coltart but, plainly, it could with reasonable diligence have been obtained and deployed at trial.

iv) The fourth category is the check-out inventory. As noted above, Mr Bermant's evidence is that the original of the document was in the defendant's possession and known to it at the time of trial. He does not explain why, despite the fact Mr Harris questioned the claimant as to the authenticity of the version on which she relied, he did not put what the defendant says was the true document to her. He also appears to accept Mr Mallinson's evidence that the challenge to the authenticity of this document was abandoned at trial.

DISCUSSION AND CONCLUSIONS.

The need for "fresh" or "new" evidence

151. Mr Mallet relied on the fact that virtually all of the evidence on which the defendant now wishes to rely was known to it and in its possession at the time of the trial. This, he said, meant that it was not "fresh" or "new", whereas this is an essential requirement if the judgment of HHJ Coltart is to be set aside.

152. The starting point is that, as Lord Sumption pointed out in *Takhar*, an action to set aside a judgment on the basis that it has been obtained by fraud is a cause of action in itself. In the present case, the question whether the cause of action should proceed

arises in the context of an appeal from the original decision, rather than a fresh claim, but there is no difference of principle in my view and none was suggested by counsel: see the reasoning in *Noble v Owens* (supra) which holds that, other than in cases where the fresh evidence relied on in the appeal is conclusive of fraud, an appellate court should usually order a trial of the fraud issue rather than simply order a retrial of the case as a whole on the basis that there is a prima facie case that the judgment which is sought to be set aside was obtained by fraud.

153. Second, a key ingredient of the cause of action is that the party and the court were deceived by the fraudulent evidence of the other party. For this reason the court requires "fresh" or "new" evidence or facts. Mr Jones submitted that evidence or facts which were not before the court in the earlier proceedings will be sufficient, but I do not accept this. In my judgement, the facts or evidence relied on must be materials which were not known, at the time of trial, to the party now alleging that it was deceived:

i) Although the comparison cannot be carried too far given that the context is allegedly fraudulent litigation, and there is also an obvious public interest in the court not being deceived, it is inherent in a claim that a party has been deceived that they were unaware of the facts or evidence on which they seek to rely in the subsequent proceedings. As Handley JA noted at paragraph 15 of his judgment in *Toubia*: *"A representee who knows or discovers the truth in time is not deceived and such knowledge is a good answer to any action based on the misrepresentation"*. This passage from Spencer, Bower and Handley 'Actionable Misrepresentation" is now at paragraph 11.07 of the 5th Edition and was approved in *Stover v Harrington* [1988] Ch 390, 407.

ii) My view also accords with the general understanding of the terms "new" or "fresh" in this context: see eg the notes at paragraph 52.21.3 of the White Book and the rule in *Ladd v Marshall* [1954] 3 All ER 745, 748 which assumes that the fresh or new evidence was not "*obtained…for use at trial"*. The reasonable diligence condition, and the debate in the authorities as to when it applies, proceeds on the assumption that the facts or evidence were not known to the applicant at the time of trial but could with reasonable diligence have been known. In relation to the discussion of the position in relation to fraud, the cases refer to *"the fraud"* (i.e. the evidence) having not been discovered before trial.

iii) As noted above, Lord Kerr cited with approval the following passage from paragraph 41 of the judgment of Handley JA in the *Toubia* case:

> *"Where the action seeks the judicial rescission of a judgment, the plaintiff must prove that he and the Court were deceived and he can only do this by showing that he has discovered the truth since the trial."* (emphasis added)

iv) The authors of Spencer, Bower and Handley 'Res Judicata' (5th Edition) also say at paragraph 17.04:

> "*The claimant must provide proper particulars and plead and prove that since the judgment he has discovered fresh facts which alone, or in*

combination with those previously known, establish that the judgment was obtained by fraud or collusion." (emphasis added)

v) This statement is said to be based on various authorities including *Birch v Birch* [1902] P 130 CA, *DPP v Humphrys* [1977] AC 1*, 30*; *The Amphtill Peerage* [1977] AC 547, 591 and *Mcllkenny v Chief Constable of the West Midlands & Others [1980] QB 283*, 333 CA which, although they were not specifically cited to me, are referred to in the authorities which were cited and support the proposition for which they are relied on by the authors of Spencer, Bower and Handley.

vi) I also note that:

a) The decision of the House of Lords in *Boswell v Coaks (No 2)* (1894) 86 LT 365 was relied on by the Court in *Toubia*, albeit with a view to demonstrating that there was not a reasonable diligence condition. At paragraph 34, Handley JA noted that Earl Selborne had said:

"*Was or was not this a matter proper to be gone into upon the present motion? That seems to me to be the only question which ultimately arises; and in my judgment it was most material to that question, which beyond all doubt ought to have been gone into upon this motion, namely whether anything material to disturb (if proved) the judgment of this House had been newly discovered by the plaintiff. That involves a double proposition; first, that something has been newly discovered, which is all they have attempted to prove, and then that that something is material."* (emphasis added)

b) At paragraph 35 Handley JA also noted that in *Birch v Birch* (supra), where the Court of Appeal held that an action to set aside a judgment on grounds of fraud should be stayed on the grounds that there was no evidence of facts discovered since the judgment which raised a reasonable probability of the success of the action, Cozens-Hardy LJ held that (at 138):

"The judgments of the Court of Appeal and of the House of Lords in Boswell v. Coaks contain some important observations as to the mode in which a motion such as that which is now before us ought to be dealt with. Lord Selborne points out that it is not sufficient for the plaintiff to allege fraud. It is the duty of the Court to receive such evidence, pro and con, as is material to the question whether there really has been, since the former judgment, a new discovery of something material to disturb the former judgment" (emphasis added)

c) In *Birch v Birch*, Vaughan Williams LJ also said:

"I think that the Court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the former judgment which raise a reasonable probability of the action succeeding".

154. This point is strictly about the validity of the cause of action pleaded in the Statement of Case but the considerations which underpin the requirement for fresh evidence overlap with those which underpin arguments of res judicata and abuse of process, namely the need for finality of litigation. In the present case, from mid-September 2017 Mr Fischer was sufficiently clear that the Claim was fraudulent to report the matter to the police and, by time of the trial, he had virtually all of the material on which the defendant now seeks to rely to prove its allegations. This, in my view, is fatal to the defendant's case based on the witness statements of Mr McDonnell and the documents which he exhibited as this evidence was known to, and in the possession of, the defendant at the time of the trial before HHJ Coltart. Mr Jones also accepted that his point on the Babatunde letter stands or falls with his arguments based on Mr McDonnell's evidence. The material on which he wishes to rely in relation to the check-out inventory was also in the possession and knowledge of the defendant at the time of trial. The only arguably "new" or "fresh" evidence is that of Mr Weedon in relation to the Fleetwood Invoices.

155. I appreciate that this conclusion may not sit comfortably with how Lord Sumption put the matter in some passages in his judgment in *Takhar*. In particular, he referred to evidence not being "*deployed"* (see e.g. paragraphs 63 and 66) rather than not being *"known"*. It is arguable that his reference to "*new evidence not before the court in the earlier proceedings"* in paragraph 65 refers to evidence which is <u>both</u> new to the claimant <u>and</u> not before the court but it could equally mean that the evidence should be regarded as new if it was not before the court on the previous occasion. Moreover, the references at the end of paragraphs 63 and 66 to the possibility that a party would or might be barred from bringing the second claim if he *"<u>deliberately</u> decided… not to rely on a known fraud"* (emphasis added) arguably support Mr Jones' submission that there may be cases where the fraud is known but the litigant is prevented from raising it and the fraud issue is nevertheless then permitted to proceed because there was no deliberate decision not to rely on it.

156. I do not rule out the possibility that there may in law be exceptional cases where the evidence of fraud is known to a party and in its possession, but cannot be deployed, and the second action is then permitted to proceed (e.g. because of threats to the litigant or for reasons related to the prevention of crime or national security or because it emerges at a very late stage e.g. during the trial: compare *Playboy Club London v Banca Nazionale Del Lavoro Spa* [2018] EWCA Civ 2025, although this was not an application to set aside a judgment). But, I do not think that these passages from the judgment of Lord Sumption should be read as establishing a general rule that it is only when there has been an entirely free choice not to rely on known evidence of fraud that the second claim will be prevented from proceeding:

   i) In my view the cases and materials referred to above are clear.

   ii) In *Takhar*, the Supreme Court was not considering a case where, as here, the alleged fraud was known at the time of trial and the evidence was in the knowledge and possession of the party seeking to set aside the judgment. Nor was it dealing with a case where the party was able plead its fraud case in the earlier proceedings but chose not to do so, deliberately failed to comply with the directions of the court and then was refused relief against sanctions.

iii) Nor was there any issue in *Takhar* as to whether the evidence of fraud was "new". It had been obtained sometime after trial.

iv) The issue which the Supreme Court was asked to determine was whether there was a requirement to show that the alleged evidence of fraud could not, with reasonable diligence have been discovered. It was not whether, having discovered the evidence of fraud, there was a condition that the case was prosecuted with reasonable diligence.

v) Indeed, it does not appear that, apart from deciding whether there was a reasonable diligence condition, the Court was required to give any, or at least any exhaustive, account of when a claim of this nature might be abusive. Lord Kerr did not think so given that he left all other questions open and I note that Lady Arden took the same view (paragraph 106). She also considered that Gracefield might yet make a further application to bar the application based on abuse of process, apparently by reference to a closer examination of Mrs Takhar's state of knowledge in relation to the alleged fraud (paragraphs 105 and 106).

vi) The last sentence of paragraph 63 of Lord Sumption's judgment is said to *"follow"* from the fact that *"..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*" (emphasis added). None of this applies in a case where the party positively believes that a claim is fraudulent and that he has the evidence to prove it. Such a party does believe that the other party is dishonest, has not assumed the contrary and has not been *'taken in'*. Lord Sumption therefore cannot have meant that it would only be where there was a decision not to investigate suspected fraud, or the party knew of the fraud and decided not to rely on it in the proceedings, that it could ever be said that the point *'should'* have been taken in those proceedings.

vii) I am not bound by what Lord Sumption said at paragraph 66, which was not a final view in any event. But in, my view, he cannot be taken to have meant that it will only be the case that a party should have deployed all of the evidence in its possession when it raised the fraud issue "first time around" if he freely chose not to rely on it in those proceedings.

viii) Lord Kerr suggested that there would be a discretion to refuse the application where there had been a deliberate decision not to investigate the possibility of a suspected fraud and he did not limit the scope of that discretion. Given that the case for the existence of such a discretion where the fraud and the evidence which supports it are known at trial is a fortiori, this does not sit comfortably with a view that there can be no discretion unless there is a deliberate decision not to rely on known evidence of fraud. Although it is logically possible to agree with both positions, there does therefore seem to me to be a tension between Lord Kerr's view and that of Lord Sumption, and an internal tension

in Lord Sumption's formulation, if the words of the latter are read in the way advocated by Mr Jones.

Issue estoppel

157. As far as issue estoppel is concerned, this argument should be approached with caution given Lord Sumption's observations at paragraphs 60 and 61 of his judgment in *Takhar*. In *Toubia* Handley JA also pointed out, at paragraph 5, that:

> *"Such proceedings are equitable in origin and nature…and in fact are proceedings for the judicial recission of the judgment....Such proceedings, when successful, do not result in the 'scandal of conflicting decisions'…. because if the second action succeeds the first judgment is set aside"*

158. Spencer Bower and Handley also say in 'Res Judicata' at paragraph 17.04:

> *"Proof that an English decision was procured by the fraud or collusion of the successful party is an answer to reliance on that judgment as an estoppel or for any purpose, including an action or proceeding such as an application for bankruptcy. The principle applies to an* ex parte *judgment, and one entered by consent which can be set aside on any ground, including fraud, on which a court can set aside a contract."*

159. There is therefore the risk of circularity in being asked to strike out a claim that the judgment of HHJ Coltart was procured by fraud on the basis that he has already decided the matter. If the claim is sound then res judicata does not arise because the judgment is set aside; if, on the other hand, the claim is unsound res judicate does not arise either because the claim will be dismissed in an event.

160. However, Mr Jones did not raise this objection to the argument based on issue estoppel, presumably on the basis that Lord Sumption cannot have had in mind a case where the issue of fraud was in fact raised and determined and/or there is no question of new or fresh evidence i.e. typical fraud litigation. Lord Briggs also said that *"if no allegation of fraud was made in the proceedings leading to the impugned judgment, there is no question of …issue estoppel"* (paragraph 82, emphasis added). Mr Jones' argument, as noted above, was that the issues had not been determined because no positive case of fraud had been advanced at trial and that, in any event, there was fresh or new evidence.

161. The question whether the issue of fraud was raised at trial is also important to the application or otherwise of *Takhar*. I will therefore address the arguments of the parties.

The interlocutory decisions in the County Court

162. I do not accept Mr Mallet's argument that there was any final determination of the issues in the interlocutory stages of the County Court proceedings. Ultimately, the only case which he advanced in this regard was that the authenticity of the McDonnell invoices and the Santander bank statements was decided by DDJ Maughan and/or when permission to appeal from her decision was refused. However:

i) The issues in the defendant's applications were not identical to the fraud issue. DDJ Maughan was asked to consider whether orders should be made on the basis that there was evidence of fraud, but she was not asked to decide whether the documents in question were actually forgeries or had been tampered with. Nor did she need to determine this issue in order to determine the application. Similarly, the applications for permission to appeal were, strictly speaking, determined on whether there was a realistic prospect of showing that DDJ Maughan's decision was wrong rather then whether the relevant documents were in fact fraudulent.

ii) Moreover, the decisions as to the strength of the evidence of fraud on the defendant's applications were not final (see Phipson on Evidence 19th Edition paragraphs 43-04 to 43-08). The Court proceeded on the basis that there was insufficient evidence of fraud before it at the relevant stage. It did not rule out the possibility that there would ever be such evidence and, indeed, it was specifically contemplated that the position might change if the evidence of Mr McDonell was held to be admissible.

The trial before HHJ Coltart

163. As far as trial is concerned, however, I do accept that the issues of the truth of the claimant's evidence and the authenticity of the impugned documents were before HHJ Coltart, that with one minor exception it was necessary that he decided these issues given the way that the case was argued and that he did decide these issues. As I have highlighted more detail above:

i) The Amended Defence denied the claimant's case as to the damage caused to her flat by the state of disrepair of the building, as to the repairs which she said she had caused to be carried out and as to the sums which she said she had spent and/or lost. Given that there was little room for error in terms of what she said had happened, this could only mean that she was being accused of not telling the truth, rather than of being mistaken. Indeed, the Amended Defence also specifically challenged the *"authenticity"* of the items of loss in respect of repair and redecoration which she claimed, as I have noted.

ii) The defendant then made various interlocutory applications on the express basis that it was accusing the claimant of fraud and alleging that certain of the documents on which she relied were forgeries.

iii) The defendant's skeleton argument stated that it was the defendant's case that the claimant's evidence of loss was *"untruthful"* and that it was challenging the *"authenticity"* of specified documents on which she relied.

iv) The Judge gave permission for the claimant to be asked questions which went to the authenticity of the documents on which she relied and she was cross examined in relation to each of the impugned documents in the context of an overall challenge to her evidence which called its truth into question, particularly as regards the carrying out of the repairs which she said she had caused to be carried out.

v) Mr Harris then submitted that the claimant's evidence should be rejected. In the context of the case, and how it had been conducted, this could only be on the basis that her evidence was untruthful rather than mistaken and that the documents on which she relied were *"suspect"* and had been forged or *"tampered with"*. This was also the Judge's view as his exchanges with Mr Harris and his judgment reflect.

vi) The Judge clearly understood that he was being asked by the defendant to decide the truthfulness of the claimant's evidence and the authenticity of the documents on which she relied to support it on the basis that these were issues on which the Claim turned. That was indeed the position.

164. I do not consider that it is an answer to this point, whether in the context of res judicata or abuse of process more generally, to say that the issue of fraud was not pleaded, or to point to a small number of passages where Mr Harris said that he was merely questioning the reliability of the claimant's evidence given that he was not in a position to advance a positive case. Nor, in my view, does it matter that he did not in terms call the claimant a fraudster at trial or put to her, in terms, that she was dishonest or a liar. He did say in terms that she was untruthful and that he challenged the authenticity of the documents on which she relied. The implication of dishonesty in his case was clear and was clearly understood by the Judge who was also alive to the allegations of fraud which had been made in the course of the interlocutory proceedings. It was also necessary for the Judge to address these questions in order to determine the case given that they went directly to the issues of damage to the flat, cost of repair and the amount of her other alleged losses.

165. As far as the question to which documents the bar applies in this case, the Judge explicitly found that the documents relied on by the claimant were *"entirely genuine and have not been tampered with"* and then made specific findings to the effect that the McDonnell invoices and the Santander bank statements were genuine. He also relied on the Fleetways Invoices and the check-out inventory in coming to his decision from which it may be inferred that, insofar as their authenticity was in issue, he determined that issue in the claimant's favour. Insofar as their authenticity was not in issue, that is because the challenge was abandoned, which is a point I shall return to below. I accept that the Judge expressly did not decide the authenticity of the 6 October 2015 email. He did, however, effectively decide that the content of the Babatunde letter was true in that he relied on as corroborating the claimant's evidence.

166. Assuming res judicata applies in this context, then, it seems to me that the defendant is barred from running its case that the claimant gave false evidence and relied on certain documents which were forged to make good her case before HHJ Coltart, subject to its arguments that it should be permitted to rely on evidence in relation to these issues which was not before the court. The question would then be whether there are "*special circumstances"* in this case where to refuse to allow him to do so "*would cause injustice"* (per Lord Sumption's summary at paragraph 22 of his judgment in *Virgin Atlantic*) having regard to the need for finality in litigation and the particular considerations which apply where it is alleged that a judgment has been procured by fraud. Similarly, insofar as the defendant did not raise issues or deploy

materials before HHJ Coltart the question would be whether he should be permitted to do so having regard to essentially the same considerations.

167. Insofar as there is any difference between the approach to these questions in the context of a plea of res judicata, as opposed to abuse of process, where the claim is to set aside an order on the grounds that it has been procured by fraud, I do not consider that there are special circumstances which mean that it would be unjust to refuse to allow the defendant to reopen the issues which were before HHJ Coltart. On the contrary, I consider that it would be unjust to the claimant to allow the defendant to do so, for the reasons stated below in relation to abuse of process, and that the finality principle should prevail in this case.

Abuse of process

168. As to whether the case of fraud which the defendant now wishes to advance is abusive, I am persuaded that it is for the reasons given above and the following reasons.

169. *Takhar* should not be regarded as detracting from the guidance as to the general approach to abuse of process in *Johnson v Gore Wood* (supra). Instead, as discussed above, the Supreme Court was looking at the application of that guidance in the particular situation where there is a claim that an earlier judgment was procured by fraud and that claim is said to be abusive, albeit that the Supreme Court held that a rule could be derived in relation to this type of case. Furthermore, the issue which the Supreme Court decided was as to the application or otherwise of a reasonable diligence condition where the alleged fraud and the evidence to support it were not known to, or in the possession of, Mrs Takhar and the issue of fraud was not raised in the earlier proceedings for determination at trial.

170. As I have pointed out, in the present case the questions whether the claimant's evidence was truthful, and the impugned documents were authentic, were raised at the outset in the County Court proceedings and were litigated before the Court in the interlocutory stages and at the trial. The honesty of her claim was in substance challenged. The majority of the impugned documents were central to the court's decision on the claim for the costs of repair and redecoration, particularly those documents which evidenced the fact and amount of the payments which she said she had made. The Judge also explicitly determined these issues. The defendant's true complaint is essentially that it did not put forward the whole of its case at trial. I therefore consider that *Takhar* can be distinguished from the present case and that the present case is not subject to the ratio of *Takhar*.

171. Mr Jones argued that there are parallels with *Takhar* given that, as set out in more detail above, Mrs Takhar said that she did not recall signing the profit share agreement etc and there was evidence that she and her advisers suspected that the signature attributed to her was not genuine. If this meant that fraud was not *"raised"* for the purposes of the Supreme Court's analysis, he argued, it must follow that it was not raised in the relevant sense in the present case. In my view, however, in drawing its distinction between cases where the issue of fraud was raised and cases where it was not raised, and bearing in mind that the issue was as to abuse of process and the need for finality, the Supreme Court intended an approach based on substance rather

than form. It had in mind the question whether the court was asked to decide the honesty or truthfulness of the claim and/or of the evidence on which it was based, rather than whether a so called positive case of fraud was advanced or the allegation of fraud was made in terms ('so called' because the line between a challenge and a positive case can be difficult to draw in practice and was not particularly clearly drawn in the present case given, for example, the way in which Mr Harris put the actual evidence of the SJE and various items of documentary evidence to the claimant). Judge Purle was not asked to adjudicate the question whether the signature on the agreement was authentic and did not formally do so. He proceeded on the basis that he had no reason to do other than assume that it was genuine and that in any event this was not the critical issue in the proceedings because it was consistent with Mrs Takhar's overall claim that she might have forgotten signing it.

172. Second, as I have discussed above in relation to the issue of fresh or new evidence, almost all of the evidence on which the defendant wishes to rely in its claim to set aside the judgment of HHJ Coltart was known to it and in its possession at or before the trial. This is a second basis for distinguishing *Takhar*. Furthermore, it is a relevant factor in the context of arguments about abuse of process, where there may also be greater flexibility than where the issue is as to the existence of a cause of action to set aside a judgment. The greater the ability of the litigant to deploy the relevant evidence, the greater the weight of the argument based on the principle that parties should put forward the whole of their cases and should not normally be given a second bite of the cherry if they don't.

173. I appreciate that the defendant applied unsuccessfully for relief against sanctions but I have concluded that, nevertheless, that the materials *"should have"* been deployed and that, in the words of Lord Sumption in *Takhar*, *"the law would expect a reasonable person to do this in his own interest and that of the efficient conduct of litigation"*. This is for the following reasons.

174. First, as I have noted, this is not a case where the argument of the alleged fraudster is that they could have been discovered by the victim. The claimant's argument is that since the defendant considered that it had discovered the alleged fraud and that it could prove it, the defendant should have put its whole case to the test when it raised the issue before HHJ Coltart.

175. Second, there was nothing to prevent the deployment of the relevant materials provided that the defendant complied with the rules and directions of the Court. As highlighted above, the Court also made directions and gave other clear indications as to what was required, but the defendant chose to ignore them.

176. Third, the defendant could and should have pleaded its case based on Mr McDonnell's evidence once it had his witness statement of 19 October 2017 at the latest. I consider that it was obliged to do so if it wished to advance a positive case based on the evidence of Mr McDonnell and agree with HHJ Simpkiss in this regard.

i) It is true that CPR 16.5(4) provides in relation to the content of a defence that: *"Where a claim includes a money claim, a defendant shall be taken to require that any allegation relating to the amount of money claimed be proved unless he expressly admits the allegation"*.

ii) However, Rule 16.5(2) requires that where an allegation is denied, as the key allegations in this case were, the defendant *"must state his reasons for doing so"* and *"if he intends to put forward a different version of events… must state his own version"*.

iii) The notes to Rule 16 in the White Book also state, at 16.5.1, that the defence must *"provide a comprehensive response to the particulars of claim"*.

177. In interpreting these requirements, well established common law principles require allegations of fraud and dishonesty to be pleaded. Reflecting these principles, for example, the Chancery Guide provides that:

> *"10.1... a party must set out in any statement of case:*
>
> - *full particulars of any allegation of fraud, dishonesty, malice or illegality; and*
>
> - *where any inference of fraud of dishonesty is alleged, the facts on the basis of which the inference is alleged"*

178. The reasons for this requirement are obvious and well known. Allegations of this sort are serious and damaging. It is a basic tenet of fairness that, if they are to be made, they should be made clearly and on cogent grounds so that the other party is clear as to the case they have to meet in what is a public process. Provided the allegations are made clearly, the person accused has a fair opportunity to marshall such evidence as they can to meet them including, for example, expert evidence. There is no sensible reason why this would not apply to a case in which the remaining issues are whether the loss and damage alleged were caused by the defendant's breach of duty and whether the losses allegedly incurred by the claimant were actually incurred.

179. But it seems to me that whether or not the defendant was <u>obliged</u> to plead this aspect of its case in full if it wished to pursue it in full, it was <u>able</u> to plead its case in full but chose not to do so, for reasons which are unexplained in the evidence but which appear from Mr Harris' exchanges with the Court to reflect a strategy which had been consciously decided upon. Moreover, the defendant persisted in choosing not to do so despite warnings from the Court in the interlocutory hearings to which I have referred. Insofar as that led to difficulties in developing its case or advancing the whole of its case at trial, that was a situation of its own making. It also means that Mr Jones' skilful arguments that the defendant did not raise the issue of fraud and that therefore res judicata does not apply, and this cannot be a case of abuse of process are, on analysis, highly unattractive. In effect, he contends that the defendant was entitled to choose to limit its pleaded case to a challenge to the honesty of the claimant's evidence and the authenticity of the documentary evidence based on some of the incriminating materials in its possession and then, when that was unsuccessful, to choose to plead, in full, the case which it chose not to plead "first time around" and to rely on all of those materials.

180. I have taken the view that Lord Sumption's remarks in *Takhar* should not be construed as a statute or regarded as an exhaustive account of what will amount to an abuse of process in this type of case. But it does seem to me that the defendant's failure to plead its case in full should be regarded as equivalent in this context, from an objective standpoint and given the rules of pleading and the need for finality, to a

deliberate decision not to advance the case which the defendant now wishes to advance. By contrast, Mrs Takhar was not in a position to plead fraud or make an effective challenge to the authenticity of the profit share agreement, and therefore her case was not one in which she deliberately chose not to do so.

181. Fourth, the defendant could and should have exchanged the first witness statement of Mr McDonnell on 3 November 2017. This view is not just based on the fact that he could have done so: it is what the EJ Russell's directions, in terms, required him to do if he intended to rely on it. Those directions also specified the sanction for non-compliance, as I have noted. Again, Lord Sumption does not appear to have had this sort of situation in mind but, insofar as it is necessary to fit the case within his formulation, the defendant's decision not to comply with the directions of the EJ Russell was a deliberate decision with knowledge of the alleged fraud, taken for tactical reasons. The fact that ultimately it could not rely on Mr McDonnell's evidence results from the application of EJ Russell's direction to that decision, albeit the court subsequently refused relief against sanctions.

182. Mr Jones sought to rely on the fact that the decisions made by the defendant were unwise or bad decisions and to argue that the Supreme Court in *Takhar* held that deliberate but negligent decisions would not be held against the party alleging fraud unless they were decisions not to rely on a known fraud. I do not agree. In my view the Supreme Court held that negligence on the part of a litigant, who was therefore unaware of the fraud or the evidence which he now sought to adduce, should not be held against them. It did not hold that a litigant which knew of the alleged fraud and raised the honesty of the other party's case, but chose not to comply with the rules and directions of the court and behaved "disgracefully" in the course of the litigation, could nevertheless have a second bite of the cherry.

183. Nor, therefore, do I consider that my approach is tantamount to allowing the claimant to rely on the negligence of the defendant in the relevant sense. In any event, the conduct of the defendant was more serious than mere negligence given that it persisted in making its allegations of fraud having been made aware of the court's requirements if it was to do so, but without complying with those requirements, apparently as part of a misguided strategy.

184. An additional reason for holding that the Statement of Case is abusive is that, in deciding whether to grant relief against sanctions HHJ Simpkiss was aware that the defendant was seeking to deploy evidence of fraud. He therefore was aware of the risk that the effect of refusing relief was that the claimant would procure a judgment in her favour by fraud. But he considered that it was not in the interests of justice, or consistent with the overriding objective, that the defendant should be permitted to rely on the McDonnell evidence. That decision has not been appealed. To allow the defendant now to rely on that evidence would, in my view, permit a collateral attack on the decision of HHJ Simpkiss and, indeed, be contrary to the rationale for the decision in *Gentry v Miller* (supra) which was that the rules of court apply in the same way to fraud claims as they do to other types of claim, and that there is the same public interest in the efficient and economic conduct of the litigation of such issues.

185. The fact that the County Court was aware of the defendant's wish to make allegations of fraud also addresses the point that there is also a public interest in courts not being

deceived. In relation to the concern that, although the defendant was aware of the alleged fraud, the County Court may have been deceived (I do not say it was) HHJ Simpkiss was aware of this risk when he refused relief against sanctions. Moreover, as I have pointed out, HHJ Coltart was also aware of the defendant's allegations of fraud and forgery when he made his decision, and he specifically decided the issues in relation to the truthfulness and authenticity of the claimant's evidence.

186. Mr Jones argued that there were parallels between the present case and Mrs Takhar's case in that she was prevented from obtaining expert evidence by a decision of the court. However, in the context of arguments based on abuse of process there seems to me to be a highly material difference between a party which chooses not to comply with the rules and orders of the court and suffers the consequences of which it was warned, and a party which seeks the permission of the court to obtain expert evidence but is not permitted to do so. Moreover, although Lady Arden had some concerns about Mrs Takhar's approach to the litigation in the Chancery Division (see paragraph 105) this had none of the *"disgraceful"* features which are present in the history of the litigation between the claimant and the defendant which I have summarised above.

187. These are all reasons why the defendant's attempt to rely on the McDonnell evidence should be denied. In relation to the Babatunde letter, as I have noted, Mr Jones accepted that this item stands or falls with his case on the McDonnell material. Mr Bermant raised a point based on the supplementary report of Mr Stimpson but this was available on the second day of the trial, as was Mr Stimpson, and no attempt was made to deploy it or to call him. In other words, there was a deliberate decision not to rely on it. In my judgement it there should have been an application to the Judge if that material was to be relied on at all.

188. In relation to the Fleetwood Invoices, here the defendant believed that they were suspect and raised this issue, but decided not to pursue the matter at trial although it had some materials on which to do so and deployed them in cross examination. That was apparently a deliberate decision not to pursue what it believed to be a fraudulent claim. The position is similar in relation to the check-out inventory where the defendant had all of the materials on which it now relies, raised the issue, but then abandoned the point.

189. More generally, in my view it is relevant that the defendant's conduct of the County Court litigation was, as HHJ Simpkiss characterised it, disgraceful. This is very much a case in which it can be said that the claimant will be twice vexed in the same matter if the fraud issue is allowed to proceed and in circumstances where there is no acceptable reason why the defendant did not raise the issues before HHJ Coltart as fully as it now wishes them to be raised.

190. I also consider that it <u>can</u> be said that the defendant would be permitted unjustly to harass the claimant if the fraud issue were to proceed further. I do not say this without appreciating the seriousness of what is alleged against the claimant, or on the basis that there never was any case to answer. I do so on the basis that the allegations against the claimant <u>are</u> very serious, and there <u>was</u> a case to answer, but it has been answered. Fairness to the claimant is a relevant consideration, as is the use of public resources. The defendant persisted in repeatedly challenging the claimant's integrity and honesty in a number of hearings and in the course of protracted litigation in the

County Court. It had its opportunity to develop that case as fully as it wished provided it complied with the rules of the court. It did not take that opportunity as fully as it now wishes it had, but it nevertheless asked the Court to rule on its allegations and the Court did so.

191. Looking at matters in the round, then, and applying a broad, merits based, judgment to all of the facts, as required by *Johnson v Gore Wood*, I do consider that the public interest in finality of litigation should prevail in the circumstances of this case.

Materiality

192. For completeness I note that, in addition to this the arguments addressed above, Mr Mallett argues that the 6 October 2015 email and the Babatunde letter were not material to the decision of HHJ Coltart in the sense required by the guidance given by Aikens LJ in the *Highland Finance* case, cited above. I think that this is a somewhat artificial exercise given that, in effect, both points relate to the evidence of Mr McDonnell, which covers a number of matters and which would undoubtedly be material if ultimately it were accepted.

i) I accept that the 6 October 2015 email issue is not, on its own, material in the relevant sense given that the Judge did not consider that it was necessary to reach a view as to its authenticity. Taken in isolation, then, evidence from Mr McDonnell which was limited to an assertion that he did not write the version relied on by the claimant might not have been material. However, this does seem to me to be an artificial hypothetical. It is more likely that evidence which he gave on this topic would have explained that he could not have written it as he did not do the work to which it referred. If that was accepted by the Judge he would likely have regarded it as casting a very different light on the case given the nature of the defence, which put the claimant's truthfulness in issue.

ii) In relation to the Babatunde letter, I take a similar view. Here the Judge did rely on it. The additional evidence for these purposes was that of Mr McDonnell and, on the basis of Mr Bermant's witness statement, Mr Stimpson. Again, this evidence went to the condition of the flat and so it is artificial to see the issue as simply being about the replacement or otherwise of the units. That evidence, if accepted, might well have given the Judge pause for thought.

CONCLUSION

193. For all of these reasons I grant the Application.

POSTSCRIPT

194. On the day before the hearing, 23 April 2020, my clerk was contacted by email by a DC Garbett. Mr Bermant had apparently forwarded her my clerk's details. She said that she wanted to make me aware that Kent Police were investigating the claimant for submitting fraudulent documents during the County Court proceedings. She said that she had a folder of evidence which she would be happy to share with me at an

arranged date and time should I wish. She said the investigation was ongoing but this evidence might have a bearing on my decision.

195. I asked my clerk to notify DC Garbett that it would not be appropriate for me to receive any materials or rely on any communications from her without the knowledge of the parties and that I would therefore show her email to them and ask for their views. My clerk duly forwarded her email to counsel for their comments and they said that they did not wish to take the matter further. DC Garbett responded that she understood that I needed to make all parties aware but that she felt that it would be unfair to produce the evidence in a public setting given that the claimant was not aware of the case which the police were building against her.

196. The hearing proceeded without any further mention of this matter but DC Garbett then contacted my clerk by telephone and by email on 28 April 2020. I asked him not to inform me of what she had said and to email her as follows:

> *"Dear DC Garbett, I have informed Mr Justice Linden that you have made contact with me today by telephone and by email. As I said in my email on 23 April 2020, however, in fairness to the parties to the application before him, he cannot take into account or act on any information which has not been shown to them. He has therefore asked me not to reveal or send the contents of your communications to him unless and until you notify me that you are content for him to provide the same information to the parties so that they are in a position to comment. He has also asked me to encourage you to take legal advice if you have concerns and to take any further steps formally, using the court's processes, rather than informally. You should also bear in mind that the hearing of Ms Elu's application has taken place and Mr Justice Linden intends to send a draft judgment to the parties late this week or at the beginning of next. "*

197. I also asked him to email counsel as follows:

> "*Further to my previous emails on this subject, Mr Justice Linden has asked me to let you know that DC Garbett has been back in contact with me by telephone and email today. He has asked me to send her an email in the following terms, and I have done so: [MESSAGE ABOVE]"*

198. At the time of handing down this Judgment, nothing further has been heard. I hope that my view about these events is self-explanatory but, for the avoidance of doubt, the determination of the Application did not involve me deciding whether or not fraud had been committed by the claimant. It also required me to determine the issues on the arguments and evidence which the parties put before the court. Such evidence as the police have was therefore likely to be irrelevant. But if the parties or the police took a different view it was open to them to deal with the matter by way of formal application. In any event, it would have risked serious unfairness to the parties if I were to receive information of which they were unaware and which might affect my decision, whether because it was relevant or merely prejudicial, and whether on analysis it supported the position of the claimant or the position of the defendant.