Neutral Citation Number: [2021] EWCA Civ 240

Case No: A3/2020/0385

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM DISTRICT REGISTRY
(Chancery Division)
His Honour Judge Simon Barker QC
(sitting as a Deputy High Court Judge)
B30BM185

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2021

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
MR JUSTICE HAYDEN

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Between :

Dale	**Appellant**
- and -	
Banga and Others	**Respondents**

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- -

Mr John Brennan (instructed by **FBC Manby Bowdler LLC**) for the **Appellant**
Mr John Randall QC (instructed by **Sydney Mitchell LLP**) for the **Respondents**

Hearing date: 3rd February 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 11.00 a.m. on Wednesday 24th February 2021.

Lady Justice Asplin:

1. This appeal raises the question of what the appeal court should do when fresh evidence is adduced after a trial which allegedly shows that the judgment below was obtained by fraud, the conduct relied upon being that of a witness and of a party to the action which took place after the events in issue, and is unrelated to the issues which were before the court. In particular, it raises the following questions: whether the fresh evidence (permission to rely upon it having already been granted) is capable of establishing that the Respondents misled the judge at trial by asserting that a letter of revocation in relation to a will had been duly attested; if so, whether the question of whether the judge was misled (the fraud issue) should be referred to the lower court to be determined or should be the subject of a separate action; and, if it is determined that the lower court was misled by fraud, whether a previous will should be admitted to probate on the basis of the original judge's obiter dicta.

2. These questions arise in the context of hard fought and bitter litigation between siblings about the estate of their father, Mr Kewel Banga, who died on 23 April 2014 (the "Deceased"). The Appellant, Mrs Paramjit Dale, is the deceased's daughter ("Mrs Dale") and the First Respondent, Mr Ravindar Banga, is his son ("Mr Banga"). The second and third Respondents are two of the Deceased's grandchildren and are children of Mr Banga.

Background

3. The Deceased made numerous wills but the ones in question before the judge were a will dated 1 November 2012 which was substantially in favour of Mrs Dale and her family (the November 2012 Will) and a second will executed on 18 November 2013, which, for the most part, was in favour of Mr Banga and his family (the 2013 Will). The November 2012 Will had been followed by a letter of revocation dated 27 June 2013 (the "Letter"). It is the November 2012 Will which it is suggested should be admitted to probate if the fraud issue were decided in Mrs Dale's favour.

4. In a careful and detailed judgment, dated 22 November 2016, His Honour Simon Barker QC, sitting as a deputy High Court judge, decided that: the 2013 Will was only witnessed by one witness and, accordingly, was invalid (see [39] of the judgment) and the Letter had been executed and duly witnessed by the two attesting witnesses and, accordingly, was valid. As a result, the November 2012 Will had been revoked by the Letter and the Deceased died intestate. See [50] and [51] of the judgment. Despite not forming part of his ratio, the judge went on to record his "non-binding conclusion" (in summary form) in relation to the third issue which had been before him, namely, whether the November 2012 Will had been procured by undue influence which he rejected. See [52] – [58] of the judgment.

5. The trial took place over seven days in September 2016 and judgment was handed down on 22 November 2016. The order containing a declaration that the Deceased died intestate was made on 26 January 2017. By an application dated 24 February 2020, Mrs Dale sought permission to appeal, an extension of time and permission to rely upon fresh evidence. That relief was granted by an order made by Lewison LJ, dated 17 June 2020.

New evidence

6. It is said that in May 2019, Mrs Dale discovered that both Mr Saleem Arif, one of the two attesting witnesses to the Letter who gave evidence before the judge, and one of Mr Banga's sons, had been sent to prison. The criminal investigation was ongoing during the trial before

the judge and Mr Arif's criminal trial took place in April 2019. He was convicted of fraudulent trading contrary to section 993 Companies Act 2006 and of being involved in a money laundering arrangement with Mr Banga's son contrary to section 328(1) Proceeds of Crime Act 2002. The fraudulent trading had taken place between 1 November 2014 and 31 May 2015. That was after the Letter had allegedly been signed by the Deceased and attested to by Mr Arif and the Second Respondent, Ms Rinku Kaur Banga, Mr Banga's daughter and the Deceased's granddaughter. It is said that the dishonest wrongdoing overlapped, in part, however, with preparation for the trial before the judge and, in particular, with the preparation of witness statements.

7. It is also said that in late January 2020, Mrs Dale discovered that as a result of the same criminal investigations, Mr Banga himself had been indicted with attempting to pervert the course of justice. In particular, it was alleged that he caused his solicitors to provide the investigating officers with a bundle of false invoices and false supporting documentation in an attempt to pervert the course of justice by seeking to persuade the investigating officers that there was a legitimate explanation for the £244,000 odd paid by Mr Arif to Mr Banga's family businesses between 5 November 2014 and 30 March 2015. Having been committed for trial, no evidence was offered and, accordingly, Mr Banga was acquitted. It is alleged, nevertheless, that it is incontrovertible that Mr Banga had sought to pervert the course of justice by the production of false invoices.

8. Mr Brennan, on behalf of Mrs Dale, submits that if the fresh evidence had been available to be adduced at trial it would have entirely changed the way in which the judge approached the question of the proper attestation of the Letter and his conclusion in that regard. It is said that the fresh evidence: undermines Mr Arif's credibility as a witness of fact (as to the attestation of the Letter); supports the conclusion that Mr Arif and Mr Banga are sufficiently dishonest to have attempted to deceive the court about the circumstances in which the Letter was signed by the attesting witnesses and even that it was a forgery and was produced on another occasion; made Mr Arif the obvious person to have been chosen to assist in attempting to deceive the court; and gave Mr Arif an obvious motive to assist Mr Banga and his family.

The Judge's approach

9. The judge dealt with the validity of the Letter at [40] – [51] of his judgment. As the judge noted at [7(2)] of the judgment, Mrs Dale challenged the Letter on the basis that it had not been properly attested by two witnesses. Although there were questions about why the solicitors to whom the Letter was addressed had never received a copy, the judge did not consider that to be of "particular significance to [this] issue". He went on to note that Mr Brennan, on behalf of Mrs Dale, had "recognised this and in his opening submissions made clear that the evidence of the Second Respondent, [Ms Rinku Banga] and Mr Arif (that is what they say about the execution of the document) is crucial". See [40] of the judgment.

10. The judge also set out six of the thirty-two points made by Mr Brennan in his written closing, as to why Mr Arif's evidence should be rejected, including the inability of the Respondents to produce evidence in the form of metadata to support the creation of the Letter at the time it was dated. The judge went on, nevertheless, to state at [47]:

> ". . . In closing submissions, Mr Brennan acknowledged that the deceased signed the 27 June 2013 letter [the Letter]. So the question is whether it was duly witnessed by the second defendant and Mr Arif as witnesses to its execution. Mr Brennan submitted that Mr Arif is a

> plausible liar whose evidence falls far short of that necessary to overcome the flaws in the second defendant's evidence."

11. At [48] of the judgment, the judge considered the confused evidence about originals and photocopy versions of the Letter and the question of where the copy contained in the bundle actually came from. He did not regard that matter as dispositive, however. Instead, he confirmed that he agreed with Mr Brennan's point in opening that "the evidence of the second defendant [Ms Banga] and Mr Arif is crucial". He went on to add that so too was the context as to timing. There was contemporaneous documentary evidence that on 22 June 2013 the Deceased had first told Mr Banga that he had executed the November 2012 Will at the behest or with the encouragement of Mrs Dale and concluded that that was why the Letter was produced at very short notice as "swift action was thought necessary to protect the first defendant [Mr Banga] and his family's future financial interests."

12. The judge described Mr Arif's oral evidence as a "cameo role". Mr Arif had stated that he had spent about an hour at the Deceased's house, the Deceased had read through the Letter in his presence, two or three times, and that the signing and witnessing had taken place in his (Mr Arif's) and Ms Banga's presence. The judge also recorded that when challenged directly on whether he could be sure that he and Ms Banga had witnessed the Deceased signing the Letter, he had looked surprised and answered unhesitatingly, "Yes. We all signed together." See [43] and [45] of the judgment.

13. Having noted that it was more difficult to assess the credibility of the evidence of a cameo witness and having taken account of Mr Arif's evasiveness about his address, he accepted that Mr Arif's evidence was "probably reliable" See [49] of the judgment.

14. The judge went on to decide that when preparing her written evidence and when giving oral evidence, Ms Banga could not really remember what she did or did not do. He went on:

> "50. . . . It is common ground that the deceased signed the 27 June 2013 document; there is a logical and inherently likely explanation for its timing. I have accepted Mr Arif's evidence as to what occurred as probably reliable. I do not think the deceased would have destroyed the document. His method of operation was to make a later document as and when he changed his mind as to testamentary dispositions, rather than to destroy a document. I therefore accept that the 27 June 2013 letter [the Letter] was executed and duly witnessed as contended for by the defendants [Respondents]."

It was on this basis that he concluded that the Letter was valid and that the Deceased died intestate.

Grounds of Appeal and the present position

15. In the grounds of appeal it is stated that the issues of whether the Letter was properly attested and whether the November 2012 Will was procured by undue influence should be remitted to the lower court and retried by the judge because the new evidence would have had an important influence upon the judge's decision that the Letter was duly attested and indicates that his decision was procured by fraud or that he was deliberately misled and that there was no binding finding in relation to the November 2012 Will. The new evidence in relation to the Letter was: (i) that when Mr Arif became involved in this matter he was trading fraudulently

and using Mr Banga's family business to launder the proceeds and after judgment in this matter he was convicted of two serious offences of dishonesty, being fraudulent trading and money laundering; and (ii) that around the time at which witness statements were made, Mr Banga caused his solicitor to provide false invoices and supporting documentation to the officers investigating the money laundering with the intention of perverting the course of justice.

16. Further, it was stated that there was no "binding finding" in relation to the November 2012 Will and it would be "in the interests of justice and the best interests of the litigants that the issues be determined without either imposing on the Appellant [Mrs Dale] the obligation to issue fresh proceedings or depriving the Respondents the benefit of the learned Judge's decision".

17. The judge has since retired. As a result, Mrs Dale's position has changed. Mr Brennan now seeks: a direction that the question of whether the judgment was obtained by fraud be remitted to the court below; and a conditional order that if it is held that the judge was misled, the judge's declaration that the Deceased died intestate be set aside and the November 2012 Will be admitted to probate. In effect, therefore, if the fraud issue is proved, Mr Brennan seeks to convert the judge's "non-binding conclusion" that the November 2012 Will was not procured by undue influence into a binding decision by means of an order of this court.

18. In oral submissions, Mr Brennan said that it would be necessary to prove either that the Letter had not been properly attested or that it could not have come into existence in the way in which the Respondents had alleged and that the judge had been deliberately misled about both or either of those matters.

Draft Points of Claim – the fraud issue in more detail

19. In response to a request from Mr Randall QC on behalf of the Respondents, Mr Brennan has produced draft Points of Claim in relation to the fraud issue. They contain a more expansive fraud claim than that summarised in Mr Brennan's skeleton argument. As before, Mrs Dale alleges that Mr Arif gave false evidence regarding the witnessing of the Letter and that it was not signed on 27 June 2013. In addition, she goes on to allege that the Letter was a complete forgery. The Letter, it is said, is likely to have been created by Mr Banga at some point between 9 and 31 July 2014, that is, after the death of the Deceased, in response to Mrs Dale having provided Mr Banga with a copy of the November 2012 Will. Accordingly, Mrs Dale avers that Mr Arif and Ms Banga gave false evidence that they attested the Deceased's signature of the Letter on 27 June 2013; and Mr Banga gave false evidence when he stated that he had created a draft of the Letter for the Deceased to sign no later than 27 June 2013.

20. To support the fraud claims, Mrs Dale relies on what she describes as "evidence of character/similar fact evidence" concerning Mr Arif and Mr Banga. The central component of this new evidence is the criminal investigations into Mr Arif and Mr Banga, culminating in Mr Arif's conviction and Mr Banga's acquittal, to which I have already referred.

21. It is helpful to set out the nature of the conduct in a little more detail. In summary, between 1 November 2014 and 31 May 2015, Mr Arif was involved in carrying on Electroponents Limited, an online electronics store, for a fraudulent purpose, namely to defraud creditors of the company, contrary to section 993 of the Companies Act 2006. Mr Arif was also involved in a money laundering scheme, contrary to s.328(1) of the Proceeds of Crime Act 2002, whereby funds from the fraudulent trading vehicle were transferred to the bank account of a

company called B4U Telecom Limited. As I have already mentioned, one of Mr Banga's sons was also involved.

22. It is said that Mr Banga himself was involved in the running of B4U Telecom Limited, and was also investigated in connection with the company's role in Mr Arif's offences. On 16 March 2016, investigating officers from the Trading Standards eCrime Team interviewed Mr Banga under caution about 53 payments made by Electroponents Limited to B4U Telecom Limited between 5 November 2014 and 30 March 2015 (amounting to £244,760.05), which they suspected were not made in the ordinary course of business. Mr Banga provided invoices for these payments to the eCrime Team via his solicitor on 6 April 2016; but the authorities suspected they were false, and conducted a second interview under caution to ascertain whether the documents constituted an attempt to pervert the course of justice. Mr Banga was later indicted for that offence; he pleaded not guilty, and the Crown offered no evidence, leading to his acquittal.

23. Mr Arif pleaded not guilty to both offences for which he had been indicted, but was convicted following trial. Mr Banga's son pleaded guilty to the money laundering offence. Both were sentenced to terms of imprisonment on 9 May 2019: Mr Arif for 4 years and 6 months, and Mr Banga's son to 2 years and 11 months.

24. Mrs Dale avers that these matters are relevant to the issues which were before the judge because they go to the character of Mr Arif and Mr Banga, and the credibility of their evidence regarding the creation of the Letter and its alleged attestation. In respect of Mr Banga, it is said that they demonstrate his "attitude and approach to legal proceedings" and "prove that [he] had a propensity" knowingly to manufacture and rely upon false documents in legal proceedings. In respect of Mr Arif, it is said that his convictions prove that he "had a propensity" (both before and after the first trial) to be dishonest and give a false account of events.

25. Mrs Dale also avers that the judgment was procured by the deliberate and conscious dishonesty of Mr Banga and Mr Arif. This, she says, is demonstrated by discrepancies in the way in which their relationship was described in the criminal investigation and the evidence given in the proceedings before the judge. In the former, the evidence (including Mr Banga's statements in interview) suggested a long-standing close friendship and business relationship, whereas before the judge they sought to present their relationship as a distant acquaintanceship: mere "family friends".

26. Further, in respect of Mr Banga, Mrs Dale also relies on evidence of character/similar fact evidence "concerning [his] attitude and approach to his parents' property", particularly his "overweening sense of entitlement" to that property and propensity to deal with it "without any or any proper regard to the legal or moral obligations to which his receipt of the same was subject". The evidence Mrs Dale refers to includes: requesting his parents to transfer £100,000 from the Deceased's pension fund to him (on a date unknown); requesting and procuring various further loans and cash payments from the Deceased; selling various assets, including shares and property, without accounting to his parents for the proceeds of such sales to which they were entitled; and his present claim against the administratrix of the Deceased's estate that he is entitled to a beneficial interest in the family home. These matters, she avers, go to her allegations that Mr Banga gave false evidence regarding the Letter. Mr Brennan accepts that some of these matters were rehearsed before the judge and are, as he described them, "re-treads".

Setting aside a judgment on the basis of fraud

27. At this point, it is important to be clear about what it would be necessary to prove in order to be successful in setting aside the judgment. It goes without saying that judgments are not set aside lightly. It is not sufficient that the evidence given below can now be proved to have been mistaken. If judgments and orders could be set aside on that basis, there would be an end to finality in litigation. Nor is it sufficient that a witness committed perjury. It is necessary that the judgment was obtained by fraud and that the fraud was that of a party to the action or was at least suborned by or knowingly relied upon by that party: *Odyssey Re (London) Ltd & Ors v OIC Run Off Limited & Ors* [2000] EWCA Civ 71 (per Buxton LJ with whom Nourse and Brooke LJJ agreed in this regard); and *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9.

28. In *Takhar v Gracefield Developments Ltd & Ors* [2020] AC 450, the Supreme Court was concerned with the question of whether a claim by which a party sought to set aside a previous judgment on the grounds that it had been obtained by fraud would be an abuse of process if the success of the claim depended upon evidence which could, with reasonable diligence, have been produced at the original trial. In the course of considering that matter, the policy considerations behind an action to set aside a judgment on the basis of fraud were considered and the principles which govern such applications which had been summarised by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners lp* [2013] 1 CLC 596, para 106 were approved. See [56] and [67]. Lord Kerr, with whom Lord Hodge, Lloyd-Jones and Kitchin JJSC agreed, set out Aiken LJ's summary at [56], as follows:

> "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."

29. As Lady Arden JSC pointed out at [104], however, Aikens LJ's statement of principles deals with the position at the trial of a rescission action, not with threshold conditions on bringing such an action. Nevertheless, it is important to have them in mind.

Noble v Owens

30. Before considering what is the appropriate course to take in this case and what the court should ask itself, it is helpful to consider *Noble v Owens* in more detail. It was a very different case

from the one with which we are concerned. The claimant was a motorcyclist who was involved in a collision with the defendant's car, leaving him with serious injuries. Liability in negligence was admitted but quantum was in dispute. In March 2008, following a trial before Field J, the claimant was awarded damages of over £3 million. The award was based on evidence that the claimant's mobility had been severely restricted by the accident, leaving him reliant upon crutches and a wheelchair; and as a result he would never work again and required assistance with daily living.

31. The defendant did not appeal the judgment at the time. However, evidence came to light in the course of the following year that indicated the claimant's disabilities were not as severe as had been made out at trial: the defendant's insurers filmed him walking without assistance and performing manual labour. The defendant therefore sought to appeal the damages award, seeking an order for a fresh trial on the grounds that the new video evidence demonstrated the judgment had been obtained by fraud.

32. The claimant accepted that the fresh evidence could be admitted, but resisted the appeal on the basis that the defendant's remedy for the alleged fraud was to commence a new action seeking to set aside Field J's judgment.

33. Turning first to the issue of when the Court would order a retrial, Smith LJ noted that there was a conflict in the authorities, particularly where fraud was alleged:

> "16. It appears to me that there is an inconsistency between the two lines of authority upon which the opposing parties to this appeal rely. On the one hand there is *Ladd v Marshall* [1954] 1 WLR 1489 which suggests that, where fresh evidence is properly admitted and it appears to the court that it might, if admitted, have had an important effect on the trial, the right course is to send the case back for retrial. That should be done, apparently even if the new evidence suggests that a deceit was practised on the court below: see *Hamilton v Al Fayed* [2001] EMLR 394. On the other hand, *Jonesco v Beard* [1930] AC 298 suggests that, where it is alleged that there was deceit in the court below, the proper course is to leave the aggrieved party to commence a new action, save where the Court of Appeal either determines the issue of fraud itself – in effect where it is admitted – or the evidence is incontrovertible. How are these two lines of authority to be reconciled?
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> 17. First, the position is clear where the new evidence does not disclose the possibility of fraud. If the *Ladd v Marshall* conditions are fully satisfied, the court may send the case back for retrial. The potential problem arises only where the new evidence suggests fraud and in those cases, the authorities are in conflict."

34. Smith LJ at [22] explained the "rationale" underlying the *Jonesco* decision as follows:

> ". . . the defendant should not lose his favourable judgment without clear evidence of fraud. He should not lose it merely on account of a plausible allegation of fraud. The interest in finality of litigation should hold sway unless and until the judgment is show to have been obtained by fraud. In that case, it is clear that the fraud was not conceded and the evidence was far from incontrovertible . . ."

After summarising the authorities and considering the conflict between the two strands of those authorities, Smith LJ, with whom Elias LJ agreed, concluded as follows:

> "27. … In my judgment, the true principle of law is derived from *Jonesco v Beard* and is that, where fresh evidence is adduced in the Court of Appeal tending to show that the judge at first instance was deliberately misled, the court will only allow the appeal and order a retrial where the fraud is either admitted or the evidence of it is incontrovertible. In any other case, the issue of fraud must be determined before the judgment of the court below can be set aside."

35. She commented at [28] that the video evidence was "sufficiently cogent that it is possible that a judge would find that the claimant had deceived the court below", but that it was "far from incontrovertible". It would therefore be unfair for the award of damages to be set aside and a re-trial ordered: inevitably, the video evidence would lead to a lower damages award, which would breach the principle of finality in litigation. However, as a matter of case management, she decided that the issue of fraud should be remitted to the lower court, explaining her reasoning as follows:

> "29. Although the old cases say that where there is an issue of fraud to be tried that must be done by commencing a fresh action, I do not think that in this day and age that should always be necessary. All that is needed is that the issue of fraud should be determined. That could be done just as well (if not better) by this court referring the trial of the fraud issue to a High Court judge pursuant to CPR r 52.10(2)(b). . . In my view that would be a better course to follow in the present case for two reasons. First, the costs of a fresh action would necessarily exceed the costs of the trial of an issue. If the issue is referred, the matter could be dealt with quite expeditiously. The judge could give directions as to the clarification of the allegations and as to the exchange of evidence. In any event, most of that has already taken place. The matter could be ready for hearing within a very short time. Second, this court would be able to direct that the issue be tried by Field J. Subject to submissions from the parties, my provisional view is that it would be appropriate for him to try the issue in that no other judge could be as well placed as he. When his memory is refreshed he will no doubt have a good recollection of the evidence.
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> 30. I would propose that, for the present, the appeal should be allowed to the extent that the issue of fraud should be referred for trial by a High Court judge. If the judge rejects the allegation of fraud, the original award will stand. If the judge finds that fraud is proved, he should make a reassessment of the damages."

36. In a concurring judgment, Elias LJ identified three principles which control exceptions to the overarching principle of finality in litigation, namely that: (i) a retrial is only appropriate where the strict *Ladd v Marshall* criteria are satisfied (see [32]-[34]); (ii) once damages have been assessed, the position is final, barring a "dramatic change in circumstances" (see [35]-[36]); and (iii) where allegations of fraud are made, they should be particularised and established to the appropriate standard of proof (see [37]).

37. He went on to agree with Smith LJ about the the proper disposition of the appeal in the following terms:

> "65. So the case is not one where there is strong prima facie evidence of fraud; it is one of evidence raising a question of fraud. I agree with Smith LJ that it does properly raise that issue. It is sufficient to justify pleading a fraud case. Sedley LJ, whose judgment I have seen in draft, has indicated that he had some hesitation in concluding that there is evidence of fraud sufficient to justify a collateral action. I do not share that hesitation, but in my judgment the court is certainly not in a position to say that the fresh evidence raises a strong prima facie case of a kind from which the court could properly conclude at this stage that it will probably have an important influence on the damages to be awarded. A case which may properly be pleaded with respect to a collateral action for fraud may fall well short of the more rigorous criteria which would justify ordering a retrial under *Ladd v Marshall*. This is recognised by Lord Phillips of Worth Matravers MR in para 15 of *Hamilton v Al Fayed* [2001] EMLR 394, set out above. In my judgment, this is such a case.
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> 66. Accordingly, for these two distinct reasons, in my judgment, the defendant fails to establish that a retrial is an appropriate remedy. The issue of fraud must first be properly determined at trial.
>
> 67. The question then is how the fraud issue should now be determined. I respectfully agree that the disposition of the case should be in accordance with the directions proposed by Smith LJ. It enables the issue of fraud to be determined in a way which the authorities and justice require. It is in accordance with the overriding objective to remit the case in this way rather than requiring fresh proceedings to be instigated, and it gives effect to the second and third principles which I identified at the start of this judgment."

38. Sedley LJ agreed with both Smith and Elias LJJ. Addressing the proper disposal of the case, he held:

> "72. Although the time-hallowed remedy is to let the aggrieved party bring a fresh action to set aside the award, today it seems a costly and circuitous exercise. The course proposed by Smith LJ seems to me more appropriate. In place of counsel's professional obligation not to sign a fraud pleading without solid evidence to support it, this court has had to form a preliminary view as to whether the evidence now before the court is capable – no more – of showing that the trial judge was deliberately misled about the claimant's capacities. Having formed the view (for my part not without hesitation) that it is, we are able to make an order which enables that issue to be properly tried but protects the claimant from the loss of his award unless and until it is proved that he obtained it in some significant measure by fraud."

39. It is clear, therefore, that where an allegation of fraud is involved, there are two courses which may be adopted. The dissatisfied party may bring a new action to set aside the judgment

already obtained on the basis that it was obtained by fraud: *Flower v Lloyd* [1877] 6 Ch D 297; *Hip Foong Hong v H Neotia & Company* [1918] QC 888; and *Jonesco v Beard* [1930] AC 298. Such a route was adopted in the *Royal Bank of Scotland* case and in the *Takhar* case. In such circumstances, the successful party retains the benefit of the judgment unless it is set aside and can seek to strike out the claim to set it aside as an abuse of the court's process.

40. In *Salekipour v Parmar* [2017] EWCA Civ 2141, [2018] QB 833, the Court of Appeal expressed a preference for this approach but did not decide the issue. The same preference was expressed by the Court of Appeal in *Daniel Terry v BCS Corporate Acceptances Limited, BCS Offshore Funding Limited, John Taylor* [2018] EWCA Civ 2442 at [38], although, once again, it was unnecessary to decide the point.

41. The second and alternative route, which is the one adopted here, is to appeal the original order, alleging that the judgment upon which it is based was obtained by fraud. A retrial will be ordered where the fraud is admitted or incontrovertible. Where, as in this case, it is neither admitted nor incontrovertible, a "*Noble v Owens* order" is sought by which the issue of fraud is remitted to the court below and decided within the same proceedings.

What is the test?

42. In this case, the issue of fraud is hotly contested. In the circumstances, this court must decide first whether the fresh evidence is sufficient to warrant a trial of the fraud issue. The relevant threshold test has been variously described and was referred to in different ways in *Noble v Owens* itself. It seems to me that it is necessary to decide whether the new evidence is capable of showing that the judge was deliberately misled by the Respondents and that the judgment may have been obtained by fraud. It must be sufficient to justify pleading a case of fraud. It must be capable of showing that there was conscious and deliberate dishonesty which was causative of the judgment being obtained in the terms it was. The conscious and deliberate dishonesty must be that of a party to the action, or was at least suborned by or knowingly relied upon by a party.

43. Secondly, if that threshold test is satisfied, the court must determine whether on the facts and in the circumstances of the particular case, it is appropriate that the fraud issue should be remitted or otherwise dealt with within the same proceedings. There is no question but that the appeal court has power to "refer any claim or issue for determination by the lower court": CPR 52.20(2)(b). The question is whether the discretion to do so should be exercised. It is not possible to list the matters which will be relevant to the exercise of that discretion because they inevitably depend on the circumstances.

Application of the principles

44. How are these principles to be applied in this case? First, on the facts of this appeal, is the threshold test met? Mrs Dale seeks to rely upon what is described as circumstantial evidence, similar fact evidence and evidence of bad character to raise the inferences that: Mr Arif committed perjury; the Letter itself was forged by Mr Banga; and that he too, committed perjury. Although it is not stated expressly in the draft Points of Claim, it is to be inferred from the close connection between the allegation of forgery and the alleged attestation of the Letter, that Mr Arif's alleged perjury was procured and/or knowingly relied upon by Mr Banga.

45. Unlike in *Noble v Owens*, the new evidence is of allegedly similar fact and bad character. It does not go directly to the central matters of fact before the judge. It requires inferences to be

drawn based upon the alleged lack of credibility of the witnesses who gave evidence before him and their alleged propensities. It is tangential. Furthermore, all of the conduct from which it is said that the inferences should be drawn post-dates the alleged attestation of the Letter.

46. In Mr Arif's case, the evidence is of subsequent unrelated offences of dishonesty, albeit that Mr Banga's son and his family companies were involved. In my judgment, in itself, it is not capable of showing that Mr Arif committed perjury and that the new evidence would have entirely changed the way in which the judge approached his decision in relation to the Letter. The dishonesty is unrelated and although the judge placed weight upon Mr Arif's evidence in relation to the attestation of the Letter, having concluded that Ms Banga could not recall what took place, he also relied upon the contemporaneous documentary evidence as to timing and the Deceased's approach when changing his testamentary dispositions. See [48] and [50] of the judgment. That is not to suggest that I consider it appropriate to conduct a detailed analysis of the judge's approach in order to determine this first threshold question. It is enough to conclude that the new evidence is highly tangential, is unrelated to the factual matters before the judge, it post-dates the events in issue and requires inferences to be drawn in relation to credibility.

47. The new evidence in relation to Mr Banga is also alleged to be of similar fact which together with the circumstantial evidence, it is said, raises the inference that the Letter was a forgery. Accordingly, it is to be further inferred that Mr Banja perjured himself and that he procured Mr Arif's perjury or knowingly relied upon it. The evidence itself goes to dishonesty and an alleged propensity to produce false documents. It is said that it must be coupled first with an allegation that the evidence Mr Banga gave in the proceedings underplayed the closeness of his relationship with Mr Arif and second, Mr Banga's attitude towards his parents and their property and his entitlement to it. It is the evidence in relation to the allegedly false invoices, and facts concerning Mr Banga's relationship with Mr Arif that came to light in the course of the criminal investigation, which are new.

48. When determining whether the threshold test is met, it is important to bear in mind that it does not matter that Mr Brennan, on behalf of Mrs Dale, accepted in the court below that the Letter had been signed by the Deceased, and therefore implicitly accepted that it was not a complete forgery. Such an admission can have no influence on the consideration of new evidence that comes to light later.

49. However, in my judgment, the new evidence in relation to Mr Banga when viewed alone, and coupled with the new evidence in relation to Mr Arif, does not meet the threshold in any event. Mrs Dale would need to prove that her brother produced the alleged false invoices, in an attempt to pervert the course of justice, despite the fact that no evidence was proffered at his trial and he was acquitted. It is not necessary to consider whether this would amount to a collateral attack on that acquittal and whether that would itself be an abuse of process. It is sufficient for these purposes to conclude that even if those matters were proved, the new evidence does not go directly to an issue of fact which was before the judge and does not tend to show that the judgment was obtained by fraud. Further, it does not tend to show that Mr Arif's alleged perjury was procured by or knowingly relied upon by Mr Banga.

50. Similarly, any discrepancies between the nature of Mr Banga's relationship with Mr Arif as it was presented during the criminal investigation, and statements made in these proceedings, are of tangential relevance to the issues before the judge. At most, like the alleged false invoices, the evidence is relevant only to Mr Banga's credibility: a matter on which he was cross-examined at trial. Answers to questions concerning collateral facts which are given under

cross-examination are generally considered to be final: *Phipson on Evidence*, 19th Edition, para 12-14.

51. In my judgment, therefore, the new evidence is insufficient to meet the threshold test. It will always be more difficult for "indirect" evidence from which inferences must be drawn, to meet that threshold; and in this case, I consider the new evidence which post-dates the events with which the judge was concerned, is too far removed from those events to be capable of showing that the judgment was obtained by fraud.

52. Even if the threshold test were met, I would, nevertheless, decline to exercise the discretion to remit the matter to the lower court. This is not a case in which it is expedient, convenient and proportionate that this matter should be dealt with in that way. The judge has since retired. A new judge would have to pick up this matter and begin again. It is unlikely, therefore, that any time or costs would be saved (save for a new issue fee). This is all the more so given the wide ranging nature of the fraud issue as pleaded in the draft Points of Claim and the need to prove that Mr Banga produced false invoices in the face of his acquittal. In effect, it would involve satellite litigation.

53. Furthermore, it seems to me that it would be inappropriate to grant the conditional order which is now sought. That is part and parcel of the relief which Mr Brennan seeks. Mrs Dale seeks to impugn the judgment in relation to validity of the Letter but to save the judge's obiter dicta in relation to whether the November 2012 Will was obtained by undue influence. It seems to me that this is the real reason for seeking a direction that the fraud issue be determined within these proceedings rather than in a fresh action. This is a considerable extension to the pragmatic approach adopted in *Noble v Owens* itself. It is also another reason why it is not appropriate to remit the fraud issue in this case.

54. Although Mr Randall QC, on behalf of the Respondents, made reference in his written argument to a passage in the judgment of Lord Sumption JSC in the *Takhar* case at [61], the question of whether part of the judgment might be saved was not argued in any detail before us. The passage referred to in Mr Randall's written argument which relates to a separate action to impugn a judgment on the grounds of fraud, is as follows:

> "The cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute. There can therefore be no question of cause of action estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parties: *R v Humphrys [1977] AC 1*, 21 (Viscount Dilhorne). If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment. It follows that res judicata cannot therefore arise in either of its classic forms."

It seems to me that the passage is not necessarily directly in point. In the circumstances, I do not express any opinion about whether a conditional order of the kind Mr Brennan now seeks could be granted. I merely conclude that the added complexity which it would add in this case, including the position in which the Respondents would be placed, were they to seek to challenge the judge's "non-binding" conclusion, is another reason which militates against the exercise of the discretion to remit the fraud issue.

55. Accordingly, for the reasons set out above, I would decline to remit the issue of fraud to the lower court and would dismiss the appeal.

Mr Justice Hayden:

56. I agree.

Lord Justice Moylan:

57. I also agree.