Rescission of county court judgments for fraud

Salekipour v. Parmar [2017] EWCA Civ 2141

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"It's never over till it's over" (Yogi Berra)

. . . and sometimes even then it isn't over! (Anon.)

"But oft they say the third doth end the strife, which I have proved, therefore the sequel view, the third pays home, this proverb is too true!" (Queen Elstride in *The Mirror for Magistrates*, 1574)

"Finality is a good thing, but justice is better"
Ras Behari Lal v. King Emperor (1933) 50 TLR 1, PC *per* Lord Atkin

Here is a scenario that many a solicitor and barrister comes across once or twice in the course of a professional life. Your case goes to trial. You lose, not on the law or on the construction of documents of undisputed authenticity, but because the trial judge prefers the evidence of the other side's witnesses. So far, so bad, yet so mundane.

Then, the twist in the tail, or indeed the tale! Years later, your client discovers compelling evidence that an important witness on the other side lied at the behest of the opposing party, or that a disputed document was, after all, a forgery. What to do?

The aggrieved party can of course apply for permission to appeal, with an extension of time for appealing over the 21 days usually allowed, but the Court of Appeal is a very busy court and applications for permission are not readily granted, especially on questions of fact, as opposed to law.

What is more, only in a truly exceptional case will an appellate court hear oral evidence, which poses obvious problems if the witness whose testimony is impugned will not "fess up".

There is however another remedy, well established in High Court practice, if too little known by most practitioners, namely an action for rescission of a judgment.

Such an action was familiar to the common law judges centuries ago; see *The Duchess of Kingston's case*[1]. Unsurprisingly a similar remedy existed in Chancery; see *Mitford on Pleadings*[2], pp. 112-113

An action for rescission has many advantages over an appeal. Firstly, the limitation period is certainly not less than six years from the date on which the damage was suffered, as opposed to the mere 21 days allowed to file a notice of appeal.

Moreover, damage, which is of the gist of a claim for fraud, may not and often will not be suffered till some time after the fraud is perpetrated.

What is more, section 32 of the Limitation Act 1980 helpfully provides that the six years do not begin to run "until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it." That might very well not be until many years later.

Indeed, it is well arguable that no limitation period *at all* applies to a claim for rescission (as opposed to damages), since rescission is an equitable remedy, so that only *laches* or delay coupled with detriment is a defence; see section 36 of the Limitation Act 1980.

An extreme case was *In re Gillard* [1949] VLR 378 noted in *Spencer Bower & Handley on Actionable Misrepresentation,* 5th ed., Chapter 20, p. 251, in which a grant of probate obtained by fraud was revoked after a remarkable forty years. There is no reason to suppose that an English court would not apply the same principle as do the courts of Victoria on similar facts.

It might be thought surprising that in certain circumstances a party can avoid the 21 day time limit for appealing by recourse to a new claim for which the limitation period is at least six years. However in the quite recent case of *Noble v. Owens*[3] the Court of Appeal saw nothing untoward in making the fullest use of any advantage that a new claim offers.

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1 (1776) 2 *Smith's Leading Cases* 644

2 5th ed. (1847)

3 [2010] 1 WLR 2491

On the contrary, Elias LJ said that "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*".

All these principles undoubtedly apply in the High Court, qualified by the important rule that the perjury or other fraud must be perpetrated or procured by a party, not by a "mere" witness; see *Spencer-Bower, op. cit.*, para. 20-09, and that the perjury must be "material", a question discussed below.

But since the High Court's powers in such a case are part of its inherent jurisdiction, as heir both to the old common law courts and the Chancery, can the County Court exercise a similar jurisdiction if one of its judgments has been procured by perjury or subornation of perjury?

There is no doubt that (in the words of Neuberger LJ in *Tower Hamlets v. Begum*[4]): "The County Court is a creature of Statute and has no inherent jurisdiction."

The County Court used to have an express power to revisit one of its own "final" judgments under CCR Order 37, rules 1 to 3, a provision with a long ancestry. As in force immediately before the introduction of the CPR and continuing in Schedule 2 to the CPR, it provided that:

> "In any proceedings tried without a jury the judge shall have power on application to order a rehearing where no error of the court at the hearing is alleged."

In other words, if an error in assessing the evidence or applying the law is alleged, the proper course was to appeal, but if the court had been deceived by false evidence, an aggrieved party could apply to re-open even a "final" judgment.

CCR Order 37 was however revoked by the Civil Procedure (Amendment) Rules SI 2002 No. 2048 ("the 2002 SI") with effect from 2nd December 2002.

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4 [2006] H. L. R. 9 at 50 (p. 173)

What, if anything, has taken its place? This question arose squarely for decision in *Salekipour v. Parmar* [2017] EWCA Civ 2141.

To summarise the facts shortly, the appellants, Mrs Salekipour and her husband Mr Saleem were the tenants of Mrs Parmar and her late husband, Mr Parmar.

The tenants alleged multiple acts of harassment, breaches of the covenant for quiet enjoyment *&c.* against their landlords, which, in the nature of things, turned largely on witness evidence.

The trial judge, HH Judge Marshall Q. C. was especially impressed with one of the respondent's witnesses, a Mr Fiszer, whom she described as:

> " . . . a bluff Polish shopkeeper, who gave evidence in good but careful English. He was the most independent of the supporting witnesses, and I am quite satisfied that he was sincerely telling me the truth as he saw it. I feel able to rely on his evidence."

Long after HHJ Marshall Q. C. gave judgment, Mr Fiszer attended the offices of the tenants' solicitors and gave a statement in which he said that Mrs Parmar had told him what evidence to give at trial, threatening to forfeit his lease if he did not give evidence to assist her case, that the evidence which he gave at trial at her behest was not in fact true, and that Mrs Parmar later threatened to have both him and his wife killed.

Armed with this startling statement, the tenants issued a claim for rescission of Judge Marshall's judgment in the County Court.

Mrs Parmar's response was to apply to strike out the claim, alleging that it was an abuse of process to proceed by way of a new claim, rather than to appeal out of time.

The slender basis for this quite remarkable submission was a footnote in the then current edition of the White Book, suggesting that since *Noble v. Owens*, the proper course where fraud in procuring a judgment is alleged was not to bring a new claim, but to appeal.

That proposition is contrary to long-standing authority in the Privy Council and the House of Lords; see *per* Lord Buckmaster in *Hip Foong Hong v. H. Neotia & Co.*[5] and *Jonesco v. Beard*[6], recently cited with approval by Baroness Hale in *Sharland v. Sharland*[7].

Moreover, it is not actually so clearly supported by the judgments in *Noble v. Owens* itself as the note might suggest.

It nevertheless succeeded before District Judge Lightman, not least because Mrs Parmar's solicitors saw fit to make it *ex parte* and District Judge Lightman was willing to consider it *ex parte*, rather than listing it for an *inter partes* hearing.

Naturally District Judge Lightman gave permission to the tenants to have his order reconsidered *inter partes*, and so the matter eventually came on before Her Honour Judge Faber.

Judge Faber was, to say the least, not impressed by the idea that to bring a new action was an abuse of process, given the high authority counselling that very course, nor was she taken with the plea that any perjury (all hotly denied, naturally) was in any event immaterial, or that the tenants' case was insufficiently pleaded.

She did however see force in the argument that the County Court did not have jurisdiction to entertain such a claim, rejecting the argument that section 23 (g) of the County Courts Act 1984, as recently amended to increase the County Court's equity jurisdiction to £350,000, confers such jurisdiction, especially when read in conjunction with section 38, and considered in the light of older authority.

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5 [1916] A. C. 888

6 [1930] A. C. 298

7 [2015] UKSC 60, [2015] 3 WLR 1070

Section 23 (so far as relevant) provides that:

> *Equity jurisdiction*
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> "The county court shall have all the jurisdiction of the High Court to hear and determine—
>
> > "(g) proceedings for relief against fraud or mistake, where the damage sustained or the estate or fund in respect of which relief is sought does not exceed in amount or value the county court limit."

Section 38 (so far as relevant) provides that:

> *Remedies available in county courts*
>
> (1) Subject to what follows[8], in any proceedings in the county court the court may make any order which could be made by the High Court if the proceedings were in the High Court."

Section 70 of the County Courts Act 1984 provides that:

> "Every judgment and order of the[9] county court shall, except as provided by this or any other Act or as may be prescribed, be final and conclusive between the parties."

The tenants' case was quite straightforward: section 23 (g) means what it says, and fraud in procuring a judgment is within the scope of section 23 (g), just as much as fraud in procuring, for example, a consent order or a deed of compromise.

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[8] Nowadays the only order which a County Court judge has no jurisdiction to make on the pleas side is a search order. On the Crown side, the County Court has no jurisdiction to grant *mandamus, certiorari* or prohibition; section 38 (3).

[9] formerly "a county court"

Denning LJ certainly thought that the three cases were analogous: see the famous passage in *Lazarus Estates Ltd v. Beazley* at 712-713[10]:

> "Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved, it vitiates judgments, contracts and all transactions whatsoever."
>
> "See as to deeds, *Collins v. Blantern*, as to judgments, *Duchess of Kingston's case* and as to contracts, *Master v. Miller*."

There was hitherto no authority directly in point. Doubt had been expressed (but without finally deciding the point) in two decision of the Court of Appeal, *Bishop v. Chokkar* [2015] EWCA Civ 24 and *Rawding v Seaga* [2015] EWCA Civ. 113 whether the County Court possesses an analogous power under section 23 (g) of the 1984 Act.

Her Honour Judge Faber quite rightly treated the observations in those case as *obiter dicta* only, but ruled against the tenants on the jurisdictional point, holding that the weight of the *dicta* in the Court of Appeal was against them.

The tenants immediately sought permission to appeal, which Judge Faber gave, so that matter went up to the High Court, where it was listed before Mr Justice Garnham, a much respected judge of the Queen's Bench Division, even though the appeal related to the extent of the County Court's equity jurisdiction.

Quite what process of reasoning could have led the Appeals Office to allocate a Chancery appeal to the Queen's Bench Division is not obviously apparent.

The appeal was vigorously argued on both sides before Mr Justice Garnham, who came to almost exactly the same conclusions as Her Honour Judge Faber, for essentially similar reasons. While against the appellants on the jurisdictional point, Mr Justice Garnham also saw nothing in the respondent's case of abuse of process, *laches* and insufficiency of pleading.

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[10] [1956] 1 Q.B. 702 at 712

Mr Justice Garnham's judgment was widely reported; [2016] EWHC 1466 (QB); [2016] Q.B. 987; [2016] 3 W.L.R. 728. The key paragraph was 56, construing the words of section 23 (g) of the County Courts Act 1984:

> "In my judgment those words are appropriate to describe an original action for relief against fraud which itself causes damage below the relevant limits. It contemplates the County Court having jurisdiction to try fraud cases where the amount in issue is below the relevant limit. In my judgment the wording of subsection (g) is inapt to create a mechanism by which a prior judgment can be set aside."

Permission to appeal further was sought and quickly granted by Floyd LJ (the respondent having filed written submissions seeking to oppose the granting of permission). The stage was now set for a second appeal, rare in County Court cases, before the Court of Appeal.

It is worth noting at this point that the rather restrictive procedure for seeking permission to bring a second appeal worked very well in this case. If there is a lesson for practitioners here, it is to hone your skeleton to the utmost of your ability, no matter how many hours it takes and how much work is required of you to prepare the very best skeleton that you are able to write. I can assure you that it will take many hours and much hard work!

Only a carefully crafted skeleton, drawing out the important points for the consideration of the busy (or, more bluntly, overworked) Lord or Lady Justice dealing with many applications for permission to appeal to the Court of Appeal, is likely to get your case through the triage on the papers stage.

Floyd LJ gave permission for a second appeal on the basis that the appeal raised an important point on the County Court's jurisdiction, with the consequence that it was listed before a constitution including the Master of the Rolls himself, who gave the only judgment, though Flaux and Moylan LJJ also put many a question to both counsel in the course of argument.

Sir T. Etherton M. R.'s judgment repays careful study. To summarise the most salient points briefly, the Master of the Rolls took a different view from Judge Faber and Mr Justice Garnham on the true construction of section 23 (g), holding that:

74 . . . sections 23 and 38 of the 1984 Act confer jurisdiction on a County Court judge to determine proceedings to set aside a final County Court order obtained by perjury or fraud. Such proceedings appear to me to fall precisely within the wording of section 23. The right of a party to have a judgment set aside on the ground of fraud is a principle of equity: *Flower v Lloyd* (1877) 6 Ch D 297; *Noble* at [42] (Elias LJ). The present proceedings are, consistently with the terms of section 23, "proceedings for relief against fraud … where the damage sustained … does not exceed in amount or value the county court limit"

75. Judge Faber does not explain why she considered that "it is clear that [section 23] does not deal with rescission of the judgment of a colleague even though it be on the grounds of fraud", other than for the reason that she was strengthened in her view by the observation in *Bishop* that the jurisdiction is described as an inherent jurisdiction of the High Court.

"76. Garnham J's interpretation of section 23 and its scope is contained entirely within paragraph [56] of his judgment, as follows:

> 'In my judgment those words are appropriate to describe an original action for relief against fraud which itself causes damage below the relevant limits. It contemplates the County Court having jurisdiction to try fraud cases where the amount in issue is below the relevant limit. In my judgment the wording of subsection (g) is inapt to create a mechanism by which a prior judgment can be set aside.'

"77. Mr Letman vigorously endorsed that reasoning of Garnham J that the wording of section 23 is "inapt" to refer to an action to set aside a judgment.

"78. I do not agree. The conduct of the defendant who has caused loss is at the core of the claim. The essence of the claim is that the fraud of the defendant has caused the claimant damage by defeating the original claim. I can see

> no sound reason for constraining the literal wording of section 23 so as to exclude such a claim."

That neatly disposes of the main issue on appeal, but several other interesting points arose, both substantive and procedural.

Importantly, the Court of Appeal considered the two rather different tests for materiality in deciding whether perjury committed or procured by a party is sufficiently serious to justify setting aside a judgment.

Recently, there has been a tendency to cite the words of Aikens LJ at para. 106 of *Royal Bank of Scotland v. Highland Financial Partners* [2013] EWCA Civ. 328 where Aikens LJ said that when a party alleges that a judgment must be set aside because it was obtained by the fraud of another party, the dishonest evidence, action, statement or concealment must be "material" in the sense that it was an operative cause of the court's decision to give judgment in the way it did.

That statement is of itself wholly uncontroversial. What followed however is not, for Aikens LJ went on to say that, put another way:

> "it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision."

On the other hand, in *Hamilton v. Fayed* [2000] EWCA Civ. 3012, an earlier decision of the Court of Appeal not cited in *Royal Bank of Scotland*, Lord Phillips M. R. said at 34 (2) that the test of materiality is whether there is a "real danger" that the perjury affected the outcome of the trial, which is a significantly lower threshold.

While not finally deciding the point (since he agreed with HHJ Faber that whether the higher or the lower threshold applies, it would be satisfied if the perjury alleged in this case is proved) Sir T. Etherton M. R. was inclined to agree (at 93) that the test was over-stated in *Royal Bank of Scotland* and that the proper approach is that laid down in *Hamilton*, especially in light of the strong *dicta* of Lord Buckmaster in the Privy Council in *Hip Foong Hong v. H. Neotia & Co.* [1916] A. C. 888 and in the House of Lords in *Jonesco v. Beard* [1930] A. C. 298 about the insidious and pervasive nature of fraud, none of which were cited to Aikens LJ in the *Royal Bank of Scotland* case. Nor indeed was Lord Phillips' judgment in *Hamilton.*

Thirdly, Sir T. Etherton M. R. deplored at 99 the practice of overanalysing the primary judgment in an attempt to show that the perjury would have made no difference any way. As Flaux LJ pointedly observed in the course of argument, Lord Denning would not have listened to such a submission with much patience!

Last but not least, the Master of the Rolls expressed considerable doubt about the view expressed by Smith LJ (I would add, in terms more tentative than the editors of the *White Book* perhaps appear to suggest) in *Noble v Owens* [2010] 1 WLR 2491 at [29] that the more common and generally the better way of challenging a judgment obtained by fraud is by way of appeal.

As the Master of the Rolls said at 72:

> "No doubt the most appropriate course - independent collateral proceedings or appeal - will depend on the facts of each case and the precise allegations being made. I do not, however, agree with the general proposition that the more common and generally the better way of challenging a judgment obtained by fraud is by way of appeal. Indeed, in *Sharland*, in which *Noble* was cited in argument, Baroness Hale said (at [38]) that an appeal is not the most suitable vehicle for hearing evidence and resolving the factual issues which will often, although not invariably, arise on an application to set aside; and (at [39]), citing *Jonesco*, that a fresh action would be the normal route in ordinary civil proceedings to challenge a final judgment on account of fraud. Further, In *Gohil,* in which *Noble* was also cited in argument, Lord Wilson said (at [18(a)]) that the Court of Appeal is not designed to address a factual issue other than one which has been ventilated in a lower court."

What are the lessons of this appeal? The first, it seems to me, is that sometimes the most important thing is to carry on believing in your own case, even in the face of discouraging decisions.

Gordon Exall, who edits the excellent *Civil Litigation Brief*, rightly pointed out that:

> "The decision in *Salekipour & Anor v Parmar* [2017] EWCA Civ 2141 was made after three previous hearings a (including two appeal hearings) in the lower courts. *It was the only time the claimants were successful.*"

That is very true! But as Bilbo Baggins said in *The Hobbit,* chapter 12: *"Third time pays for all"*.

I shall not however become complacent. The respondent has indicated an intention to seek leave to appeal to the Supreme Court. If it is granted, the last word on this question has not been spoken.

Another lesson, which I have pointed out above, is that no advocate who hopes to succeed in a superior court can ever work too hard on his or her written submissions under our system, which now places so much emphasis on a Darwinian process to weed out unmeritorious appeals without an oral hearing. It has been said that "sweat equity is the best equity". That is certainly true in Chancery appeals!

The third (again from Tolkien, but this time from *The Fellowship of the Ring*) is that "short cuts make long delays". The respondent might arguably have done better to allow the claim for rescission to go to trial on the facts, rather than to apply to strike it out on procedural grounds.

That is admittedly a difficult judgment call, for while in theory an appeal on a point of law remains open to a party who has lost on the facts, in practice it is scarcely likely that if an allegation of subornation of perjury is not only made but also proved (which, I should emphasise, is a question for the trial judge, and has not been decided yet) the suborner will get very far on appeal. So choose carefully!

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