# Court of Appeal—County Court can set aside order obtained by perjury (Salekipour v Parmar)

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**Dispute Resolution analysis: The Court of Appeal has, on a second appeal, ruled that the County Court has the same power as the High Court to set aside one of its earlier orders which had been obtained following a contested hearing on perjured evidence. Barrister Adrian Davies, of 3 Dr Johnson Buildings Chambers, (who acted for the successful appellants) comments on what lessons can be learned from this case and considers the wider implications for these types of cases.**

## Original news

*Salekipour and another v Parmar (in her own right and as executrix of Parmar, deceased)* [2017] EWCA Civ 2141, [2017] All ER (D) 108 (Dec)

*The appellants' appeal against findings of the High Court was allowed. The Court of Appeal, Civil Division, held that the County Court had jurisdiction under section 23 of the County Courts Act 1984 (CCA 1984) to hear and determine a claim to set aside one of its own judgments that had been obtained by fraud.*

## What is the significance of this case? Why is it important for practitioners?

Two claimants had brought County Court proceedings against their former landlord to recover sums they alleged were owing to them. At trial their claim was dismissed, with the judge preferring the defendant's evidence. The claimants then brought another action asking the County Court to rescind its judgment and order a new trial. They produced a witness statement showing that one of the defendant's witnesses had been pressured to give perjured evidence. However, that claim was struck out as an abuse of process and the claimants' application to set aside the striking out was dismissed on the basis that the County Court had no jurisdiction to rescind one of its previous judgments.

That dismissal was upheld on first appeal by a High Court judge who found that the County Court was a creature of statute and that CCA 1984, s 23 did not empower it to set aside one of its own judgments obtained by fraud.

However, on a second appeal, this ruling has been overturned by the Court of Appeal. It ruled that the County Court does have jurisdiction under CCA 1984, s 23 to set aside one of its previous final judgments obtained by fraud. Before the Civil Procedure Rules 1998 (CPR), SI 1998/3132, came into force, the County Court had jurisdiction to set aside one of its previous orders on the basis that it had been made in consequence of perjury or fraud.

If neither CPR 3.1(7) nor CCA 1984, s 23(g) enabled the County Court to set aside such an order, then it had lost a jurisdiction it had possessed since its creation without any explanation. There would be a discrepancy between the powers of the High Court and the County Court, leaving litigants in the latter at a serious procedural disadvantage. A party's right to have a judgment set aside on the ground of fraud was a principle of equity and proceedings for such relief were 'proceedings for relief against fraud' within the meaning of the equity jurisdiction in CCA 1984, s 23(g). There was no reason to limit the wording of section 23(g) to exclude such a claim.

The finality provision in CCA 1984, s 70 stipulated that County Court judgments and orders were final as between the parties except as otherwise provided by statute. CCA 1984, s 38 was such a provision. It entitled the County Court to make any order that could have been made by the High Court and the High Court had an inherent power to set aside an earlier order and direct a new trial where appropriate. It was irrelevant that CCA 1984, s 23 had not previously been invoked in this sort of context. Until the repeal of County Court Rules (CCR) Order 37 rule 1(1), there had been an explicit procedure for revoking final orders and there had been no need to resort to CCA 1984, s 23.

*Salekipour* is an interesting case in these three respects:

### County Court powers

It lays to rest the view that, since the old CCR Order 37 was revoked (it had remained in effect after the CPR came into force in a schedule until it was finally revoked on 2 December 2002), the County Court no longer has a statutory power analogous to the High Court's power at common law to revisit and in an appropriate case revoke even a final judgment. Some doubt had been expressed (but without finally deciding the point) in two earlier Court of Appeal decisions (*Bishop v Chhokar* [2015] EWCA Civ 24 and *Rawding v Seaga* [2015] EWCA Civ 113, [2015] All ER (D) 233 (Feb)) as to whether the County Court possesses an analogous power under CCA 1984, s 23(g). In *Salekipour*, the Court of Appeal has ruled that that the County Court does have jurisdiction to re-open one of its own judgments.

**Tests for 'materiality'**

The Court of Appeal has 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. There has been a tendency to rely on *Royal Bank of Scotland v Highland Financial Partners* [2013] EWCA Civ 328, [2013] All ER (D) 65 (Apr), 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. Aikens LJ added: '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.' In *Hamilton v Al Fayed* [2000] EWCA Civ 3012, Lord Phillips MR had said 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, Sir Terence Etherton MR was inclined to agree that the test was over-stated in *Highland Financial* and that the proper approach is that laid down in *Hamilton.*

**Challenge by appeal**

Etherton MR expressed considerable doubt about the view expressed by Smith LJ in *Noble v Owens* [2010] EWCA Civ 284, [2010] 4 Costs LR 540, [2010] All ER (D) 87 (Mar), that the more common and generally the better way of challenging a judgment obtained by fraud is by way of appeal. That view is contrary to that of Baroness Hale DPSC in *Sharland v Sharland* [2015] UKSC 60, [2015] All ER (D) 108 (Oct), that 'a fresh action would be the normal route in ordinary civil proceedings to challenge a final judgment on account of fraud'.

## How helpful is this judgment in clarifying the law in this area? Are there any remaining grey areas?

Undoubtedly the primary issue for decision (namely whether the County Court has jurisdiction to re-open one of its own judgments) has been resolved subject only to a mooted application by the respondent for permission to appeal to the Supreme Court. The Court of Appeal refused permission and it will be interesting to see whether the Supreme Court grants it. The Court of Appeal has also given a strong indication that the test of materiality is the lower *Hamilton* test and not the higher *Highland Financial* test.

One interesting question canvassed in oral argument remains open, namely whether it is possible to re-open a final judgment by issuing an application notice relying on CPR 3.1(7) rather than new proceedings. Here the appellants had not been willing to risk taking that course in the light of Hughes LJ's judgment in *Roult v NW Strategic Health Authority* [2009] EWCA Civ 444, [2009] All ER (D) 173 (May), that CPR 3.1(7) is more limited in scope than CCR Order 37 r 1.

More recently, Baroness Hale said in *Sharland* that Family Procedure Rules 2010, SI 2010/2955, r 4.1(6) (which is in identical terms to CPR 3.1(7)), 'is a very wide power' and gives the court power to entertain an application to set aside a final order in financial remedy proceedings where the judgment has been obtained by fraud—so the point remains open. Since it was not essential to the decision in *Salekipour*, the Court of Appeal expressed no concluded view.

## What are the practical implications of the judgment? What should practitioners be mindful of when advising in this area?

These three things are now clear:

- the remedy of a new claim is available in the County Court and will often be both more procedurally straightforward and also cheaper than an appeal
- the materiality threshold is most likely lower than the stringent *Highland Financial* test, and
- a time limit of six years not 21 days applies—so we can expect an increased number of claims to set aside judgments obtained by fraud

There are clearly areas of practice, notably road accident claims, where fraud has been all too common in recent years. Victims of fraud, especially insurers, should perhaps carry out a 'cold cases review'.

## How does this case fit in with other developments in this area of the law? Do you have any predictions for future developments in this area?

While the Court of Appeal has not ruled finally and conclusively upon the materiality threshold, it is fairly clear which way the wind is blowing. There is a clear trend of authority in the Supreme Court to resolve the tension between the desirability of finality and the undesirability of allowing a fraudster to retain benefits obtained by deceit. In *Ras Behari Lal v King Emperor* (1933) 102 LJPC 144, (1933) 50 TLR 1, Lord Atkin's opinion was that 'finality is a good thing, but justice is better'.

Baroness Hale's judgment in *Sharland* and the judgments of Lord Clarke and the late Lord Toulson in *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] All ER (D) 138 (Jul), all point in the same direction. Lord Justice Denning in *Lazarus Estates Ltd v Beazley* [1956] 1 All ER 341 said that:

'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.'

In this respect, it is also worthy of note that a few weeks before, on 15 November 2017, a different constitution (Lewison, Hamblen and Peter Jackson LJJ) independently applied the lower *Hamilton* test when *Bishop* was determined by the Court of Appeal.

In December 2017, the Supreme Court gave permission to appeal in *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147 in which the Court of Appeal reversed Newey J's ruling at first instance. Newey J had thought that the well-known 'reasonable diligence' requirement discussed in *Ladd v Marshall* [1954] 3 All ER 745 does not apply in a case of fraud. However, in the Court of Appeal, Lord Justice Patten LJ held otherwise, principally it seems because he thought that the Court of Appeal should follow dicta in *Owens Bank Ltd v Bracco* [1992] 2 AC 443, [1992] 2 All ER 193, out of deference to the highest court. Patten LJ took the view that even if the observations in *Owens Bank* were strictly obiter, similar observations in *Hunter v Chief Constable of the West Midlands Police* [1981] 3 All ER 727 formed part of the House of Lord's decision and were binding upon him.

In the Court of Appeal of New South Wales, Justice of Appeal Handley had criticised these dicta. Handley JA is also the editor of a leading text book on res judicata and actionable misrepresentation ('Spencer Bower and Handley on Actionable Misrepresentation'). In that work he has strongly maintained his criticisms of *Owens Bank* as having no real basis whatsoever in their supposed source.

Lord Toulson JSC wrote this postscript to his judgment in *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] All ER (D) 138 (Jul):

'It was expressly conceded…that whenever and however a legal claim is settled, a party seeking to set aside the settlement for fraud must prove the fraud by evidence which it could not have obtained by due diligence at the time of the settlement. It makes no difference to the outcome of the present case and the court heard no argument about whether the concession was correct. Any opinion on the subject would therefore be obiter, and since the court has not considered the relevant authorities (including Commonwealth authorities such as *Toubia v Schwenke* (2002) 54 NSWLR 46) or academic writing, it is better to say nothing about it.'

Just as the question of the County Court's jurisdiction (doubted but left open in *Bishop*) was resolved in *Salekipour*, so the Supreme Court will have to resolve finally the lingering doubts about whether the due diligence principle applies to cases of fraud.

*Interviewed by David Bowden.*

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