A Court of Appeal

Salekipour and another *v* Parmar and another

[2017] EWCA Civ 2141

2017 Dec 5; 15 Sir Terence Etherton MR, Flaux, Moylan LJJ

B *County Court — Jurisdiction — Rescission of earlier judgment — Judgment dismissing claim against defendants and allowing counterclaim — Claimants issuing fresh claim seeking to rescind judgment on grounds of fraud and subornation of witness — Whether County Court having jurisdiction to rescind earlier judgment on grounds of fraud — County Courts Act 1984 (c 28) (as amended by Courts and Legal Services Act 1990 (c 41), s 3 and Crime and Courts*
C *Act 2013 (c 22), s 17(5), Sch 9, para 10(1)(a)(b)), ss 23, 38*

The right of a party to have a judgment set aside on the ground of fraud is a principle of equity, and so the High Court has inherent jurisdiction to determine proceedings to set aside a final order obtained by perjury or fraud. Sections 23 and 38 of the County Courts Act 1984[1] confer the like jurisdiction in respect of a final County Court order on a judge sitting in the County Court (post, paras 69, 70, 73, 74,
D 79, 86, 101, 102).

Dictum of Lord Phillips of Worth Matravers MR in *Hamilton v Al Fayed* (sub nom *Hamilton v Al Fayed (No 2)*) [2001] EMLR 15, para 34, CA applied.

Where, therefore, the claimants appealed against the High Court's dismissal of their appeal against the County Court's refusal of their application to revoke a district judge's decision to strike out as an abuse of process their claim for rescission of an earlier decision of a county court on the grounds of perjury and subornation of
E a witness and for an order for a new trial—

Held, allowing the appeal, that section 23 of the County Courts Act 1984 conferred jurisdiction on the County Court to entertain the claim and so the district judge's decision would be revoked (post, paras 86, 100, 101, 102).

Per curiam. The suborning of a witness by a party to give perjured evidence in order to succeed at trial is a most serious matter, which not only taints the evidence of the witness but potentially undermines the credibility of that party on all issues (post,
F paras 95, 101, 102).

Decision of Garnham J [2016] EWHC 1466 (QB); [2016] QB 987; [2016] 3 WLR 728 reversed.

The following cases are referred to in the judgment of Sir Terence Etherton MR:

Bishop v Chhokar [2015] EWCA Civ 24; [2015] CP Rep 26, CA
G *Brown v Dean* [1910] AC 373, HL(E)
Flower v Lloyd (1877) 6 Ch D 297, CA
Forcelux Ltd v Binnie [2009] EWCA Civ 854; [2010] HLR 20, CA
Gohil v Gohil (No 2) [2015] UKSC 61; [2016] AC 849; [2015] 3 WLR 1085; [2016] 1 All ER 685, SC(E)
Hackney London Borough Council v Findlay [2011] EWCA Civ 8; [2011] PTSR 1356, CA
H *Hamilton v Al Fayed* (sub nom *Hamilton v Al Fayed (No 2)*) [2001] EMLR 15, CA
Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318, CA
Hip Foong Hong v H Neotia & Co [1918] AC 888, PC
Jonesco v Beard [1930] AC 298, HL(E)

[1] County Courts Act 1984, ss 23, 38, as amended: see post, para 3.

Kuwait Airways Corpn v Iraqi Airways Corpn [2003] EWHC 31 (Comm); [2003] 1 Lloyd's Rep 448
Noble v Owens [2010] EWCA Civ 224; [2010] 1 WLR 2491; [2010] 3 All ER 830, CA
R v Wothington-Evans, Ex p Madan [1959] 2 QB 145; [1959] 2 WLR 908; [1959] 2 All ER 457, DC
Rawding v Seaga UK Ltd [2015] EWCA Civ 113; [2015] Info TLR 161, CA
Roult v North West Strategic Health Authority [2009] EWCA Civ 444; [2010] 1 WLR 487, CA
Royal Bank of Scotland plc v Highland Financial Partners LP [2013] EWCA Civ 328; [2013] 1 CLC 596, CA
Sharland v Sharland [2015] UKSC 60; [2016] AC 871; [2015] 3 WLR 1070; [2016] 1 All ER 671, SC(E)
Smith v Kay (1859) 7 HL Cas 750, HL(E)
Stephenson v Garnett [1898] 1 QB 677, CA
Zurich Insurance Co plc v Hayward [2016] UKSC 48; [2017] AC 142; [2016] 3 WLR 637; [2016] 4 All ER 628; [2016] 2 All ER (Comm) 755, HL(E)

The following additional cases were cited in argument:

Danchevsky v Danchevsky [1975] Fam 17; [1974] 3 WLR 709; [1974] 3 All ER 934, CA
Lazarus Estates Ltd v Beasley [1956] 1 QB 702; [1956] 2 WLR 502; [1956] 1 All ER 341, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

Chodiev v Stein [2015] EWHC 1428 (Comm)
Cole v Langford [1898] 2 QB 36, DC
Kingston's (Duchess of) Case (1776) 2 Smith LC (13th ed (1929), vol 2) 644
Meek v Fleming [1961] 2 QB 366; [1961] 3 WLR 532; [1961] 3 All ER 148, CA
Murtagh v Barry (1890) 24 QBD 632, DC
Peek v Peek [1948] P 46; [1947] 2 All ER 578, DC; [1948] 2 All ER 297; 64 TLR 429, CA
Takhar v Gracefield Developments Ltd [2015] EWHC 1276 (Ch)
Tower Hamlets London Borough Council v Rahanara Begum [2005] EWCA Civ 116; [2005] LGR 580;, CA
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534
Wyatt v Palmer [1899] 2 QB 106, CA
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA
Young v Kershaw (1899) 81 LT 531, CA

APPEAL from Garnham J

By a claim form dated 24 September 2014, the claimants, Shahan Salekipour and Amir Saleem, sought against the defendant landlords, Mohinder Singh Parmar and Jashan Kaur Parmar, an order for the rescission, on the grounds of alleged perjury and deception, of a judgment and order of Judge Marshall QC in the Central London County Court dated 10 May 2012, whereby she had dismissed a claim made by the claimants against the defendants by a claim form dated 29 September 2011 and allowed the defendants' counterclaim.

By a without notice application dated 7 November 2014 the defendants sought to have the claim struck out on the grounds that it disclosed no reasonable grounds or otherwise as an abuse of process. On 14 January

A 2015, without a hearing, District Judge Lightman in the County Court at Central London struck out the claim as an abuse of process, giving the claimants liberty to apply.

By an application notice dated 22 January 2015 the claimants applied to have the district judge's strikeout order revoked. On 18 August 2015 Judge Faber sitting in the County Court at Central London refused the application, ruling that the claim was bound to fail for want of jurisdiction.

B By an appellant's notice the claimants appealed on the principal ground that the judge had erred in concluding that there was no jurisdiction in the County Court to set aside an earlier decision of a county court on grounds of fraud. On 23 June 2016 Garnham J dismissed the appeal [2016] EWHC 1466 (QB); [2016] QB 987 and refused permission to appeal.

By an appellant's notice filed on 14 July 2016 and with permission of the C Court of Appeal (Floyd LJ) given on 18 October 2016 the claimants appealed on the ground that the judge had erred in law in holding that section 23 of the County Courts Act 1984 did not confer jurisdiction on the County Court to hear and determine a claim to set aside one of its own judgments obtained by fraud.

By a respondent's notice dated 8 November 2016 the second defendant, on her own behalf and as executrix of the will of the first defendant, who had D died, sought to uphold the decision of Garnham J on the further ground that, even assuming the further evidence of perjury relied on by the claimants for the purposes of their claim was true, that evidence was not such as could have affected the result in the previous proceedings before Judge Marshall QC, nor was it otherwise sufficiently material so that the claim should remain struck out.

E The facts are stated in the judgment of Sir Terence Etherton MR.

Adrian Davies (instructed by *Lancasters Solicitors*) for the claimants.

The High Court has an inherent and very long-established jurisdiction inherited from the old Court of Chancery to rescind a judgment obtained by fraud. The settled practice is normally to bring a fresh action in ordinary civil proceedings: see e g *Sharland v Sharland* [2016] AC 871, para 39. In the F County Court, while the court is certainly a creature of statute and has no inherent jurisdiction, section 23 of the County Courts Act 1984 when read with section 38 confers such jurisdiction; paragraph (g) of section 23 is apt to cover the case in point. The historical statutory background and development of the court's jurisdiction are important in understanding the present state of the law. Under the County Courts Acts of 1934 and 1959 the G power to order a new trial was preserved in the relevant County Court Rules. More recently under the 1984 Act, the power to order a new trial was provided by CCR Ord 37 r 1(1).

The approach of the court below proceeds on the mistaken premise that an action to set aside a judgment on the grounds of fraud is analogous to a quasi-appeal founded on some error by the court [2016] QB 987, paras 56–59. Para 59 concludes on an egregious non sequitur: the court was H not being asked to review the court's conduct under section 23, rather the conduct of the first defendant. Of relevance is *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712–713 per Denning LJ, approved in *Zurich Insurance Co plc v Hayward* [2017] AC 142, para 53. Section 23 of the 1984 Act deals with fraud generally. See, also, *Danchevsky v Danchevsky* [1975] Fam 17,

23, 24. Reliance is placed on *Stephenson v Garnett* [1898] 1 QB 677 where three Lords Justices, dealing with a statutory predecessor of section 23(g), said that a county court judge had jurisdiction to rescind a deed of compromise obtained by fraud.

An alternative route to section 23 is by way of CPR r 3.1(7) granting the court power "under these Rules" to revoke or vary an order. The analogous provision in the FPR r 4.1(6) has been held to provide the court with a very wide power: the *Sharland* case [2016] AC 871, paras 41, 42. [Reference was also made to *Roult v North West Strategic Health Authority* [2010] 1 WLR 487, para 15 which is of more limited scope.]

Paul Letman (instructed by *Rice-Jones & Smiths, Solicitors*) for the defendants.

The County Court has no jurisdiction to entertain a collateral action to set aside a final decision of its own. The judge below [2016] QB 987, para 56 reached the right conclusion on the construction of section 23 of the County Courts Act 1984. That section has to be read together with section 70. Judgments and orders of the County Court are final and conclusive, and can only be challenged on appeal: section 77. Section 23(g) is inapt to rectify a judgment in its terms. While it is accepted that under previous County Courts Acts and the Rules made under them the jurisdiction had existed, it was removed by the introduction of the Civil Procedure Rules where there is no confirmation of, or equivalent to, CCR Ord 37 r 1. CPR r 3.1(7) applies only to revocation of an order made "under these Rules". This is a case management power and does not deal with final orders. [Reference was made to *Roult v North West Strategic Health Authority* [2010] 1 WLR 487, para 15; decisions to set aside in *Forcelux Ltd v Binnie* [2010] HLR 20 and *Hackney London Borough Council v Findlay* [2011] PTSR 1356 which did not relate to final orders; and *Civil Procedure 2017*, vol 2, pp 2592–2593 (note to section 70 of the 1984 Act).]

Under the Civil Procedure Rules the County Court no longer enjoys the power to order a new trial to set aside an earlier judgment as had been shown in *R v Worthington-Evans, Ex p Madan* [1959] 2 QB 145. There is no basis to suggest that the power is in abeyance. *Bishop v Chhokar* [2015] CP Rep 26, paras 35–37 suggests that the County Court does not have jurisdiction to entertain a collateral action to set aside its own final orders; it seems the only route is a challenge by way of appeal. As the judge below held, *Stephenson v Garnett* [1898] 1 QB 677 is not authority to the contrary.

Fresh evidence sought to be adduced to set aside a judgment allegedly obtained by fraud is subject to stringent safeguards, and must be decisive in showing that the court would have adopted a completely different approach to the way it reached its decision: see for example *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] 1 CLC 596, para 106. There is a public interest in the finality of judgments. The new evidence which the claimants seek to adduce, even if true, could not have affected the outcome of the decision of the judge in the County Court. That judge made clear and systematic findings against the allegations made by them. The further evidence cannot satisfy the applicable test of materiality.

The court took time for consideration.

A 15 December 2017. The following judgments were handed down.

SIR TERENCE ETHERTON MR

1 The principal issue on this appeal is whether the County Court has jurisdiction to set aside a final order made in other County Court proceedings and to order a new trial in those proceedings on the ground that an important witness gave perjured evidence under pressure from the successful party.

B **2** The claim in the present proceedings to "rescind the judgment" in *Salekipour v Parmar* Claim No OCL 10544 in the Central London County Court ("the original proceedings") for that reason and to order a new trial was struck out by District Judge Lightman as an abuse of process. An application to set aside his order was dismissed by Judge Faber for the reason that the County Court has no jurisdiction to set aside one of its own C judgments "on the ground that it was obtained by subornation of perjury". By his order dated 23 June 2016 Garnham J dismissed the appeal from her order [2016] QB 987. This is the appeal from his order.

The County Courts Act 1984

3 The relevant provisions of the County Courts Act 1984 are sections D 23(g), 38 and 70, as amended, which are as follows:

> "23 *Equity jurisdiction*
>
> "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 E Court limit."
>
> "38 *Remedies available in County Courts*
>
> "(1) Subject to what follows, 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."
>
> "70 *Finality of judgments and orders*
>
> F "Every judgment and order of the 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 original proceedings

4 I gratefully take the majority of the following summary of the original G proceedings from the judgment of Garnham J.

5 The claimants on this appeal, Mrs Shahan Salekipour and her husband Mr Amir Saleem, were the tenants of a ground floor lock-up shop and rear garage at 500 Greenford Road, Greenford, Middlesex ("the shop"). The landlords were Mrs Jashan Kaur Parmar and her late husband Mr Mohinder Singh Parmar. Mrs Parmar is the defendant to the present H proceedings and the respondent to this appeal. She is sued both in her personal capacity and as the executrix of Mr Parmar.

6 Mrs Salekipour commenced the original proceedings in the Central London County Court against Mr and Mrs Parmar on 29 September 2010.

7 She claimed, first, the recovery of £25,000 which she said her husband paid on her behalf to Mrs Parmar. The claim was expressed as being for

misrepresentation, although it was subsequently put, in the alternative, as a claim to recover money paid under economic duress.

8 Second, she claimed £21,000 in respect of rent which she said she overpaid during her occupation of the shop.

9 Third, she claimed under section 1 of the Landlord and Tenant Act 1988 on the basis that Mrs Parmar unreasonably delayed or withheld her consent to a proposed assignment of the lease in mid-2008. The claim was for the loss of a premium of £38,000 which was to have been paid.

10 Fourth, she claimed damages under section 3 of the Protection from Harassment Act 1997 on the basis of a series of acts which she says were carried out or procured by Mrs Parmar. Those allegations relate to the removal of a sunblind, the erection of scaffolding outside the shop, dumping and burning rubbish behind the shop, an allegedly false accusation that Mrs Salekipour was dumping rubbish and repeatedly disturbing Mrs Parmar to complain about the same, threatening on one occasion to have Mrs Salekipour raped, causing the telephone wires to the hairdressing business she carried on at the shop to be cut, and causing the breakage of the plate glass window of the shop. That list of complaints was expanded during the course of the evidence. In respect of this harassment Mrs Salekipour claimed damages for distress and anxiety.

11 The defence to the claim was broadly one of complete denial. Mrs Parmar counterclaimed three quarters' rent in the sum of £15,000, unpaid insurance premiums in the sums of £907 and £994·82, and the cost of floor plans and fees in the sums of £141 and £96·13, together with interest.

12 The original proceedings were tried by Judge Marshall QC. She heard oral evidence over five days. She handed down her detailed and extensive judgment (running to 175 paragraphs) on 10 May 2012. She rejected each of Mrs Salekipour's claims and allowed each of Mrs Parmar's counterclaims.

13 The following paragraphs of Judge Marshall QC's judgment are particularly pertinent to this appeal:

> "17. . . . It will be seen that much depends on which of two conflicting accounts between the two sides I prefer. Indeed, Mr Richard Power, appearing for Mrs Salekipour . . . suggested the evidence on the opposite sides of the dispute differs so profoundly that the only conclusion is that there is 'collective lying' on one side or the other.
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> "18. I accept that this applies in particular to the first claim (the '£25,000' dispute), the second claim (the 'overpaid rent' dispute), and the fourth claim (the 'harassment' dispute), the third claim (the 'unreasonable withholding of consent' dispute) depends mainly on an analysis of correspondence passing between the solicitors who are acting. The counterclaim is a mixture of fact and law.
>
> "19. Credibility is thus vital in this case and this has had the result that each side has sought to introduce evidence going to credit . . ."
>
> "33. As to the defendant's witnesses, Mr Fiszer was 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."

A "40. Mrs Parmar presented a marked contrast to the emotional claimants, but I will still have to examine how far I can safely accept her evidence at face value. In this case, much of what I have to decide rests on whose account of the facts I believe or prefer. In deciding this, I shall have regard to the degree of support for either contention which can be derived from documents, other clear facts, or just from plain common sense."

B "46. The first issue then is whether or not the claimants satisfy me . . . that any payment such as they allege did actually change hands. This is an issue of fact. In effect, I must decide whether I believe Mrs Parmar or Mr Saleem. This also means that one of them is not telling me the truth, as there is hardly room for a finding of honest innocent mistake about such a stark and simple point . . ."

C "53. Taking into account all the evidence therefore I do not believe Mrs Parmar's assertion that she let the claimants into possession only at Easter 2006, and I do not believe her associated assertion that she took no money from them before rent became payable under the lease. Given both my assessment of her in evidence, and the circumstances disclosed in the documents, I find this implausible in the extreme and entirely out of character. Whilst I accept Mr Fiszer's evidence that she did let him into

D possession of the shop rent free for a period before he took over the unit in 2011, I note that this was after Mrs Parmar became aware of the allegations being made against her in these proceedings."

14 At para 136, Judge Marshall QC turned to the allegations of harassment. As to the dumping of rubbish, she said, at para 153: "I prefer Mrs Parmar's evidence on this aspect and I find that Mrs Salekipour is simply

E in unjustified denial of this matter." She continued, at para 154: "It follows that I am satisfied that these complaints by Mrs Parmar were, in all likelihood, not 'false' at all, but were justified."

15 As to the allegation of a threat to have Mrs Salekipour raped, Judge Marshall QC said, at para 160:

F "Having reviewed all the evidence, and taking into account not only my caution about the reliability of the claimants' evidence on anything but basic matters, and also Mr Letman's submission as to Mrs Salekipour's tendency to make highly incredible accusations and assertions about Mrs Parmar (who has obviously become her bête noire) I am simply not satisfied that this threat was ever made."

16 In respect of the cutting of telephone lines and smashed windows,

G Judge Marshall QC concluded, at para 163: "In short, the claimants simply fail to prove to my satisfaction that in so far as these incidents of vandalism occurred, they were either committed or procured by the defendant at all."

17 On the counterclaim, Judge Marshall QC said, among other things, as follows, at paras 169–170:

H "169. As regards the claim for unpaid rent, Mrs Salekipour's resistance to this rests on the contention that Mrs Parmar's harassing conduct amounted to a repudiation of the lease, justifying her leaving the premises in February 2010 and refusing to pay any further rent. I have found that there was no such harassing conduct. It follows that the lease, with its liability for rent, continued until such point as Mrs Parmar, in effect, accepted its determination.

"170. With regard to that, I am satisfied by the evidence of both Mr Fiszer and Mrs Parmar that this did not take place until January 2011 . . ." A

18 By her order made on 10 May 2012 Judge Marshall QC dismissed the claim. She gave judgment on the counterclaim for £17,138·95 plus interest of £1,518·93 and ordered Mrs Salekipour to pay Mr and Mrs Parmar 90% of the costs of the action, claim and counterclaim. B

19 By an order dated 18 February 2013 Mr Saleem was added as a third party to the original proceedings for the purposes of costs. He is liable with Mrs Salekipour up to a limit of £75,000.

The present proceedings

20 The present proceedings for "rescission of the judgment" in the original proceedings and an order for a new trial were issued by Mrs Salekipour and Mr Saleem on 24 September 2014. C

21 The particulars of claim allege that Judge Marshall QC placed particular reliance on the evidence of Mr Fiszer but that Mrs Parmar procured him to give perjured evidence at trial by making threats against him, in particular a threat to forfeit the lease of the shop, of which he had become the tenant by the date of the trial in the original proceedings. The particulars of claim also allege that Mrs Parmar threatened to have Mr and Mrs Fiszer killed. It is further claimed that, the defendant having obtained judgment "by subornation of perjury" and the practising of a gross deception upon the court, the claimants are entitled in equity and claim to have the judgment in the original proceedings set aside and an order for a new trial. D

22 A signed written statement of Mr Fiszer, endorsed with a statement of truth, was annexed to the particulars of claim. It contained serious allegations about Mrs Parmar's conduct. In the witness statement Mr Fiszer said that he responded to an advertisement above the shop at the beginning of November 2010, and, having agreed £20,000 a year rent, started building works on the shop at the end of November. He said that the negotiations for the lease went on a long time and that he entered into the lease in April 2011. E F

23 The following paragraphs of Mr Fiszer's statement are of particular relevance:

"9. I carried on the business which became successful. In or around February 2012 I received a lot of e-mails from Mrs Parmar about the case between Mrs Salekipour and Mrs Parmar. She told me that she would tell me what to write and she gave me a piece of paper which had the broad terms of what she wanted on it and asked me to put it in my own words. G

"10. Mrs Parmar's daughter then brought a typed version which I believe came from Mrs Parmar's solicitors. I had no contact with her solicitors at all.

"11. Although there were no particular problems with Mrs Parmar I put some video cameras outside the back of the premises and I caught Mr Parmar and a tenant burning furniture and rubbish at the back. I told them not to do it and they desisted. Due to the length of time, unfortunately the photographic evidence of the incident no longer exists. H

"12. In March 2012, I went to court to give evidence. I was told by Mrs Parmar that if I did not go to court for her and she lost then I would

A lose the shop. Before I went into court Mr Parmar and Mrs Parmar and some others got me in a room and told me what to say and in particular to say that I had only been in the premises since February–March 2011.

"13. I was asked by the barrister for Mrs Salekipour when did I start work and I said two months before the lease which would have made it about February. The judge asked how could I have carried out all the works and I said that we were Polish builders. I feel very bad about this B now as it was not true. I also said in court that the premises were devastated and very messy. This was also untrue."

24 In November 2014 Mr and Mrs Parmar applied to strike out the present proceedings. We have been shown an undated, unsigned and unsealed application for an order

C "to strike out the claim under CPR r 3.4 as disclosing no reasonable grounds for bringing the same or otherwise as an abuse, and/or a stay pursuant to CPR r 11.1 on the grounds that this claim ought in any event to have been the subject of an appeal rather than a new claim."

25 The application was supported by a witness statement of Mr Peter Burton, the defendant's solicitor, who described the claim as "misconceived D and hopeless". He did not allege that the Central London County Court did not have jurisdiction in the matter. He said that, assuming that the court did have jurisdiction, the claim for rescission of the judgment of Judge Marshall QC should have been made by way of an application for permission to appeal to the Court of Appeal rather than by way of fresh proceedings. He said that, further or alternatively, the claim should be E struck out because of the lack of merits, the new evidence and allegations affording no basis for any different decision at the original trial since the ambit of Mr Fiszer's evidence at the trial was extremely limited and the allegations are of a preposterous nature and would have been irrelevant or inadmissible.

26 Mr and Mrs Parmar's application effectively proceeded as an ex parte application, of which the claimants were entirely unaware. As F mentioned above, District Judge Lightman determined the application, apparently without hearing any oral submissions and without any notice to the claimants, and made an order on 14 January 2015 striking out the action as an abuse of process. The order cross-referred to the paragraph of Mr Burton's witness statement which set out the procedural objection that there should have been an application for permission to appeal rather than G the issue of a new action.

27 District Judge Lightman's order permitted the claimants to apply to set aside, vary or revoke all or any part of the order.

28 The claimants duly applied to set aside the order of District Judge Lightman. As I have said earlier, their application was heard by Judge Faber, who gave an oral judgment on 19 August 2015. Judge Faber said that there were four issues for her to decide upon: the jurisdiction of the County Court to H hear the claim; "abuse of process"; whether the pleaded case was incoherent and unwinnable; and whether the matters alleged were sufficiently material that the action should be permitted to proceed.

29 On the issue of jurisdiction, Judge Faber observed that the argument about lack of jurisdiction was not the ground on which District Judge

Lightman had struck out the action but had only been raised after his order. She held that the County Court did not have jurisdiction because the County Court is a creature of statute and the jurisdiction to set aside a judgment obtained fraudulently is an inherent jurisdiction of the High Court.

30 In case she was wrong on that issue, she went on to deal with the other three issues on which she had heard argument. She rejected the case of Mr and Mrs Parmar on all those issues. She found that the delay in commencing the present proceedings was not undue; the procedure adopted was lawful and appropriate (subject to the issue of jurisdiction); there was no abuse of process; and the contents of Mr Fiszer's witness statement annexed to the particulars of claim were material. She said the following on materiality, at para 15:

> "It follows that the findings in that case to which this evidence of witness subornation is directly material are credibility, harassment and the rent counterclaim. I have already outlined the very detailed analysis that Judge Marshall QC made of Mrs Parmar and if you look at the pleaded case set out in paras 7, 8, 9 and paras 9, 10 and 12 of Mr Fiszer's witness statement it can be seen that they are absolutely material to credibility, to harassment and the rent counterclaim. The allegations about burning rubbish support some of the claimants' case as presented before Judge Marshall QC in relation to individual activities of harassment. Furthermore I am sure that had evidence been presented during the trial before Judge Marshall QC that Mrs Parmar had perverted the course of justice before Mr Fiszer gave evidence it would have entirely changed the way the judge approached and came to her decision. Thus it is very, very material to the outcome. So if I had jurisdiction to deal with this case, which I have already ruled I have not, I would grant the application to set aside the district judge's order and give directions for trial of the issue of subornation."

31 Judge Faber gave the claimants permission to appeal. The defendant sought to uphold Judge Faber's refusal to strike out the claim on the additional grounds (which she had rejected) that the allegedly perjured evidence was not material to the matters decided in the original proceedings, and the claimants' pleaded case is incoherent and unwinnable.

The judgment of Garnham J

32 Garnham J handed down a careful and detailed judgment [2016] QB 987 on 23 June 2016, in which he dismissed the appeal. His reasoning may be summarised as follows.

33 He said, at para 30, that, the County Court being a creature of statute and having no inherent jurisdiction, the question is whether the 1984 Act gives jurisdiction to the County Court to rescind earlier judgments of the court on the grounds of alleged perjury and subornation of witnesses.

34 He said, at para 31, that the relevant provisions of the 1984 Act, as amended, are sections 23, 38 and 70.

35 He said, at paras 32–39, that there can be little doubt that the High Court has jurisdiction to hear proceedings for rescission of a previous decision on the ground, for example, of fraud. He observed that in more recent times the more common means of challenging a judgment obtained by

A fraud is by way of appeal but, nevertheless, it remains entirely proper for a party to challenge a decision of the High Court obtained by fraud by collateral action rather than by way of appeal.

36 Garnham J referred, at paras 40–52, to three authorities relating to the question whether the County Court has a similar jurisdiction to the High Court: *Stephenson v Garnett* [1898] 1 QB 677; *Bishop v Chhokar* [2015] CP
B Rep 26 and *Rawding v Seaga UK Ltd* [2015] Info TLR 161.

37 Garnham J said, at para 53, that the decisive question for this part of the case is whether sections 23 and 38 of the 1984 Act give the County Court jurisdiction to rescind earlier judgments of that court.

38 He said, at para 54, that section 38 is only of marginal relevance since it does not purport to give jurisdiction but only describes the remedies
C available where there is jurisdiction.

39 He said, at paras 55–57, that section 23(g) of the 1984 Act, which gives the County Court all the jurisdiction of the High Court to hear and determine 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, describes an original action for relief against fraud which itself causes damage below the
D relevant limits but is inapt to create a mechanism by which a prior judgment can be set aside. He said that he was reinforced in that view by section 70 of the 1984 Act, which provides that every judgment of the County Court shall be final and conclusive between the parties, save as is provided for by the Act or other statutory provisions. He said that, if it had been Parliament's intention to provide, by means of section 23, a
E method of challenging and overturning a County Court judgment, one might have expected rather more precise language in that section and in section 70.

40 Garnham J said, at paras 58–60, that he was further reinforced in this view by the decisions of the Court of Appeal in the *Bishop* and the *Rawding* cases, which, while not decisive of the issue, showed plainly that
F the Court of Appeal did not envisage section 23 giving the County Court the sort of jurisdiction for which the claimants contend. He said that the *Stephenson* case did not make good the claimants' case since it was not a case in which a judgment was rescinded for fraud but was a case in which a compromise was set aside for fraud, and that is a crucial difference since, in the case of a deed of compromise or contract, the court is reviewing the
G conduct of the parties not the conduct of the court, and it is that for which section 23 provides jurisdiction. He said that it was of note that counsel had been unable to find any case in the 118 years since the *Stephenson* case in which it has been held that the County Court has the jurisdiction contended for by the claimants.

41 In deference to the submissions of counsel for the defendant on the alternative grounds rejected by Judge Faber, Garnham J held that Judge
H Faber had rightly rejected them.

42 He said, at paras 66–67, that, apart from the allegation in the particulars of claim that Mrs Parmar had threatened to have Mr and Mrs Fiszer killed, which he would have struck out had he allowed the appeal, the pleadings are adequate.

43 As to the relevance of the new evidence of Mr Fiszer and their materiality to Judge Marshall QC's judgment, he said the following [2016] QB 987, paras 68–71:

> "68. . . . I reject the submission that the relevant evidence went wholly or primarily to the counterclaim. It seems to me entirely clear that the credibility of Mrs Parmar and Mr Fiszer were central to Judge Marshall QC's reasoning in respect of credibility generally, harassment and the rent counterclaim, precisely as Judge Faber concluded. In fact I would go further; in my judgment it is only in respect of the third claim considered by Judge Marshall QC, namely the unreasonable withholding of consent, that it can be said that the evidence of witness subornation was not relevant.
>
> "69. Furthermore, in my judgment it is not necessary or appropriate to dissect every element of the judgment under challenge. Where a court is reaching its conclusions on the basis of witness evidence, and that evidence is challenged on grounds of fraud, or the like, it will be a rare case where any part of the judgment can survive. Here, as is common ground, Mrs Parmar was the driving force on the part of the landlord in all these events. The evidence of Mr Fiszer, if true, would undermine her credibility in every part of the case.
>
> "70. As was pointed out in *Jonesco v Beard* [1930] AC 298, 301–302: 'Fraud is an insidious disease and if clearly proved to have been used so that it might deceive the court, it spreads to and infects the whole body of the judgment.' To rely on a somewhat more up-to-date authority, in *Hamilton v Al Fayed (No 4)* [2001] EMLR 15, para 34(2) Lord Phillips of Worth Matravers MR said: 'Where it is clearly established by fresh evidence that the court was deliberately deceived in relation to the credibility of a witness, a fresh trial will be ordered where there is a real danger that this affected the outcome of the trial.'
>
> "71. In my judgment there can be no doubt that, if the evidence of Mr Fiszer is true, there is a real danger that that would have affected the outcome of the trial on all issues, with the sole exception of the alleged unreasonable withholding of consent to the assignment of the lease."

44 He, accordingly, concluded, at para 72, that, had he reached the conclusion that the County Court had jurisdiction to entertain the proceedings for rescission, he would have allowed the appeal.

The appeal to the Court of Appeal

45 The claimants appeal on the ground that Garnham J made an error of law in holding that section 23 of the 1984 Act does not confer jurisdiction on the County Court to hear and determine a claim to set aside one of its own judgments obtained by fraud.

46 There is a respondent's notice to uphold the order of Garnham J dismissing the appeal from Judge Faber on the additional ground that the evidence of perjury relied upon by the claimants is not such as could have affected the judgment of Judge Marshall QC in the original proceedings, "nor is it otherwise sufficiently material and the claimants' claim should accordingly remain struck out".

A *Discussion*

47 It is not in dispute that, before the introduction of the Civil Procedure Rules 1998, the County Court had jurisdiction to set aside an order made in a prior County Court case in consequence of perjury or fraud.

48 Section 89 of the County Courts Act 1846 (9 & 10 Vict c 95) provided that every order and judgment of the court shall be final and
B conclusive between the parties, "except as herein provided", and conferred on the County Court judge "in every case . . . the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings".

49 That provision was preserved by the County Courts Act 1867 (30 & 31 Vict c 142).

C **50** The corresponding finality provisions in section 93 of the County Courts Act 1888 (51 & 52 Vict c 43) included the provision that

> "The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

51 The predecessor of section 23(g) of the 1984 Act first appeared in
D section 67(8) of the 1888 Act. The predecessor of section 38 of the 1984 Act first appeared in section 9 of the 1888 Act.

52 That general power in section 93 of the 1888 Act to order a new trial was not unlimited. It was confined to the same circumstances that enabled the High Court to order a new trial in a High Court case: *Brown v Dean* [1910] AC 373. It was omitted from the corresponding finality provisions of
E section 95 of the County Courts Act 1934 (24 & 25 Geo 5, c 53) but the provision in that section for judgments and orders of the County Court to be final and conclusive between the parties was stated to be "except as provided by this or any other Act or County Court rules". CCR Ord 37, r 1(1) of the County Court Rules 1936 (SR & O 1936/626) made under the 1934 Act conferred in identical language the same general power to order a new trial as was previously contained in section 93 of the 1888 Act.

F **53** In *R v Wothington-Evans, Ex p Madan* [1959] 2 QB 145 the Divisional Court (Lord Parker CJ, Donovan and Salmon JJ) confirmed that this power under CCR Ord 37, r 1(1) of the County Court Rules 1936 extended to setting aside an order finally disposing of the case, which had been obtained by false evidence.

54 The finality provisions of section 98 of the County Courts Act 1959
G are identical to those of the 1934 Act.

55 The finality provisions of section 70 of the 1984 Act are materially the same, save that the exception is "or as may be prescribed" rather than "as provided by . . . County Court rules".

56 The wording of CCR Ord 37, r 1(1) in the County Court Rules 1981 (SI 1981/1687) was in different language to its predecessor provision and provided that: "In any proceedings tried without a jury the judge shall have
H power on application to order a rehearing where no error of the court at the hearing is alleged."

57 The notes to the County Court Practice 1998 state that this power exists in cases of perjury. The contrary has not been suggested by Mr Paul Letman, the defendant's counsel.

58 In *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, 2324 Hale LJ, with whom the other members of the Court of Appeal agreed, explained the width of the earlier provisions as being due to the fact that, prior to the 1984 Act, the rights of appeal from the County Court to the Court of Appeal were limited because the County Courts were then designed as small claims courts. Section 77(1) of the 1984 Act, however, gave broader rights of appeal to any party dissatisfied with the determination of the judge in a County Court.

59 The version of CCR Ord 37, r 1(1) in the County Court Rules 1981 was in force from 1 September 1982 until 1 December 2002. From 26 April 1999 until 1 December 2002 it was included in Schedule 2 to the CPR. It was repealed by the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058) with effect from 2 December 2002.

60 The only provision in the CPR which is in the nature of a general power to set aside an order is that in CPR r 3.1(7), as follows: "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

61 That provision was contained in the original version of the CPR and so already existed when CCR Ord 37, r 1(1) was repealed. It is in the first section of CPR Pt 3 headed "Case Management". The heading to CPR r 3.1 itself is "The court's general powers of management".

62 The claimants do not rely on CPR r 3.1(7) as conferring power to set aside the order of Judge Marshall QC in the original proceedings and to order a new trial. On a literal reading, it cannot apply since the order of Judge Marshall QC was not made pursuant to a "power of the court under these [CPR] Rules" but was made pursuant to powers conferred by the 1984 Act. Mr Letman submits that, for that reason, it cannot apply in the present case.

63 Furthermore, in *Roult v North West Strategic Health Authority* [2010] 1 WLR 487, para 15 Hughes LJ, with whom the other members of the Court of Appeal agreed, said that CPR r 3.1(7) could not apply to a final order disposing of the case, whether in whole or in part. That was a medical negligence case, in which the defendant health authority conceded liability, and a settlement was agreed between the parties on the basis that care in a local authority group home would be appropriate to the needs of the claimant. The order approving the settlement provided that the future costs of care would be quantified later because the cost of the group home were uncertain. Hughes LJ held that CPR r 3.1(7) did not constitute a power to set aside the order to reflect the claimant's revised schedule of his outstanding claim, seeking damages for future care in privately obtained accommodation with privately engaged dedicated carers.

64 Hughes LJ, at para 15, distinguished between, on the one hand, essentially case management decisions, when the grounds for invoking CPR r 3.1(7) would generally be either (i) erroneous information at the time of the original order or (ii) subsequent events destroying the basis on which it was made, and also some non-procedural but continuing orders which may call for revocation or variation as they continue, such as an interlocutory injunction, and, on the other hand, a final order disposing of the case in whole or in part.

65 That clear distinction has been put in doubt by other cases. In *Forcelux Ltd v Binnie* [2010] HLR 20 the Court of Appeal set aside an order

for possession of a flat for non-payment of service charges, which had been made at a hearing fixed pursuant to CPR r 55.5(1). The tenant had not received the claim form and did not attend that hearing. Warren J, with whom the other members of the court agreed, held that the hearing, at which the order for possession was made, was not a trial for the purposes of CPR r 39.3 (failure to attend the trial) but the court had power to set aside the possession order under its management powers under CPR r 3.1(2)(m). He also said, at para 54, that, if it was right to set aside the possession order pursuant to that provision, "then I consider that rule 3.1(7) would provide an answer to any suggestion that there is no power to do [so]". He did not, however, refer to the *Roult* case, which, it must be surmised, was not cited to the court.

66 In *Hackney London Borough Council v Findlay* [2011] PTSR 1356, a district judge, who invoked CPR r 3.1(7), set aside a possession order for non-payment of rent, which had been made at a hearing unattended by the tenant. On appeal, Arden LJ, with whom the other members of the Court of Appeal agreed, said, at para 22, that the key fact, as in the *Forcelux* case, was that the defendant had not attended the hearing at which the order had been made. She distinguished the *Roult* case on that basis. She did not accept the argument that the approach of the court in the *Forcelux* case to the exercise of its discretion was per incuriam or that the approach in the *Roult* case necessarily applied.

67 The power of the court to set aside an order on the ground that it had been procured by dishonest evidence arose in the context of financial provision in divorce proceedings in *Sharland v Sharland* [2016] AC 871. In that case Baroness Hale of Richmond DPSC, with whom the other members of the Supreme Court agreed, said, at para 41, that FPR r 4.1(6), which is in identical terms to CPR r 3.1(7), "is a very wide power" and gives the Family Court power to entertain an application to set aside a final order in financial remedy proceedings where the judgment has been obtained by fraud.

68 *Gohil v Gohil (No 2)* [2016] AC 849 is another case in which the wife applied to set aside a consent order in ancillary relief proceedings on the basis of the husband's serious material non-disclosure. In that case the husband argued that the High Court judge who had set aside the earlier High Court order had no jurisdiction to do so in view of the terms of section 17 of the Senior Courts Act 1981. In the event, the argument was not pressed but Lord Wilson JSC, with whom the other members of the Supreme Court agreed, observed, in para 17, that section 17 of the 1981 Act appears never to have been considered in the context of the existing high authority that the issue by the wife of a fresh action to set aside the earlier order would have conferred the necessary jurisdiction on a judge of the High Court.

69 In this state of the authorities, there is a lack of clarity about the precise scope of CPR r 3.1(7). It is not necessary or appropriate for us to seek to provide further clarity on this appeal because Mr Adrian Davies, counsel for the claimants, prefers to advance the claimants' case on the basis of section 23(g) of the 1984 Act. It is appropriate, nevertheless, to highlight the consequence of the defendant's argument that neither CPR r 3.1(7) nor section 23(g) of the 1984 Act gives a County Court judge power to set aside an earlier final order of the County Court obtained by perjury or fraud. The argument means that, when CCR Ord 37, r 1(1) was repealed by the Amendment Rules 2002 with effect from 2 December 2002, the County

Court lost a jurisdiction it had had since the creation of the court in 1846 to set aside an order obtained by perjury or fraud, including an order finally disposing of a case in whole or in part. Yet there is nowhere to be found, either in the notes to that statutory instrument or in any official statement or any commentary on that change, any explanation for the removal of the jurisdiction. There is, in short, no indication to be found anywhere of any conscious decision to remove the jurisdiction or of any policy reason for doing so.

70 Furthermore, if the jurisdiction has been lost, it will have produced an important discrepancy between the powers of the High Court and those of the County Court, and will have left litigants in the County Court at a serious procedural disadvantage. Garnham J [2016] QB 987, paras 32–35 mentioned the well-established inherent jurisdiction of the High Court to hear proceedings to revoke an order obtained by fraud. In that connection, he referred to *Spencer, Bower & Handley, Actionable Misrepresentation*, 5th ed (2014), para 20.02, *Hip Foong Hong v H Neotia & Co* [1918] AC 888, 894, *Jonesco v Beard* [1930] AC 298, 300 and *Kuwait Airways Corpn v Iraqi Airways Corpn* [2003] 1 Lloyd's Rep 448. Those cases all endorse the procedure of commencing independent proceedings to set aside the earlier judgment.

71 Garnham J said, at para 36, that in more recent times the more common means of challenging a judgment obtained by fraud is by way of appeal, and he cited in that connection the judgment of Smith LJ in *Noble v Owens* [2010] 1 WLR 2491, para 29. Smith LJ suggested that, rather than commence a fresh action if there is an issue of fraud to be tried, it would be just as good, if not better, for the Court of Appeal to refer the trial of the fraud issue to a High Court judge, who could give directions as to the clarification of the allegations and as to the exchange of evidence.

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 the *Sharland* case [2016] AC 871, in which *Noble v Owens* was cited in argument, Baroness Hale DPSC said, at para 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 para 39, citing the *Jonesco* case, that a fresh action would be the normal route in ordinary civil proceedings to challenge a final judgment on account of fraud. Further, In the *Gohil* case [2016] AC 849, in which *Noble v Owens* was also cited in argument, Lord Wilson JSC said, at para 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.

73 If, however, the defendant is correct about the County Court's lack of jurisdiction, the only remedy for a litigant in the County Court who wishes to have a prior final County Court order set aside for perjury or fraud is to appeal, even though that will often not be the most appropriate course consistent with the overriding objective in CPR r 1.1. It was common ground before us that the High Court has no jurisdiction to hear independent proceedings to set aside an earlier final order of the County Court obtained by perjury or fraud. If that deprivation of a previous County Court

A jurisdiction was the effect of the repeal of CCR Ord 37, r 1(1), then it appears that it would have been the result of oversight rather than intention, and, contrary to the objective of the CPR, would have produced a significant difference between the High Court and the County Court and would have seriously disadvantaged County Court litigants, for no sound policy reason.

74 I agree with the claimants that such an anomaly does not exist because, leaving to one side the CPR, including the management powers B under CPR r 3.1, 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 v Owens* [2010] 1 WLR 2491, para 42 C (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 the *Bishop* case [2015] D CP Rep 26 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 para 56 of his judgment [2016] QB 987, as follows:

> "In my judgment those words are appropriate to describe an original action for relief against fraud which itself causes damage below the E 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 F 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.

G 79 Garnham J said, at para 57, that he was reinforced in his view by the finality provisions in section 70 of the 1984 Act. Again, I respectfully disagree that section 70 supports a constrained interpretation of section 23. Section 70 expressly stipulates that judgments and orders of the County Court are not final and conclusive as between the parties to the extent that the 1984 Act otherwise provides. Section 38 of the 1984 Act does otherwise provide in the case of proceedings to set aside an earlier County Court order H obtained by fraud because that section entitles the County Court to make any order which could be made by the High Court if the proceedings were in the High Court; if such proceedings were in the High Court, the High Court would have inherent power to set aside the earlier order and to direct a new trial. No further elaboration in section 70 is necessary.

80 The fact that section 23 has not previously been invoked in this context is no indication that the jurisdiction does not exist. Until the repeal of CCR Ord 37, r 1(1), that wide provision and its predecessors, both in the County Court Rules and in the early statutes, provided an explicit and convenient general procedure for revoking final orders. There was no need to resort to section 23 for a jurisdiction in relation to the particular equitable cause of action to set aside an order of the court obtained by fraud.

81 Garnham J also said, at para 58, that he was further reinforced in his view by the decisions of the Court of Appeal in the *Bishop* case and in the *Rawding* case [2015] Info TLR 161. I do not consider that either of those cases assists on this point of jurisdiction since it was expressly left open in them. In the *Bishop* case the Court of Appeal granted an application to re-open an earlier appeal, in which permission to appeal had been refused. The ground of the application was that the defendant in the original County Court action had lied in his evidence at the trial. One of the requirements for re-opening a final appeal is that there is no alternative effective remedy. On that point, Aikens LJ, with whom the other members of the Court of Appeal agreed, set out [2015] CP Rep 26, para 35 the submissions of Mr Tim Buley, who was acting as advocate to the court, that

> "there must be some doubt as to whether [the County Court] has jurisdiction to determine a freestanding claim to set aside a previous decision of the County Court, which second claim is based on an allegation that the first judgment was obtained by fraud . . . [and] it is not clear that this kind of action comes within the scope of Part II of the County Courts Act 1984 which sets out the statutory basis for that court's jurisdiction."

82 There were a number of other points made by Mr Buley, which are not directly relevant. Aikens LJ expressed his conclusion on the effective remedy point briefly as follows, at para 37:

> "In the course of the hearing we did not fully investigate all these points. It seemed to us that there was sufficient in all the points that Mr Buley brought to our attention to conclude that, in this case, there was not an *effective* alternative remedy in a collateral action of the kind envisaged in *Flower v Lloyd* and *Jonesco v Beard*. Any possible alternative remedy had such jurisdictional and procedural difficulties that meant it could not be regarded as 'effective'."

83 In the *Rawding* case the defendant appealed against the finding of a County Court judge that he was liable on a personal guarantee to the claimant. The defendant denied that he ever provided a guarantee in respect of the relevant indebtedness. In support of his appeal, the defendant sought permission to introduce fresh evidence which was not put before the court below. The claimant submitted to the Court of Appeal that it should decline to admit the new evidence on the appeal and leave the defendant to bring a new action to set aside the original decision as having been obtained by fraud. Tomlinson LJ, with whom the other members of the Court of Appeal agreed, said [2015] Info TLR 161, para 46, that there was some doubt as to whether either the County Court or even the High Court has jurisdiction to entertain an action to set aside or rescind a decision of the County Court, and

A referred to "the discussion" in the *Bishop* case. He said that "the better course here is to admit the evidence on the appeal".

84 Accordingly, there was no detailed analysis of the court, let alone any conclusion, in the *Bishop* or the *Rawding* cases supporting a constrained interpretation of section 23 of the 1984 Act, read in conjunction with section 38, such as to deny jurisdiction for the County Court to hear the present proceedings.

B

85 Mr Davies submitted to us, as he had before Garnham J, that *Stephenson v Garnett* [1898] 1 QB 677 is authority which supports this appeal. I agree with Garnham J that it does not. In that case the Court of Appeal held that a County Court judge had jurisdiction under section 67 of the 1888 Act (the predecessor of section 23 of the 1984 Act) to determine that a deed releasing the defendant from a judgment debt had been obtained

C by fraud. That was a straightforward case of setting aside a deed obtained by fraudulent misrepresentation. It was not a case in which the court ordered the revocation of an order of the court obtained by fraud.

86 Nevertheless, for the reasons I have given, I am satisfied that the County Court does have jurisdiction under section 23 to hear and determine these proceedings.

D

The respondent's notice

87 I would reject the additional grounds in the respondent's notice for upholding the striking out of the claim.

88 Mr Letman made forceful submissions that, even if all the evidence of Mr Fiszer was true, it would not have made any difference to the decision of Judge Marshall QC both because she formed an adverse view of the

E credibility of the defendant on various matters of fact and because, in relation to each claim and counterclaim on which the defendant was successful, the success was due to evidence and legal argument which were not tainted by the alleged perjury. He took us through a detailed analysis of the judgment of Judge Marshall QC. In that connection, Mr Letman relied on *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013]

F 1 CLC 596, para 106 where Aikens LJ, with whom the other members of the Court of Appeal agreed, said that, where 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 said that, put another way, it must be shown that the fresh evidence would have entirely changed the way in which

G the first court approached and came to its decision.

89 There is a dispute between the parties as to whether that put the legal test too high. Mr Davies did not address this point in his oral submissions because we indicated that we did not need to hear him on the respondent's notice. In his skeleton argument, however, he submitted the correct test was that stipulated by the Court of Appeal in *Hamilton v Al Fayed* (sub nom

H *Hamilton v Al Fayed (No 2)*) [2001] EMLR 15, para 34:

> "Where it is clearly established by fresh evidence that the court was deliberately deceived in relation to the credibility of a witness, a fresh trial will be ordered where there is a real danger that this affected the outcome of the trial."

90 As Mr Davies observed in his skeleton argument, the *Hamilton* case was not cited to the Court of Appeal in the *Royal Bank of Scotland* case and the test set out by Aikens LJ was agreed between counsel in that case.

91 Furthermore, in the *Sharland* case [2016] AC 871, para 32 Baroness Hale DPSC, citing *Smith v Kay* (1859) 7 HL Cas 750, said that "a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality".

92 That statement was cited with approval by Lord Clarke of Stone-cum-Ebony JSC, with whom the other Justices of the Supreme Court agreed, in *Zurich Insurance Co plc v Hayward* [2017] AC 142, para 37.

93 In those circumstances, I am inclined to agree with Mr Davies that the test was over-stated in the *Royal Bank of Scotland* case and that the proper approach is that laid down by the Court of Appeal in the *Hamilton* case.

94 It is not, however, necessary to make a final decision on that point on this interlocutory application to strike out the claim. If the facts alleged in the claim and set out in the witness statement of Mr Fiszer are correct, then, whichever test is the correct one, it is satisfied in the present case.

95 The suborning of a witness by a party to give perjured evidence in order to succeed at trial is a most serious matter, which not only taints the evidence of the witness but potentially undermines the credibility of that party on all issues. That certainly is the case here where so much turned on credibility. If the fact of subornation and perjury, as described in Mr Fiszer's witness statement, had been known to Judge Marshall QC, it is highly likely that it would have had a material impact on her assessment of the credibility of all the evidence given by Mr and Mrs Parmar.

96 I, therefore, see no reason in the present case to deviate from Lord Buckmaster's statement in the *Hip Foong Hong* case [1918] AC 888, 893 that a judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail, and his statement in *Jonesco v Beard* [1930] AC 298, 301–302 that "Fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the court, it spreads to and infects the whole body of the judgment".

97 It is to be noted that Lord Buckmaster's speeches in both those cases were cited in the judgment of the Court of Appeal in *Hamilton v Al Fayed* (sub nom *Hamilton v Al Fayed (No 2)*) [2001] EMLR 15, although not by Aikens LJ in the *Royal Bank of Scotland* case [2013] 1 CLC 596.

98 The consequence of perjury and fraud in any particular case will depend upon the circumstances. In the present case, for the reasons I have given, which are essentially the same as those given by Judge Faber and Garnham J, I have no hesitation in rejecting the respondent's notice.

99 I would add, for completeness, that I consider it is inappropriate on a strike out application on the ground that the claim is bound to fail for there to be the kind of detailed analysis of the lengthy judgment of Judge Marshall QC, who had heard oral evidence over five days and who had to weigh up the conflicts in that evidence, as was undertaken by Mr Letman in order to persuade us that the contents of Mr Fiszer's witness statement would have made no difference to the reasoning and outcome of Judge Marshall QC on any issue.

Conclusion

100 I would, therefore, allow this appeal and reject the respondent's notice.

FLAUX LJ

101 I agree.

MOYLAN LJ

102 I also agree.

Appeal allowed with costs, subject to detailed assessment if not agreed.
District judge's order revoked.
Order for payment out of £8,000 on account of costs.
Case remitted to County Court for directions.
Permission to appeal refused.

ROBERT RAJARATNAM, Barrister