Has the golden age of fraud passed?

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Takhar v Gracefield Developments Ltd [2019] UKSC 13; [2019] 2 WLR 984 holds that a litigant can apply to set aside a judgment procured by fraud even if the fraud was discoverable by reasonable diligence during the trial. The unanimous decision realigns United Kingdom law with the position in Australia and Canada. However, the four judgments delivered disclose four quite different approaches of judicial technique. This note considers those approaches as well as addressing three topics of more general significance: the way in which broadly expressed dicta may be read down, the role of an historical approach in developing the body of judge-made law, and the relationship between rules and principles in the legal system.

While Sheridan's assessment that 'the golden age of fraud seems to have passed' is probably true,[1] recent decisions of the Supreme Court and the High Court of Australia suggest a steady supply of modern cases. *Takhar v Gracefield Developments Ltd*[2] addressed a fundamental question: when may a litigant apply to set aside a judgment on the basis that it has been procured by fraud? In particular, is it necessary to establish that the fraud was not discoverable by reasonable diligence during the trial? The Supreme Court unanimously rejected any such requirement. However, the four judgments delivered reveal underlying differences, as well as a remarkable diversity in judicial technique.

This note summarises the facts and the judgments, and then considers three topics of more general significance: the way in which broadly expressed dicta may be read down, the role of an historical approach in developing the body of judge-made law, and the relationship between rules and principles in the legal system.

Ms Balber Takhar and Ms Parkash Krishan were cousins. In around 2005, properties owned by Ms Takhar were transferred to Gracefield Developments, a company which at the time was owned half by Ms Takhar and half by Ms Krishan and her husband Dr Krishan. The parties disagreed as to the nature of the transaction. Ms Takhar claimed that she would retain

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1 L Sheridan, 'Fraud and Surprise in Legal Proceedings' (1955) 18 *MLR* 441.

2 *Takhar v Gracefield Developments Ltd* [2019] UKSC 13.

beneficial ownership and that the transfers had been procured by undue influence or other unconscionable conduct. Dr and Ms Krishan maintained the agreement was that Gracefield would purchase the properties for deferred consideration of £300,000 with a view to renovating and selling them, paying £300,000 to Ms Takhar from the proceeds and splitting the remaining profit equally.

Ms Takhar's suit was dismissed in 2010. The judge was influenced by a scanned copy of what appeared to be part of a profit sharing agreement, signed by Ms Takhar. The document was said to have been misfiled in the Krishans' solicitor's office. No original was ever found. Permission to adduce handwriting evidence was refused because the application was only made shortly before trial.

Ms Takhar thereafter obtained expert evidence stating 'conclusively' that Ms Takhar's signature on the profit share agreement had been transposed from another letter sent by her to the Krishans' solicitors (although that opinion remains untested). She brought fresh proceedings in 2013 seeking to set aside the 2008 judgment. The defence alleged an abuse of process, in part because the profit sharing agreement had been made available in 2009, well before the trial. Whether there was an abuse of process was tried as a preliminary issue.

Newey J held that there was no abuse of process, and no requirement that a person seeking to set aside a judgment procured by fraud demonstrate that the fraud was not discoverable by the exercise of reasonable diligence.[3] An appeal was allowed.[4] Patten LJ, writing for the court, regarded himself as bound to apply a test of reasonable discoverability stated in *Owens Bank Ltd v Bracco*.[5] One commentator (who as an appellate judge had addressed this point almost 20 years ago) predicted, presciently, this would not be the last word on the subject.[6]

Seven judges sat on the further appeal to the Supreme Court, with substantive judgments being given by Lords Kerr, Sumption and Briggs and Lady Arden. All agreed that Newey J's order should be restored and the trial on the merits should proceed. Lord Kerr's

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3 *Takhar v Gracefield Developments Ltd* [2015] EWHC 1276 (Ch).

4 *Takhar v Gracefield Developments Ltd* [2017] EWCA Civ 147.

5 *Owens Bank Ltd v Bracco* [1992] 2 AC 443 at 483.

6 K Handley, 'Fraud is a Thing Apart' [2018] *LMCLQ* 201.

judgment attracted the qualified agreement of Lord Sumption, and Lords Hodge, Lloyd-Jones and Kitchin agreed with both judgments. Lord Briggs and Lady Arden wrote separate, substantially free-standing, judgments. The four judgments proceed quite differently.

Lord Kerr's judgment must have been circulated first and deals with the background and procedural history. Understandably and unavoidably, it addressed the authorities addressed by Patten LJ, reaching the opposite conclusion on whether they established a requirement of reasonable diligence. Patten LJ had regarded as dispositive two statements in decisions of the House of Lords and the Privy Council concerning the enforcement of (different) foreign judgments against Owens Bank. In *Owens Bank Ltd v Bracco*,[7] Lord Bridge had said that 'the common law rule' was:

> that the unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered.

The same generality of expression was found in *Owens Bank Ltd v Etoile Commerciale SA*.[8] But Lord Kerr read down both passages. Because there had been allegations of fraud in both earlier proceedings, both were confined to attempts to relitigate the same issue. The Australian and Canadian authorities were 'compelling' as they had addressed the very question whether there was an additional requirement to establish that the evidence of fraud could not have been obtained by reasonable diligence.[9] Two decisions had rejected such a submission: *McDonald v McDonald*[10] and *Canada v Granitile Inc*.[11] The third, *Toubia v Schwenke*,[12] went further, and declined to follow the dicta in the *Owens Bank* cases, in what was described as a 'powerful defence' of the absence of any reasonable discoverability requirement.[13]

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7 *Owens Bank Ltd v Bracco* at 483.

8 *Owens Bank Ltd v Etoile Commerciale SA Co (Grenadines)* [1994] UKPC 27 at 30-31.

9 *Takhar v Gracefield Developments Ltd* at [52].

10 *McDonald v McDonald* (1965) 113 CLR 529.

11 *Canada v Granitile Inc* (2008) 302 DLR (4th) 40.

12 *Toubia v Schwenke* [2002] NSWCA 34 (Handley JA, Heydon and Hodgson JJA agreeing).

13 *Takhar v Gracefield Developments Ltd* at [50].

Having surveyed the authorities, Lord Kerr returned to policy: '[t]he idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice'.[14] The policy arguments for permitting a judgment procured by fraud to be set aside were 'overwhelming'.[15]

Lord Sumption commenced his judgment with the statement that the disorderly state of authorities made the question 'appear more complicated than it really is'.[16] Ms Takhar's application was an example of equity's jurisdiction to set aside judgments procured by fraud, as explained in *Flower v Lloyd (No.1)*.[17] Historically, an application in chancery to bring an original bill to set aside a judgment procured by fraud, which could be done as of right and without leave, was distinguished from a supplemental bill in the nature of a bill of review on further evidence, which was procedural and required leave. The cause of action to set aside a judgment procured by fraud was independent of the original cause of action because the judgment and the conduct which procured it were elements; indeed, 'the fraud used in obtaining the decree being the principal point in issue'.[18] It followed that there could be no cause of action estoppel. Forgery had been disavowed by Ms Takhar at trial, so there could be no issue estoppel. The only question was whether there was an abuse of process, and that required showing not only that the evidence establishing fraud *could* have been deployed, but also that it *should* have been deployed in the first trial. Lord Sumption was alert to the possibility that a claimant might deliberately choose not to investigate a suspected fraud or rely on a known fraud. In such cases, the claimant would be precluded from relitigating the issue in fresh proceedings under the rubric of abuse of process. He too accepted that the Australian decisions were correct, and the *Owens Bank* cases contrary to principle.

Lord Briggs commenced his judgment with the evocative statement that the appeal 'turns on the outcome of a bare knuckle fight between two important and long-established principles of public policy. The first is that fraud unravels all. The second is that there must come an end to litigation'. However, Lord Briggs preferred a 'more flexible basis' which would 'seek to weigh the gravity of the alleged fraud against the seriousness of the lack of

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14 ibid at [52].

15 ibid at [53].

16 ibid at [59].

17 *Flower v Lloyd (No 1)* (1877) 6 Ch D 297 at 299-300.

18 J Mitford, *Treatise on the Pleadings in a Suit in Chancery* (5th edn, JWT Clarke 1847) at 113.

due diligence'.[19] His Lordship was concerned about cases where 'the victim fell short of reasonable diligence by a narrow margin' or where a successful litigant who fell 'just on the wrong side of honesty' might be exposed to 'the full rigour of a second trial',[20] and proposed a discretionary balancing approach.[21]

Lady Arden's starting point was that preventing a person from seeking to rescind a judgment procured by fraud amounted to restricting a right to pursue a cause of action in fraud and to have access to justice for that cause of action. So much is probably uncontroversial, but once again, framing the issue at that level of generality is unlikely to assist its resolution. Her Ladyship treated the appeal as a case where the 'principles found in the jurisprudence of the European Court of Human Rights apply': the restriction had to be one which 'serves the legitimate aim of proving a just solution, thus striking a fair balance between the relevant considerations and going no further than necessary, and which does not defeat the core right of access to court'.[22] One reason for allowing the appeal was that the approach in the Court of Appeal selected just one consideration, leaving all other factors out of account, which might involve a sanction (a ban on bringing the second action) that might be wholly disproportionate to the lack of diligence, while a restriction should be imposed only where it was necessary to do so to protect the rights and freedoms of others.

Thus there is no element of want of reasonable discoverability in an application to set aside a judgment procured by fraud. That accords with the position in Canada and Australia (in New Zealand reasonable discoverability is a discretionary bar).[23] The 2018 unanimous joint judgment of the High Court of Australia in *Clone Pty Ltd v Players Pty Ltd* considered all the decisions considered by Lords Kerr and Sumption, and more.[24] The court recognised (what was then) the divergent English approach, stating that it appeared to be based on an assimilation of two historical sets of principles–subsequent review of a decree where there was fresh evidence, and rescinding a decree for fraud—and confirmed that no such assimilation had been adopted in Australia.

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19 *Takhar v Gracefield Developments Ltd* at [68].

20 ibid at [70].

21 ibid at [85]-[86].

22 ibid at [94].

23 *Shannon v Shannon* [2005] NZCA 83.

24 *Clone Pty Ltd v Players Pty Ltd* (2018) 264 CLR 165; [2018] HCA 12.

Although it was said on delivery of the Supreme Court's judgment that there was a 'difference in approach or perhaps a difference in emphasis', that tends to understate the divergence. Perhaps the most remarkable aspect of the judgment is the diversity of reasoning, which includes (a) a careful analysis of authority confirmed by a policy choice; (b) a short discursus on equitable principles regarded as settled in the 1870s and 1880s; (c) an evaluative balancing of degrees of fraud and degrees of culpable neglect; and (d) an appeal to human rights jurisprudence. I do not intend to imply any criticism from the variety in approach. Lord Reid said in *Broome v Cassell & Co Ltd* that 'it is never wise to have only one speech in this House dealing with an important question of law'.[25] Lord Reid had in mind the risk that a single speech might be read textually, as if it were a statute, rather than as expressing the applicable principles. A further reason is that the variety of views on an important question leaves scope for the further development of the law. That is especially apt given that that fraud is protean: 'judgment procured by fraud' embraces a multiplicity of misconduct and the reasoning in *Takhar* will be applied in widely varying cases in the future.

The variety of approach prompts five observations. First, Lord Kerr's judgment is, with respect, an excellent example of the basic proposition that every judgment must be read in context, by reference to what was argued and decided. After all, one would not expect broad statements about the need to bring forward all points at trial necessarily to cover the exceptional case of judgments procured by fraud. Nor would one expect broad statements about fraud unravelling all necessarily to apply to a final judgment years after the event. Textual support in dicta is one thing, but decisions where the very point was argued and determined is another entirely. As Lord Porter said in *Commonwealth of Australia v Bank of New South Wales*:[26] '[t]hese words must (as must every word of every judgment) be read secundum subjectam materiam. They were appropriate to their context and must be read in their context'. Or, as Sir George Jessel MR said in *Hood v Newby*,[27] with characteristic pithiness, '[y]ou must always look to what was being discussed by the Judges as well as to the words used'. The insistent universality of both statements is noteworthy. Advocates will regularly seize upon verbal formulations in earlier judgments with a view to buttressing a submission; indeed, the relatively shortened mode of oral argument in modern courts tends to

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25 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1084.

26 *Commonwealth of Australia v Bank of New South Wales* [1950] AC 235 at 308.

27 *Hood v Newby* (1882) 21 Ch D 605 at 608.

encourage as much. Hence it has been observed that '[l]anguage quoted from earlier cases tends to be "snippets" of rules, not conceptual analysis, so that precedents now carry a textual authority that more nearly resembles statutory language than they once did'.[28] Limiting and framing general words is a familiar aspect of judicial technique; indeed, a case could be made that much of the actual creation of judge-made law takes place in these precedential interstices.

Hence no question arose of overruling the unanimous decision of the House of Lords in *Owens Bank Ltd v Bracco*, whether explicitly in accordance with the 1966 Practice Statement,[29] or less directly. The question was the more familiar one: what is the proper scope of a dictum expressed more broadly than was necessary to decide the case? The dynamism which is an inherent and important aspect of the legal system is achieved in many ways other than explicit overruling by ultimate appellate courts ('copper-bottomed overruling', in Harris' evocative phrase).[30] The 'innovative traditionalism' developed as of necessity prior to 1966 was not extinguished upon the promulgation of the Practice Statement.[31]

Secondly, the problem is old. It was old 140 years ago when James LJ referred to the 'hundreds of actions tried every year in which the evidence is irreconcilable conflicting, and must be on one side or other wilfully and corruptly perjured'.[32] Why not start with earlier solutions? Lord Simonds once cautioned that it is 'even possible that we are not wiser than our ancestors'.[33] Lord Sumption regarded the appropriate starting point to be the approach formulated after the Judicature legislation had commenced. So did the High Court of Australia, concluding that the continuing distinction between review based on fresh evidence

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28 K Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press 2013) 179.

29 House of Lords Practice Statement [1966] 1 WLR 1234.

30 J Harris, 'Towards Principles of Overruling–When Should a Final Court of Appeal Second Guess?' (1990) 10 *OJLS* 135. See too M Harding and I Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34(2) *MULR* 519.

31 See, for example, N Duxbury, 'Lord Wright and Innovative Traditionalism' (2009) 59 *U Toronto L J* 265 at 266.

32 *Flower v Lloyd* at 333.

33 *Chapman v Chapman* [1954] AC 429 at 444.

and rescission for fraud was 'justified as a matter of principle and history'.[34] This is not mere antiquarian learning. As Windeyer J—deeply steeped in legal history but conscious of its limitations—once put it, '[w]e are concerned with the law of to-day, not with the law of the Middle Ages. The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law of to-day by seeing how it took shape'.[35] An historical starting point does not, of course, predetermine that the result achieved a century ago should be perpetuated. But it does tend to respect precedent and may also give a helpfully precise answer.

> Equity's distinctive approach in this area emerges from an historical approach.
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> > As the ablest judges have often said, one of the occasions for the existence of a separate court of chancery was its power to deal with all cases of fraud; its original grant of jurisdiction covered fraud in all its forms and phases. The law courts, on the other hand, originally had little, if any, jurisdiction in such matters.[36]

Thus fraud was not admitted as a defence to an action on a covenant, a development which had to await the growth of assumpsit;[37] not until the nineteenth century did fraud become available as a defence to a claim on a deed.[38] Hence the need for an equitable jurisdiction to set aside chancery decrees, and to prevent execution of judgments at law, which had been procured by fraud. The creation in 1875 of Selborne's Court of Appeal within the High Court of Judicature required a careful analysis of whether, and if so how, the procedures formerly available in chancery by way of bill of review were reconciled with the new right of appeal and the new prohibition against common injunctions (largely achieved in *Flower v Lloyd* and *Re St Nazaire Co*).[39]

Thirdly, the judgments reconcile a tension between important values or principles in the legal system: those concerning finality and fraud. Advocacy by slogans such as 'fraud

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34 *Clone Pty Ltd v Players Pty Ltd* at [44].

35 *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 595; see also V Windeyer, "History in Law and Law in History" in B Debelle (ed), *Victor Windeyer's Legacy* (Federation Press, 2019) at 132-150.

36 J Pomeroy, *Pomeroy's Equity Jurisprudence* (Volume III, 5th edn, Bancroft-Whitney and Lawyers Cooperative 1941) at 580-581.

37 W Jones, *The Elizabethan Court of Chancery* (Clarendon Press 1967) at 428-430.

38 D O'Sullivan QC, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, Oxford University Press 2014) at 587-590.

39 *Re St Nazaire Co* (1879) 12 Ch D 88.

unravels all' is no new thing, and may be effective rhetoric. However, maxims and slogans admit of exceptions and qualifications. *Most* transactions involving a bona fide purchaser without notice, and most judgments obtained through perjured testimony, may not be set aside on the basis that they are vitiated by fraud. A less inaccurate proposition would be that 'fraud does not always and absolutely unravel all'.[40] All this is obvious if one pauses to think. One danger of a catchy maxim or slogan is that it may distract from paying proper regard to its implicit, unstated exceptions and qualifications.

Fourthly, it is quite true that areas of traditional equitable principle may be affected, sometimes profoundly affected, by human rights legislation (the law of confidential information is an example). However, irrespective of whether 'access to justice' says much about applications for determination on the merits of a dispute for a *second time*, it may be doubted whether much assistance is given by the inevitably general notions of proportionality and striking a fair balance.

Finally, *Takhar* was a clear case. All four judgments explicitly address the more marginal cases which will arise in the future, but diverge as to their resolution. One way of analysing the divergence might be styled 'granularity'—at what level of generality or abstraction are the applicable principles to be framed? The more general approaches favoured by Lord Briggs and Lady Arden led to a more open-ended discretion, while those of Lords Kerr and Sumption which gave greater prominence to authority may prove to be more nuanced. Space precludes any attempt to address the large and important topic of principles and rules. But it is a happy coincidence that at around the same time as *Takhar* was handed down, some prominence was being given to the notion that many aspects of the legal system are so complex that a balanced *mixture* of principles and rules is appropriate.[41] Neither high level principles nor precise rules will by themselves achieve certainty and predictability. That said, getting that balance right is one of the hardest problems in law.

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40 P Turner [2016] 75 *CLJ* 206 at 207.

41 M Briggs, 'Equity in Business' (2019) 135 *LQR* 567. Also see Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press 2019); M Leeming, 'The Role of Equity in 21st Century Commercial Disputes—Meeting the Needs of any Sophisticated and Successful Legal System' (2019) 27 *Aust Bar Rev* 137 at 156-158.