Challenging fraudulent judgments

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To set aside a judgment on the grounds of fraud, is it necessary to show that the evidence of fraud was unavailable at the trial and could not have been obtained with reasonable diligence? In May 2015, two High Court Judges gave totally contradictory answers to this question.

Mr Justice Newey in **Balber Kaur Takhar v Gracefield Developments** [2015] EWHC 1276 (Ch) considered the situation where at trial a party did not remember signing a document but had made no specific allegation of forgery and so had not been permitted to adduce expert handwriting evidence. After the trial, expert evidence, which was said to conclusively prove forgery, was obtained. An application was made to set aside the original judgment on the grounds that it had been obtained fraudulently. Some of the requirements for setting aside a judgment on the grounds of fraud were not in dispute and are not in doubt:

> *"first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned.*
>
> *Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was.*
>
> *Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."*

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(See **RBS v Highland Financial Partners LP** [2013] EWCA Civ 328 at para 106, cited at para 26 of **Takhar**)

However, Newey J had to determine whether or not, if a judgment is to be set aside on the grounds of fraud, there is a further requirement that new evidence could not reasonably have been obtained in time for the original trial. After extensive citation of authority Newey J. concluded a party seeking to set aside a judgment simply has to comply with the requirements in **RBS v Highland** and does not also have to show that the new evidence could not reasonably have been discovered in time for the original trial. He said:

> *To my mind, the reasoning in the Australian and Canadian cases is compelling. Finality in litigation is obviously of great importance, but "fraud is a thing apart". Supposing that a party to a case in which judgment had been given against him could show that his opponent had obtained the judgment entirely on the strength of, say, concocted documentation and perjured evidence, it would strike me as wrong if he could not challenge the judgment even if the fraud could reasonably have been discovered. Were it impossible to impugn the judgment, the winner could presumably have been sent to prison for his fraudulent conduct and yet able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud.*

At the same time as Newey J. was drafting his judgment, Burton J. was considering the same issues and reaching the opposite conclusion in **Chodiev & others v Stein** [2015] EWHC 1428. He decided that to set aside a judgment on the grounds of fraud there must be apparently credible evidence as to the fraud or perjury which not only was not available at the trial and could not have been obtained with reasonable diligence. He was concerned to ensure, so far as possible and except in very limited circumstances, a finality to litigation.

After Burton J. had written the **Chodiev** judgment, and moments before he was about to distribute it, the **Takhar** decision was brought to his attention. This resulted in an addendum to the **Chodiev** judgment. Burton J. noted in the addendum that he considered himself bound by a previous authority (**Hunter v CC of West Midlands Police** [1982] AC 529) that had not been referred to by Newey J and was not persuaded to change his mind by the judgment in **Takhar**.

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In the light of these almost simultaneous but totally conflicting decisions we can expect these issues to be examined by the appellate courts soon.

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