

ENGLAND AND WALES / JUDGMENT

Estate of Euan McIntyre Lindsay (Deceased) & Anor v Outlook Finance Ltd & Anor [2025] EWHC 3100 (KB) (26 November 2025)

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Case No: KB-2023-002114

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

26/11/2025

B e f o r e :

MR JUSTICE KERR

Between:

(1) THE ESTATE OF EUAN McINTYRE LINDSAY (deceased)

(2) WILLIAM DONALD LINDSAY (t/a DM LINSDAY)

Claimants

- and -

(1) OUTLOOK FINANCE LIMITED

(in liquidation)

(2) RODERICK GRAHAM BUTCHER

Defendants

Jeffrey Bacon (instructed by Direct Access) and Gunnercooke LLP) for the Claimants

The First Defendant did not appear and was not represented

Henry Bankes-Jones (instructed by Kennedys Law LLP) for the Second Defendant

Hearing dates: 14, 15, 16 and 28 October 2025

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Mr Justice Kerr :

Introduction and Summary

This is an action to set aside a 2014 judgment allegedly obtained by fraud. The claimants (the Lindsays

) are from a family of Scottish dairy farmers who had farms in Scotland and Cumbria. Financial difficulties in 2008 led to some family members becoming bankrupt. The claimants and associated entities obtained loan funds from the first defendant (

Outlook

) secured on the two farms and certain livestock. Outlook alleged defaults and appointed the second defendant (

Mr Butcher

) in 2012 as "LPA receiver" in relation to the farm in Cumbria and as agent to take possession of the livestock.

In November 2012, Mr Butcher took possession of the farm in Cumbria and certain livestock, plant and machinery there. That farm has been sold on. In a Chancery Division claim heard in Manchester, the claimants challenged Mr Butcher's appointments, contending that a sale and leaseback agreement had been entered into with the wrong entity; and that Outlook's director and controlling mind, Mr Derek Fradgley, had breached an oral agreement and certain oral assurances said to create a waiver, estoppel or collateral contract.

There was then no challenge to the underlying loan, lease and security documents, nor any allegation of fraud. The case turned on the credibility of witnesses. The trial judge preferred Mr Fradgley's evidence to the Lindsays', though Mr Fradgley admitted having deceived the family by telling them he was backed by funding from a bank. In his June 2014 judgment, His Honour Judge Bird rejected the claim against Outlook and said he need not determine the claim as against Mr Butcher, nor against the purchasers of the farm, sued as third defendants. He dismissed the claims against all three defendants, with costs.

Protracted litigation in Scotland then followed. Outlook sought to enforce its charge over the farm in Scotland, relying on indebtedness and unpaid costs. The Lindsay family sought to set aside the loan and security documents that had gone unchallenged in the Manchester proceedings. They took the view, on detailed scrutiny of disclosed accounting records and other documents and with advice from counsel and forensic accountants, that the loan and security documents had been obtained by fraudulent misrepresentation and (in English law terms) undue influence

[1]

. Mr Fradgley died of cancer in July 2017.

The litigation continued. It culminated in a trial before Lady Wolffe in the Outer House of the Court of Session. In her detailed reserved opinion in August 2021, she found that Mr Fradgley had taken advantage of the family's trust in him, had fabricated documents, invented facts and falsified the records of a Lindsay family company, of which he was the secretary, to mask his exercise of control over the family's business affairs. She upheld the family's contention that the loan agreements and mortgages were obtained by lesion, facility and circumvention and by fraudulent misrepresentations as to the amounts due.

Lady Wolffe found that, as at September 2009, the amount due had been no more than £900,000, not £1.8 million or £2.6 million as Mr Fradgley had falsely told the family; and that Outlook had systematically and deliberately overcharged the family in respect of interest payments on the outstanding loan monies. She "reduced" (set aside) the loans and legal charge over the Scottish farm and ordered repayment of overpayments in the sum of £180,077. However, Outlook did not pay anything and went into voluntary liquidation.

The claimants then brought this action in April 2023 against Outlook and Mr Butcher, asserting that the judgment of the High Court in Manchester had been obtained by fraud on the part of Mr Fradgley and that the judgment and consequential orders should be set aside as against Outlook and Mr Butcher, whose appointment as LPA receiver and agent had been invalid and whose conduct in seizing the Cumbria farm, cattle, plant and machinery had been tortious, amounting to trespass and conversion. The claimants seek a retrial.

The Facts

In slightly more detail, I find the following facts. Most of the account that follows was not challenged by Mr Butcher; his stance was, mainly, to put the claimants to proof of their allegations and to point out that he is not bound by the findings of Lady Wolffe in the case before her (

the Scottish proceedings

), in which he took no part. Mr Butcher did give evidence at the trial before HHJ Bird (

the Manchester proceedings

) but his evidence turned out to be peripheral because Mr Fradgley's evidence was preferred to that of the Lindsays.

There were many bundles before me, old and new, from these and previous proceedings. Some of the bundles were "not agreed"; others were agreed. By paragraph 27.2 of the practice direction supplementing CPR Part 32:

"All documents contained in bundles which have been agreed for use at the hearing shall be admissible at that hearing as evidence of their contents, unless (a) the court orders otherwise, or (b) a party gives written notice of objection to the admissibility of particular documents."

The findings set out below are mine. I do not adopt Lady Wolffe's findings except when independently agreeing with her. Her findings do not bind Mr Butcher, nor this court. On the other hand, I am entitled to regard her findings as convincing and persuasive and, in forming my views, to consider the cogency of her reasoning. On the central issue of Mr Fradgley's dishonesty and fraudulent conduct, there is no real dispute. Lady Wolffe found that he was a dishonest fraudster and Mr Butcher did not seriously suggest I should disagree.

Lady Wolffe made damning findings against Mr Fradgley to the effect that he had fraudulently extracted money from the Lindsays systematically over many years, taking advantage of their naivety and lack of business acumen. Mr Butcher advanced no positive contrary case before me. His stance at trial was not that Mr Fradgley was honest and truthful but, rather, that he, Mr Butcher, had no reason to suppose otherwise at the material times in 2012 and 2013; and that it would be unfair to reopen the failed claim against him.

In fairness to Mr Butcher, it cannot be said that he gave dishonest evidence to HHJ Bird or to me; nor that he knew he was acting improperly in respect of his appointments as an enforcer of debts owed to Outlook; nor that he knew Mr Fradgley was anything worse than a tough businessman rigorously enforcing debts owed to his company, Outlook. This case would be more straightforward if it were pleaded and proved that Mr Butcher and Mr Fradgley acted in cahoots; but that is not suggested. Rather late in the day, the Lindsays have confirmed that they do not in these proceedings allege any fraud against Mr Butcher.

They seek a retrial as against him, as well as against Outlook, on the basis that he was the beneficiary of Mr Fradgley's fraud and, in his capacity as LPA receiver and agent, became liable in trespass and conversion for wrongful use and disposal of real and personal property under security instruments that were set aside ("reduced") or declared void in the Scottish proceedings. In that manner, it is said that he unjustly enriched his client, Outlook, and himself; and unjustly impoverished Outlook's supposed debtor, the first claimant.

Lady Wolffe's findings are corroborated by the claimants' three witnesses in this case, Messrs Rodger, William and James Lindsay (to whom I will refer by their first names). Mr Butcher also gave evidence. The Lindsay witnesses confirmed the correctness of the written evidence they gave in affidavits in the Scottish proceedings, which were before me and not seriously challenged by Mr Butcher. The facts, therefore, are mainly not controversial and can be stated quite briefly, especially since I am not retrying the Manchester proceedings.

The farm in Scotland is Harperfield, in Lanarkshire. It has been trading since about 1946, when the brothers Euan and James were young boys. They left school aged about 14 or 15 and became farmers. James is now 83 and Euan died in 2011. James is not a man of business or good with numbers. He reads only slowly. William is dyslexic and slow at reviewing documents. They are not sophisticated men of business, as Mr Fradgley was and Mr Butcher is. Harperfield was owned by Euan and traded as DM Lindsay, first being traded by Euan and, after his death, by his executor and beneficiary, William.

The farm in Cumbria is Metal Bridge Farm (

MB Farm

), purchased in 2001 and farmed by a partnership of James' wife Helen Lindsay and two of their three children, Rodger and Kerr Lindsay. The partnership received loan funding from Outlook from 1996. The business traded as Lindsays Dairy and Lindsay's AI (artificial insemination). There were various loan agreements from 2000 to 2008 when financial difficulties arose from a commercial error leading to litigation. Rodger and Kerr were made bankrupt in 2008; Helen, in 2009.

Mr Fradgley advised the Lindsays to set up a limited company to trade MB Farm, for which Outlook would supply working capital, secured by a legal charge on Harperfield for £200,000, and to which it would lease the necessary assets. The three bankrupt family members could not be directors. The directors should, Mr Fradgley advised, be James and Euan. This was agreed and Metal Bridge Limited (

MBL

) was incorporated. The company secretary was Mr Fradgley.

Mr Fradgley held a general meeting of MBL on 24 June 2008 at his offices in Stourport-on-Severn, Worcestershire. The minutes he prepared falsely record that the directors, Euan and James, were present and signed them to confirm their presence. But neither has ever been to Stourport. The minutes also falsely stated that James could produce budget reports or forecasts. He could not. I accept, as Lady Wolffe did, that Mr Fradgley ran MBL while creating the false narrative that the directors, ignorant of business matters, were running it.

It was also in 2008 that Mr Butcher first had a business relationship with Outlook and Mr Fradgley. Mr Butcher was and still is now a director of Butcher Woods Limited and a licensed insolvency practitioner. He gave evidence in the Manchester proceedings, confirmed in his evidence before me and not challenged, that he first became involved with Outlook in 2008, when he was providing general advice in relation to certain redundancy payments and staff issues, a matter unrelated to the Lindsay family.

Both the Lindsays and Mr Butcher gave evidence that Mr Fradgley was very plausible, convincing and gave every appearance of being trustworthy and a man of integrity. I accept that evidence. In August 2009, Mr Fradgley stated that MBL was insolvent. Euan refused to allow the security over Harperfield to be increased by a further £200,000. An unscheduled meeting then took place on 26 August 2009 at James' then home at Halltown Farm, near Carlisle. Mr Fradgley arrived unexpectedly. Euan and Mr Fradgley were present. James was nearby in the kitchen and overheard some of what was said.

I accept James' unchallenged account, also in his affidavit in the Scottish proceedings. Mr Fradgley aggressively told Euan that he was liable for MBL's debts under indemnities; that these debts amounted to some £2.6 million; and that, to avoid Euan being sued and made bankrupt, Mr Fradgley could arrange fresh loans – funded by a bank, he falsely stated – at a discounted sum of £1.8 million. He produced a "settlement calculation" document (quoted in Lady Wolffe's opinion at [21]) to support his position. Euan was aghast, but accepted that he needed to raise £1.8 million. Mr Fradgley orchestrated the arrangements.

Metal Bridge Dairy Farm Limited (

MBDFL

) was incorporated and MBL was (later) dissolved. Euan purchased MB Farm for £465,000 and granted MBDFL a two year tenancy or licence to occupy it and use the plant and machinery to trade the business, at a monthly rent of £10,500, payable to Euan. The same sum was payable by Euan to Outlook as interest to service the loans. He granted a charge over Harperfield for a loan of £1.335 million and over MB Farm for a loan of £465,000, the security therefore totalling £1.8 million. The loan and security documents were dated 29 September 2009 and 4 February 2010. The loans were repayable after two years, by 29 September 2011, or on Euan's death.

The legal charge over MB Farm dated 4 February 2010, in favour of Outlook, included at clause 10 a power, at any time after the security had become enforceable, to appoint a receiver over the charged property, whose remuneration (by clause 10.4), fixed by Outlook "shall be a debt secured

by this legal mortgage which shall be due and payable immediately upon its being paid by the Lender [Outlook]." Clause 11.3 provided that the receiver would be the "agent of the Borrower" (Euan) and "shall be solely responsible for his acts and remuneration, as well as for any defaults committed by him".

Clause 11 and Schedule 5 set out the receiver's powers, over and above statutory powers under the Law of Property Act 1925 and the Insolvency Act 1986. These were the usual powers to repair and develop the property, to grant or surrender leases, to employ personnel and advisers, to make and revoke VAT options to tax, to charge for remuneration and expenses, to realise the charged property, to manage or restructure the borrower's business, to dispose of the property, and various other management powers of the usual kind.

There is a disagreement about whether, as Mr Butcher suggests, Outlook advanced £465,000 in cash to Euan or indeed any amount in cash. The Lindsays assert that the £465,000 represented a "roll over of a series of loans" going back to the early 2000s. I do not need to resolve that dispute, but it is likely (based on the subsequent calculations done by forensic accounts) that Outlook advanced cash amounts of considerably less than £465,000.

Euan then died on 3 June 2011, whereupon the £1.8 million became repayable, according to the loan documents. William became Euan's sole executor and beneficiary under his will. MBDFL's two year fixed term tenancy was due to expire at the end of September 2011. William met Mr Fradgley for the first time on 6 September 2011, with Kerr and Rodger also present. Mr Fradgley emailed the three of them the next day. HHJ Bird accepted that email as a broadly accurate account of the meeting.

I do not make specific findings about what was said or agreed at that meeting because I am not retrying the Manchester proceedings. The Lindsays' case was and is that William told Mr Fradgley that DM Lindsay, i.e. himself as Euan's heir, would be the trading entity at MB Farm in succession to MBDFL. The Lindsays' unsuccessful contention in the Manchester proceedings was that it was orally agreed at the meeting that, provided the monthly interest payments of £10,500 were paid on time, the loans would continue and not be called in.

I interject that the Lindsays rely on documents disclosed by Mr Butcher in these proceedings, but not in the Manchester proceedings, to show that he and Outlook knew when he took possession (later, in November 2012) of MB Farm, that DM Lindsay, not MBDFL, was the lawful tenant of that farm. It certainly appears that an email from the relevant milk purchaser of 26 November 2012 (to which I am coming) named the supplier as MBDFL up to 31 December 2011 and "Firm of D M Lindsay" from then up to 21 November 2012; and that email was forwarded to Mr Butcher by Outlook's solicitor the same day.

On 21 September 2011 European Livestock UK Limited petitioned to wind up MBDFL. On 30 September, Outlook (i.e. Mr Fradgley) wrote to William saying the loans totalling £1.8 million (plus £58,000 interest) were repayable but that "without prejudice to our right to enforce the loan, we agree that the existing facility may continue until we give you notice to the contrary". That letter was before the court in the Manchester proceedings. It was the subject of argument in those proceedings, but I do not need to comment on it here.

Further discussions took place with Mr Fradgley, according to the Lindsays, into December 2011 and into January 2012. These were the subject of findings by HHJ Bird in the Manchester proceedings. I do not here revisit those findings. The Lindsays say MBDFL ceased trading from 31 December 2011 whereupon, with effect from 1 January 2012, William trading as DM Lindsay took over as the trading entity for MB Farm.

The Lindsay family refer me to an email from Mr Fradgley of 18 January 2012, mentioned by HHJ Bird, saying that Outlook's funders thought the security for the £1.8 million debt was not sufficient and that, Mr Fradgley suggested, the security should be supplemented by a sale and leaseback agreement (

the SAL

) described in Outlook's letter of 19 January 2012, also before HHJ Bird, as "a sale and leaseback agreement in respect of the herd of cattle owned by your company or by [William] personally."

I interject that I have not seen a copy of the SAL but I note that Outlook and Mr Butcher's later pleaded case in the Manchester proceedings was that the SAL was made on or about 25 January 2012 between Outlook and MBDFL. Both denied in their pleaded defence in those proceedings (at paragraph 34) that there was "any common intention shared by Outlook and [William] that [William], not MBDFL, should be a party to the lease."

In return, the letter of 19 January explained, Outlook would advance £160,000, of which £60,000 was due to Outlook and the rest to be paid by Outlook to other creditors of MBDFL. The Lindsays say that in reliance on the misrepresentation that £60,000 arrears of interest was due, William signed the SAL, believing the parties to it to be himself personally and Outlook. I have not seen a copy but, on its face, the parties must have been Outlook and MBDFL. The latter was subject to ongoing insolvency proceedings which, I understand, culminated in MBDFL being wound up by the court on or about 26 April 2012.

A letter dated 1 May 2012 was before HHJ Bird. I too have a copy. The Lindsays say it was never sent and is not genuine. It is addressed to MBDFL "(in Liquidation)", with a copy to "Mr W Lindsay at Harperfield Farm". The letter says that in view of the liquidation, the SAL "is now terminated". Termination was "automatic" under the terms of the SAL but Outlook would accept the family having continued use of the cattle in return for £5,760 per month paid by William "under his personal indemnity".

The liquidators of MBDFL asserted a claim to cattle at MB Farm. On 1 May 2012 Mr Fradgley emailed Mr Butcher, who knew the liquidator from previous business dealings, asking for his assistance in demonstrating that the relevant 505 cattle were owned by Outlook. The dispute about the cattle continued. Over the rest of the summer, Mr Fradgley pressed the Lindsays for various payments he said were due and pressed them to sell the cattle.

HHJ Bird made various findings about meetings held on 5 July and 23 September 2012. It is not for me to revisit those findings here. It appears not to be disputed that at the latter meeting, Mr Fradgley told the Lindsay family members present that he required about £164,000 to be realised without delay by the sale of sufficient cattle to raise that sum; and that thereafter he began to take steps to take possession of the cattle. The matter became potentially litigious. The Lindsays suggested Outlook refer the matter to solicitors.

Rodger was evidently aware Mr Butcher had or might have some involvement. He contacted Mr Butcher in October 2012 and asked if there were problems at Outlook, since Mr Fradgley was making demands even though the Lindsays were making payments to Outlook. Mr Butcher denied any knowledge. Rodger's evidence is that Mr Butcher "played dumb" and "he joined in Mr Fradgley's deceit of us by not telling what was going on"

Mr Butcher's evidence is that he was not then formally instructed as LPA receiver in respect of MB Farm when Rodger contacted him and "[i]t would have been wrong for me to reveal any plans to take possession of the Property as that could have led to possession being obstructed." He explained that this is standard practice where a "hostile" appointment of a receiver is made. It is normal not to tip off the debtor, for obvious reasons, he told me in oral evidence. It could lead to the debtor putting property beyond the reach of the creditor.

Mr Butcher considered he owed confidentiality obligations to Outlook though he thought it was "still possible that Mr Fradgley would elect against taking possession", something he had not previously done. On 23 October 2012, Mr Butcher reported back by email to Mr Fradgley about the call from Rodger, saying Rodger was "asking why you'd sent him a demand" and explaining that he had responded that he, Mr Butcher, "wasn't involved and knew nothing."

Mr Fradgley then coordinated plans for Mr Butcher to be appointed as a receiver for Outlook and to take possession of MB Farm on 21 November 2012 and, if possible, of Harperfield as well. The detailed plans are set out in emails from 10 to 20 November 2012 including some that were not available to the parties in the Manchester proceedings. A cattle auctioneer and expert on cattle, Mr Tom Brooksbank, was brought in to deal with taking possession of the cattle.

He emailed Mr Fradgley on 13 November confirming he could take possession of the cattle and suggested advertising them for sale before Mr Butcher's appointment: "[c]ould we take a punt and advise the papers in time for the first ad on Nov 16? The Lindsays would not know before the Friday other than by word of mouth". Mr Butcher accepted in evidence that it would not be proper to sell the cattle without clear title to sell them, i.e. clarity as to their ownership. He said he was not personally involved in placing the advertisements.

On or around 14 November 2012, Mr Butcher was appointed as Outlook's agent to repossess what he called in his witness statement "the cattle owned by Outlook". On 17 November (according to HHJ Bird in his judgment at [63]), William received an undated formal demand letter from Outlook to William, as executor of the will of Euan. The demand was for repayment in full of the £465,000 loan secured on MB Farm. On 20 November 2012, Mr Butcher was appointed as receiver in respect of MB Farm. He signed the instrument of appointment, accepting the appointment at 5pm that day.

The plan was that Mr Butcher would take physical possession of MB Farm the next day. His co-director and counterpart in Scotland, Mr Adrian Woods, would if possible take possession of Harperfield at the same time. Correspondence not available in the Manchester proceedings shows that English and Scottish solicitors, Gateley LLP, warned Mr Butcher and Mr Woods, in an email from the English solicitor, Ms Karthyn Hacking, sent at 10.08pm on 20 November 2011, against entering either farm without permission of the Lindsays or, if that were not forthcoming, "a court order will need to be obtained".

Mr Butcher did not accept that advice. He considered that in England (unlike in Scotland) a court order is not required; the instrument of appointment as receiver or agent suffices. That was the view he acted on the next morning, 21 November 2012 when he, a colleague Mr Andrew Deere, Mr Brooksbank and others entered into possession of MB Farm without permission from the Lindsays who were not there but some of whom arrived later in the morning. The events are described in Mr Butcher's file note of 22 November 2011.

The situation became heated; the police attended. Mr Butcher was at the farm until 3.30pm, when he left, leaving Mr Deere as his representative. Mr Butcher succeeded in excluding the Lindsays from occupation and in taking possession of MB Farm and the cattle, plant and machinery and other property there. But at Harperfield the same day, Mr Woods did not enjoy the same success. He was denied permission to enter by William, who was there and repelled the attempt. Mr Woods did not attempt to take possession against Williams' wishes.

As to MB Farm, there is a file note from Mr Deere dated 23 November 2012 and one from Mr Butcher of the same date. Kerr Lindsay alone was allowed limited access to MB Farm under escort, to collect personal possessions. Outlook sought to take over milk production at the farm. Mr Butcher's solicitors advised him that to produce milk the farm would need to be "registered", to protect his position as receiver.

On 26 November 2012, as stated above, the Food Standards Agency passed on to Mr Butcher's solicitor (who forwarded it to Mr Butcher the same day) the identities of past milk suppliers: MBDFL only up to 31 December 2011 and, thereafter, "Firm of D M Lindsay" up to 21 November 2012. Mr Butcher's evidence about ownership of the cattle was stated in his witness statement in the Manchester proceedings (made on 18 December 2013):

"At the date of my appointment. there were cattle at the Property. I understood that some cattle had been purchased by Outlook and leased to MBDFL. Of the remaining cattle, the majority did not have any passports so could not be identified and therefore they could not moved [sic] from

the Property. I was advised by my solicitors that I was bailee of the cattle and I needed to be satisfied as to evidence of ownership before I could take any action in respect of the cattle. To date no evidence of ownership has been provided by WL [William] although it has been alleged in the Claimants' Particulars of Claim that they are owned by WL."

In the same witness statement, he said later:

"On or around 4 December 2012, under the instruction of Outlook, I arranged with Norton & Brooksbank for the cattle owned by Outlook to be sold by auction. However, the auction did not go ahead because some of the cattle reacted positively to the pre-movement tuberculosis test and DEFRA locked down the Property. I had to keep the cattle on site. A licence for the destruction of the infected cattle was obtained. However, the cattle belonging to Outlook which were not destroyed were sold to the Third Defendant, R & W Beattie limited on 23 January 2013. The remainder of the cattle remain on site at the Property."

Ms Hacking, the solicitor, did indeed email Mr Butcher on 5 December 2013 (an email not available in the Manchester proceedings) advising Mr Butcher that as bailee of "cows that Outlook do not own which will be left at the farm when the cows Outlook do own are moved/ slaughtered." She pointed out that it was not known who owned cows not owned by Outlook:

"... it may be the Lindsays or an unknown third party. As LPA receiver appointed over the land, you are a 'bailee' of these cows. A bailee is someone who is in possession of property which they do not own, usually with the consent of the owner.

In this case you do not have the formal consent of the owners and you are what is known as a 'bailee by unilateral assumption'. This which [sic] imposes on you the following duties towards the cows:

1. To take reasonable steps to re-unite the owner with their cows; and
2. To take reasonable care of the cows."

Ms Hacking then went into considerable further detail in expounding the content of these two duties. She suggested at the end of her email that Mr Butcher should discuss the matter with Defra as "we do not know who owns all of the cows". If Defra did not take the matter out of Mr Butcher's hands or have a duty to take control of the cows due to the outbreak of disease, "you may need to apply Court [sic] to resolve the matter." She referred to the right to apply for an order authorising sale of property under sections 12 and 13 of the Torts (Interference with Goods) Act 1977.

Mr Butcher explained in his witness statement in the Manchester proceedings that he wrote to Rodger and William on 2 January 2013 that he would be clearing the property and that any claimed ownership of items at the farm should be notified to him by 9 January, a week later or they would be disposed of. He wrote to HMRC on 7 January 2013 (correspondence not available in the Manchester proceedings) saying he had been unable to trace a VAT number in respect of MB Farm and asking whether an "option to tax" had been exercised in relation to MB Farm.

He granted a tenancy at will to what later became R & W Beattie Limited (

Beattie

) on 9 January 2013 in respect of MB Farm; and an option to the same company to buy the Farm. The option was to be exercised by 1 March 2013 but was later extended to await the outcome of the Manchester proceedings, in which Beattie became the third defendant. The option agreement included at clause 10.5 an indemnity from Beattie to Mr Butcher "against any Claim or Loss ... arising after the Completion Date out of the giving of possession, use or control to the Buyer [Beattie] of the Third Party Assets "

On 11 January 2013, Mr Butcher wrote to William attaching a copy of an inventory of items at the site done the previous day in the presence of Kerr Lindsay. The inventory included numerous items of farm machinery, not included as part of Outlook's security. He asked William for "full supporting evidence as to your ownership of all items on the inventory." He suggested some of the items could be owned by finance houses, in particular Close Asset Finance. He sought proof that items were not owned by that company.

On 21 January 2013 HMRC replied to Mr Butcher's query (not available to HHJ Bird) asking for further information, namely the "full trading name" and VAT registration number of "the trader" and a copy of the deed of appointment, appointing him as an LPA receiver. On 24 January Mr Butcher replied (also not available to HHJ Bird) saying it was "possible the business traded the VAT registration number [given], which as far as I am aware applies to 'the firm of D M Lindsay'. It is also possible that this was the full trading name used."

On 29 January, a further email (not available before HHJ Bird) from Mr James Busby of Gateley LLP advised Mr Butcher that he would not be automatically discharged from office on disposal of MB Farm and that he would "have to officially resign". There was a warning, again, that he was at risk of being "liable for ... conversion, which is where you interfere with property of another so as to amount to appropriating the property for yourself"; and:

"As involuntary bailee of the cattle, you were entitled to get rid of them by reasonable means. Ultimately you sold the cattle but not before attempting to locate the true owners by writing to the Lindsays setting out your position and advertising in the local newspaper. To our mind your actions demonstrate that you acted reasonably in the circumstances."

On 6 February 2013 (a letter not available before HHJ Bird), HMRC wrote to Mr Butcher advising that they did not appear to have been notified of any option to tax in respect of MB Farm; though one may have been exercised many years earlier, or under a different trading name or VAT registration number. That concluded Mr Butcher's enquiries with HMRC.

That brings me to the claim in the Manchester proceedings, originally issued in Birmingham on 27 February 2013. HHJ Bird summarised the claims thus in his judgment:

"3. In essence the Claimants (the estate of EL [Euan] and Willie Lindsay) plead that Outlook had no right to repossess the cattle or to appoint a receiver under the terms of the Charge or that if such right arose it has been lost by waiver or estoppel or is barred by the terms of a collateral agreement.

4. The Claim really boils down to these assertions, which if found might be sufficient to give rise to the legal defences advanced:

4.1. There was an agreement in January [2012] that as long as interest was paid and capital repayments started in July [2012] no steps to enforce the loan security would be taken

4.2. There was an agreement in July [2012] that Outlook would wait until Harperfield was sold before claiming its capital

4.3. The sale and lease agreement should have been made with DM Lindsay (Willie) and not MBDFL. I should rectify it to reflect this. If I do so there is no breach and no right to the cattle.

4.4. There was an agreement on 1 May [2012] that Willie would rent the cattle and that as long as he paid the rent the cattle would not be repossessed".

Outlook and Mr Butcher filed a joint defence settled by the same counsel, but instructed by separate solicitors, on 28 March 2013. Broadly, Mr Butcher aligned his defence with that of Outlook save that at paragraph 29 he made clear that, "except as appears below", he did not plead to the allegations against Outlook relating to the alleged collateral contract, the possession of cattle claim as against Outlook, nor the SAL related claim as against Outlook; nor the "D. M. Lindsay Lease" claim as against Outlook.

Witness statements were produced by Mr Butcher (made on 18 December 2013) and by Mr Fradgley (on 6 January 2014), among others. I have already referred to Mr Butcher's witness statement in the Manchester proceedings. Mr Fradgley exhibited, among other things, schedules of longstanding agreements and loans he said were consolidated, together with a diagrammatic representation of the various agreements showing how, according to Mr Fradgley, they were linked and loan monies were rolled over from one agreement to another.

The claim as against Beattie was stayed to await the outcome as against them. Over the weekend before the trial, a 970 page "Omissions Bundle" was disclosed by Outlook's solicitor. I accept the evidence of Rodger in the current trial that:

"This was on the very eve of trial and there was a vast amount going on and the agreements and the amounts due were not in issue and no arguments about them were to be or were deployed before HHJ Bird. They were not studied in any way at all. As I explain below, by no means all of the relevant agreements were disclosed, and we noticed only after the trial and judgment that one agreement was materially different to the one that had been disclosed."

The trial took place in Manchester over six days in the period from 31 March to 17 April 2014. HHJ Bird's attention was very much focussed on the conflict of evidence between the Lindsays and Mr Fradgley. They and he gave evidence. So did Mr Butcher, for an hour or two, but his evidence was peripheral. He is barely mentioned in the reserved judgment and in the draft version, it was mistakenly recorded that the claim against him was stayed, as was the claim against Beattie. The reserved judgment was given on 2 June 2014.

HHJ Bird found as follows, in summary. He accepted that the Lindsays were not sophisticated business people, though Rodger had more experience of business than the others. The family trusted Mr Fradgley; they had "enjoyed a long and profitable relationship with Outlook". They saw Mr Fradgley as "a trusted adviser" ([65]). The judge mentioned Mr Fradgley's candid acceptance of having misled the family by inventing a fictional bank; but said it "carries little weight in my assessment of Mr Fradgley's credibility as a witness."

Outlook deployed the

Gestmin

case, then and now much relied on by parties seeking to elevate documents over oral testimony in the finding of facts, particularly in commercial cases. The judge (at [69]) quoted the best known passage. I have said before that the primacy of documents over testimony can be taken too far and that Leggatt J (as he then was) in

Gestmin

took care not to elevate the status of documentary evidence above that of oral evidence (

O'Hare v. Coutts & Co

[2016] EWHC 2224 (QB)

), at [21(3)] and [49]).

HHJ Bird bore in mind "the real danger of supposing that evidence of personal recollection given confidently and honestly must reflect what actually happened" ([70]); and noted at [71] that "[t]he outcome of the case depends on whose evidence I accept". At [72]-[83] he gave various reasons, which I need not set out, for preferring that of Mr Fradgley to that of "the Lindsay family", while not doubting that the latter's evidence was given honestly.

The judge's conclusions were then stated [84]-[86], at the end of the judgment:

"84. My conclusion then is that in every material respect I prefer the evidence of Mr Fradgley over that of the Lindsay family. As was submitted by Mr Vickery, the documentation I have seen is almost universally unhelpful to the Lindsays. The real context of this case is that Outlook was a commercial, experienced lender which wished at every step to protect its own position as it is entitled to do. The Lindsays (encouraged by Mr Fradgley) did not see it that way. They saw Outlook (for a long time at least) as a reliable supportive friend, perhaps willing to put its own

interests to one side from time to time to help out. This view of Outlook has perhaps encouraged the Lindsays to believe that the support offered would be everlasting. That was not the case.

85. The findings I have made make it unnecessary for me to reach any conclusions on the legal points raised.

86. In view of my findings the claims before me must be dismissed in their entirety."

I interject that the claimants say their claim against Mr Butcher has never been determined. That is not strictly correct. It has been determined, adversely to the claimants, but in a summary manner. The claimants lost against Mr Butcher because they could not succeed unless they had also succeeded against Outlook. That outcome is reflected in HHJ Bird's order, sealed on 14 June 2014. He ordered that all the claims, including the stayed claim against Beattie (and a stayed additional claim by Beattie against Outlook) be dismissed. He ordered the claimants to pay all three defendants' costs of the action, with payments on account of £31,000 to Outlook, £24,000 to Mr Butcher and £7,125 to Beattie.

Mr Butcher then had no further involvement until this claim was brought in 2023. He does not challenge much of the Lindsays' case on subsequent events, mainly taken from the detailed account in Rodger's witness statement in this case. Rodger also produced the witness statement he made in the Manchester proceedings and an affidavit sworn by him in the Scottish proceedings. He confirmed the truth and correctness of all the evidence given in all three documents and, although he was cross-examined, there was little challenge to the veracity and accuracy of his factual account. I accept that account.

Rodger gives a detailed chronological explanation in his lengthy witness statement of "[h]ow we got to Lady Wolffe". His account includes the twists and turns of multiple legal processes, including among other things:

- (1) an allegation made to police in Cumbria which came to nothing, that one or more Lindsay family members had stolen cattle from MB Farm;
- (2) the discovery of discrepancies between different copies of earlier finance and leasing agreements; and intense review of the documents by Scottish junior counsel;
- (3) the discovery of misrepresentations by Mr Fradgley from 2009 about the levels of indebtedness;
- (4) admissions by Outlook in the Scottish litigation that William had not been told he would be giving a personal indemnity;
- (5) alterations to the signature pages of contractual documents after the time of the original signature;
- (6) fabrication of documents by Mr Fradgley concerning the level of indebtedness to Outlook;

- (7) a "war of attrition" to persuade the family's lawyers to add fraudulent misrepresentation to the claims in Scotland;
- (8) a battle to secure access to original documents, to compare with copies in Rodger's possession, some of which had been left in a box at MB Farm;
- (9) discovery of a forgery of James' and Euan's signatures on the board minute of MBL in Stourport in June 2008, which James and Euan did not attend;
- (10) an unsuccessful attempt in 2016 (without legal representation) to appeal against HHJ Bird's judgment out of time;
- (11) an attempt to obtain original documents purporting to prove indebtedness to Outlook, so they could be examined by expert forensic accountants;
- (12) eventually, the instruction of Mr Peter Graham CA of Henderson Loggie, forensic accountants, to examine Outlook's internal records and report on their effect; and
- (13) the instruction of Mr Stuart Preston of Grant Thornton to carry out essentially the same exercise on behalf of Outlook.

I take that detailed account fully into consideration, but need not repeat it here in the same level of detail. I can take matters more briefly. In late 2014 and 2015, Outlook brought three actions in Scotland against Euan's estate and against William. The basis of those actions was that the Lindsays were indebted to Outlook for loans and unpaid costs. Possession of Harperfield was sought, among other remedies. In 2015, Rodger explains, the family discovered that James, as a director of MBL, was entitled to obtain MBL's bank statements.

When they examined the bank statements they realised that only £100,000 of the £200,000 of the promised working capital for MBL had been advanced and that "MBL was paying rent to Outlook and that Outlook were charging MBL for the cattle and that MBL was never in debt" The family then brought its own proceedings against Outlook in Scotland to counter Outlook's claims. The nature of these claims is explained in Lady Wolffe's later opinion, given in August 2021.

First, in 2016, William, as executor of Euan's estate, brought "

the reduction action

" against Outlook. The claim was to "reduce" (set aside) the "

all-sums standard security

" (in England, a legal charge) over Harperfield, executed by Euan in favour of Outlook on 3 October 2009, and "

the first loan agreement

" dated 29 September 2009 for £1.335 million secured by that legal charge; on the ground of facility, circumvention and lesion (which in England would be called undue influence). Later, the pursuer added a claim for payment of £182,217 on the ground of unjustified unjust enrichment.

Second, in 2017, William, as executor of Euan's estate, brought "

the declarator action

" against Outlook. The pursuer sought a declarator (declaration) that what I will call "

the second loan agreement

" also dated 29 September 2009, for £465,000, was obtained by facility, circumvention and lesion. That loan was (as Lady Wolffe later explained in her opinion) secured by the legal charge over MB Farm (

the legal charge

) that was subsequently realised, leading to MB Farm being sold and the proceeds of sale passed to Outlook.

The two claims brought by William in Scotland were eventually joined and given the case numbers CA66/20 and CA67/20. The bringing of those two claims progressively (with some setbacks along the way) succeeded in acting as a check on Outlook's ambitions to enforce its claims against William and Euan's estate. In July 2017, Mr Fradgley died of cancer. Outlook's efforts continued without him. On 6 September 2018, Sheriff's officers in Scotland served a demand from Outlook for about £163,000 of unpaid costs following assessment of the costs of the Manchester proceedings.

However, in a major setback for Outlook and a boost to the Lindsays' fortunes, William's Scottish solicitors and counsel succeeded in obtaining a suspension (stay) of that enforcement action. On 27 September 2018, the Lord Ordinary, Lord Armstrong, suspended the charges for payment served on 6 September 2018 and interdicted Outlook from pursuing any other enforcement action pending disposal of the declarator action in respect of the second loan agreement and the legal charge over MB Farm.

Mr Graham's report was dated 19 February 2019. A copy of it was before Lady Wolffe and myself. I have considered it carefully. It strongly supports William's case. Mr Preston's report of 22 August 2019, less supportive, was available to Lady Wolffe. On 28 October 2020, she held a two day debate (in the actions CA66/20 and CA67/20) on the defenders' challenge to the relevancy of the pursuer's actions. This is equivalent to a strike out application in England. She repelled the challenge, for reasons given in her opinion which can be found in

Lindsay v. Outlook Finance Ltd

[2020] CSOH 90

.

After a further supplemental report from Mr Preston in December 2020, affidavits were filed by Rodger, William and Kerr in the two actions in March 2021. Lady Wolffe heard evidence over nine days in April 2021 from those witnesses, from two of Outlook's solicitors and from both experts. She gave her reserved opinion on 12 August 2021, allowing the claims and granting relief in favour of William and against Outlook.

Lady Wolffe's judgment is long and detailed and speaks for itself; see

Lindsay v. Outlook Finance Ltd

[2021] CSOH 82

. She granted the remedies sought. She reduced the first loan agreement and the all-sums standard security; she declared that the second loan agreement and the legal charge (which had been realised and were no longer in being) were obtained by facility, circumvention and lesion; and she ordered repayments by Outlook to the estate of just over £180,000 on the basis of unjust enrichment.

A pithy summary of the successful claim may be found on the Westlaw database, in the following terms:

"In an action by an executor for reduction of loan agreements and a standard security entered into by a farmer in favour of the defender, the pursuer had established on the evidence that the deeds had been obtained by the defender's director by facility, circumvention and lesion. An alternative case of fraudulent misrepresentation was made out where there had been a pattern of deceit on the part of the director."

I think that is a fair summary in briefest outline of what Lady Wolffe decided. In the amended and reamended pleadings in the present action, the claimants provided their own rather longer summary at paragraphs 30 to 34 of the amended particulars of claim, cross-referred to the numbered paragraphs of Lady Wolffe's opinion.

Mr Butcher's pleaded response in his reamended defence at paragraph 29 was that the claimants' summary was "selective and edited paraphrasing" which was "deprecated". More importantly, he denied that the claimants "are able to place any reliance on findings made by a different Judge in separate proceedings in a different jurisdiction" I will need to return to that contention when considering the parties' submissions.

I do not find it necessary to attempt my own paraphrase or summary of the judgment. As I have said, it is long and detailed and speaks for itself. More importantly in this action, its correctness as to factual matters is corroborated by detailed factual evidence from two of the witnesses who gave evidence to Lady Wolffe, who have produced most of the documents that were before her and which supported her conclusions. I too am able to evaluate and assess that evidence and I am doing so in this judgment.

Mr Butcher is right to say that Lady Wolffe's findings do not bind him and are not evidence against him in these proceedings. However, evidence to the same effect has been, independently of the case presented to her, presented to me in this action. Mr Butcher has been largely unable to challenge that evidence, although he pleaded in his defence (including the reamended version, right up to trial) a denial that Mr Fradgley was "consciously and deliberately dishonest in the evidence he gave in the Manchester proceedings".

Despite that plea his counsel, Mr Bankes-Jones made it clear at the trial that he did not act for Outlook and was not concerned to defend Outlook or to assert that the late Mr Fradgley was an honest and truthful man of integrity. That seems to me a realistic stance. I record here that having formed my own independent view, I agree with Lady Wolffe's conclusions and specifically with her findings to the following effect and I make the same findings in this action:

- (1) that Mr Fradgley created fabricated board minutes of MBL in June 2008 on its incorporation evidencing a meeting in Stourport at which the directors Euan and James were not present, purporting to record their presence;
- (2) that Mr Fradgley was a
de facto
director of MBL, exercised control over it and created a trail of documents that were not genuine to create the false impression that the directors Euan and James were managing its business;
- (3) that Mr Fradgley deliberately made the Lindsays think MBL's financial position was worse than it was, in the period from its incorporation up to 23 August 2009, thereby extracting a commitment from Euan to security of £200,000 on Harperfield;
- (4) that he dishonestly told Rodger at a meeting on 23 August 2009 that MBL was insolvent and that a fictitious bank could take proceedings at any time to place it in an insolvency process;
- (5) that he dishonestly told Euan at the meeting on 26 August 2009, at which Rodger was not present, that unless new agreements were signed at once, Euan could be sued by the fictitious bank for over £2 million;
- (6) that he produced the settlement calculation at that meeting, falsely representing to Euan that the balance of capital and rent due was a little over £2.6 million, but that Euan could settle for a discounted £1.8 million;
- (7) that Euan was in poor health and in a state of "facility" when in September 2009 he entered into the first loan agreement, the all-sums standard security, the second loan agreement and the legal charge;
- (8) that each of those four instruments was obtained by undue influence (i.e. circumvention and lesion) on the part of Mr Fradgley and Outlook, to the detriment of Euan and the Lindsay family;

- (9) that none of the Lindsay family members was aware that they were to provide personal indemnities to Outlook; Mr Fradgley exploited their lack of business experience and ability to obtain those indemnities from them;
- (10) that Mr Fradgley systematically under-recorded the amount of interest payments made under the various loan agreements, as demonstrated by Mr Graham's analysis in the Henderson Loggie report;
- (11) that the indebtedness to Outlook of the estate or associated entities amounted to not more than about £900,000, with overpayments totalling about £180,000, for the reasons given in Mr Chapman's report.

In my judgment, those findings are wholly inconsistent with HHJ Bird's acceptance of Mr Fradgley as a credible witness whose evidence should be accepted. I find that Mr Fradgley lied to HHJ Bird and deceived him by portraying himself as an essentially honest (apart from inventing the fictional bank) businessman who had dealt honestly and in good faith with the Lindsays with regard to the contractual and financial arrangements that were being considered in the Manchester proceedings.

After Lady Wolffe's judgment, Outlook paid nothing of the £180,000 which she had ordered to be repaid by reason of unjust enrichment. In September 2021, Outlook went into liquidation. About 18 months later, on 18 April 2023, the present claim was brought, seeking to set aside HHJ Bird's judgment and seeking a retrial, as against Outlook (now in liquidation) and Mr Butcher; but not against Beattie, the third defendant in the Manchester proceedings.

In the amended particulars of claim, the relief sought is, as against Outlook and Mr Butcher only, not as against Beattie:

"(1) An Order setting aside the Judgment of HHJ Bird given on 2 June 2014 in the Chancery Division in Manchester under Case number 3BM30126;

(2) An order setting aside HHJ Bird's orders for costs against the Claimants dated 14 June 2014;

(3) An order that the Defendants [

i.e. Outlook and Mr Butcher

] be jointly and severally liable to repay the costs paid by the Claimants to the Defendants in the Manchester Proceedings;

(4) An Order for a retrial of all matters not tried by HHJ Bird but pleaded by the Claimants in the Manchester Proceedings;

(5) Further or other relief."

In the course of case managing the present claim, the court gave directions of the usual kind for disclosure, witness statements and other matters required to prepare for trial. During the disclosure process, certain further documents were disclosed by Mr Butcher, over and above documents he had disclosed in the Manchester proceedings. I have mentioned the most important ones already.

There is no dispute about which documents were available before HHJ Bird and which documents, now available, were not. I was helpfully provided with a list by the claimants' solicitors after the hearings. It does not, of course, follow that documents disclosed by Mr Butcher in this action ought to have been disclosed by him in the Manchester proceedings, in which the issues were very different. I have also noted that some of the emails mentioned above and now available, constituted legal advice which, at least arguably, are (or rather were) privileged.

At the start of the trial, I heard an application on behalf of Mr Butcher for permission to reamend the defence so as to add certain further averments, most importantly, to add a plea of laches. I granted that application on the condition that Mr Butcher should not by adding the plea seek to add to the scope of the evidence to be heard, which was already set out in witness statements. I also required Mr Bankes-Jones, for Mr Butcher, to give further particulars of the plea over a short adjournment on the first day of the trial.

Although the application was strongly opposed, I saw no reason not to grant it provided any risk of prejudice to the claimants was avoided by imposing the conditions I have just mentioned. In the reamended defence, the plea of laches is as follows:

"... under the doctrine of Laches the Claimants are now out of time in which to bring any such claim, the Claimants having unreasonably delayed in asserting fraud in supposed reliance on the documents in question, which documents are not new and have at all times been in the Claimants' possession, and the length of time in which the Claimants have delayed in commencing these proceedings having caused significant prejudice to the 2nd Defendant in seeking to meet the allegations made against him in these proceedings, most notably the death of Mr Fradgley who is now unable to give any evidence in these proceedings.

....

though the allegation of any forgery of papers is denied by Mr Butcher, it is averred that in any event under the doctrine of Laches the Claimants are now out of time in which to bring any such claim to set aside the Manchester Judgment, the Claimants having unreasonably delayed in asserting fraud in supposed reliance on the documents in question, which documents are neither new and which have at all times been in the Claimants' possession and available for preparation of the Henderson Loggie report."

In his further particulars, Mr Bankes-Jones added:

"... The documents referenced throughout those paragraphs now adopted by the Claimants against Mr Butcher relate to documents produced exclusively by the 1st Defendant Outlook, and involve claims in which Mr Butcher had no involvement. Had the Claimants pleaded a case against Mr Butcher from the outset when those documents came into their possession after MBL was dissolved and whilst Mr Fradgley was still alive, as confirmed within the witness statement of Rodger Lindsay at paragraphs 133 -134 [B1 77], Mr Butcher would have been afforded the opportunity of canvassing the creation of those documents with Mr Fradgley, which documents he had no role in creating, and responding accordingly to the allegations now made against him in the Amended Particulars of Claim in stated reliance on those documents.

The unexplained and unjustifiable delay has therefore caused Mr Butcher significant prejudice in defending these proceedings, the author of those documents having since died in the interim, thereby precluding Mr Butcher from mounting a full defence to the very serious allegations now made against him by reason of the author of those documents' death in the interim."

Relevant Law

Where a party alleges that a judgment must be set aside because it was obtained by the fraud of another party, the principles to be applied are those stated by Aikens LJ (with whom Maurice Kay LJ and Toulson LJ (as he then was) agreed) in

Royal Bank of Scotland plc v. Highland Financial Partners LP

[2013] EWCA 328, [2013] CLC 596, at [106]:

"... 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.

"

To complete the citation, the footnotes numbered 98-101 read as follows:

"98.

Ampthill Peerage

case [1977] AC 547 at 571B per Lord Wilberforce; to the same effect, at 591B per Lord Simon of Glaisdale. This case did not involve a judgment but a declaration of legitimacy under the

Legitimacy Declarations Act

1858 but the principle is the same. 99.

Tuvyahu v Swigi

(QB. unrep. 26 October 1998) per Laws J at page 5 of the transcript. 100.

Sphere Drake Insurance plc v Orion Insurance Co plc

(Com Ct. unrep. 11 February 1999) at [119] per Langley J. 101.

Kuwait Airways Corp v Iraqi Airways Corp (Perjury II)

[2005] EWHC 2524 (Comm)

at [198]–[199] per David Steel J."

Aikens LJ's formulation of the principles was endorsed by Lord Kerr JSC (Lords Hodge, Lloyd-Jones and Kitchin JJSC agreeing), in

Takhar v. Gracefield Developments Ltd

[2020] AC 450

, at [56]–[57]. Where fraud is not alleged in the first action, there is no requirement to show that the fraud could not have been uncovered using reasonable diligence (

ibid.

at [54]). There must have been "a miscarriage of justice" (

ibid.

at [45], citing Lord Buckmaster's speech in

Hip Foong Hong v. H. Neotia & Co

[1918] AC 888

, 894).

Aikens LJ's second requirement, materiality, (per Sir Geoffrey Vos MR in

Tinkler v. Esken Ltd

[2023] Ch 451

, at [38], citing from Grant and Mumford,

Civil Fraud: Law, Practice & Procedure

(2018), paragraph 38-017):

"does not extend to the second court having to retry the question of the liability of the parties or to see whether fresh evidence or new facts are material to the final result in the sense of influencing what the decision would be if the matter were to be retried with honest evidence; indeed the second court should not undertake such an exercise. The purpose of a second action to set aside an earlier judgment is to take the parties back to the position as it was before the trial so that a new trial on honest evidence can then take place. Nonetheless, in practice it will be difficult for a judge in deciding the question of materiality not to trespass at least to some extent on to such matters."

In

Finzi v. Jamaican Redevelopment Foundation Inc

[2024] 1 WLR 541

, PC, Lord Leggatt JSC giving the judgment of the Board said at [65] that the Board could see no justification for exempting actions alleging that a settlement of judgment was obtained by fraud from the scope of the protection for the principle of finality in litigation "in cases where the evidence relied on was already known to the claimant at the time of the settlement or judgment". Further, he held at [72]:

"... where a claimant relies on evidence not adduced in the original proceedings to allege that a judgment or settlement in those proceedings was obtained by fraud, the burden is on the claimant to establish (1) that the evidence is new in the sense that it has been obtained since the judgment or settlement, or (2) if the evidence is not new in this sense, any matters relied on to explain why the evidence was not deployed in the original action. Furthermore, where the evidence is not shown to be new in this sense, the claim is likely to be regarded as abusive unless the claimant is able to show a good reason which prevented or significantly impeded the use of the evidence in the original action."

Those propositions of law on high authority were, not surprisingly, common ground. Some other areas of law were debated before me, on which I touch only briefly because they are not matters for me to decide, but matters that would or might arise if, but only if, a retrial were to take place as against Mr Butcher. They were not necessarily common ground and I would not wish to tie the parties to them. Nonetheless, the propositions are mostly tolerably clear.

First, a receiver of real property appointed under a legal instrument or under statutory powers (section 101 of the Law of Property Act 1925) acts as the agent of the borrower in default, not the lender; and owes the borrower a duty, among other things, not to sell the property at an undervalue. Second, a person in wrongful possession of real property to the exclusion of the lawful owner may be liable in trespass for damages or for an account.

Third, where an agent acting on behalf of a principal creditor wrongfully takes possession of the debtor's personal property (chattels) and wrongfully deals with or disposes of the property, the agent may be personally liable for conversion or trespass to goods (see section 1(a) and (b) of the Torts (Interference with Goods) Act 1977). Such a person may be liable to the debtor in damages or for an account.

Where the agent holds goods for a principal, article 114 in Bowstead & Reynolds on Agency 23rd

ed (2024) (paragraph 9-126) is relevant and states (omitting footnotes) beneath the heading "Conversion By Innocent Agent":

"(1) Where an agent holds possession or control of goods for a principal, and:

- (a) sells and delivers or otherwise deals with the possession of and assumes to deal with the property in the goods without the authority of the true owner; or
- (b) refuses without qualification to deliver possession to the true owner on demand; or
- (c) transfers possession to the principal or any other person except the true owner, with notice of the claim of the true owner, the agent is liable in conversion to the true owner for the value of the goods, even if the agent obtained possession from the principal, reasonably believing that such principal owned the goods or had the right to dispose of them, and acted in good faith on the authority of such principal.

(2) But an agent is not guilty of conversion who in good faith merely:

- (a) receives or holds goods on behalf of the principal without dealing with them;
- (b) refuses to deliver to the true owner goods which the agent holds for the principal in such terms that the refusal does not amount to a repudiation of the title of the true owner;
- (c) contracts on behalf of the principal to sell goods of which the agent has neither possession nor control;
- (d) by the authority of the principal, and without notice of the claim of the true owner, deals with the possession of, without assuming to deal with the property in, the goods."

Submissions

Despite diligent researches for which I am very grateful, neither counsel could find any case law in any jurisdiction, nor any academic or text book commentary, directly addressing the issue whether a judgment obtained by fraud could or should be set aside not just as against the fraudster but as against another party to the original proceedings who was not party to the fraud but in respect of whom the second and third elements of Aikens LJ's threefold test are met; namely, materiality, assessed by reference to the impact of the fresh evidence on the evidence supporting the original decision.

Broadly, the position of Mr Bankes-Jones, for Mr Butcher, was that a judgment could only be set aside as against a party to the original proceedings where all three elements of the test are met in respect of that party. Thus, he submitted, a judgment could not be set aside as against a party to the original proceedings who was not guilty of the fraud tainting the judgment. It would be unfair and inequitable to set aside a judgment in favour of an innocent party by reason of the fraud of another.

For the Lindsays, Mr Bacon's position was, broadly, that where all three tests are met, the entire judgment is tainted and must fall. Transactions affected by the fraud must be unravelled and liabilities of other parties to the original proceedings retried on honest evidence. The court should exercise its equitable jurisdiction to set aside the judgment and order of the court in the previous proceedings against all parties, unless a retrial would be an abuse of process.

On the claimants' behalf, Mr Bacon's main points were as follows. The fraud of Mr Fradgley infects the whole of HHJ Bird's judgment, including the dismissal of the claim against Mr Butcher, he said. The latter decision was made summarily and flowed directly from acceptance of Mr Fradgley's evidence, fraudulently given. A retrial against Mr Butcher would not be inequitable, nor an abuse of process. There is no requirement that, to set aside the judgment dismissing the 2013 claim against Mr Butcher, he must have been party to the fraud, or have had knowledge of it or in some way be implicated in it.

Mr Bacon recognises that the present claim is not brought against the third defendant in the original proceedings, Beattie; to which, he suggests, MB Farm and the cattle were sold at "a fire sale price". He submits that if the claimants in this action had sought to set aside HHJ Bird's judgment as against Beattie also, the court would have had a duty to grant that relief.

For pragmatic reasons the claimants had decided not to ask for relief in this action against Beattie, not for any reason of principle, said Mr Bacon. In closing submissions, Mr Bacon clarified, in response to my query, that his clients undertake in any retrial not to pursue any relief against Beattie; but he recognises that in any retrial Mr Butcher may seek to bring an additional claim against Beattie under certain indemnities on which he might wish to rely.

I asked Mr Bacon to state what in his submission was the juridical nature of the cause of action as against Mr Butcher. I noted that the Master of the Rolls in

Tinkler v. Esken Ltd

, at [12], had observed that "[i]n modern terms, we can perhaps regard the action to set aside a judgment for fraud as akin to an action for deceit." That cannot be the nature of the cause of action against a non-fraudulent co-defendant who did not give false evidence in the original proceedings or otherwise conduct himself fraudulently in relation to them.

Mr Bacon referred me to a passage in Meagher, Gummow and Lehane's

Equity Doctrines and Remedies

, 5

th

edition (2015), at the end of chapter 12 entitled

Fraud in Equity

, at 12-145 (omitting most footnotes):

"As Lord Buckmaster put it in

Jonesco v. Beard

[[1930] AC 298 at 301-2] fraud is 'an insidious disease' and if used to deceive the court, 'spreads to and infects the whole body of the judgment'. The suit in equity to impeach a judgment, whether given at law or in equity, is a separate proceeding; it takes on none of the characteristics of the proceedings which gave rise to the judgment under impeachment, but, rather, there is a personal obligation to give up the fruits of unconscionable conduct. ... Fresh evidence is brought forward and the litigation is new and not appellate in character. Nor is it an equivalent proceeding to that involved in the introduction of fresh evidence on an appeal. ..."

That is consistent, say the claimants, with the remarks of Lord Sumption in

Takhar

at [60]-[61]. He explained at [60] that "[e]quity has always exercised a special jurisdiction to reverse transactions procured by fraud". The cause of action, he said at [61] is "independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute."

Mr Bacon also relied on the decision of the High Court of Australia in

Clone Property Ltd v. Players Property Ltd (in Liquidation)

[2018] HCA 12 and the scholarly historical review at [43]-[57]. I note that the five judge panel of the High Court answered two questions, giving the judgment of the court (at [1]-[2]). We are concerned here with the first: whether the power to set aside a perfected judgment extends to "misconduct by the party who succeeded at trial which does not amount to fraud".

The answer was that "the general power of a court to set aside its perfected judgment required actual fraud, although there are other discrete grounds to set aside a perfected judgment which were not in issue in these appeals." The High Court did consider categories of case in which "the Court of Chancery recognised jurisdiction to set aside a perfected decree in the absence of fraud" ([54]); but in no case, the court noted, had it been held that professional malpractice during proceedings, short of fraud, was enough.

Mr Bacon likened the cause of action against Mr Butcher here to a "claim which seeks to bring back to life, by setting aside a previous judgment in his favour, an action against him which has never been determined by the Court as a result of a fraud by another defendant on the court in the judgment under challenge". He also made submissions on the facts concerning Mr Butcher's role in the events that would, in any retrial, be deployed to establish liability on Mr Butcher's part in trespass and conversion.

As I understand it, the purpose of those submissions is to show, if it is necessary to show, that Mr Butcher was not a mere bystander but was heavily involved in assisting Outlook and as such benefited from Mr Fradgley's deception of the court and the resulting dismissal of all the claims by HHJ Bird. While these would be matters for a retrial, Mr Butcher's success before HHJ Bird without a contest was undeserved. He organised the seizing of MB Farm, cattle, plant and machinery and sold the assets to Beattie in a "fire sale", said Mr Bacon.

Moreover, say the claimants, Mr Butcher has disclosed the emails not available to HHJ Bird which show he was aware that MBDFL was not the true tenant of MB Farm when he entered into possession of it. He sought advice on his potential exposure, received that advice and then chose to take the risk of ignoring it. For those reasons, it would not be unfair to deprive him of the fruits of the judgment in the Manchester proceedings, Mr Bacon argued.

Mr Bacon addressed at length in written submissions the question of conscious and deliberate dishonesty in relation to relevant evidence given, action taken, any statement made or matter concealed, which is relevant to HHJ Bird's judgment. He submitted that Mr Fradgley's dishonest evidence had led the judge to take the documents at face value as to the amounts of principal and interest due.

The judge accepted, said Mr Bacon, that a debt of £1.8 million and arrears of interest payments of £58,000 were due; and that the discussions were about how these would be repaid. The judge did not doubt that the amounts were due or suspect that some of the documents on which the debts were founded had been doctored or fabricated. He accepted Mr Fradgley's evidence that the intended party to the SAL and the tenant of MB Farm was MBDFL and not DM Lindsay.

Those matters were causative of the judgment in Outlook's favour and thus in Mr Butcher's favour, say the claimants. Mr Fradgley's dishonest evidence that the documents were genuine played a crucial role in persuading the judge to adopt the

Gestmin

approach to conflicts of oral evidence, resolving them by looking at the documentary record which, the judge was deceived into believing, reflected the true indebtedness of the Lindsays to Outlook.

Mr Bacon addressed the second and third elements of the threefold test together: the issue of materiality, assessed by reference to the impact of fresh evidence on the evidence supporting the original decision. The claimants say that, here, the fresh evidence relied on now was not deployed before HHJ Bird and was obtained after his judgment. It would not have been obtained before his judgment because there was no allegation of fraud in the original proceedings.

The relevant fresh evidence here is that which shows the documents deployed before HHJ Bird to be tainted with fraud; and in relation to Mr Butcher, the emails since disclosed by him which, the claimants say, show that he knew DM Lindsay had the tenancy of MB Farm. There can be no question of an abuse of process here, Mr Bacon submits. In the Scottish litigation it took years of struggle to obtain a sufficient basis for asserting Mr Fradgley's fraud. The accounting documents had to be first extracted and then forensically analysed.

The resulting Henderson Loggie report and Lady Wolffe's judgment, the claimants submit, are admissible as evidence of Mr Fradgley's fraud on the court in the Manchester proceedings. Her judgment binds Outlook and, though it does not bind Mr Butcher, it is admissible against him in this action. Rodger was not challenged when he said only some of the documents analysed by the experts were available at the time of the Manchester proceedings; and that the late "Omissions Bundle" was not properly studied.

Returning to the issue of remedy, Mr Bacon cited the famous observation of Denning LJ (as he then was) in

Lazarus Estates Ltd v. Beasley

[1956] 1 QB 702

, at 712 that "fraud unravels all ... once a fraud is proved, it vitiates judgments, contracts and all transactions whatsoever"; and Lord Buckmaster's remark in

Hip Foong Hong

at 894 that "[a] judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail "

There was no need for a precedent in a previous case on all fours with this one, the claimants argue. Equally, Mr Bacon submitted, there is no precedent for exempting Mr Butcher from the scope of the remedy; especially as his role included, albeit unwittingly, helping Outlook to secure the fruits of Mr Fradgley's fraud and himself obtaining significant benefits from it knowing the risks he was running.

Mr Bacon referred to the detailed account of equitable remedies in cases of fraud in Meagher, Gummow and Lehane,

op. cit.

in chapter 12,

Fraud in Equity

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passim

; and in particular to the remarks of Millett J (as he then was) in

Lonrho v. Fayed (No 2)

[1992] 1 WLR 1, at 9A-C, including his approval of a passage from an earlier edition of the same work:

"When appropriate, the court will grant a proprietary remedy to restore to the plaintiff property of which he has been wrongly deprived, or to prevent the defendant from retaining a benefit which he has obtained by his own wrong. It is not possible, and it would not be desirable, to attempt an exhaustive classification of the situations in which it will do so. Equity must retain what has been called its 'inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction:'

Meagher, Gummow & Lehane

,

Equity Doctrines and Remedies

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ed. (1984), p.327. All courts of justice proceed by analogy, but a court of equity must never be deterred by the absence of a precise analogy, provided that the principle invoked is sound."

Finally, Mr Bacon was dismissive of the late defence of laches which I allowed at the start of the trial. There was no undue delay on the part of the Lindsay family. They did all they could through years of litigious strife to arm themselves with the evidence needed for the present claim. There was nothing close to any waiver of rights by passage of time. No evidence of specific prejudice to Mr Butcher is pleaded or evidenced, beyond dissatisfaction with having to defend himself against claim some 13 years after the material events.

For Mr Butcher, the following were Mr Bankes-Jones' main submissions. In his opening skeleton, he referred at the start to what had been very serious allegations of fraud against Mr Butcher; to the long passage of time since the Manchester proceedings and the events leading to them; to the equitable doctrine of laches and the claimants having "unreasonably delayed in asserting fraud in supposed reliance on the documents in question, which documents are not new and have been in the Claimants' possession for many years."

He submitted that the delay had caused significant prejudice to Mr Butcher, "most notably the death of both Mr and Mrs Fradgley who are now unable to give any evidence in these proceedings about what transpired at the Manchester Proceedings" That is, said Mr Bankes-Jones, "good reason why a retrial ... as against Mr Butcher should not proceed, over and above the fact that Mr Butcher was not dishonest in the testimony he gave in those proceedings, but also because a fair trial is no longer possible due to passage of time."

Mr Bankes-Jones referred me to the detailed judgment of HHJ Paul Matthews, sitting as a High Court judge, in

James v. Scudamore

[2023] Ch 391

, analysing the doctrine of laches in the context of a will contested long after the death of the testator and after the death of the beneficiary having herself made a will disposing of the same property. The challenger had considered a timely challenge but stayed his hand until long afterwards, by which time the estate was distributed and the beneficiary had died and could not give best evidence.

Having reviewed the authorities, HHJ Matthews said at [197]:

"197. Accordingly, in the light of the authorities, I consider that the following propositions are warranted:

- (1) Where a person having a right to intervene in existing probate proceedings is aware of those proceedings and of that right, but deliberately abstains from joining in them, he or she is bound by the result:

Newell v Weeks

2 Phil 224;

Ratcliffe v Barnes

2 Sw & Tr 486;

Young v Holloway

[1895] P 87

;

In the Estate of Langton

[1964] P 163.

(2) Explicable delay, even when coupled with taking a legacy under a will proved in common form, is not generally enough to bar a claimant from taking probate proceedings:

Bell v Armstrong

1 Add 365

;

Merryweather v Turner

3 Curt 802

.

(3) But unjustified delay, possibly on its own (see dicta in

Merryweather v Turner

at pp 813 and 814, and also now

Wahab v Khan

), and certainly when coupled with acts amounting to waiver of the claimant's right, will bar the claim:

Hoffman v Norris

2 Phil 230n;

Braham v Burchell

3 Add 243

(4) Similarly where the delay has led to others' detrimental reliance on the inaction, such as distribution of the estate:

Williams v Evans

[1911] P 175

Whether the propositions at (3) and (4) should be referred to as a probate version of the doctrine of laches, or by some other name, does not much matter. In my judgment, however they are called, they represent the probate law applicable to this case."

As to the facts, Mr Butcher complains strongly that the claimants should not have alleged fraud against him earlier in the current proceedings, having only recently disavowed it and earlier invited the court to "infer" that he must have been part of Mr Fradgley's fraudulent designs because of his close association with Mr Fradgley and his common purpose of removing the Lindsays from their farms and relieving them of their chattels. That was a wholly insufficient basis for making such a serious allegation against Mr Butcher, said Mr Bankes-Jones.

He said it was "self-evident" that Mr Butcher's evidence in the Manchester proceedings was not dishonestly given. His role was simply that of "LPA receiver over a property that had been repossessed", who was instructed to dispose of the asset. He was a reputable and well regarded professional insolvency practitioner acting honestly and reasonably in accordance with his instructions from Outlook, his client.

The threefold test enunciated by Aikens LJ in

Royal Bank of Scotland plc

must be satisfied for any and every party against whom judgment is sought to be set aside. As against Mr Butcher, the claim must fail at the first stage simply because he, Mr Butcher, played no part in any fraud. Mr Bankes-Jones criticised the claimants for answering with the formulation "not admitted" the assertion (in a Notice to Admit Facts) that "Mr Butcher did not make any false statement to the Court in the Manchester proceedings."

In relation to the sale of the cattle, Mr Bankes-Jones submitted, Mr Butcher confirmed in his witness statement in these proceedings that he was advised by his solicitors to:

"publish a notice giving people the opportunity to claim ownership of the cattle ... [and] [i]n accordance with that advice, in addition to the public advertisement of the auction by Norton & Brooksbanks or Outlook, a notice of intention to sell cattle at the Property was placed in the 17th December 2012 edition of the West Cumbria News & Star. That notice gave the opportunity for anyone claiming ownership of the cattle to put forward such a claim."

The claimants had not, Mr Butcher complains, adequately pleaded any dishonesty on his part, nor produced a transcript of his oral evidence in the Manchester proceedings. Fraud must be distinctly pleaded with full particulars, in advance of any disclosure obligation. The fraud must also be put in cross-examination. That had not been done in the Manchester proceedings; no fraud was alleged against anyone in those proceedings.

Applied to Mr Butcher and the evidence he gave in the Manchester proceedings, Mr Bankes-Jones contended that the second and third limbs of Aikens LJ's test – materiality, in the sense of being an operative cause of the court's decision, assessed by reference to impact of the dishonest evidence on the judge's conclusions – are equally not met. The claim to set aside the judgment as against him was therefore wholly misconceived and without foundation.

The Scottish proceedings were irrelevant except as part of the chronology of events supporting the plea of laches. On the authority of Goddard LJ's remarks, giving the judgment of the court in *Hollington v. Hewthorn and Co Ltd*

[1943] KB 587, at 596, Mr Bankes-Jones submitted that it is:

"settled law that a judgment in earlier proceedings to which an individual was neither a party, and in which he took no part, can have no probative value as regards that individual in subsequent proceedings, and is not admissible as evidence against them. The Claimants' seeming attempt therefore to use the Scottish Judgment of Lady Wolffe in some way to impugn the honesty of Mr. Butcher has no basis in law."

I interject that

Hollington v. Hewthorn and Co Ltd

has been considered many times and in the ICLR electronic report produced by Mr Bankes-Jones is signposted as having received "Mixed Judicial Consideration". But it is still good law. I was not taken to all the recent authorities but am aware of some of them (e.g. Martin Spencer J's recent decision in

Commerzbank AG v. Ajao

[2025] EWHC 1914 (KB)

). Mr Bankes-Jones took me to

Percy v. Merriman White (a Firm)

[2022] Ch 249

, per Sir Julian Flaux C at [90]-[93]; and to HHJ Paul Matthews' analysis of the rule in

Hollington

in

Crypto Open Patent Alliance v. Wright

[2021] EWHC 3440 (Ch)

.

Mr Bankes-Jones objected to any suggestion that he would have known about any dishonesty on the part of Mr Fradgley. As an LPA receiver and agent, he would come to the estate as a stranger. If HHJ Bird found Mr Fradgley believable, as the Lindsays did before him, why would not Mr Butcher too find him believable? He was entitled to assume that his client was dealing in good faith, like anyone else. The claimants had failed, it was submitted, to adduce any evidence that could support a suggestion that Mr Butcher's relationship with Outlook was anything other than an ordinary arms length business relationship.

In closing, Mr Bankes-Jones submitted that:

"the proposition that the Court should set aside a judgment alleged to have been procured by fraud despite there being no allegation of fraud on the part of that party is without precedent, for which proposition, the author ... is unable to identify any authority in any jurisdiction at all. The need to identify conscious and deliberate dishonesty on the party against whom it is sought to set aside judgment is a fundamental requirement of the cause of action."

He reminded me of Lord Sumption's recognition in

Takhar

at [67] that there was a "risk of frivolous or extravagant litigation to set aside judgments on the ground of fraud". This is controlled, said Lord Sumption, by "the stringent conditions" set by Aikens LJ in

Royal Bank of Scotland plc

combined with "the professional duties of counsel". Mr Bankes-Jones warned that "[t]o set aside a judgment against an entirely honest individual would ... set a very dangerous precedent indeed ... for which there is no authority whatsoever."

Mr Bankes-Jones added that an insolvency practitioner cannot be liable for his client's dishonesty of which he was unaware. If authority for such an obvious proposition were needed, he referred me to Trower J's decision in

Kebbell v. Hat & Mitre plc

[2020] EWHC 2649 (Ch)

, (especially at [47]-[49]): an administrator of a company was entitled to rely on the directors' assessment of the company's insolvency and on the documents provided to him evidencing the insolvency.

Mr Bankes-Jones also took me to passages in *Bowstead & Reynolds*, 23

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edition, article 116, at paragraphs 9-134 and 9-135, to similar effect. An agent will not be liable for his principal's dishonesty of which the agent is unaware and does not condone. To be liable (for knowing receipt or dishonest assistance):

"the agent must, in addition to possessing the requisite mental element, have contributed in a material way to the commission by the principal or other party in a breach of trust or fiduciary obligations [M]ere ministerial receipt of assets will not suffice".

In oral closing argument, Mr Bankes-Jones strongly deprecated any idea that in an action such as this, a person such as Mr Butcher who is not alleged to be party to the relevant fraud, should be dragged back before the court over a decade after the relevant events and after the death of a key witness (Mr Fradgley). He used expressions such as vexatious satellite litigation, floodgates, procedural anarchy, Pandora's box and grossly unfair. In answer to a query from me, he confirmed that he does submit that any retrial would be an abuse of process in so far as directed against Mr Butcher.

Reasoning and Conclusions

I consider first the position of Outlook. It took no part in these proceedings, though the liquidator was served and was aware of them. It is unlikely that Outlook has any assets of substance or that it would contest a retrial, if one were ordered. Mr Butcher has not, despite his pleaded defence, sought seriously to contest the proposition that Mr Fradgley was dishonest and that the evidence he gave to HHJ Bird was dishonest and fraudulent.

I agree that it was. I have already stated my finding that Mr Fradgley lied to HHJ Bird and deceived him into believing he had dealt honestly and in good faith with the Lindsays in relation to the written contracts considered in the Manchester proceedings. The way in which he deceived the Lindsays over many years about their indebtedness to Outlook makes it inconceivable that he was unaware the account he was giving to HHJ Bird was false.

I therefore accept the claimants' submission that there was evidence given by Outlook in the Manchester proceedings amounting to conscious and deliberate dishonesty in relation to relevant evidence given; namely, that the loan and security documents were genuine and had not been procured by fraudulent misrepresentations; and that the full £1.8 million was due. Mr Fradgley's control over MBDFL and the fabrication of its company documents was a matter concealed from HHJ Bird. There is no difficulty about these findings.

I also accept the claimants' submissions that those matters played an important role in persuading HHJ Bird to adopt the approach he adopted to the oral and written evidence and were causative of the judgment in Outlook's favour. Mr Fradgley's dishonest, untruthful and fraudulently given evidence was material. Most of the evidence subsequently obtained, enabling the Lindsays ultimately to unmask the fraud, was not available to them in the Manchester proceedings.

I accept the claimants' submission that the fresh evidence would have had a major impact on the evidence supporting the original decision. Outlook is bound by Lady Wolffe's findings, which the claimants are therefore entitled to rely on as against Outlook here. The course of the trial would have been completely different. The favourable impression Mr Fradgley made on the judge would have been unthinkable if the truth had been known.

Without the fresh evidence, there was no basis for alleging fraud against Outlook. It was therefore not remiss to refrain from deploying such allegations in the Manchester proceedings. On the contrary, on the information then available to the Lindsays, it would have been untenable and wrong to do so. Mr Fradgley was very plausible. It is entirely understandable that the action proceeded on the basis of collateral contract, waiver and estoppel and therefore turned largely on the credibility of witnesses.

I accept the claimants' submission that a retrial against Outlook would not be an abuse of process. It was Outlook's continued attempts to extract money and land from the Lindsays which eventually provided them with the evidence they needed to unmask Mr Fradgley's fraudulent conduct. I do not agree that the Lindsays took too long to obtain the fresh evidence and secure the findings of Lady Wolffe in the Scottish proceedings. It was necessary to proceed step by step with dogged tenacity and determination and the Lindsays did so.

The requirements for setting aside the judgment, as against Outlook, are therefore met and I am willing to make an order to that effect. However, I must also consider the claim to set aside the judgment as against Mr Butcher, which is another matter. The first point is that, unlike Outlook, Mr Butcher was not consciously and deliberately dishonest before HHJ Bird in relation to relevant evidence, action taken, statement made or matter concealed. Aikens LJ's first requirement in

Royal Bank of Scotland plc

is therefore not met in his case.

Nor, to state the obvious, are the second or third requirements relating to materiality met in his case. Indeed, the second and third requirements do not logically arise, if the first requirement is not met. I can therefore only consider setting aside the Manchester judgment as against Mr Butcher if the equitable jurisdiction to do so extends to setting aside a judgment tainted by fraud against a party who is not implicated in or complicit in the fraud.

To answer this question, it is necessary to look carefully at the juridical nature of the cause of action. As regards the fraudulent party, there is no difficulty. We might, with Sir Geoffrey Vos MR, regard it as akin to an action for deceit (as he put it in

Tinkler

at [12]). I prefer to regard it as (in the words of the authors of Meagher et al, op. cit.

at 12-145) a "suit in equity to impeach a judgment", a separate proceeding asserting "a personal obligation to give up the fruits of unconscionable conduct"; or, as Lord Sumption put it in

Takhar

at [60], "a special jurisdiction to reverse transactions procured by fraud."

In my judgment, there is no bar which prevents the court, in an appropriate case, from exercising the equitable jurisdiction to set aside a judgment against other parties to the original proceedings who are affected by the fraud but not themselves guilty of it. I accept Mr Bacon's submission that a direct precedent is not necessary to reach that conclusion. If an exact precedent were required, the law could not develop. Equity has an inherent flexibility and capacity to adapt to new situations, as Millett J noted in

Lonrho v. Fayed (No 2)

at 9B-C.

The vice of the relevant fraud is that it taints the impeached judgment. The setting aside of that judgment is not done to punish the fraudster, but to protect the integrity of the legal process. The tests propounded by Aikens LJ in the

Royal Bank of Scotland plc

case are directed not at the parties but at the impeached judgment. They address the grounds for setting aside the judgment, not the identity of the party or parties against whom it must be set aside.

That view accords with the proposition that fraud unravels all (subject to any abuse of process issue, as pointed out by Lord Leggatt in

Finzi

); and with Lord Buckmaster's analogy with an infectious disease in

Jonesco v. Beard

and his observation that fraud "spreads to and infects the whole body of the judgment". It runs counter to Mr Bankes-Jones' submission that the fraud based tests must be applied and met separately for each party to the proceedings that produced the impeached judgment.

I am not thereby saying that a party's innocence of fraud is irrelevant to exercise of the equitable jurisdiction; I am saying that the party's innocence goes to the scope of the remedy, if any, against him and not to the existence of the equitable jurisdiction. It is not

ipso facto

unfair to set aside a judgment in favour of a party innocent of wrongdoing in the process leading to the judgment. Aside from fraud, an innocent party may lose the benefit of a judgment in his favour - for example, a default judgment - that is set aside for other reasons.

Some instances of such cases were mentioned by the High Court of Australia in the

Clone Property Ltd

case, in the judgment of the court at [54] (omitting most of the footnotes):

"There were other categories of case in which the Court of Chancery recognised jurisdiction to set aside a perfected decree in the absence of fraud. One was where the decree affected rights of parties who had not been joined

. Another was where the enrolment of the decree occurred by 'surprise', involving '[u]nderhanded dealings, such as where the enrolling party had led the other party to believe that the decree would not be enrolled. It is unnecessary in these appeals to attempt to catalogue those other categories or to identify the principles which underlay their recognition. ... "

Among the cases cited in footnote 73 were

Cameron v. Cole

(1944) 68 CLR 571, at 590-591; [1944] HCA 5; and

John Alexander's Clubs Pty Ltd v. White City Tennis Club Ltd

(2010) 241 CLR 1 at 48 [137]; [2010] HCA 19. In

Cameron v. Cole

, at 589, Rich J said that it was "a fundamental principle of natural justice that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case" and if this principle is not observed, he may have any determination against him set aside as of right: "[t]he setting aside of the invalid determination lays the ghost of the simulacrum of a trial, and leaves the field open for a real trial."

The latter observation was cited with approval in the judgment of the High Court of Australia in

John Alexander's Clubs Pty Ltd

, at [137]:

"Walker Corporation submitted that if a court makes an order affecting a person who should have been joined as a necessary party, while the order will not be a nullity, that person is entitled to have the order set aside, and is not limited merely to seeking the favourable exercise of a discretion, whether or not the person in question becomes a party. As a general proposition this submission is correct. The setting aside of the order 'lays the ghost of the simulacrum of a trial, and leaves the field open for a real trial.'"

Those observations suggest that the necessary minimum requirement for setting aside a judgment in favour of an innocent party is that the party must have notice of the application to set aside and an opportunity to argue against setting the judgment aside. They do not suggest that the law or equity should go further and adopt as a dogmatic proposition that an innocent party may never lose the benefit of a judgment in his favour procured by fraud unless he has himself taken part in or been complicit in the fraud.

The circumstances of a particular case in which an innocent party benefits from a fraudulently obtained judgment may vary almost infinitely. At one end of the spectrum, the innocent party may have nothing to do with the fraud or the fraudster. The innocent party may be, for example, a

bona fide

purchaser of relevant property without actual or constructive knowledge or notice of the fraud. At the other end of the spectrum, the innocent party may be closely connected to the fraudster and may benefit financially from the fraud, albeit without taking part in it; or they may turn a blind eye to the fraud, and so forth.

For those reasons, I prefer the claimants' submissions that the remedy can extend to setting aside the impugned judgment as against a non-fraudulent party to the original proceedings. The tests for setting aside the impugned judgment need not be met for each party individually. They are directed at the integrity of the judgment and not, or not only, at the integrity of the party guilty of tainting it with fraud. The court may set aside the impugned judgment as against any party to the original proceedings who has been served in the action to set it aside.

Returning for a moment to the present case, it follows that I could not set aside the judgment as against Beattie. Although it was a defendant in the original proceedings, it is not a party to these proceedings and has not been served. If the claimants had wished to ask me to exercise the equitable jurisdiction as against Beattie, they would have to have served Beattie and given it an opportunity to appear and present its case in these proceedings.

Next, in deciding whether to set aside against a non-fraudulent party, what principles should the court apply? The court should apply equitable principles in the normal way. I would not call it a matter of the court's discretion. The question is whether it is fair and equitable to exercise the jurisdiction, examining the facts and taking all relevant circumstances into account, including any laches or other equitable defence. That the party is not guilty of the fraud which taints the impugned judgment is likely to be a factor of considerable importance.

Applying those principles to the facts here, I start by recognising that there is some force on both sides of the argument. On the one hand, Mr Butcher is aggrieved at the prospect of the case against him being revived more than a decade after the trial and about 13 years after the relevant events, without fraud on his part. On the other hand, the Lindsays are aggrieved that they could be left without a useful remedy after being despoiled of their land and goods in a process in which Mr Butcher assisted his fraudulent client.

I have decided that it is not inequitable to set aside the judgment of HHJ Bird as against Mr Butcher, for the following reasons. I am conscious that in examining the facts relevant to the issue of remedy against Mr Butcher, I am to some extent going back into the factual territory of the Manchester proceedings. I have to do that in order to assess whether it is just and equitable to grant relief against Mr Butcher. In doing so, I stress that I am not retrying the Manchester proceedings and my observations below will not bind any judge retrying them.

First, Mr Butcher was an experienced insolvency practitioner. He voluntarily, for reward, took part in the plan to take possession of MB Farm on Outlook's behalf. I do not criticise him for taking on that work; nor for failing to appreciate that Mr Fradgley was dishonest. In that regard, he was in good company. Nor do I criticise him for not informing Rodger that he was advising Outlook in October 2012. It is, I accept, normal not to tip off the debtor when a hostile appointment and repossession of property and goods is in prospect.

However, Mr Butcher did run the risks inherent in acting as an LPA receiver and recovery agent. He could be expected to protect himself against ordinary business risks through insurance, as those in business and in the professions generally do. Furthermore, there were particular features of this receivership and agency role that were, or should be, unusual. His chosen cattle auctioneer made a plan to advertise the cattle on MB Farm for sale at a time when he and Mr Butcher must have known Outlook had no clear title to sell them.

Furthermore, barely five hours after being appointed as LPA receiver, he was warned by his solicitors to obtain a court order before forcing entry to MB Farm. He must have known that forced entry to such premises would be likely to be controversial and could cause verbal or even physical conflict. With surprising insouciance and unlike his Scottish counterpart Mr Woods, he pressed ahead regardless, ignoring sensible objective legal advice to the contrary.

By 26 November 2012, he had evidence that MBDFL had ceased supplying milk from MB Farm from 1 January 2012 and that the supplier after that had been DM Lindsay, up to the date Mr Butcher took possession, 21 November 2012. That is the sort of evidence that could usefully have been weighed by a court, had Outlook or Mr Butcher sought a court order. He could have told Mr Fradgley he had been advised to obtain a court order before entering.

Mr Butcher was not a farmer, nor an expert in cattle. His cattle expert had engaged in some sharp practice, as already mentioned. Mr Butcher was out of his depth when disease broke out among the cattle. He was advised on 5 December 2012 that he might need to apply to the court concerning his duties as bailee of the cattle. I accept that he gave the Lindsays a chance to claim ownership of the cattle and it appears they did not respond. He prepared an inventory of plant and machinery and left those goods in the care of Beattie.

In his dealings with Beattie, I am in no position to make any finding as to whether the sale of MB Farm and the cattle was, as the claimants say, a "fire sale". It is not for me to make that finding. However, the chronology of events supports the proposition that Mr Butcher was keen to proceed with a sale quickly. There is nothing necessarily wrong with acting swiftly, but it does increase the risk that the sale may be challenged later. Mr Butcher knew of that risk because he took the trouble, he says, to obtain an indemnity.

On 29 January 2013, Mr Butcher was again warned by his solicitors about the risk of liability for conversion of goods. His enquiries of HMRC did not support the proposition that the true tenant of MB Farm was MBDL. He did not, as far as I am aware, express any concern about that to Outlook. When he paid over the proceeds of the sale of the farm and the cattle, he took the risk that the validity of his appointment and therefore the lawfulness of his dealings might, at some stage, be challenged.

Indeed, they were challenged, in the Manchester proceedings. He took the risk that they would be. It is a business risk of a kind often run by licensed insolvency practitioners, who protect themselves by obtaining indemnities and insurance. He largely aligned himself with Outlook's defence, though not entirely. He was, presumably, paid by Outlook for his work and thus benefited from its actions in that way. He benefited from Mr Fradgley's deception of the court because it led to the claim against him being summarily dismissed.

For completeness, I reject the submission that a retrial of the claim against Mr Butcher would be an abuse of process. The claimants were unable to obtain a determination of that claim on its merits because of the fraud on the court perpetrated by Mr Fradgley. They did not have in their possession the material necessary to expose that fraud until, at the earliest, 2019 when the Henderson Loggie report was obtained. This is not frivolous or vexatious satellite litigation brought by a party merely dissatisfied with the outcome of a previous action.

I also reject the defence of laches. The efforts of the Lindsays, particularly Rodger, were sustained and unrelenting. The process was time consuming through no fault of theirs. The rule in

Hollington v. Hewthorn and Co Ltd

does not assist Mr Butcher because the findings of fraudulent conduct made by Lady Wolffe are binding on Outlook and they are directed at Outlook and not at Mr Butcher. They are not relied on by the claimants as against Mr Butcher because the claimants do not accuse Mr Butcher of fraud. But the time it took to obtain those findings is a good answer, in my judgment, to the defence of laches.

For those reasons, I will set aside the judgment of HHJ Bird as against Mr Butcher also, as well as against Outlook. I will order a retrial. Directions for the retrial should be sought from the Business and Property Court (Chancery Division) at the Manchester Civil Justice Centre.

My order will include in a recital the claimants' undertaking not to seek any relief or bring any further proceeding against Beattie, the third defendant in the Manchester proceedings. I do not set aside the judgment as against Beattie, nor will I disturb the costs orders made in so far as they affect Beattie. Any other consequential matters can be dealt with by brief written submissions. I am grateful to counsel for their diligent and helpful submissions.

Note 1 Or in Scottish law terms, fraudulent misrepresentation and

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[Back]

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