Neutral Citation Number: [2017] EWHC 176 (Ch)

Claim No: HC-2016-002377

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

7 Rolls Building
Fetter Lane,
London EC4A 1NL

Date: 13 February 2017

**Before** :

**MR S MONTY QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)**

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**Between :**

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| **KULWINDER SINGH ROSHAN** | **Claimant** |
| **- and -** | |
| **(1) SOHAN SINGH** | **Defendants** |
| **(2) JASWANT SINGH BHARJ** | |
| **(3) AMRIK KAUR BHARJ** | |
| **(4) HER MAJESTY'S ATTORNEY GENERAL** | |

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**Mr Roger Bartlett** (instructed by **Starck Uberoi Solicitors**) for the **Claimant**
**Mr Stephen Boyd** (instructed on a Public Access basis) for the **Second and Third Defendants**

Hearing dates: 14 and 15 December 2016

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# Judgment Approved

**Mr S Monty QC:**

**Introduction**

1. This is an application by the Second and Third Defendants to strike out the claim. The Fourth Defendant has taken no part in these proceedings and no relief was sought against the Fourth Defendant by the claim. The First Defendant has served a Defence but did not appear, was not represented, and took no part in the hearing.

2. The Claimant is represented by Mr Roger Bartlett and the Second and Third Defendants by Mr Stephen Boyd. Mr Bartlett and Mr Boyd provided me with detailed and thorough skeleton arguments and developed those in the course of oral submissions. I am grateful to them both for the way in which each of them presented and argued the issues.

3. The essence of the application is that a county court judgment in an earlier action, which resolved the issue of ownership of a property, was obtained by fraud. I was the trial judge in that action. The Claimant, who was not a party to that action, says that he is entitled to set aside that judgment, and all subsequent findings in related proceedings, and for there to be a new trial in the present action to determine the true ownership of the Property. The Second and Third Defendants say that the present claim is an abuse and in any event has no chance of succeeding.

4. My conclusions are that the claim is an abuse of process, it has no real prospect of success, and accordingly, the claim should be struck out. The reasons for my conclusions are set out below. I need first to set out the background.

**The ownership claim and related proceedings**

5. On 2 February 2015, following a five-day trial in the Central London County Court, I gave judgment in a case called *Singh v Bharj and others*, Claim No 3CL10076. I shall refer to that action as "the ownership claim", as the central issue which I had to determine was the beneficial ownership of a property at 253-265 The Broadway, Southall ("the Property") which was used as a Sikh Temple known as the Gurdwara Miri Piri Sahib. I held that the Property (the legal title to which was registered in the name of Mr Sohan Singh) was beneficially owned by Mr Jaswant Singh Bharj, his wife Mrs Amrik Kaur (also known as Amrik Kaur Bharj) and Mr Sohan Singh as tenants in common in the shares 33% to Mr Singh, 34% to Mr Bharj, and 33% to Mrs Bharj. I shall refer to them as "the owners", each of whom was a party to the ownership claim. I also held that Mr Mahender Singh Rathour (also a party to the ownership claim) was the lawful lessee of the Property, and that the owners were entitled to collect the rents and profits of the Property which had at all times been received by Mr Sohan Singh as trustee. I directed that there be an account as between the owners as to the rents received and sums raised by way of security on the Property, that account to be conducted in the light of the findings made in my judgment.

6. On 5 June 2015 HHJ Hand dismissed as totally without merit an application made by Mr Sukhwinder Singh (who had not been a party to the ownership claim) to stay the ownership claim on the basis that the Property in fact belonged not to the owners but to the congregation of the Gurdwara, and that my judgment in the ownership claim had been obtained by fraudulent evidence.

7. The hearing of the account proceedings which I had ordered should take place commenced on 8 February 2016 before DJ Lightman. The hearing was adjourned part heard on 10 February 2016, recommenced on 7 and 8 November 2016, and a detailed judgment was given on 1 December 2016.

8. Meanwhile, on 11 March 2015 Mr and Mrs Bharj then brought a separate

claim against Mr Sohan Singh under the Trusts of Land and Appointment of Trustees Act 1996 seeking amongst other relief an order for sale of the Property, Claim No B10CL514 ("the TOLATA claim"), the trial of which took place before HHJ Gerald on 1 June 2016. At that trial, Mr Kulwinder Singh Roshan (who is the Claimant in the present action) applied to intervene in the TOLATA claim in a representative capacity for the members of the Gurdwara, but that application was dismissed. HHJ Gerald ordered that the Property be sold by public auction and gave detailed directions as to the conduct of the sale. That sale has not yet taken place.

**The present claim**

9. These proceedings were commenced on 12 August 2016. Mr Roshan claims the following relief:

   i) The ownership claim and the TOLATA claim be transferred to the High Court;

   ii) All proceedings in the TOLATA claim be stayed until further order;

   iii) A declaration that Mr Roshan, as member of the charity known as the Gurdwara Miri Piri Sahib and as a representative of all of the members thereof (except for Mr Sohan Singh and Mr & Mrs Bharj), is not bound by the declarations I had made in the ownership claim as to the ownership of the Property;

   iv) Further or alternatively, an order setting aside my order of 2 February 2015 in the ownership claim as having been procured by the fraud of Mr Sohan Singh and/or Mr Bharj and/or Mrs Bharj;

   v) Further or alternatively, an order setting aside HHJ Gerald's order of 1 June 2016 in the TOLATA claim as having been obtained by Mr & Mrs Bharj in reliance on their fraud in the ownership claim;

   vi) A declaration that Mr Sohan Singh holds the Property on trust to be used for charitable purposes of the Gurdwara and that it is charity property.

10. Particulars of Claim were served on 18 August 2016, which assert as follows. In 1995 Mr Sohan Singh, Mr Bharj, Mr Rathour, Mr Sukhwinder Singh and Mr Bhagwan Singh formed a committee with a view to establishing a Sikh Temple in Southall, and on 13 April 1995 they adopted a set of Rules which formed the constitution of the Gurdwara. The committee then found the Property and agreed to purchase it for £185,000. They started a fund-raising campaign and various individuals gave money towards the purchase, which were either gifts or interest-free loans. A deposit was paid to the vendors of the Property and works commenced to convert it for use as a Gurdwara, with many members of the community giving their labour as volunteers. The purchase of the Property completed in July 1996 with the aid of a mortgage advance taken out by Mr Sohan Singh, in whose name the Property was registered. As a result, it is averred that Mr Sohan Singh thereafter held the Property on trust for all the members of the Gurdwara and did so until it was registered as a charity in 2013, whereafter he continued to hold it in trust for the charitable purposes of the Gurdwara. The lease to Mr Rathour at a rent of £1,400 (later increased to£2,000) per month was granted in order to fund the mortgage payments, the rent being paid from the Gurdwara's funds. The ownership claim was commenced after disputes had arisen between Mr Sohan Singh and Mr Bharj over the management of the Gurdwara.

11. Mr Roshan says that in the ownership claim:

   i) Mr Sohan Singh falsely claimed and asserted that he was the sole beneficial owner of the Property and falsely claimed in evidence that he had made substantial payments towards its purchase.

ii) Mr & Mrs Bharj falsely claimed and asserted that they, together with Mr Sohan Singh, were the beneficial owners of the Property.

iii) Mr Bharj falsely gave evidence that he had contributed towards the purchase of the Property £20,000 in cash and a further £60,000 by releasing a debt, and that Mrs Bharj had contributed £30,000.

12. Pausing there, it will be noted that in my judgment in the ownership claim I rejected Mr Singh's claim to be the sole beneficial owner, and accepted as correct what Mr Roshan now says to have been the false evidence of Mr (and Mrs) Bharj in reaching my conclusions.

13. Continuing with the assertions in the Particulars of Claim, Mr Roshan says that neither he nor the members of the Gurdwara are bound by the judgment in the ownership claim as they were not parties to it and there was no claim that the Property was held on trust for them. Mr Roshan says that he and the members are therefore entitled to assert that the Property is charity property. Furthermore, he says that my judgment ought to be set aside as having been procured by fraud, because each of Mr Sohan Singh, Mr Bharj and Mrs Bharj (knowing what Mr Roshan says is the true history of the purchase of the Property) thus knew that their respective claims were false and fraudulent.

14. Mr Roshan goes on to say that the TOLATA claim also ought to be set aside as it was brought by Mr & Mrs Bharj in reliance upon the decision in the ownership claim, which itself had been obtained by fraud as they were aware.

15. On 14 September 2016 Mr Sohan Singh served a Defence (entitled "Response of the First Defendant) in which he stated that he "does not deny the matters stated in the Particulars of Claim" and that he "confirms that he does not assert any personal proprietary interest in the Property save that such interest is held on behalf of and for the benefit of the Gurdwara." Mr Sohan Singh expressly "admits and does not deny or raise issue with" the entirety of the Particulars of Claim". It is clear, therefore, that Mr Sohan Singh's current position is that he says he made a false claim and gave false evidence before me in the ownership claim.

16. On 15 September 2016 Mr & Mrs Bharj served their Defence to the present claim. The Defence raises as a "preliminary issue" a contention that the claim is an abuse of process and should be struck out. On 3 October 2016 Mr & Mrs Bharj applied for reverse summary judgment under CPR 24.2 and/or an order striking out the claim under CPR 3.4(2)(b) on the grounds that the claim has no reasonable prospects of success and/or is an abuse of process. The application was supported by a witness statement of Mr Bharj dated 3 October 2016. Mr Roshan has provided a statement dated 1 December 2016 opposing the application, together with other evidence to which I shall refer below.

**The relevant principles**

17. There is no dispute as to the principles to be applied on an application for summary judgment under CPR 24.2, the provisions of which I need not set out here; the question is whether the claim has a real (as opposed to a fanciful) prospect of success.

18. Similarly in relation to abuse of process the parties are agreed that the principles to be applied are those summarised by Simon LJ in *Michael Wilson & Partners Limited v Sinclair and others* [2017] EWCA Civ 3 (a decision which post-dated the hearing of the present application, and which was drawn to my attention by Mr Bartlett without further comment from him or Mr Boyd). Having considered the relevant authorities (*Hunter v. Chief Constable of the West Midlands* [1982] AC 529; *Bragg v. Oceanus Mutual* [1982] 2 Lloyds Rep 132; *Arthur J S Hall & Co (a firm) v. Simons* [2002] 1 AC 615; *Johnson v. Gore Wood & Co* [2002] 2 AC 1; *In re Norris* [2001] 1 WLR 1388; *Secretary of State for Trade and*

*Industry v. Bairstow* [2004] Ch 1; *Taylor Walton (a firm)* v. *Laing* [2007] EWCA Civ 1146 [2008] PNLR 11; and *Kotonou v. National Westminster Bank Plc* [2015] EWCA Civ 1106], Simon LJ said this [48]:

> "The following themes emerge from these cases that are relevant to the present appeal.
>
> (1) In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter v. Chief Constable*, Lord Hoffmann in the *Arthur Hall* case and Lord Bingham in *Johnson v. Gore Wood*. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter v. Chief Constable*. Both or either interest may be engaged.
>
> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse, see *Bragg v. Oceanus*; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur Hall* case.
>
> (3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v. Gore Wood* and Buxton LJ in *Taylor Walton v. Laing.*
>
> (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the *Arthur Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the *Bairstow* case; or, as Lord Hobhouse put it in the *Arthur Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.
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> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris*.
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> To which one further point may be added.
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> (6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* [2014] AC 160 at [17] as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the *Taylor Walton* case, at [13]."

19. I gratefully adopt those as the authorities and the principles which govern the present application.

20. The High Court has jurisdiction to hear proceedings for rescission of a previous decision of the County Court on the grounds of fraud: *Salekipour v Parmar* [2016] QB 987 at [52].

21. I should also mention at this point that both parties were content for me to hear the present application, for similar reasons to those expressed by Burton J in *Chodiev v Stein* [2015] EWHC 1428 at [25], and I particularly take into account what is said in the last three sentences of that paragraph:

> "I actually consider that it is helpful that, to adopt the words of Langley J in *Sphere Drake* at 186, it is the same Judge who is considering whether the fresh evidence would have *entirely changed the way in which I approached and came to my decision*. The important caveat is that I must ensure that I follow the course laid down by David Steel J in *Perjury II* at 198 (and repeated and adopted by the Court of Appeal in *RBS v Highland* at 106) that "*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 to its impact on what might be the decision if the matter were retried on honest evidence*". The question is the impact, if any, upon my decision if in cross-examination of the Defendant it had been put that he was the owner of Aurdeley, and if I had disbelieved him."

**The issues**

22. It seems to me that the correct approach to the present application is to ask the following questions:

    i) The claim has been brought by Mr Roshan as a representative claim on behalf of the members of the Gurdwara. The claim is actually that the Property was at all times held on trust by Mr Sohan Singh for the Gurdwara. Is the claim properly constituted, or should it have been a claim by the trustees rather than by the members?

    ii) Can a person bring fresh proceedings to set aside a judgment in earlier proceedings to which that person was not a party where that judgment was obtained by fraud?

    iii) If so, is there any basis for characterising those fresh proceedings as an abuse of process and as such are they liable to be struck out?

    iv) If they are not an abuse of process, do the fresh proceedings have a realistic prospect of success, and if they do not, should they be struck out?

**The proper claimant**

23. I have no doubt that this is a claim which should really have been brought by the trustees and not by Mr Roshan on behalf of the members.

24. It is Mr Roshan's case that the Property was, from the outset, held by Mr Sohan Singh on trust. This begs the question: on trust for whom?

25. The Rules of the Gurdwara are dated 13 April 1995. This was after the Property purchase had been agreed (but before completion). The Rules state that any property purchased by the Association (the original name for the Gurdwara) shall be vested in the Trustees. The Charity Commission conducted an inquiry in 2004 and reported in 2005. The Report notes as follows.

    i) The Gurdwara is described as a non-registered organisation; it was not a registered charity.

    ii) In March 2004, the Commission received a complaint from a solicitor acting for a number of individuals connected to the Gurdwara complaining that funds from the community had been used towards the

deposit with the intention that the Property be held on charitable trust. However, the Property was in fact held in the name of a private individual with no indication that it was held on trust nor were there any restrictions on sale.

iii) There were cautions entered against the Property in November 1996 and December 1997. The cautioners attested that those donating funds intended that a charitable trust should be set up. They claimed that it was not until after the registration of the land in the name of the proprietor (Mr Sohan Singh) that they had realised that this had not occurred.

iv) The cautioners provided a copy of a notice in the Punjabi Times dated 31 July 1996, which was the only written evidence of the intended purpose of the Temple. However, the notice referred to the centre and not the land and whilst it stated that it was proposed that a trust be formed, this would not conclusively meet charitable criteria.

v) When the Commission visited the Temple in July 2004, the representatives they met outlined the purposes of the Temple, which appeared not to be exclusively charitable.

vi) The Commission considered that while there is evidence to suggest the existence of a trust with respect to the donated funds, there is no conclusive evidence to suggest that this was a charitable trust, and that none of the evidence obtained conclusively supports the existence of an organisation with exclusively charitable purposes.

26. Further consideration of the Gurdwara's charitable status was given by the Charity Commission in 2013. In an email dated 2 September 2013 Mr Lewis of the Charity Commission said this:

i) In the Commission's strong view, the governing document of the charity is the 1995 Rules.

ii) The organisation is likely to be a charity, but that would be a matter to be determined by registration should an application be made.

iii) Registration is not optional and failure to register means that the trustees are in default.

iv) "Unincorporated associations are characterised by the existence of a membership who elect from among themselves a group of trustees to manage the organisation. Unincorporated associations typically have AGM's at which the trustees are regularly elected. In an unincorporated association the ultimate power rests with the membership as they can usually remove the trustees. In this Charity there is no membership and no AGM. Instead there are officers and trustees. The governing document is not well drafted and if the organisation applies for registration I would expect that we will require that amendments are made to rectify the problems. …The rules indicate that there should be a committee but no names are entered on the deed and the rules do not say what role the committee will play."

27. In *Rehman v Ali* [2015] EWHC 4056 HHJ Purle QC sitting as a Deputy High Court Judge held as follows.

i) The issue was whether three plots of land were acquired beneficially for the legal owners or were they acquired beneficially under a charitable trust for the Muslim community of Walsall as a place of worship and education.

ii) Section 53(1)(c) of the Law of Property Act 1925 provides that a declaration of trust of land must be in writing, although there is an exception for implied, resulting or constructive trusts.

iii) The question was whether an intention to benefit the community through the purchase was translated into a legal commitment to hold the Property only for the benefit of the community.

iv) There was no convincing evidence that there was an intention to create a charitable trust in 2003 as opposed to acquiring the premises privately and operating them for the benefit of the community.

v) If a sufficiently large section of the community is induced to contribute by representations or promises that the product of their contributions will be held for charitable purposes benefitting a significant section of the community, that may be sufficient to give rise to a constructive trust of a charitable kind. However, as that would, in this particular case, result in a change of the beneficial ownership of the first plot once acquired, clear and convincing evidence was obviously needed.

vi) "None of the defendants, or of the members of the congregation outside the Rehman family, knew of the private trust. Nevertheless, at least some of them knew that the mosque was in the name of the claimants. Some of them, whilst ultimately admitting this, said the opposite in their witness statements. If they did not know this one must enquire: who did they think owned the mosque when they contributed to the purchase of the next two plots? If they did not enquire, then as I have found that the owners of the mosque were the persons shown as such on the title deeds, that is why they must be taken (taken objectively, which is the correct test for the purpose of constructive trusts) to have intended when contributing to the acquisition of the additional plots for the mosque. If one goes to a mosque or other similar institution which takes collections, one is giving one's money to the institution, whatever its legal status and whoever may own it. One expects one's money to be disbursed for the benefit of that institution. That is what happened in this case. As it happens, the mosque was privately owned. [54] … those who donate their money unconditionally to a mosque or other religious institution do so, whatever the formal structure of the mosque or other institution may be, intending to part with ownership of their money and can therefore have no claim under a resulting trust nor, in the absence of a properly formulated and coherent representation, promise or assurance, under a constructive trust or an estoppel". [56]

28. It seems to me that this is similar to the present case now being advanced by Mr Roshan. I can see no basis for the members of the Gurdwara (being in a similar position to the members of the community in *Rehman*) claiming a resulting or constructive trust. In my view the action now brought by Mr Roshan should properly have been brought by the trustees on behalf of the unincorporated association. The problem here is that under the 1995 Rules there were no members and any cause of action in relation to a trust would have accrued when there were no members.

29. It may be that this could be cured by an amendment. As was suggested by Mr Bartlett, the trustees could meet and agree the position, and in the meantime this action could be stayed subject to imposing a time limit for reconstituting the claim. However, in my judgment such a course should not be allowed, because – for reasons which I shall now set out – the action should be struck out irrespective of whether the Claimant is or is not the correct party.

**Setting aside on the grounds of fraud**

30. Mr Boyd contends that only a party to the original proceedings is entitled to set aside a judgment in those proceedings on the grounds that it was fraudulently obtained. It would only be if a third party to the original proceedings – such as Mr Roshan – was claiming that the proceedings were part of a conspiracy to damage his interests that he could apply to set aside a judgment. Mr Boyd relies

on the decision of Burton J in *Chodiev v Stein* to which I have just referred for the principle that a party against whom a judgment has been given may bring an independent action to set aside the judgment on the ground that it was obtained by fraud; but this is subject to very stringent safeguards, which are found to be necessary because otherwise there would be no end to litigation and no solemnity in judgments. The most important safeguard is that the second action will be summarily dismissed unless the claimant can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence, and which is so material that its production at the trial would probably have affected the result, and (when the fraud consists of perjury) so strong that it would reasonably be expected to be decisive at the rehearing and if unanswered must have that result. Mr Boyd contends that Mr Roshan has not provided even an arguable case of irrefragable evidence of fraud, and does not get close to establishing what new evidence he is relying on, and why it could not with reasonable diligence have been produced at the trial of the ownership claim.

31. I can see no basis for concluding that as a matter of principle a judgment obtained by fraud can only be set aside by a party to that earlier action. It might well be that where a judgment is sought to be impeached it would be a rare case where a non-party can say to the court that because a judgment in a case to which he was not a party was obtained by fraud it should be set aside; it might be said that the non-party had no personal (as opposed to a more general public- spirited or general) interest in that happening. However, it seems to me that the present case is different. If Mr Roshan is right (and subject to other points made by Mr Boyd about delay and acquiescence, which I will deal with below), then he and the members of the Gurdwara have been cheated out of their beneficial ownership of the Property because of a fraud, and the courts ought not to allow a judgment obtained by fraud to stand; it would deprive them of their rights.

32. The important safeguard to which Mr Boyd refers is the question of whether the evidence supporting the assertion of fraud is evidence (a) which could not with reasonable diligence have been obtained at the trial, (b) which is so material that it would probably have affected the result of the trial, and (c) which is so strong that it would reasonably be expected to be decisive at the rehearing and if unanswered must have that result.

33. In *Chodiev*, Burton J held that the fresh evidence must satisfy the reasonable diligence requirement (usually referred to as the test in *Ladd v Marshall* [1954] 1 WLR 1489) in that it must be evidence which was not before the first court and could not have been obtained by reasonable diligence: see paragraphs [14] to [20] of Burton J's judgment.

34. In *Takar v Gracefield Developments Ltd* [2015] EWHC 1276 (Ch) Newey J held that a judgment can be set aside for fraud if the loser satisfies the requirements summarised in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328 and it does not have to be shown that the new evidence could not reasonably have been discovered in time for the original trial. Those requirements are:

> "…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."

35. In a postscript to his judgment in *Chodiev*, Burton J respectfully disagreed with Newey J's conclusion that the reasonable diligence test did not apply. For my part, and with the greatest respect to Newey J's contrary conclusion, I think that Burton J is right and the new evidence must satisfy the reasonable diligence test. That is consistent with the decisions of Langley J in *Sphere Drake Insurance Plc v The Orion Insurance Co Plc* (unreported, 11 February 1999), David Steel J in *KAC v IAC* [2003] 1 Lloyd's Law Rep 228, the Court of Appeal (in the speech of Lord Goff) in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 and the Court of Appeal and House of Lords in *Owens Bank Ltd v Bracco* [1992] 2 AC 443, all of which (for the reasons given by Burton J at paragraphs [14] to [20] and [84] in *Chodiev*) support the existence of the reasonable diligence test. In particular, Langley J's conclusion in *Sphere Drake* that the reasonable diligence test applied was based on a careful consideration of the authorities, and expressly on the authority of *Hunter*, which is of course binding on this court:

> "it is not permissible to call further evidence which was available at the trial or could by reasonable diligence have been obtained and the fresh evidence must be likely to have been decisive."

See *Hunter*, in the speech of Lord Diplock, at page 545.

36. However, one must also bear in mind, as I do, what Garnham J said in *Salekipour v Parmar* [2016] QB 987 at [69-70]:

> "69. Where a court is reaching its conclusions on the basis of witness evidence, and that evidence is challenged on grounds of fraud, or the like, it will be a rare case where any part of the judgment can survive.
> ...
> 70. As was pointed out in *Jonesco v Beard* at 310, '*Fraud is an insidious disease and if clearly proved to* have *been used so that it might deceive the court it spreads to and infects the whole body of the judgment'*. To rely on a somewhat more up-to-date authority, in *Hamilton v Al Fayed* [2000] EWCA Civ 3012, Lord Phillips MR said at paragraph 34(2) that:
>
> > 'Where it is clearly established by fresh evidence that the court was deliberately deceived in relation to the credibility of a witness, a fresh trial will be ordered where there is a real danger that this affected the outcome of the trial.'"

37. I also take into account what was said by Langley J in *Sphere Drake*:

> "a judgment obtained by perjured evidence is, like any judgment obtained by fraud, liable to be set aside but there must be apparently credible evidence as to the fraud or perjury which not only was not available at the trial and could not have been obtained with reasonable diligence for use at the trial but which is such as entirely changes the aspect of the case in the sense that it must be likely to be decisive of the outcome of the case in question."

38. Further, the evidence brought forward must be "clear and convincing": *Rehman*

*v Ali* at [34] (see above, paragraph 27.v).

39. Mr Bartlett, for Mr Roshan, says that where a non-party seeks to set aside a judgment on the grounds of fraud, there must be a remedy to avoid an injustice. There is also a public interest at stake here, to protect charity property. He says that the documents which have now been produced admit of only two possibilities: either they are not genuine documents, or Mr Bharj and Mr Sohan Singh gave false evidence. He says that the documents show that the deposit for the Property did not come from Mr Bharj, there was no release of a debt allegedly owed to Mr Bharj, and that the money collected from the contributors was not for work to the Property, but for the purchase. Mr Bartlett says that Mr Roshan, and the witnesses now supporting the present claim (including Mr Sukhwinder Singh) were not parties to the ownership claim, nor did they have legal advice. It was only after judgment was handed down in the ownership claim that new trustees were appointed and the application was made by Mr Singh to HHJ Hand. If there is a reasonable diligence requirement, which Mr Bartlett does not accept (but in my view he is wrong about that, for the reasons I have already set out), then there needs to be some flexibility where the parties are not the same as those in the previous trial. Mr Bartlett suggests that many of those responding to the appeal for funds might not have addressed their minds to whether the money would be used for the purchase or for works to the Property; what was important to them was the establishment of the Gurdwara and the belief that the Property would belong to the Gurdwara. The important point is what was known to the membership at large, rather than by individuals, and the membership knew nothing at all about the dealings with the Property by Mr Bharj and Mr Sohan Singh. They did not understand what the ownership claim was really about or that it involved a dispute over the ownership of the Property until judgment was handed down. The key facts are that a large number of people contributed to the purchase having been led to believe that it would be held on trust for the Gurdwara and not privately, and would not have done so otherwise. It would be unconscionable and fraudulent for the defendants to deny that it was held on trust.

40. The fresh evidence on which the Claimant relies is principally contained in and exhibited to the statements of Mr Roshan dated 1 December 2016 and Mr Sukhwinder Singh dated 6 December 2016.

41. Mr Roshan says that he is the head priest of the Gurdwara. He relies on a resolution of the General House of the Gurdwara authorising him to bring this claim on behalf of the members. He says that he contributed £500 when the Property was being purchased and that he made fund-raising appeals to the congregation in 1995-6 so that the Property could be bought for the Gurdwara. It was announced that a trust had been formed for the Property and this led to a fall-out between the trustees because they could not agree how many trustees should hold the Property. Mr Roshan left the Gurdwara and did not rejoin until February 2015. He says that whilst Mr and Mrs Bharj and Mr Sohan Singh claimed at the original trial that they had provided the purchase monies for the Property, the truth is that it was collected from the congregation by fund-raising. He would never have contributed nor would he have solicited contributions from the congregation if he had known it was to be a private purchase. Mr Roshan says that Mr Sohan Singh holds the Property on trust for the Gurdwara. He exhibits correspondence with the Charity Commissioners (to which I have referred earlier in this judgment) and a handwritten note from the Gurdwara's records which he says "appears to record the income and expenditure of the campaign to purchase and refurbish" the Property. That document seems to record income (sums from named individuals) and expenditure (payment of sums to "Walia", which I take to be a reference to the vendors of the Property, amounting to £62,000, and further sums paid out). The handwritten document is difficult to follow and there is no further explanation given, in particular in

relation to the further expenditure.

42. Mr Sukhwinder Singh says that from 1991 to 1993 he was the manager of the Gurdwara and one of the founder members. In February 2015 he became one of the trustees along with 6 others. He says that he "obtained and contributed£16,070 to buy" the Property and also gave £3000 to the building fund. He exhibits a handwritten note which he says confirms his contribution of £16,070 (and also the contributions of others) and extracts from his bank statements which show that this sum was paid. Mr Singh says that when the constitution was established in April 1995 it was agreed that any property purchased would be held by the trustees on behalf of the Gurdwara. He says as follows:

> "We viewed multiple properties, but the Property at 253-263 The Broadway, Southall, was unanimously approved because the location was a corner plot on the main Southall Broadway and had a large square footage. Initially Mr Walia wanted £300,000 for the Property but we asked him to reduce the sale price and agree to be paid in instalments on the basis that this was to build a Gurdwara for the Sikh Community with contributions from the community. Mr Walia was himself a religious Sikh. Mr Walia therefore agreed in about June or July 1995 following months of negotiations to sell the Property for £185,000 in instalments. Immediately thereafter we commenced a fundraising campaign.
>
> The people leading the 253-263The Broadway initiative were: Jaswant Singh Bharj, Mahender Singh Rathour, myself, Sohan Singh and Bhagwan Singh. Besides us, there were many others involved who had also given interest-free loans, donations and building supplies for buying the land and building the Gurdwara. … The land was always meant to be held in a trust for the gurdwara.
>
> The contributions were recorded contemporaneously on a piece of paper … these pages record that a total of £20,000 was collected as the initial amount to lodge the first £20,000 deposit with Mr Walia. I then copied my contemporaneous note into English in my personal hardback red book which I have kept in my possession since 1995 to date."

43. Mr Singh goes on to refer to further meetings at which contributions were made, and says that monies were handed over to Mr Walia for the purchase, a total of£60,000 as a deposit. He says that a fundraising campaign raised further monies which were used to pay Mr Walia, and he used a pro-forma document to confirm receipt of interest-free loans from donors. Mr Singh says that before final completion, Mr Walia raised the purchase price to £200,000 and they had no choice but to agree. It was originally the plan to have the Property transferred into the name of Mr Inder Singh, but he was not satisfied with the proposed arrangement. It was therefore agreed that Mr Sohan Singh would apply for a mortgage on the basis that once the mortgage was paid off, he would transfer the Property into the names of the trustees. Mr Sohan Singh gave a Special Power of Attorney dated 22 July 1996 to Mr Bharj, Mr Sukhwinder Singh and Mr Rathour "to act on my behalf and do whatever my Attorneys think fit and proper in relation to" the Property, which Mr Singh says was "an assurance that neither he nor his beneficiaries (were he to die) would have any personal interest in the Property other than the gurdwara as charity property."

44. Mr Singh says that when the mortgage was repaid from the Gurdwara donations, he suggested that title be transferred to the trustees as had been agreed, but Mr Bharj would not agree. There was a dispute between the factions in the Gurdwara and Mr Singh says that Mr Bharj and Mr Sohan Singh brought false

claims and made false allegations against him.

45. Mr Singh notes that he was a witness at the trial of the ownership claim.

> "I…gave evidence that there was a rift in the management committee. I did not give any evidence of ownership of the Property. My evidence was limited to the subject of management. I did not support either side's claim of personal entitlement to the Property and was not asked any questions about ownership or contributions. At that time, I did not have access to my old contemporaneous books which I found in about April 2015 when I cleared out my entire garage looking for them. …
>
> Until the county court trial in the matter, I and the other community members, were not aware of any trust deeds between Mr Sohan Singh and Mr Bharj or re-mortgages on the Property, which appear to have been created and taken out to defraud the community and those who have contributed to the Gurdwara project."

46. It will be noted that Mr Singh says that he was not asked about ownership; however, I note what Mr Bartlett says about this in his skeleton argument: "C and his witnesses have not previously given evidence about the purchase of the Property. Sukhwinder Singh was asked to do so [*emphasis added*] but it is understandable that he did not want to support either side in the previous action on that issue."

47. In addition to the evidence of Mr Roshan and Mr Singh, there are witness statements from a number of persons who say that they made contributions or loans towards the purchase of the Gurdwara. Finally, there is a statement from Mr Ajit Singh Khera, dated 4 December 2016 in which Mr Khera says that he was present at a meeting in 1995 at which Mr Bharj and others said that the Property would be held by the trustees. He also contributed. He refers to subsequent meetings at the Gurdwara at which there were discussions about why the trust had not been formed. There were negotiations between the two factions (Mr Bharj, Mr Rathour and others on the one hand, and Mr Bhagwan Singh, Mr Inder Singh and others on the other). He says that he is shocked to hear that Mr & Mrs Bharj and Mr Sohan Singh claimed this was private property; he would not have given any financial help had that been the case.

48. In my judgment, none of this evidence comes close to satisfying the reasonable diligence test. There is nothing in the statements which could not, in my view, with reasonable diligence have been made available at the time of the ownership claim. I find Mr Sukhwinder Singh's explanation of why he said nothing about ownership at the time of the ownership claim very unconvincing. It must have been plain to him what the ownership claim was all about – I cannot think of any good reason why he did not raise, at the time, the simple point that the ownership claim was based on a falsity. He was present at the trial. He gave evidence. The history of the dispute demonstrates throughout the entire period that there were warring factions at the Gurdwara and it must have been entirely clear to all what was at stake in the ownership claim. Mr Singh knew that the Property had been transferred into the name of Mr Sohan Singh. He says that he only found documents relating to the contributions in April 2015 but he made no mention of the existence of such documents in his evidence at the trial, despite the fact that he must have known what the dispute was about. Nor did he say anything about having found such evidence in his statement for the hearing before HHJ Hand (witness statement dated 22 May 2015). I agree with Mr Boyd that it is inconceivable that had he found such important documents in April 2015 he would not have mentioned them when providing that witness statement in May 2015.

49. Even if I am wrong about the need to satisfy the reasonable diligence test, in my view the evidence falls short of demonstrating that there is a credible case

of fraud.

50. Mr Sukhwinder Singh's evidence is crucial. Mr Roshan's solicitors describe him as "a key witness" (witness statement of Mr Starck, 20 October 2016). It is clear that Mr Singh knew in 2003, when the mortgage was discharged, that the Property was in the name of Mr Sohan Singh (witness statement of Mr Sukhwinder Singh, 22 May 2015, paragraph 8) and that, according to him, this was contrary to what had been agreed. There is no credible explanation, were it true that the Property should have been held on trust, as to why this was not raised by Mr Sukhwinder Singh in the context of the ownership claim. Mr Sukhwinder Singh's evidence at the trial (witness statement 8 October 2014) deals with meetings of the committee of the Gurdwara, the falling out between himself and Mr Bharj. The reason for the falling out is now said to have been over the refusal of Mr Bharj and his associates to have the Property transferred to the trustees (witness statement 6 December 2015 paragraph 20). There is no explanation of why this was not mentioned in the evidence for the ownership claim, particularly in the light of the assertion in the witness statement of 8 October 2014 that Mr Bharj "has acted in a manner that is incompatible with his duties in respect of the management and the operation of the Gurdwara and has acted in breach of trust."

51. There were cautions registered against the Property in 1996 and 1997; one of the cautioners was Mr Manjit Singh, who is one of those persons now giving evidence for the Claimant as to his contributions (see paragraph 47 above, witness statement of Mr Manjit Singh 4 December 2016). He also gave evidence at the trial of the ownership claim (witness statement 24 September 2014) which made no mention of the alleged trust. No explanation is given for this. Again, I find it inexplicable why this is so. Mr Manjit Singh must have known what the issues were in the ownership claim, yet he also was silent.

52. I agree with Mr Boyd that the witnesses at the trial of the ownership claim must have known what the issues were. There is no explanation of why the present assertions were not made then.

53. There are also some further oddities in the evidence put forward on behalf of the Claimant.

    i) Mr Sukhwinder Singh refers to the nomination of 5 trustees, but in fact there were 2 trustees with Mr Singh as a nominee to sort out any differences.

    ii) In his witness statement of 6 December 2016, paragraph 5, Mr Singh says that the purchase price was originally £300,000, but this had not been mentioned by him before (see his witness statement of 22 May 2015).

    iii) I have already mentioned Mr Singh's evidence about the use of a pro-forma document to record interest-free loans (paragraph 43 above). In the Further Information provided by the Claimant, it is said that similar documents were in the possession of Mr Rathour. In Mr Rathour's evidence at the trial, he said that donations were made for the purpose of running the Gurdwara, the proposed extension and other building work. He did not exhibit the pro-forma document. He was the treasurer of the Gurdwara. It would have to be Mr Roshan's case that Mr Rathour also gave false evidence at trial, yet Mr Rathour was one of the new trustees appointed after the trial, together with Mr Bhogal (another of the defendants in the ownership claim). Had Mr Rathour and Mr Bhogal been untruthful witnesses about ownership, and had Mr Sukhwinder Singh truly believed that the court had been deceived, surely these appointments would not have been made.

    iv) When Mr Singh left the Gurdwara in 2004, it was because of the falling

out with Mr Bharj over his refusal to have the Property transferred to the trustees. Mr Sukhwinder Singh was brought back in to support Mr Rathour in 2012, and was party to the decision to make Mr Sohan Singh, Mr Boghal and Mr Rathour (amongst others) trustees on 6 February 2016. Why would this have been done if Mr Sohan Singh Mr Rathour and Mr Bhogul had acted dishonestly in relation to the ownership of and dealings with the Property?

v) Mr Singh was one of the attorneys appointed by Mr Sohan Singh under the Special Power of Attorney dated 22 July 1996. This document was in evidence at the trial. A General Power of Attorney by Mr Sohan Singh dated 22 July 1996 (also in evidence at the trial) appointed Mr Jaswant Singh and Mr Sukhwinder Singh as his attorneys. Why did Mr Sukhwinder Singh do nothing to challenge what was going on, if he believed that a fraud was being committed? Mr Bartlett says that the obvious explanation for the Special Power of Attorney is that it was a recognition by Mr Sohan Singh that he had made the purchase on behalf of the Gurdwara. If that is so, why wasn't this raised in the course of the trial?

vi) The Property was let to Mr Rathour. Paragraph 15 of the Particulars of Claim says: "…and Mr Rathour permitted the Gurdwara to use and occupy it". If the Property was, or was supposed to be, held on trust, I agree with Mr Boyd that it seems odd that Mr Bharj would enter into a lease with Mr Rathour who would allow the Gurdwara to use and occupy it. This seems to me to be consistent with the Property not being held on trust, but rather being owned privately with a view to allowing it to be used as a Gurdwara.

vii) The involvement of the Charity Commission in 2004 and 2013 shows that the ownership of the Property, and whether it was held on trust, was a contentious matter long before the trial of the enforcement action. That this was so must have been known to the community as a whole and in my view was known to Mr Roshan and Mr Sukhwinder Singh.

54. I therefore conclude as follows:

i) The fresh evidence brought by the Claimant does not satisfy the reasonable diligence test.

ii) Even if that is wrong, the Claimant has not made out a credible case that the judgment in the ownership claim was obtained by fraud, and the evidence is less than clear and convincing.

iii) Applying the test summarised by Burton J in *Chodiev* at [25] (paragraph21 above), I do not believe that the fresh evidence would have entirely changed the way in which I approached the issues in the ownership claim. The fresh evidence in essence goes to the provision of loans and gifts for the purchase of the Property, but in the ownership claim this was a live issue. I was satisfied that the loans and gifts were for the building works and not for the purchase. There is nothing in the evidence now presented on behalf of the Claimant to make me think that I would have reached a different conclusion had that evidence been presented in the course of the trial.

iv) In my judgment, the evidence now put forward, for the reasons I have summarised above, is simply not credible: see Langley J in *Sphere Drake* (paragraph 37 above),

**Abuse of process**

55. Mr Bartlett referred to two cases in particular.

56. First, *Resolution Chemicals Ltd v H Lundbeck A/S* [2014] RPC 5. In that case, it was held that where A has pursued a cause of action against B the public interest requires that he should not be permitted to relitigate that claim. "There is however no reason in principle why C, who has the same complaint against B should not be free to litigate the same question." C is normally entitled to do so and conduct the claim as he sees fit [22]. The central question in such cases is whether the new claimant is either in reality the previous claimant in a new guise or has stood back and allowed the previous claimant to fight his battle for him. In the latter case the previous claimant must have been fighting the battle in the same interest as the new claimant [26-27]. There is a clear distinction to be maintained between judgments *in rem* and judgments *in personam*. As a general rule the former are binding on persons not party to the action and the latter are not [23].

57. Secondly, *Shalabayev v JSC BTA Bank* [2016] EWCA Civ 987. In that case Gloster LJ held:

    i) The fact that the present claimant was not a party to the previous proceedings was not conclusive that the claim was not an abuse [54].

    ii) It was in that case plainly right that the present claimant should be allowed to proceed simply because he had had no proper opportunity to establish his claim to the Property. He had had no opportunity to call such evidence as he saw fit on that issue, put in documents or make submissions on the evidence. There was now available evidence which had not been before the judge on the previous occasion which cast doubt on his findings [47-51].

    iii) A key point made by Lord Hobhouse in *Re Norris* [2001] 1 WLR 1388, cited in *Shalabayev* at [57-60], was that the interests of the husband and wife were different and indeed opposed to each other. They had competing rights in the Property. "It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse" (Lord Hobhouse at [26]).

58. Mr Bartlett says that the issues in the ownership claim were not the same as those in the present claim; a dispute between A and B as to what their beneficial interests in a property are is a different dispute from a claim by a third party that neither of them has any beneficial interest in it because it belongs to him. The judgment in the previous action was a judgment *in personam* which decided as between the parties what their interests in the Property are. To prevent Mr Roshan from bringing this claim is to treat that judgment as if it were a judgment *in rem*, which is the point made by Floyd LJ in *Resolution Chemicals*.

59. Even if the battle were the same battle, Mr Sohan Singh did not fight it in the same interest as Mr Roshan. His case then was completely different from and opposed to that of Mr Roshan in this action. Mr Bartlett says that the observations of Lord Hobhouse about opposing interests in *Re Norris* apply with even more force to this case.

60. Finally, Mr Bartlett says that his case is also in another respect stronger than that of the claimants in *Shalabayev* and *Re Norris*. Both of those claimants had given evidence on oath about the precise matters in issue in the new proceedings in the course of the previous proceedings and been disbelieved. Mr Roshan and his witnesses have not previously given evidence about the purchase of the Property and Mr Sukhwinder Singh did not want to support either side in the previous action on that issue. Mr Bartlett concludes that it cannot be disputed that the Gurdwara and its members have not had an opportunity to present their case by being parties to litigation with all the rights of a party.

61. In my judgment, despite the attractive way in which Mr Bartlett puts the case, I have concluded that it would be an abuse of process to allow this action to continue.

62. I say that essentially for the reasons I have already given in relation to the new evidence. It seems to me completely inexplicable why Mr Roshan and his principal witness Mr Sukhwinder Singh could have sat back during the course of the ownership claim and said nothing about ownership. I have already noted that in his skeleton argument, Mr Bartlett says this: "C and his witnesses have not previously given evidence about the purchase of the Property. Sukhwinder Singh was asked to do so [*emphasis added*] but it is understandable that he did not want to support either side in the previous action on that issue." I simply cannot accept that it is open to Mr Bartlett, in the circumstances, to contend that there was no opportunity for the case now being put forward to have been made in the ownership action. It seems to me that there was ample opportunity for those who now contend, on the basis put forward in this new claim, that Mr Sohan Singh and Mr & Mrs Bharj were being dishonest in their claims and their evidence in the ownership claim, and to have given evidence about what they say was the true position. They did not, and this to me is the key element. To allow the Claimant to do so in the context of this new claim, after the judgment in the ownership claim, the subsequent inquiry and the TOLATA claim, when it was or must have been clear to the Claimant and Mr Sukhwinder Singh that ownership was in issue, would in my judgment be an abuse. It seems to me that it would be manifestly unfair to the Defendants to have the issue of ownership relitigated in such circumstances – on the basis of evidence which, as I have said, lacks credibility – and to permit the action to continue would bring the administration of justice into disrepute (see Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v. Bairstow* [2004] Ch 1 at [38]).

63. In my judgment, Mr Boyd is entirely correct when he characterises the present claim as a further step in a power struggle between competing factions for control of the Gurdwara. It is in my view a blatant attempt to drive out Mr Bharj and raises real doubts about the integrity of the claim. Mr Sukhwinder Singh, and Mr Roshan, are clearly members of the group opposed to Mr Bharj and Mr Sohan Singh. They were prepared to sit back and see how the ownership claim developed; they did nothing until just before the hearing for the account, when the unsuccessful application was made to HHJ Hand. Then they did nothing during the taking of the account until the trial of the TOLATA claim when another unsuccessful application was made. In those circumstances, again it is my conclusion that the present claim is an abuse.

**Striking out**

64. In my judgment, the present claim has no real prospect of success, for the reasons set out above, and should be struck out.

**Other issues**

65. In the light of my conclusion that the claim should be struck out, I can deal with the other issues raised quite briefly.

66. Mr Boyd contended that the present claim is statute barred under the Limitation Act 1980 because it must have been clear to all concerned, on the Claimant's side, that ownership was a contentious matter since the registration of the cautions in 1996 and 1997 and/or the involvement of the Charity Commission in 2004 and 2005. Mr Boyd relies on sections 21(3) of the 1980 Act. Had it been necessary for me to decide this point – which, in the light of my earlier conclusions, it is not – I would have held that this is at least arguably a claim falling within both of the classes within sections 21(1) for which no period of limitation applies, and I would not have struck out the claim – at this stage – on limitation grounds.

67. Mr Boyd also argued that the claim was bad for laches, in that there was both delay and circumstances showing that it would be unconscionable for the Claimant to pursue the claim. Not only is the laches allegation wholly unparticularised, it seems to me that Mr Bartlett might be right in saying that whether it would be unconscionable is really a matter for trial and that I should not strike out the claim on that basis.

**Conclusion**

68. This claim must be struck out on the grounds that it is an abuse of process and, or alternatively, that it has no real prospect of success.

69. I would not have struck out the claim on the basis that it was statute barred or that the doctrine of laches applies.

*(End of judgment)*