



Neutral Citation Number: [2021] EWCA Civ 1766

Case No: B2/2021/0534

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BLACKPOOL
HIS HONOUR JUDGE KHAN
Lower Court Case No. E00BC708

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/11/2021

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE ANDREWS

and

LORD JUSTICE EDIS

Between :

JOHN ANDREW PARK

**Claimant/
Appellant**

- and -

CNH INDUSTRIAL CAPITAL EUROPE LTD
t/a CNH CAPITAL

**Defendant/
Respondent**

Jonathan King (instructed on direct access) for the **Appellant**
Ben Harding (instructed by **Gisby Harrison**) for the **Respondent**

Hearing date: 4 November 2021

Judgment Approved by the court
for handing down
(subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as ‘read-only’.
You should send any suggested amendments as a separate Word document.

Lady Justice Andrews:

INTRODUCTION

1. This is an appeal against an order made by His Honour Judge Khan (“the Judge”) in the Blackpool County Court striking out a claim brought by the appellant (“Mr Park”) which sought to set aside a default judgment entered against him in earlier proceedings brought by the respondent (“CNH”) on the basis that it had been obtained by fraud. The Judge’s order was itself made on appeal by CNH against a decision of District Judge Woosnam refusing its application to strike out Mr Park’s claim as an abuse of the process of the court, and giving directions for the matter to proceed to trial.
2. The Judge was persuaded that the District Judge had misdirected himself on the question of what would amount to an abuse of process for these purposes. He accepted CNH’s contentions that the claim was abusive for the following reasons:
 - i) Mr Park’s claim for fraud was based on facts that were known to him at the time of the original action, and therefore failed to satisfy the requirement for “fresh evidence”;
 - ii) there was no deception of the court when the default judgment was entered;
 - iii) the claim was fundamentally inconsistent with Mr Park’s defence in the original action; and
 - iv) the alleged fraud was not the operative cause of the default judgment, which was due to Mr Park’s own procedural failings.
3. A party who seeks to set aside a judgment for fraud must establish that both he and the court were deceived by the party in whose favour judgment was entered. The principles which govern such applications were summarised by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners lp* [2013] EWCA Civ 328, [2013] 1 CLC 596 at [106], and approved by Lord Kerr JSC in the leading case of *Takhar v Gracefield Developments Ltd* [2020] UKSC 13, [2020] AC 450 (“*Takhar*”) at [57]. Applying them to the present claim, Mr Park needs to establish conscious and deliberate dishonesty by CNH in relation to a statement made, evidence given or action taken which was relevant to the judgment it procured, and that the dishonest conduct was an operative cause of the court’s decision to enter judgment in those terms.
4. In the course of his oral submissions on behalf of Mr Park, Mr King took us to evidence demonstrating, in the clearest terms, that the court was deceived at the time when the judgment in default was entered. We heard submissions from Mr Harding on that issue, but he was unable to provide any satisfactory answer. We indicated that this was our view, and invited Mr Harding to take instructions from his client. Having done so, Mr Harding informed us that CNH no longer opposed the appeal, and that he would make no further oral submissions in response to the grounds of appeal relied on by Mr Park.
5. In the light of these developments, consideration was given to whether the Court of Appeal should agree to make an order recording that the appeal was allowed by consent, without the necessity of delivering a judgment. However, in response to further questions of counsel, it became clear that CNH was not prepared to concede that Mr

Park’s claim was not an abuse of process, but only to accept that it should not have been struck out at this juncture, and that the District Judge’s order should be restored. Indeed, it appeared that CNH envisaged that the abuse of process arguments might be aired again at trial. In those circumstances, we were not prepared to allow the appeal without giving our reasons.

6. Mr Harding, having taken further instructions, accepted that the appropriate course was that the Court should determine the matters in issue and explain the basis upon which it was allowing the appeal. He confirmed that he was not going to make any further oral submissions. We therefore announced at the end of the hearing that the appeal would be allowed, for reasons that would be provided in reserved judgments.

BACKGROUND

7. Mr Park is a contract farmer in Lancashire. His farm is called Park Hall Farm. In 2007 Mr Park and his wife set up a limited company, Park Organic Farms Limited (registered no. 06048475), through which to run their farming business (“POFL”). Mr Park was the sole director of POFL and Mrs Park the company secretary, until it was dissolved in August 2017.
8. CNH is a finance company. On 4 June 2013, 20 November 2013, and 22 March 2014, Mr Park signed four unregulated hire-purchase agreements with CNH relating to farm equipment for use in the business. Two were signed on the same day, 22 March 2014.
9. Each agreement was on a CNH proforma which stated that:

“This Agreement is made between CNH Capital Europe Limited (trading as CNH Capital)... and the Hirer named below. CNH Capital agrees to hire and the Hirer agrees to take on hire the Equipment described below on the terms and conditions set out in this Agreement.

The Hirer

Limited company – NAME ONLY

Park Hall Farms Limited

trading as

Park Hall Farms Limited.”

The hirer’s address was given as the address of Mr and Mrs Park’s farm. All that information was typed in the agreements by someone on behalf of CNH. There is an issue as to whether it was inserted before or after Mr Park signed them. In the signature box on the second page of the form, entitled “Hirer Signature”, Mr Park signed under the typed words “for and on behalf of the Hirer” and next to the words “signature(s) of Hirer.” Adjacent to his signature, his position is described as “director”. That word, and the date, are both entered in handwriting, which is possibly that of Mr Ian Smith.

10. Mr Smith was the relevant area sales manager for CNH Industrial NV, the manufacturer and seller of the farm equipment, who was responsible for completing sales and finance agreements for their customers. It was Mr Smith who arranged the finance with CNH

and gave Mr Park the documents to sign on each of the relevant occasions. Mr Harding confirmed that the only witness statement served in the original proceedings which was of relevance to this appeal was Mr Smith's witness statement of 24 February 2017. In that statement, Mr Smith described the process by which he arranged the finance with CNH. He would submit the finance proposal to CNH, they would assess it "for underwriting purposes", and they would then let him know if the deal was approved and the terms. He would then notify the customer and arrange a meeting to sign the documentation.

11. Mr Park also signed a personal guarantee in respect of "all agreements entered into between CNH and 'the customer named below'." The named customer was "Park Hall Farms Limited". Its address was identified as the address of Park Hall Farm, but the company's registration number was stated as 03616349. All those details were handwritten on the first page of the guarantee by Mr Smith. Again, there is an issue as to whether those details were inserted before or after Mr Park signed the document. Mr Park says he has no recollection of signing the guarantee, but on the face of it his signature (which is on the front page) was witnessed by Mr Smith.
12. Mr Smith's evidence is that he only took one guarantee because it was an "all monies" guarantee and he assumed that it would extend to cover all further hire-purchase agreements. The date written on the guarantee is 4 June 2013, which is the same as the handwritten date next to Mr Park's signature on the first hire-purchase agreement. The latter was countersigned by someone on behalf of CNH on 17 June 2013. The guarantee was therefore the first in the sequence of agreements, as one might expect, since the consideration for it was the extension of finance to the hirer under the hire-purchase agreements.
13. There is and was no company with the name "Park Hall Farms Limited". The company registered under registration no. 03616349 was named "Park Hall Farms Enterprises Ltd". That company had no connection with Mr Park or his wife. Its registered office was at a *different* Park Hall Farm, in Shropshire. There is no suggestion that the name "Park Hall Farms Limited" or the registration number typed in the guarantee emanated from Mr Park, nor that he was in any way responsible for the hirer being named as "Park Hall Farms Limited" in the guarantee or the hire-purchase agreements.
14. None of the indemnity provisions in the guarantee has the effect of making Mr Park personally liable for any sums due to CNH under or in connection with the four hire-purchase agreements in circumstances in which the named hirer is a company which does not exist. CNH could not enforce the hire-purchase agreements against the non-existent company, nor could they enforce the guarantee against Mr Park, unless and until the agreements (including the guarantee) were rectified to correct the mistake in the name of the hirer. The guarantee has never been rectified.
15. Mr Park's evidence is that his company, which ran the farming business for which the equipment was intended from the address identified, was always intended to be the hirer. That was the mistake that needed to be corrected by the substitution of POFL for the non-existent company named in the agreements. His recollection is that he was only presented with the final page of the hire-purchase agreements to sign. He believed that Mr Smith or someone else from CNH would later fill in the rest of the details:

“This probably explains why the agreements refer to Park Hall Farms Limited. Obviously I wouldn’t have signed something that had this name on, as that wasn’t the name of my company.”

16. POFL initially had difficulty in raising the finance to pay the deposits for some of the machinery, and so it was kept in storage at Mr Park’s request. The hire-purchase instalments were paid in the meantime. When POFL was in a position to pay the deposits, Mr Park went to inspect the equipment in storage. He says that he discovered it was badly damaged and of no practical use. A dispute then arose.
17. CNH terminated the first two hire-purchase agreements on 23 July 2014 for failure to make punctual payment of the rentals pursuant to clause 2.2, which made time of the essence, and clause 7.1, which treated any non-payment of rentals as a repudiatory breach. The remaining hire-purchase agreements were terminated by CNH much later, on 16 November 2015, for breaches of the first two agreements (again pursuant to clause 7).
18. In December 2014, nearly five months after CNH had terminated the first two hire-purchase agreements, Mr Smith visited Mr Park at his farm and procured his signature on a document sent to Mr Smith by CNH entitled “Deed of Rectification” (“the Deed”). Mr Smith says that CNH inserted the date (15 December) on the Deed when they countersigned it. There is a conflict of evidence between Mr Smith and Mr Park about what happened when Mr Park signed the Deed, which can only be resolved at a trial. However, it is not disputed that Mr Smith had made no prior arrangement with Mr Park to visit the farm or to sign any documents, and that he climbed over the locked gate in order to gain entry. Mr Park says that this was after 10pm when he and his wife had already gone to bed.
19. The Deed is typed. It identifies the parties to it as CNH, on the one hand, defined as “the Lessor,” and “John Andrew Park a sole trader trading as Park Hall Farms” on the other (defined as “the Lessee”). Under the heading “Background” it states that “the Lessor and the Lessee have entered into the following lease agreements” and identifies the four hire-purchase agreements by number and date. It continues:

“...

(B) It was always the intention of the parties that the Agreements should be concluded between them. However, the documents used for the execution of the Agreements incorrectly name the Lessor (sic) as Park Hall Farms Limited.

(C) For the avoidance of doubt the parties wish to rectify this mistake as set out in this deed.”

Clause 1 provides as follows:

1. Rectification of the Agreements.

“1.1 It is hereby agreed that all references to Park Hall Farms Limited in the agreements mean John Andrew Park trading as Park Hall Farms.”

1.2 It is further agreed and acknowledged that this has always been the intention of the parties from the date of the Agreements and continues to be going forward.

1.3 John Andrew Park remains liable for all obligations of the customer under the Agreements past, present and future.”

(Emphasis added).

20. Mr Park’s account of what happened when he signed the Deed is that Mr Smith told him that CNH needed him to sign a document to release any claim over the stored equipment to enable its sale (see paras 8-11 of the Particulars of Claim in the fraud action). Mr Park believes he was only presented with the final page. He says that he would not have signed that document if he had understood that its purpose was to make him personally liable under the hire-purchase agreements.

21. Mr Smith’s account is radically different. In para 21 of his witness statement, he states that he had previously received a call from Angela Hogan at CNH, who told him that the finance agreements should have been made in Mr Park’s name rather than in the name of the limited company. She said that CNH would require Mr Park to sign a Deed of Rectification to put the agreements into Mr Park’s name. CNH sent Mr Smith the Deed to take to Mr Park for signature. Mr Smith describes trying to contact Mr Park without success, and eventually arriving unannounced at the farm with the document “on the off-chance” on his way home after a business trip. He met Mr Park in the yard and they went into the farm office. He says in para 25 that he explained to Mr Park that the four finance agreements should have been in his personal name rather than in the name of the company, and gave him the Deed, which he said would put the agreements into his personal name; Mr Park read it and said he would sign it. Mr Smith witnessed his signature and then sent the Deed back to CNH.

22. However, earlier in his witness statement Mr Smith states that:

“The [first hire-purchase] transaction was introduced in the name of a limited company, Park Hall Farms Limited, to be supported by Mr Park’s personal guarantee (para 11);

I told [Mr Park] on the phone in advance that a personal guarantee would be required for the finance agreement (para 12);

[At the time of signature of the first hire-purchase agreement] I confirmed to [Mr Park] that the finance had been approved subject to a personal guarantee. I gave him a relatively brief explanation as to what the guarantee was. I said that, because the finance agreement would be in the name of a limited company, CNH Capital required Mr Park to personally guarantee the finance. I explained that the guarantee could be called upon against him if the limited company failed to make payments to the finance company (para 15).”

23. It is clear from that evidence, consistently with the documents themselves, that Mr Smith's understanding on each occasion when the guarantee and hire-purchase agreements were signed by Mr Park in 2013 and 2014 was that the hirer was to be a limited company associated with Mr Park, and that Mr Park was intended by CNH to undertake a secondary liability as guarantor. Since Mr Smith was the person who introduced the business to CNH, and Mr Park had no direct dealings with them, it must be inferred that this was the basis upon which the proposal for the finance was agreed to by CNH before Mr Smith procured Mr Park's signature on the guarantee and each of the hire-purchase agreements.
24. Despite this, Mr Smith does not say that he queried with CNH why they were now alleging in December 2014 that the agreements should have been made in Mr Park's name. He must have been aware, if he read it, that the Deed contained statements that were not in accordance with his understanding of who the intended hirer was to be at the times when he procured the signature of Mr Park on the original agreements.
25. There is no evidence that CNH thought Mr Park was carrying on business as a sole trader (under the name of Park Hall Farms or otherwise); they cannot have gained that impression from Mr Smith, and there is no other potential source of such confusion. On Mr Smith's account, when they were entered into, CNH and Mr Park intended and understood (as did he) that the hire-purchase agreements were to be with Mr Park's company. The documents signed by Mr Park, including the guarantee, objectively and accurately reflected that common intention. Unfortunately, someone on CNH's side of the transaction got the name (and registered number) of the company wrong.
26. The obvious explanation for CNH preparing the Deed of Rectification was that after they terminated the first two hire-purchase agreements, and litigation was in prospect, they discovered that the named hirer, "Park Hall Farms Limited" did not exist, and therefore that none of the signed agreements, including the guarantee, was enforceable. That explanation is supported, to some extent, by an internal email chain in January 2015, the month after the Deed was signed, in which CNH referred to "the need to ensure that our system is correct, otherwise the agreements will remain unenforceable."
27. CNH must have been well aware that there was no basis for rectifying the hire purchase agreements in the manner sought. The mistake was not signing an agreement with a limited company, instead of with an individual trading in business under a similar name, but wrongly identifying the name of the company through which that individual carried on his business. It cannot have been Mr Park's intention that he should be the hirer; on the contrary, he had signed the agreements as a director of a limited company, on that company's behalf. CNH must have known that – there was no other way of construing the documents which he signed.
28. Nor was it CNH's intention that Mr Park should be the hirer. CNH would not have required Mr Smith to procure a personal guarantee from him before they agreed to provide the finance, if that had been the case. But even if it *had* been CNH's intention to contract with Mr Park personally instead of with his company, Mr Park had no means of knowing that. Mr Smith says he told him before anything was signed that CNH required him to give a personal guarantee *because a company was the hirer*. Therefore, if there had been a mistake of the nature alleged by CNH, it would have been unilateral and there would have been no grounds for seeking to substitute Mr Park as the hirer.

29. On Mr Smith's account, therefore, after two of the agreements had been terminated and the parties were already in dispute, Mr Park knowingly signed a document which falsely stated that it was *always intended by both parties* that the hire-purchase agreements should be with him personally. He did so, moreover, without raising any objections or questions and without any explanation being given for the change, other than that the agreements "should have been" in his personal name. In fact, as Mr Smith knew, that was neither party's intention at the time when the agreements were made, and Mr Park knew, at the very least, that that was not his own intention.
30. It is theoretically possible for parties to enter into a contract on the basis that something which to their knowledge is untrue, *is* true, though one would expect there to be a very good reason why they would make such a bargain. In the unlikely event that they do enter into such an agreement, and do so with their eyes open, it will be valid and enforceable. In deciding whose evidence about this late-night encounter to accept, a judge would consider what possible motive Mr Park would have had in the circumstances for agreeing to take on a personal liability as the hirer, on the false basis that this was what the parties had always intended, even though he intended that POFL should have been the named hirer, and he knew that he never traded as a sole trader under the name "Park Hall Farms" or any other name. No motive has yet been suggested by CNH.
31. Suffice it to say that, as matters presently stand, Mr Park appears to have strong grounds for contending that his signature on the Deed was procured by fraud. Irrespective of this, for the reasons set out below, his case that CNH deceived the court into granting judgment by default by making deliberately false statements in their Particulars of Claim is overwhelming.

THE DEFAULT JUDGMENT

32. By a Claim Form issued on 25 June 2016, CNH brought proceedings in the Blackpool County Court against Mr Park personally (Claim No C14YM650). They claimed £138,483.48 due under the four hire-purchase agreements, plus interest. The Particulars of Claim are verified by a statement of truth in the form then prescribed, namely that "*the Claimant believes that the facts stated in the Particulars of Claim are true.*" It is signed by CNH's solicitor.
33. The Particulars of Claim state at paragraph 1 that:
- " b) the Defendant signed the hire purchase agreements purportedly as director of Park Hall Farms Limited, a company which did not exist and of which the Defendant was not a director.
 - c) The mistake was rectified by a Deed of Rectification made between the parties on 15.12.14 by which it was agreed that all references to Park Hall Farms Limited in the agreements meant the Defendant t/a Park Hall Farms and the Defendant remains liable for all obligations of the customer under the agreements past, present and future.
 - d) The claim is made against the Defendant as the party to the hire purchase agreements pursuant to the Deed of Rectification. In the

alternative if (which is denied) the Defendant is not bound by the hire purchase agreements, the claim is made against him as surety for the liabilities of Park Hall Farms Limited to the Claimant pursuant to the Defendant's personal guarantee dated 4.6.13 pleaded below." (Emphasis added).

Although the Particulars of Claim do not expressly identify the "mistake" which was rectified, the inference to be drawn from para 1(c), read together with para 1(b), is that the mistake was naming a non-existent company as the hirer instead of Mr Park personally as a sole trader, trading as Park Hall Farms.

34. The Particulars of Claim go on to refer to each of the original hire-purchase agreements as being "purportedly made" between CNH and Park Hall Farms Limited. They assert, in paras 4,13, 22 and 31 respectively, that:

"by a written Deed of Rectification dated 15.12.14, the agreement was rectified so that all references to Park Hall Farms Limited in the agreement meant the Defendant trading as Park Hall Farms and the Defendant remained liable for all obligations of the customer under the agreement, past present and future. A copy of the Deed of Rectification is attached."

(Emphasis added).

35. As foreshadowed in para 1(d), the Particulars of Claim also contain paragraphs asserting that "further or in the alternative", if the Deed of Rectification is not binding on Mr Park, by virtue of the personal guarantee (a copy of which is also attached) "the Defendant is accordingly jointly and severally indebted to the Claimant for the like sums as Park Hall Farms Limited." That plea is demurrable. As explained in para 14 above, "Park Hall Farms Limited," which CNH positively avers (and is common ground) did not exist, could not owe a debt to them under the hire purchase agreements for which the Defendant had any liability under the guarantee. CNH's claim against Mr Park depends on the Deed of Rectification. He has no personal liability unless that Deed is enforceable. District Judge Woosnam rightly recognised this in his judgment, though he did not specifically address the guarantee or explain why it does not assist CNH.
36. Mr Park, who was then acting in person, served a handwritten Defence on 7 July 2016 in which he said, among other matters:

"the debt is to [sic] Park Hall Farms Ltd (and not John Andrew Park) as per the Finance Agreements. I do not remember signing the indemnity to JA Park on 4/6/03 [this must be a reference to the guarantee signed on 4/6/13] as stated by CNH Capital and it certainly was not explained fully to me, if I did." (Emphasis added).

37. CNH submitted, and the Judge accepted on appeal, that this was fundamentally inconsistent with Mr Park's pleaded case in the fraud action that the hirer was intended to be POFL, because it suggested that Park Hall Farms Ltd was liable, and this inconsistency made the fraud action abusive. The District Judge also appears to have thought there was an inconsistency, though he decided that this was no bar to the action

and could be explored in cross-examination. However, there is no inconsistency, let alone a fundamental one. Mr Park was denying that he had any personal liability for the debt arising under the hire-purchase agreements. In that context, he correctly pointed out that according to the agreements the person liable to pay the hire was “Park Hall Farms Limited” *not* “John Andrew Park”. Mr Park’s Defence did not take issue with the assertion that “Park Hall Farms Limited” did not exist. There is no inconsistency between stating that the person identified in the agreements as the hirer was Park Hall Farms Limited, and subsequently asserting that the named hirer should have been POFL.

38. The Defence did not address the Deed of Rectification at all. There is no pleaded case of fraud.
39. Mr Park failed to comply with the timetable set at a Case Management Conference for serving his witness statement and filing a pre-trial check list. He then failed to comply with an “unless” order made on 29 March 2017 to file a pre-trial check list by 5 April 2017, and his defence was automatically struck out. This was confirmed by a further order dated 11 April 2017.
40. Mr Park sought relief from sanctions and the reinstatement of his defence on the basis that the “unless” order was not served on him until after the time for compliance with it had passed. He also sought relief from sanctions for the late service of his witness statement (served by email on 11 May 2017). Both these applications were heard by HH Judge Butler on 24 May 2017, the date when the matter had been originally listed for trial, and refused. The Judge stated that it was open to CNH to proceed to trial on another date to be fixed, or to enter judgment under CPR 3.5(2). CNH chose the latter course.
41. On 25 May 2017, CNH’s solicitor wrote to the Court enclosing a “request for judgment” signed by him on behalf of CNH. The covering letter stated that “as the Defence was struck out under the Order dated 5 April 2017 for breach of the Unless Order dated 29 March 2017, *our client is entitled to Judgment pursuant to CPR 3.5(1).*” Even if that had not been stated in the covering letter, a request to enter judgment in default necessarily carries with it an implicit representation of entitlement to judgment on the case set out in the Particulars of Claim. The letter explained the basis upon which interest was claimed and calculated. Judgment was duly entered administratively on 21 July 2017.
42. Mr Park exhausted his rights of appeal against the refusal of relief from sanctions. Finally he tried, unsuccessfully, to persuade the High Court to re-open the refusal of permission to appeal under CPR 52.30. The action to set aside the default judgment for fraud was commenced on 23 November 2018.

THE DECEPTION OF THE COURT

43. In any civil proceedings the claimant must prove his claim on the balance of probabilities. Even if no defence is offered, the court must be satisfied that there is at least a viable cause of action and a case for the defendant to answer on the facts alleged in the claimant’s statement of case. That is so irrespective of whether the case goes to trial.

44. The rules of civil procedure permit a party to enter a judgment in default of defence in certain circumstances. As this is effected administratively in response to an application made by the claimant, the process necessarily involves the court trusting in the truth of representations made in his Particulars of Claim which are material to his cause(s) of action, which will not have been examined by a judge and tested at trial. Those representations are fortified by the statement of truth indorsed on the Particulars of Claim.
45. As is pleaded in paragraph 17(c)(ii) of Mr Park's Particulars of Claim in the fraud action, the clear and unequivocal representation was made by CNH in the Particulars of Claim in the original action that it was always the intention of both CNH and Mr Park that Mr Park should be personally liable as hirer under the hire-purchase agreements, and that this was the "mistake" which was corrected by the Deed of Rectification annexed to the Particulars of Claim (and as reflected in its terms). For the reasons already stated, that representation was untrue. It must have been known to CNH that it was untrue when they gave instructions to their solicitor to sign the statement of truth on the Particulars of Claim. It remained untrue, to CNH's knowledge, at the time when they sought the default judgment.
46. It is regrettable that, in the teeth of compelling evidence to the contrary, including from its own key witness, CNH has persisted in maintaining the lie all the way to the Court of Appeal. CNH's Defence in the fraud action, served on 4 January 2019 and again bearing a statement of truth signed by their solicitor, contains the following positive assertions in paras 9, 10 and 11:
- "9(b) As further particularised below, the common intention was that the Defendant would contract with the Claimant personally, which led to the Deed of Rectification.
10. ... it is admitted and averred that the HP Agreements by mistake referred to PHFL as hirer. They should have referred to the Claimant.
11. On or about 15 December 2014, the mistake in the HP Agreements as to the name of the hirer was rectified by way of Deed of Rectification signed by the Claimant and the Defendant."
47. Paragraph 14 of the Particulars of Claim in the fraud action refers to what is stated in the Deed under recital (B): "it was always the intention of the parties that the Agreement should be concluded between them." It is alleged that this statement was untrue, and was known at all material times by CNH to be untrue. Those allegations are denied in para 19(b) of the Defence. Para 19(c) then goes on to deny, if it is so alleged, that an "*incorrect statement in the recitals to the Deed ... would have affected [CNH's] entitlement to judgment against the Claimant in the Original Proceedings.*" That plea conveniently ignores the fact that the "incorrect statement" was repeated in the Particulars of Claim in those proceedings and certified to be true.
48. Mr King submitted that CNH must have known that it was not entitled to enter judgment in default based upon the untruthful representations in its Particulars of Claim. In response, Mr Harding submitted that CNH "could have" sent the wrong forms to Mr Smith for signature by Mr Park. However, quite properly, in the absence of any

evidence from CNH, he was unable to suggest that this was what *did* happen. The many problems with Mr Harding's theory, apart from the absence of any evidence to support it, include (a) the fact that Mr Smith's evidence indicates that there was no such error; (b) Mr Park *did* carry on business through a limited company and not as a sole trader, and (c) that company, POFL, was buying the equipment from CNH's affiliate company. In those circumstances it would have made no commercial sense for CNH to wish to enter into hire-purchase agreements with Mr Park personally. A personal guarantee of the company's liabilities, which was sought, and on Mr Smith's evidence explained to Mr Park, would leave CNH with the right to claim against either or both of them.

49. There is no answer to Mr King's submission. The court was deceived and the deception was an operative cause of the judgment in default being entered. The entire action was based upon the Deed, and absent the Deed, CNH had no basis for a claim against Mr Park. It was an essential element of CNH's claim that the Deed gave effect to the common intention, present from the outset, that Mr Park should undertake personal liability under the hire-purchase agreements.
50. The Judge held that causation was not established because "*the operative cause*" of the entry of the default judgment was Mr Park's procedural default or failure. That is the wrong test; *Takhar* establishes that the deceit only needed to be *an* operative cause. Mr Park's default provided the opportunity for CNH to enter judgment on their claim against him without proceeding to trial, but judgment was entered on the basis that Mr Park was personally liable for the reasons set out in CNH's Particulars of Claim.
51. Insofar as the Judge thought that the fact that CNH also pleaded reliance on the guarantee meant that they had a viable alternative cause of action against Mr Park, on which they were entitled to enter judgment, he was wrong about that. In any event, once a judgment is tainted by deceit it is fatally flawed: see *Takhar*, especially the discussion by Lord Kerr of the policy considerations underlying the maxim that "fraud unravels all" in the section beginning at [43]. He observed at [52] –[53] that:

"52. ... The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice. Quite apart from this, the defrauder, in obtaining a judgment, has perpetrated a deception not only on their opponent and the court but on the rule of law...

53. The policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming".

Lord Hodge, Lord Lloyd-Jones, and Lord Kitchin all agreed with Lord Kerr's judgment. Lord Sumption (who also agreed with Lord Kerr, subject to any contradictory observations in his own judgment) appears to have agreed with this aspect of his reasoning.

52. It is therefore no answer to a claim to set aside a judgment which has been procured by a dishonest representation relating to the claimant's primary case, that he also had an alternative cause of action on which he might have entered judgment without relying on the dishonest representation.

ABUSE OF PROCESS

53. Given that (i) there is an overwhelming case that the court was consciously and deliberately deceived, (ii) there is also a strong arguable case that Mr Park was deceived into signing the Deed of Rectification, which can only be resolved at trial, and (iii) there is no substance in the inconsistency and causation arguments for the reasons already explained, the key issue on this appeal is whether the Judge was nevertheless right to find that Mr Park's claim to set aside the judgment for fraud is an abuse of process because the circumstances in which he came to sign the Deed were known to him before the default judgment was entered. The short answer is that the Judge failed to follow *Takhar* and in so doing, reached the wrong conclusion.
54. CNH contended, and the Judge accepted, in reliance on the decision of Linden J in *Elu v Floorweald Ltd* [2020] EWHC 1222, [2020] 1 WLR 4369, and dicta of Handley JA in *Toubia v Schwenke* (2002) 54 NSWLR 46, cited by Lord Kerr in *Takhar* at [49], that the facts or evidence relied upon in support of the fraud claim must be materials which were not known at the time of trial to the party now alleging that he was deceived. Far from supporting that proposition, the reasoning of the Supreme Court in *Takhar*, particularly in the judgment of Lord Sumption (with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agreed) contradicts it.
55. In *Takhar* the defendants in the original action relied on a written agreement which they said Mrs Takhar had signed, which supported their version of an oral joint venture agreement that the parties previously made. The only copy of that document was a scanned copy which was found in the files of the defendants' solicitors, having apparently been misfiled. Mrs Takhar could not remember signing the agreement. She suspected forgery, but she was refused permission to obtain evidence from a handwriting expert in advance of the trial because her application was made too late. Without that evidence she could not have pleaded fraud. The trial judge found that the signature was hers. He relied heavily on the document in finding for the defendants. Subsequently Mrs Takhar obtained an opinion from an eminent handwriting expert which concluded that the signature, though genuine, had been transposed from a letter sent by Mrs Takhar to the defendants' solicitors. Moreover, this was not an isolated example of such a transposition.
56. The Supreme Court held that in a case where the alleged fraud was not in issue in the previous proceedings, even if the previous judgment has been entered after a trial on the merits, the person seeking to set aside the judgment is not obliged to show that the fraud could not have been discovered before the original trial by reasonable diligence on his or her part. The requirement in *Henderson v Henderson* (1843) 3 Hare 100 that "a litigant should bring forward his whole case" in the first set of proceedings does not apply in such circumstances, and there are no good policy reasons to allow the fraudulent party to rely upon the passivity or lack of due diligence of his opponent.
57. Lord Kerr left open the question whether the court should have a discretion to refuse to entertain an application to set aside the judgment in two situations, namely (i) where the fraud *was* in issue in the earlier proceedings and the party challenging the judgment seeks to rely on evidence of its existence that was not adduced in those proceedings – which was the situation that arose in *Elu v Floorweald* - and (ii) where a deliberate decision was taken not to investigate the possibility of fraud in advance of the first trial.

He expressed the view that it was arguable that in those scenarios, the court should have such a discretion.

58. Lord Sumption went further. After a clear exposition of the underlying principles, he stated at [63] that proceedings of this kind (i.e. a fresh action to set aside the judgment for fraud) are *only* abusive where the point at issue and the evidence deployed in support of it not only could have been raised in the earlier proceedings but should have been. It follows the fact that the fraud argument could have been raised in the first action is not enough to make the second action an abuse of process. Lord Sumption then defined the circumstances in which it can be said that the point “should have been” raised in the earlier proceedings. He said:

... the basis on which the law unmakes transactions, including judgments which have been procured by fraud, is that a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows they are. That is why it is not a defence to an action in deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in...

It follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he “should” have raised it.”

59. Lord Sumption left open the position in a case in which fraud had been raised unsuccessfully in the earlier proceedings, but he expressed the provisional view that the position should be the same, for essentially the same reasons. He concluded at [66]:

“If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material.”

60. The question whether evidence “could reasonably have been deployed” is self-evidently different from the question whether it “could reasonably have been discovered”. A person cannot take a deliberate decision not to rely on evidence of fraud, unless he is not only aware of that evidence, but knows that he can rely on it to plead fraud in answer to the case brought by his opponent.
61. It is clear from their judgments that both Lord Kerr and Lord Sumption used the expression “new evidence” or “fresh evidence” to denote evidence that was not deployed in the action which led to the imputed judgment, not just evidence that had only come to light since the judgment.
62. The present case, like *Takhar*, is one in which the fraud was not pleaded in the first set of proceedings. It too involves an allegation that a key document relied on by the successful party was procured by fraud. The circumstances in which the Deed came to be signed were first mentioned in a letter written by solicitors who were briefly instructed by Mr Park to CNH’s solicitors on 23 May 2017, the day before the hearing of the application for relief from sanctions. They were also mentioned in the grounds

settled by Mr King in support of the application to re-open the appeal against the refusal of that relief. However, unlike *Takhar* there was no trial. The court did not evaluate the truthfulness of the evidence on which the claimant relied, but assumed the truth of what was alleged in the Particulars of Claim, verified by a statement of truth. That assumption was incorrect. Mr Park is seeking to set aside a judgment because he says it was obtained by a fraud which has not been alleged or adjudicated upon, and indeed could not have been adjudicated upon because there was no trial.

63. The Judge was wrong in principle to characterise the fraud action as an abuse of process. This is not a case in which Mr Park took a deliberate decision not to investigate a suspected fraud or that he would not rely on the material which is now before the court. On his version of events, he had no reason to connect the document he signed late at night at the behest of Mr Smith with a Deed of Rectification which made him personally liable under the hire-purchase agreements, at least until after he saw Mr Smith's witness statement. Even then, he did not have the benefit of legal representation.
64. One of the reasons given by the Judge for disagreeing with District Judge Woosnam was his suggestion that the District Judge had taken into account an irrelevant factor, namely that Mr. Park was unrepresented during the first action. This was a misunderstanding by the Judge. The authorities he probably had in mind, referred to in *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119 at [18], and reviewed at greater length by the Court of Appeal in that case, [2016] EWCA Civ 177, deal with failures by litigants in person to comply with the CPR and the proper approach to relief from sanctions. The fact that they are unrepresented in that context is said to be relevant "only at the margins". It is obviously relevant to the quite different issue of whether a litigant had taken a deliberate decision not to advance a case in fraud, that the litigant did not have the benefit of legal advice at the time when he decided what substantive defence to advance in the first action.
65. There is no evidence that Mr Park knew that he could rely upon the circumstances in which the Deed was signed as a defence to the claim brought by CNH until very shortly before the application for relief from sanctions was heard. Unless and until that application succeeded, he could not amend his defence to raise an allegation of fraud: he was debarred from defending the claim. By the time he sought to rely on the material in support of the application to re-open the refusal of permission to appeal against the refusal of relief from sanctions, it was too late; the judgment had already been entered.
66. Turning to the two authorities on which the Judge relied, the decision of the New South Wales Court of Appeal in *Toubia* was among a number of authorities cited by Lord Kerr in *Takhar* in support of the proposition that there is no due diligence requirement. It appears to me that Handley JA's observation in *Toubia* that "where the action seeks the judicial rescission of a judgment, a plaintiff must prove that he and the court were deceived, and he can only do this by showing that he has discovered the truth since the trial", was taken out of context by the Judge (and by Linden J in *Elu v Floorweald*) and therefore wrongly interpreted as a statement of principle that a party cannot set aside the judgment for fraud on the basis of evidence (or facts) which he knew about before trial. Had it been a statement of such a principle, it would be contrary to the decision in *Takhar*, and in this jurisdiction the latter must prevail. However, that statement, when read in context, was simply a reflection of the principle referred to earlier in Handley JA's judgment (at [14]–[15]) that a person who has full knowledge of the truth when he acts upon a false representation cannot establish that he was deceived by it.

67. That principle was of fundamental importance in *Toubia*. The claimant insurers brought a statutory claim to recover damages paid to Mr Toubia under an earlier arbitration award in respect of injuries sustained in a motor accident, on the basis that he had dishonestly exaggerated the seriousness of those injuries. One of the issues was whether the insurers' state of knowledge at the time of the award precluded them from establishing that they were deceived by Mr Toubia's representations made in his claim, and repeated in his evidence. If so, they would have had no cause of action. It was held that although they had strong grounds for suspicion, the insurers did not have "full and complete" knowledge of the fraud at that time. That only emerged when they discovered he had been working as a labourer under an assumed name for six months.
68. In the present case, the alleged deception of Mr Park did not occur at the time when judgment was entered, but at the much earlier time when he signed the Deed. If he knew the truth when he signed it, as Mr Smith says he did, the Deed would be enforceable; but if he did not, his discovery of the truth *after* the Deed was signed would not preclude him from establishing that he was deceived. It would not matter for that purpose whether he discovered the truth before judgment or afterwards. Handley JA was not addressing that situation.
69. As Mr King pointed out, if Mrs Takhar had obtained the expert's report before she made her unsuccessful application to adduce expert evidence, then on CNH's argument, she would have been aware of the factual basis for alleging fraud, the evidence would not be "fresh" and her action to set aside the judgment would be an abuse of process, even though she could not have deployed the expert evidence at trial. That proposition needs only to be stated to demonstrate that it must be wrong. The decision in *Takhar* would have been exactly the same in those circumstances. There would be no conceivable policy reason for allowing the deception of the court to go unchallenged. The same is true here.
70. *Elu v Floorweald* is not directly in point. It concerned a very different case in which the allegations of fraud had been raised in the first set of proceedings and either abandoned or found in favour of the successful claimant at trial. Linden J found that there was a deliberate decision not to pursue the fraud allegations or deploy the evidence at trial; the defendant had also, for tactical reasons, deliberately failed to comply with directions from the court for the service of the evidence of a witness on which he now sought to rely. There was ample material for Linden J to find the second claim to be an abuse of process, consistently with Lord Sumption's reasoning in *Takhar*.
71. Linden J's observations about what is meant by "fresh evidence", particularly in the passage at [153] to [156], were unnecessary to his decision. As he himself recognised, they are difficult to reconcile with Lord Sumption's approach in *Takhar*. What Lord Sumption says is clear and in accordance with principle, and it should be assumed that he meant what he said. There is, with respect, no internal inconsistency in his judgment, and three other members of the Supreme Court agreed with it. Lord Sumption's judgment is not at odds with what Lord Kerr said. On the contrary, Lord Kerr took the view that there should be a discretion to refuse an application to set aside the judgment if the claimant took a deliberate decision not to investigate a suspected fraud. Lord Sumption held that it would be an abuse of process to bring the claim in those circumstances. Apart from the quotation from *Toubia*, which was specifically in the context of explaining why there is no "due diligence" obligation, Lord Kerr said nothing about what the position would be if the evidence of fraud was obtained prior to trial.

72. For those reasons, the case of *Elu* should be treated with some caution. It provides no justification for finding that Mr Park's knowledge of the circumstances in which he signed the Deed is a proper basis upon which to deny him the opportunity of seeking the judicial rescission of the default judgment on the grounds of fraud.

CONCLUSION

73. Mr Park's claim is not an abuse of process and it should not have been struck out. I would allow the appeal and restore the directions given by the District Judge.
74. CNH will now have to decide whether to continue to defend the claim, bearing in mind the false statements in its Particulars of Claim, repeated in its Defence to the fraud action, and the difficulties it may face in establishing that Mr Park is bound by the Deed of Rectification in any event.

Lord Justice Edis:

75. I agree.

Sir Geoffrey Vos, Master of the Rolls:

76. I also agree.