

Insights

IS CHALLENGING A JUDGMENT ALLEGEDLY PROCURED BY A PREVIOUSLY KNOWN FRAUD AN ABUSE OF PROCESS AND VEXATIOUS?

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SUMMARY

"Once a judgment is tainted by deceit it is fatally flawed" (Park v CNH Industrial Capital Europe Limited).

But can an application to set aside a default judgment allegedly procured by fraud, itself be an abuse of process, vexatious and a collateral attack on a previous judgment of the court?

We explore this question in the context of the claimant having previously known about the alleged fraud, in Henshaw J's judgment of 8 May 2025 in *(1) Federal Government of Nigeria; and (2) Attorney General of the Federal Republic of Nigeria v Williams*.

We act for the Federal Government of Nigeria (FGN) and the Attorney General of the Federal Republic of Nigeria (AG) in its claim to set aside a default judgment for USD15 million obtained by Dr Williams where just these issues have arisen.

THE FACTS

The facts are compelling:

1. Dr Williams had previously brought and discontinued proceedings against the Central Bank of Nigeria (CBN) alleging that he had been the victim of an undercover sting operation and seeking the "return" of some USD6.5 million. The CBN asserted that a number of the key documents relied on by Dr Williams were forgeries and that his claim was a fraudulent one. Dr Williams discontinued his claim against the CBN shortly before trial.
2. Immediately afterwards, Dr Williams issued the proceedings against the FGN and AG based on the same facts and documents and obtained default judgment against them.

3. On advice, the FGN and AG (unsuccessfully) sought to set aside the default judgment on the ground of service and state immunity (i.e. not fraud).
4. Following the instruction of this firm, the FGN and AG applied to set aside the default judgment on the basis that it was procured by fraud, alleging that Dr Williams knowingly made false representations and relied on fabricated documents.
5. In his application before Henshaw J, Dr Williams sought to strike out the FGN and AG's application on the basis that it was an abuse of process, vexatious and a collateral attack on a previous judgment of the court.

THE PRINCIPLES

Dr Williams argued that the allegations of fraud could have been made prior to the default judgment being obtained or at the very least when the FGN and AG initially sought to set aside the default judgment. He relied on the familiar principles in *Henderson v Henderson (1843) 3 Hare 100* that "*a litigant should bring forward his whole case*".

This principle was re-stated by the House of Lords in *Johnson v Gore Wood & Co [2002] UKHL 65* and explained as follows: "*The underlying public interest is the same: there should be finality in litigation and ... a party should not be vexed twice in the same matter*".

The FGN and AG relied on:

1. the principles stated by the Supreme Court in *Takhar v. Gracefield Developments Ltd [2019] UKSC 13*, where it was held (by a majority) that a party seeking to set aside a judgment on the ground of fraud is **not** required to show that the fraud could not with reasonable diligence have been uncovered in advance of the obtaining of the judgment. The action is abusive only if either:
 - a. fraud was actually alleged 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, or
 - b. there was a deliberate decision in the earlier proceedings not to allege a known fraud or not to investigate a suspected fraud.
2. the decision of the Court of Appeal in *Park v. CNH Industrial Capital Europe Ltd [2021] EWCA Civ 1766* that a party cannot take a deliberate decision not to rely on evidence of fraud unless, as well as being aware of that evidence, they know they can rely on it to plead fraud in answer to their opponent's case.

Crucially the FGN and AG argued that they equivocally had not taken a deliberate decision not to rely on the underlying merits/fraud as part of their initial set aside application: they had relied on the advice of their former lawyers to seek to set the default judgment aside on different bases and did not appreciate that there was any alternative basis on which to do so.

THE DECISION

In his judgment, Henshaw J dismissed Dr Williams' application and affirmed the principles laid down in *Takhar*. He held that the FGN and AG's claim, which he said "*is, on the face of it, a strong one*" was not abusive and should be allowed to continue.

The court did not accept Dr Williams' argument that *Takhar* was distinguishable on the basis that the fraud in that case had been established, or at least there was compelling evidence of it, whereas in the present case, according to Dr Williams the allegation of fraud was disputed. Henshaw J said that the fraud allegation in *Takhar* was an "*untested allegation*" and there was "*not a logical ground of distinction from the present case.*"

The court accepted the evidence before it that the FGN and AG did not take a deliberate decision in any earlier proceedings not to allege a known fraud or not to investigate a suspected fraud. The court considered that the evidence indicated that the FGN and AG were not actually aware of the possibility of defending the proceedings on the ground of fraud, no consideration was given to doing so, and therefore no decision was taken not to do so. The FGN and AG's former solicitors did not raise the possibility of a challenge based on fraud, but instead advised a defence on jurisdictional and/or technical grounds.

WHAT DOES THIS JUDGMENT MEAN FOR YOU?

In cases of alleged fraud, a party should not conclude that it is necessarily prevented from making its case on the basis of *Henderson*. It should consider further the *Takhar* principles.

The *Henderson* principle and the public policy of achieving finality in litigation are clearly of significant importance. However, parties should note, as this judgment emphasises, that it remains the case that the courts consider it paramount to ensure that parties are not denied the opportunity to bring allegations of fraud before the court at trial, even if the claimant was aware of the fraud allegations during the course of the earlier proceedings.

It is however important to remember that the courts have imposed stringent safeguards so as not to undermine the public policy consideration of finality in litigation: the party must not have deliberately decided not to allege a known fraud or not to investigate a suspected fraud.

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