CACV 66/2017
[2019] HKCA 777

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 66 OF 2017

(ON APPEAL FROM HCCL NO 2 OF 2016)

BETWEEN

MAYER CORPORATION DEVELOPMENT INTERNATIONAL LIMITED	Plaintiff
and	
ALLIANCE FINANCIAL INTELLIGENCE LIMITED	1st Defendant
CHAN WAI DUNE CHARLES (陳維端)	2nd Defendant
LAM CHIN CHUN (林前進)	3rd Defendant
BUMPER EAST LIMITED	4th Defendant
ASPIAL INVESTMENT LIMITED	5th Defendant

Before: Hon Kwan VP, Cheung JA, and L Chan J in Court

Date of Hearing: 28 November 2018

Dates of Further Submissions: 4 and 18 April 2019, 2 May 2019

Date of Judgment: 12 July 2019

J U D G M E N T

Hon Kwan VP:

1. This is the appeal of the plaintiff, Mayer Corporation Development International Limited ("Mayer" or "Mayer BVI")[1] against the decision of Mimmie Chan J on 7 February 2017, in which she ordered the plaintiff's claim against the 4th and 5th defendants, Bumper East Limited and Aspial Investment Limited ("B&A"), to be struck out for disclosing no reasonable cause of action and as an abuse of process. The plaintiff was ordered to pay the costs of B&A of this action (HCCL 2/2016) and of their application to strike out, including the costs of the plaintiff's application for leave to amend its statement of claim.

2. The background matters leading to the strike out application are of considerable importance and would need to be set out in some detail. I take them from the judge's decision, the judgment of Reyes J in the consolidated actions of HCA 238/2012 and HCCL 3/2012 ("the B&A Actions") on 16 July 2012, the judgment of the Court of Appeal in CACV 162/2012 on 24 May 2013 ([2013] 3 HKLRD 276), the judgment of the Court of Final Appeal in FACV 17/2013 on 17 July 2014 ((2014) 17 HKCFAR 401), and the decision of Anthony Chan J in HCA 686/2012 on 31 July 2015.

Background

(1) The B&A Actions

3. Mayer is a company incorporated in the British Virgin Islands. From June 2004 to June 2009, it was the registered owner of 200 million

[1] Mayer has obtained a winding-up order in the British Virgin Islands on 28 March 2017 on its own petition. The present appeal is pursued by the liquidators of Mayer.

shares in Mayer Holdings Limited ("Mayer HK"), a Cayman Islands company whose shares were listed in the Hong Kong Stock Exchange.

4. On 16 February 2012, B&A commenced HCA 238/2012 against Mayer, claiming to be the rightful owners of the 200 million Mayer HK shares represented by certificates No. 70 and 71. B&A asserted that they each acquired 100 million of such shares in January 2012 from a company called Capital Wealth Finance Co Ltd ("Capital Wealth") for good consideration — $10.5 million in the case of B and HK$10 million in the case of A. When B&A sought to become registered as shareholders by submitting stamped executed transfer forms in respect of the shares to Mayer HK's share registrar for processing, the share registrar refused to register the transfers as Mayer had in late 2011 reported the share certificates as having been lost and had applied for replacement certificates to be issued to it. Mayer denied it had entered into any agreement with Capital Wealth by which Capital Wealth was entitled to sell the 200 million shares to B&A.

5. On 13 March 2012, Mayer commenced HCCL 3/2012 against Alliance Financial Intelligence Ltd ("AFIL"), Chan Wai Dune Charles ("Charles Chan", the principal of CCIF CPA Ltd which later changed its name to Crowe Horwath (HK) CPA Ltd, the auditors of Mayer HK from 2004 to 2011), Lam Chin Chun ("Lam", the chief executive officer of Capital Wealth) and B&A, alleging that AFIL was guilty of a breach of its fiduciary duties owed to Mayer in respect of the certificates relating to the 200 million shares (which Mayer said had been deposited with AFIL as custodian), that Charles Chan and Lam dishonestly assisted AFIL in its breaches of fiduciary duty, and that B&A received the share certificates with notice of AFIL's breaches of fiduciary duty in relation to them (and

in consequence could not claim good title to them or the shares they represented).

6. On 22 March 2012, Reyes J ordered that HCA 238/2012 and HCCL 3/2012 should be consolidated. On the application of B&A for a speedy trial as the dispute involved a large and significant shareholding in a listed company, Reyes J gave directions on 5 April 2012 to enable the matter to be tried quickly, setting out a timetable leading to trial dates in early July 2012, some three months later.

7. There were other pending actions involving various combinations of parties that were the same as or related to the parties in the B&A Actions. One of them was HCA 686/2012, in which Capital Wealth sues Lai Yueh Hsing ("Lai", the sole director of Mayer), Tommy Chan (the company secretary of Mayer HK), Wang Ing Jye ("Wang", he gave evidence for Mayer in the B&A Actions) and others for repayment of various loans allegedly advanced to them, including a loan of $49.295 million odd to Lai and/or Tommy Chan and/or Wang and/or the 4th defendant in the proceedings, which was advanced by a combination of money and shares in Mayer HK. Included amongst the Mayer HK shares were some 47 million shares which featured in the B&A Actions.

8. When the trial of the B&A Actions commenced in July 2012, HCA 686/2012 was still in its very early stages, no defence having yet been filed. Reyes J was understandably anxious to avoid making findings unnecessarily in the B&A Actions which might impinge upon findings which other judges might be called upon to make in the other proceedings involving various combinations of parties as mentioned above. He indicated in the course of the trial that he proposed to adopt a "minimalist

approach", by determining and dealing with only those issues that were necessary for him to deal with in order to resolve the B&A Actions. This course was assented to by all the parties.

9. The key issue which Reyes J had to resolve was who was entitled to the 200 million Mayer HK shares represented by certificates No. 70 and 71. The cases of the parties as to this were irreconcilably different.

10. The case of all the defendants (AFIL, Charles Chan, Lam, and B&A) was that:

(1) In about the first half of 2009, Mayer and Lai wished to sell shares in Mayer HK, consisting of 300 million shares held by Mayer and 100 million shares held by Lai (through nominees), as they were in need of funds. With this in mind, Lai was introduced by Charles Chan to Lam.

(2) Following discussions between Lai and Lam, it was orally agreed between them by the beginning of June 2009 that:

(a) Lam (or Capital Wealth) was authorised to sell the 400 million shares for at least $100 million within one year, with any excess over that amount to be retained by Capital Wealth as a reward for its services;

(b) Lam (or Capital Wealth) was to deposit the sum of $50 million with AFIL as "promise money" (this being paid on 3 June 2009), while Mayer was to deposit

200 million of its Mayer HK shares with AFIL (this being done on 19 June 2009);

(c) Lam was to locate buyers for Mayer's remaining 100 million shares in Mayer HK through securities firms in Hong Kong (which it is said Lam did by 23 or 24 June 2009, when a buyer was sourced through GF Securities Ltd for 100 million Mayer HK shares at a total price of $55 million);

(d) Lai's 100 million Mayer HK shares would be placed with Lam for Lam to look for purchasers for them (but in the event, Lai only delivered to Lam, through Tommy Chan, 99 million shares represented by seven share certificates in the names of various nominees on 19 June 2009; although Tommy Chan told Lam that a share certificate for the remaining 1 million shares would be delivered after subdivision of another certificate held by Lai, this never happened).

(3) The agreement in (2) was referred to in the judgments of Reyes J and the Court of Appeal as "the 1st Oral Agreement".

(4) Because Mayer and Lai were in need of funds, Lai sought the release of the "promise money" to them on or shortly before 24 June 2009. As arrangements had by then been made for the sale of 100 million Mayer HK shares for $55 million (a sale which was completed on the market on 25 June 2009), Lam suggested that a further $45 million should be released out of the promise money. Following discussions between

Lam and Lai (through Charles Chan as an intermediary), it was agreed on 24 June 2009 that:

(a) $45 million out of the "promise money" would be released by AFIL to Lai/Mayer, subject to the deduction therefrom of AFIL's service charge of $2.5 million (in the event, a total of $42.5 million was paid to various individuals on 24 and 25 June 2009, in accordance with a list provided by Flora Kao, Lai's personal assistant);

(b) the share certificates No. 70 and 71 would be released to Lam for him to dispose of as he thought fit;

(c) the remaining $5 million of the "promise money" would be released back to Lam/Capital Wealth.

(5) This later agreement in (4) was referred to in the judgments as the "2nd Oral Agreement".

11. It should be noted that the underlying events giving rise to the B&A Actions occurred in April to June 2009 and did not involve B&A, who, until about January 2012, had no knowledge of the circumstances in which Capital Wealth through Lam came to be in possession of the 200 million shares in Mayer HK represented by certificates No. 70 and 71.

12. On the other hand, the case of Mayer was that:

(1) Lam was introduced to Lai by Charles Chan, who suggested that Mayer HK could benefit from Lam's experience and

ability to introduce business opportunities to it so as to improve its financial performance. Following on this introduction, Lam did in fact bring investments in Vietnam (which formed the subject matter of other litigation) and Argentina to the attention of Mayer HK.

(2) Charles Chan also suggested that Mayer should deposit 200 million of its shares in Mayer HK with AFIL, on the basis that this would be convenient if Mayer should subsequently decide to dispose of such shareholding, or part of it. It was for this purpose (and not the purposes of the alleged 1st Oral Agreement) that Mayer deposited the share certificates with AFIL, under the terms of a written Share Custodian Agreement between Mayer and AFIL, pursuant to which the share certificates could only be released or disposed of on the written resolution of Mayer, and the proceeds of sale thereof were to be paid to Mayer.

(3) Mayer did not, as at June 2009, wish to dispose of the whole of its 300 million shares in Mayer HK. Rather, it only had in mind to dispose of 100 million such shares if a buyer could be found at a suitable price — in the event, it was decided that 100 million shares should be sold at a price of $55 million odd (as evidenced by a resolution of Mayer's parent company in Taiwan).

(4) There was no arrangement to sell 100 million shares in Mayer HK belonging to Lai personally.

(5) Mayer and Lai had not entered into either the 1st Oral Agreement or the 2nd Oral Agreement with Lam/Capital

Wealth, and accordingly, AFIL should not have released the share certificates relating to the 200 million shares to Lam, who had no right to dispose of them to B&A.

13. In relation to the 99 million Mayer HK shares delivered on 19 June 2009, Mayer's case was that these did not belong to Lai. Instead, it was said that these 99 million shares were deposited by Wang with AFIL (having been delivered to the managing director of AFIL, Ku Siu Fun Alex ("Ku") by Wang), and that they were held by AFIL under the terms of a Share Custodian Agreement between Wang and AFIL ("the 2nd SCA"), the terms of which were broadly identical to those of the Share Custodian Agreement between Mayer and AFIL, for the purpose of being sold by Charles Chan on behalf of investors whom Wang represented, at a price of not less than $1 per share. The payment by AFIL of $42.5 million in accordance with the instruction sheet provided by Flora Kao was said to be an advance payment by Charles Chan of the anticipated sale proceeds of such shares.

14. Mayer made no reference to the 2nd SCA in its pleadings. The 2nd SCA first came to light when a copy of it was exhibited to an affirmation filed on behalf of Mayer on 5 April 2012. On 10 May 2012, the solicitors acting for AFIL and Charles Chan wrote to Mayer's solicitors stating that Ku (who had purportedly signed this document) "has doubts as to the authenticity" of that exhibit and requested for inspection of the original. Mayer's solicitors responded on 11 May 2012 stating that they were taking instructions. On 18 May 2012, Mayer served its list of documents which included the 2nd SCA. On 23 May 2012, the solicitors for AFIL and Charles Chan again requested inspection of the original of the 2nd SCA and gave notice that their clients "do not admit the authenticity"

of the 2nd SCA and, pursuant to Order 27 rule 4 of the Rules of the High Court, would require Mayer to produce the original document as well as to prove its authenticity at trial. Mayer's solicitors sent a reply on 11 June 2012 that they were taking instructions as regards the 2nd SCA. On 11 and 18 June 2012, Lam, AFIL and Charles Chan filed their respective notices under Order 27 rule 4(2) not admitting the authenticity of the 2nd SCA.

15. The trial took place on 3 to 6 July 2012. On 4 July 2012, while giving evidence for Mayer, Wang produced for the first time the original of the 2nd SCA. Mayer did not adduce any expert evidence to deal with the challenge to the authenticity of the 2nd SCA.

16. Reyes J gave judgment on 16 July 2012. He found in favour of the defendants, finding that the 1st and 2nd Oral Agreements had indeed been made, and rejecting the case put forward by Mayer. As regards the 2nd SCA, the judge concluded that he "[could not] regard that Agreement as authentic" and that it was "on the balance of probability … a fake".

17. In coming to these conclusions, the judge approached the matter by considering seven issues. These were:

(1) Did Mayer enter into an agreement with Capital Wealth in or about May/June 2009 relating to the sale of 300 million shares held by Mayer in Mayer HK and (if so) what were the terms of that agreement?

The judge concluded that such an agreement had indeed been entered into and was on the terms of the 1st Oral Agreement.

(2) What were the terms of the Share Custodian Agreement entered into on 19 June 2009 between AFIL and Mayer in respect of the latter's 200 million Mayer HK shares?

The judge dealt with this issue by concluding that the terms of that agreement were as stated in the agreement, but said that such terms were not inconsistent with the 1st Oral Agreement having been made.

(3) Did Wang enter into (a) the 2nd SCA on 19 June 2009 for 99 million Mayer HK shares and (b) an agreement with Charles Chan to sell those shares on behalf of seven individual investors?

As to this issue, the judge rejected the story advanced by Wang and held that no such Share Custodian Agreement had been entered into, and no such agreement for the sale of the 99 million shares had been made.

(4) Was the Share Custodian Agreement between Mayer and AFIL superseded by a further agreement among Capital Wealth, Mayer and AFIL on 24 June 2009 relating to the 200 million Mayer HK shares and (if so) what were the terms of that further agreement?

On these questions, the judge concluded that the Share Custodian Agreement between Mayer and AFIL was indeed superseded by a further agreement between the entities referred to, namely the 2nd Oral Agreement.

(5) Was there a breach of the Share Custodian Agreement and/or breach of trust by AFIL in releasing certificates No. 70 and 71 to Capital Wealth on 24 June 2009?

In the light of his conclusions on the first four questions, the judge concluded that there had not been any such breaches.

(6) If there was a breach of trust by the release of certificates No. 70 and 71 by AFIL to Capital Wealth on 24 June 2009, did Charles Chan and Lam dishonestly assist in the breach?

Having regard to his conclusion in respect of the previous issue, the judge also answered this question in the negative.

(7) Did B&A receive certificates No. 70 and 71 with actual or constructive knowledge of a breach of trust by AFIL or Lam?

Again, in the light of his determination in relation to the preceding two issues, the judge answered this question in the negative.

(2) CACV 162/2012

18. Mayer lodged an appeal (CACV 162/2012) against the judgment of Reyes J in the B&A Actions.

19. The judgment of Reyes was handed down on 16 July 2012. In less than a month, Mayer obtained a "preliminary report" dated 14 August 2012 from a handwriting expert, Robert W Radley, on the questioned signatures of Ku in the 2nd SCA. Mr Radley stated that the production of eleven comparison signatures "is not regarded as adequate" to show the full range of writing range variation of Ku and considered it

"highly desirable to see a much larger volume of preferably original signatures of Mr Ku for the comparison process so the matter may be taken further". Nevertheless, he was able to opine as follows in the "Summary of Opinion":

> "The two questioned signatures on the [2nd SCA] provide strong evidence to support the proposition that Mr Ku wrote these two signatures and I consider that the possibility that these are simulations (freehand copies of his general signature styles) is unlikely."[2]

20. On 21 August 2012, Mayer's solicitors as instructed by Wang engaged an institute in Mainland China 中國法醫學會司法鑒定中心 to provide another opinion on the questioned signatures of Ku in the 2nd SCA. The report issued on 7 September 2012 opined that the questioned signatures were written by the same person who signed the specimen signatures provided.

21. The appeal was scheduled to be heard on 14 to 16 May 2013. A month before the hearing, on 12 April 2013, Mayer filed an application to the Court of Appeal to adduce the two expert reports it had obtained in August and September 2012. This was dealt with on the first day of the appeal. The court applied the conditions in *Ladd v Marshall* [1954] 1 WLR 1489. It took the view that the further evidence could have been obtained for use at the trial with reasonable diligence, noting that it was clear from the correspondence that before trial, there was already an issue between the parties as to the authenticity of the 2nd SCA and the potential need for Mayer to adduce expert evidence to support the authenticity of Ku's purported signature would have been self-evident before trial. And

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[2] In another part of this report, Mr Radley wrote as follows: "34. … bearing in mind the poor volume of comparison signatures of Mr Ku available for comparison, I am of the opinion that these signatures, taken collectively, provide moderate, approaching strong, evidence that Mr Ku is the writer of these signatures. 35. The possibility of this group of signatures … being a group of simulations must be regarded as a reasonably unlikely scenario."

although the original of the 2nd SCA was in the possession of Wang who was apparently reluctant to part with it to Mayer, there was no good reason why steps were not taken to obtain a handwriting expert's report without necessarily requiring Wang to surrender the document to Mayer, for example by requesting Wang to obtain the report himself upon an indemnity of Mayer[3].

22. As for the other two conditions in *Ladd v Marshall*, the court noted that the report of Mr Radley was expressed to be a preliminary report and in its terms was "somewhat qualified". Further, the lateness of the application had clearly deprived the respondent parties of any opportunity to consult or obtain their own expert handwriting evidence and it is axiomatic that experts may disagree. Given the necessarily inconclusive nature of the evidence, the court was doubtful if the other two conditions were satisfied. The patent lateness of the application and the lack of satisfactory explanation for it was a significant factor in the exercise of the discretion against admission of the further evidence on appeal[4].

23. The appeal proceeded without reference to such further evidence. Judgment was given on 24 May 2013. The Court of Appeal held there was no basis to overturn Reyes J's factual findings and the conclusion he reached. The first four issues considered by the judge provided the basis on which he could (as he did) resolve the question of which side was to be believed. The remaining issues provided the framework against which he could decide whether or not particular defendants were liable to Mayer on the bases pleaded by it. Barma JA (with

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3 The expert report provided by the Mainland institute in September 2012 was obtained by Mayer's solicitors on the instructions of Wang.

4 See separate judgment of the Court of Appeal given by Fok JA (as he then was) on 14 May 2013, §§6 to 8

whose judgment Fok JA and Lunn JA agreed) had this to say regarding the third issue:

> "32. The third question was directed towards assisting the Judge to come to a conclusion as to both the 1st and 2nd Oral Agreements — if [the 2nd SCA] were genuine, and Wang had indeed deposited the 99 million shares for the purpose of having them sold on behalf of his clients by Charles Chan, this would go a long way in negativing the existence of the 1st Oral Agreement (since there would not be any shares belonging to Lai supplied for sale, contrary to the case being advanced that Lam had agreed to procure the sale of a total of 400 million Mayer HK shares for not less than HK$100 million). It would also militate against the existence of the 2nd Oral Agreement, for the payment of the HK$42.5 million would then be referable to the shares to be sold for Wang's clients, and not to the balance payable to Mayer BVI/Lai in respect of the 400 million shares owned by them (300 million and 100 million respectively) which they were to receive earlier than intended under the 1st Oral Agreement."

24. Barma JA dealt with at some length the submissions whether Reyes J should have accepted Wang's evidence and went over the seven factors identified by the judge which were indicators why Wang's evidence should not be accepted[5]. Barma JA regarded the seven factors as compelling reasons to "harbour grave doubt" about the veracity of the account put forward by Wang. He concluded that for the reasons explained by Reyes J, there was ample evidence on the basis of which the judge was justified in making the findings and disposing of the proceedings as he did. Mayer's appeal was dismissed with costs.

(3) FACV 17/2013

25. Mayer appealed against the judgment of the Court of Appeal to the Court of Final Appeal[6]. There was no appeal against the decision of the Court of Appeal dismissing the application to adduce new evidence.

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5 Judgment of Reyes J, §§147 to 166

In dismissing the appeal on 17 July 2014, Tang PJ, giving the judgment of the court, said Mayer's appeal "represents yet again the worst excesses caused by the as of right route of appeal" under section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance, Cap 484, and "this is as strong a case on unassailable concurrent findings as one could imagine". Mayer was ordered to pay costs on an indemnity basis.

26. Regarding the attack on the finding that the 2nd SCA was not an authentic document, Tang PJ said in §17:

> "The burden was on Capital Wealth to prove the 1st and 2nd oral agreements, on a balance of probabilities. Insofar as Mayer BVI relied on the alleged 99 million shares agreement, it also had to establish it on a balance of probabilities. The fact that, in the process, Wang produced a document the authenticity of which was disputed made no difference. The burden was on Mayer BVI to prove that the document was authentic, again, on a balance of probabilities. That Mayer BVI failed to do. The judge accepted the evidence of Ku who denied having signed the disputed Custodial Agreement [i.e. the 2nd SCA]. Reyes J accepted the evidence of Charles Chan on the events of 24 June 2009 which were irreconcilable with the existence of a separate agreement with Wang. Moreover, he regarded the evidence of Wang as unreliable and incredible. After a careful examination of the totality of the evidence, Reyes J was satisfied that both the 1st and 2nd agreements were made. ..."

(4) HCA 686/2012

27. This action was commenced by Capital Wealth against Lai, Tommy Chan, Wang and two others on 27 April 2012 for repayment of various loans. It was on 28 February 2014 that Lai and Tommy Chan filed an application to amend their defence and to adduce handwriting expert report on the 2nd SCA. On 23 October 2014, Deputy High Court Judge Seagroatt gave leave to Lai and Tommy Chan to amend their defence and to adduce expert report on the authenticity of the 2nd SCA.

28. To give effect to the order of 23 October 2014, Lai and Tommy Chan filed a third party discovery application on 26 January 2015, against Ku and AFIL for production of documents bearing the original signatures of Ku for inspection by handwriting expert in connection with the 2nd SCA. Capital Wealth countered with a summons on 26 February 2015 to strike out parts of the defence of Lai and Tommy Chan and of the defence of Wang relating to an alleged oral agreement between Wang and Charles Chan in respect of 99 million Mayer HK shares deposited by Wang with AFIL and the existence of the 2nd SCA for abuse of process, on the ground that this was re-litigation of the same issues which had been determined in the B&A Actions and affirmed in CACV 162/2012 and FACV 17/2013.

29. Anthony Chan J heard both summonses. On 31 July 2105, he declined to strike out those parts of the pleadings in question holding that there was no issue estoppel as Lai, Tommy Chan and Wang, who all gave evidence for Mayer in the B&A Actions, were not parties to that action, nor were they privies of Mayer. He held further that the extended doctrine of *res judicata*[7] did not apply. The judge was inclined to the view that the handwriting evidence would be material to the determination of the disputes embodied in issue 3 in the B&A Actions, thereby negating the proposition that the re-litigation of those issues in HCA 686/2012 will be based on substantially the same evidence[8]. Further, the matters concerning 47 million shares represented by the certificates in Wang's possession, which was an important link in the disputes concerning issue 3, were not fully explored in the B&A Actions[9]. If Lai, Tommy Chan and

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7 The principles of which were summarised by Lam VP in *Secretary for Justice v FTCW* [2014] 2 HKC 132 at §97.

8 Judgment of Anthony Chan J §§63 to 66

9 See the judgment in CACV 162/2013 §42

Wang were barred from contesting issue 3 in HCA 686/2012, they would have a justified grievance.

30. As to the point that the handwriting evidence could have been adduced at the trial of the B&A Actions with reasonable diligence, the judge took the view that Mayer's lack of reasonable diligence and the judgment of the Court of Appeal in refusing leave to adduce further evidence on appeal should not impact on the position of Lai and Tommy Chan as litigants in HCA 686/2012, as it cannot be right to bind Lai and Tommy Chan to that judgment of the Court of Appeal regardless of whether they were privies of Mayer.

31. Having dismissed the strike out summons, the judge granted the discovery summons of Lai and Tommy Chan against Ku and AFIL.

(5) The present action: HCCL 2/2016

32. On 28 January 2016, Mayer brought the present action against all the defendants in the B&A Actions, seeking a declaration that the judgments in the B&A Actions have been obtained by fraud and accordingly are void and of no legal effect. The reliefs sought include an order that those judgments be set aside and the defendants take all steps required to restore Mayer to the position it would have been in had no steps been taken pursuant to the judgments.

33. Central to its claim that the judgments were obtained by fraud was further evidence Mayer obtained in 2015 and 2016, which is alleged would demonstrate that AFIL, Charles Chan and Lam [10] (the 1st to

[10] Mayer sought leave to amend its statement of claim to allege knowledge of fraud only in respect of the 1st to 3rd defendants, not all five defendants as originally pleaded.

3rd defendants) well knew at all material times that their case as presented to the courts in the B&A Actions was dishonest and untrue, and that perjured evidence was called and relied upon by the 1st to 3rd defendants at the trial before Reyes J and was adopted by B&A (the 4th and 5th defendants). In particular, the further evidence supports the authenticity of the 2nd SCA, contrary to Ku's evidence that he never signed the 2nd SCA.

34. The further evidence consists of: (1) handwriting experts' reports (being an expert report prepared by Mr Radley dated 4 March 2016 and an examination report of another expert Mr S C Leung dated 14 March 2016); and (2) the evidence of seven Taiwan investors who had asked Wang to sell their Mayer HK shares (totalling 99 million) in Hong Kong as maintained by Mayer in the B&A Actions (this evidence was said to be discovered by Mayer through its solicitors around July 2015).

35. On 18 July 2016, B&A issued the present summons to strike out the statement of claim on the grounds that it discloses no reasonable cause of action against them, and/or Mayer is estopped, and/or it is an abuse of the process of the court. Mayer issued a summons on 21 November 2016 for leave to amend the statement of claim to plead knowledge of fraud only in respect of the 1st to 3rd defendants and that such fraud was adopted by B&A.

The judgment on the strike out summons

36. The judge held that neither the statement of claim nor the proposed amended statement of claim disclosed a reasonable cause of

action against B&A, and should be struck out on that basis, and as an abuse of process[11]. Her reasons may be summarised as follows:

(1) There is no claim made in this action that B&A gave perjured evidence in the B&A Actions in relation to the 1st Oral Agreement, the 2nd Oral Agreement or the 2nd SCA. Mayer sought leave to amend the statement of claim to plead that the perjured evidence and fraud of the 1st to 3rd defendants had been adopted by B&A at the trial of the B&A Actions.

(2) "The fraud or perjury must be that of the party himself, or at least be suborned by or knowingly relied on by that party." (*Odyssey Re (London) Ltd & Anr v OIC Run-Off Ltd* [2000] EWCA Civ 71, section XII, p. 289, per Buxton LJ, following the "fraud of a party" rule as held in the unreported decision of the English Court of Appeal in *Boswell v Coaks* (5 November 1892)).[12]

(3) It is a question of fact and degree, depending on the facts and circumstances of the case, whether the perjured evidence of a witness can be said to have been adopted by the party in the proceedings, to be treated as the evidence of the party itself, see the *Odyssey* case and *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9[13].

(4) B&A were not related to the other defendants in any way apart from being joined in the B&A Actions. They had separately and independently purchased the shares from Capital Wealth and had been found by Reyes J to be genuine buyers with no

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11 Decision of M Chan J in HCCL 2/2016 ("Decision"), §25
12 Decision, §21
13 Decision, §18

notice of any breach of trust. They had made clear in their defence in the B&A Actions the facts and matters relating to the alleged Share Custodian Agreement between Mayer and AFIL, and the alleged breach of such agreement by AFIL's wrongful release of the share certificates to B&A, were not matters within their knowledge[14].

(5) In the circumstances, it is insufficient that B&A's counsel had, at the trial of the B&A Actions, adopted without challenge the evidence in chief of the other defendants as to the facts and circumstances before B&A's acquisition of the shares, and made submissions that the evidence adduced by Mayer's witnesses should be rejected and the evidence of the other defendants should be preferred[15].

(6) There is no pleading in the statement of claim, and no evidence to suggest, at any time, that B&A had knowledge that the factual evidence presented by the other defendants in the B&A Actions was untrue. There is absence of pleading as to B&A's "knowing adoption" of the false evidence as to the facts occurring before their purchase of the shares[16]. B&A cannot be said to have "knowingly adopted" the fraudulent case of the other defendants, "with knowledge" that the case presented by them was dishonest and untrue, or to have "knowingly consented to and relied on" the presentation of the perjured evidence of the other defendants[17].

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14 Decision, §22
15 Decision, §24
16 Decision, §24
17 Decision, §§22, 67

37. On the footing that she was wrong in holding there was no adoption by B&A of the fraud of the other defendants, the judge went on to consider the further evidence sought to be relied on in the present action. The judge did not consider that the two expert reports obtained in March 2016 or the evidence of seven Taiwan investors in July 2015 "can properly be said to be new evidence which was only obtained after the date of the Judgments [in the B&A Actions]."[18] The reports in 2016 (which relied on further control signatures obtained by Mayer from Ku after the judgments in the B&A Actions) are "simply additional evidence to improve and further elaborate on the earlier reports and expert evidence already available to Mayer in 2012", and which was held inadmissible by the Court of Appeal[19]. As for the investors' evidence (the effect of which is to show that they had independently subscribed for the shares and there was never any 1st Oral Agreement or 2nd Oral Agreement), Reyes J had heard evidence from Wang as regards these investors and analysed thoroughly this aspect of the case in his judgment. The further evidence from the investors is "not new, nor evidence which was hitherto unknown to Mayer", and is again "further details of the evidence which had been presented to and considered by [Reyes J]"[20].

38. The judge concluded there is no new evidence properly so called which can justify Mayer's attempt to reopen the judgments in the B&A Actions. Mayer is simply seeking to re-argue the entire case concerning the probabilities of the 1st Oral Agreement, the 2nd Oral Agreement and the 2nd SCA and this is an abuse of process[21].

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18 Decision, §30
19 Decision, §34
20 Decision, §37
21 Decision, §§38, 68

39. In the event she was wrong in finding that there is no new evidence discovered since the trial of the B&A Actions, the judge dealt with the question if such evidence can be considered in an action to set aside the judgments in those actions for fraud. She rejected the submission of Mayer that the reasonable diligence requirement is only applicable where a party seeks to adduce fresh evidence on appeal in circumstances concerning fraud, and not where a party brings a new action to set aside a judgment on grounds that it was obtained by fraud[22]. She held that Mayer has failed to show that the further evidence could not have been produced with reasonable diligence before the trial or even the appeal[23].

40. Leaving aside the question of reasonable diligence, the new evidence sought to be relied on must be sufficiently strong, material or decisive, to justify the exceptional course of setting aside a judgment as allegedly obtained by fraud. The judge noted that in finding the existence of the 1st Oral Agreement and 2nd Oral Agreement and dismissing the existence of the 2nd SCA, Reyes J took into account many factors in the balancing of the probabilities and improbabilities of the case, and it was upon consideration and review of the entirety of the evidence from different witnesses, including the evidence of Ku as to the disputed signatures on the 2nd SCA, that he reached his conclusion[24]. Neither the 2016 reports nor the investors' evidence could have entirely changed the way in which Reyes J or the Court of Appeal approached and came to their decision (*Royal Bank of Scotland plc v Highland Financial Partners LP & Ors* [2013] EWCA Civ 328 at §106, per Aikens LJ). In particular, the investors' evidence cannot show a reasonable probability of fraud to

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22 Decision, §§42, 47, 52
23 Decision, §§41, 53, 54, 69
24 Decision, §§57 to 65

invalidate the judgments. The judge held that the materiality requirement is not satisfied[25].

41. For all the above reasons, the judge held that the further evidence does not by nature justify the exceptional departure from the general rule that the judgments in the B&A Actions are binding and conclusive and should not be reopened from argument. She therefore struck out the present action for disclosing no reasonable cause of action, and as an abuse of process[26].

This appeal

42. Four broad issues were raised by Mayer on appeal.

43. The first relates to the question whether there was adoption of the fraud by B&A. The contention is that the judge erred in law in holding that the fraud or perjury must have been "suborned or knowingly relied on" by the innocent party ("the adoption of fraud issue"). It is sufficient to fall within the "fraud of a party" rule even if the innocent party was unaware of or was not complicit in the perjury, if the innocent party relies on and adopts the evidence of the fraudulent party and the two share a "common foe" against which they have a "completely intermixed cause", citing *Cinpres Gas* at §§60, 106 to 107.

44. The second is whether the further evidence could properly be said to be new evidence ("the new evidence issue"). It was contended there is no requirement that the evidence in question must have been more than simply "additional evidence" elaborating on existing evidence.

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25 Decision, §§66, 68
26 Decision, §§70, 71

45. The third relates to the reasonable diligence requirement ("the reasonable diligence requirement issue"). The contention is that the judge erred in law in holding that there was such a requirement, citing *Toubia v Schwenke* (2002) 54 NSWLR 46 at §§37 and 41, Handley JA; *Canada v Granitile Inc* (2008) 302 DLR (4th) 40 at §299, Lederer J; *Takhar v Gracefield* [2015] EWHC 1276 (Ch) at §37, Newey J; *Clone v Players* (2018) 92 ALJR 399 and *Spencer Bower and Handley: Res Judicata* (4th ed, 2009) at §17.05[27]. The judge was wrong to hold there was no material distinction between fresh evidence being sought to be introduced on appeal in circumstances concerning fraud, and fresh evidence being sought to be introduced in a new action to set aside a judgment for fraud. And even if the reasonable diligence requirement applies, the judge erred in that she should have applied it "flexibly" so as to avoid a miscarriage of justice, by considering the strength of the case in fraud and its relevance.

46. The fourth relates to the materiality of the further evidence ("the materiality issue"). It was argued that the judge erred in holding that neither the 2016 reports nor the investors' evidence could have entirely changed the way in which Reyes J or the Court of Appeal approached and came to their decision, and that the further evidence would not have an important influence on the result of the judgments.

47. I will consider first the adoption of fraud issue, followed by the reasonable diligence requirement issue. The new evidence issue and the materiality issue are inter-related and are best considered together. They will be dealt with last.

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[27] The court was informed during the hearing in November 2018 that the UK Supreme Court heard argument in *Takhar v Gracefield* on 10 October 2018 and had reserved judgment. After the Supreme Court handed down judgment on 20 March 2019, we directed the parties to lodge further submissions on the implications of this decision.

The adoption of fraud issue

48. At the trial of the B&A Actions, B&A had relied on and adopted the evidence of all of the witness statements made by the witnesses of the other defendants, including Ku's evidence that he did not sign the 2nd SCA. Their trial counsel Mr John Litton (who also appeared for them in the strike out application of the present action and on appeal[28]) had made closing submissions before Reyes J to the effect that Ku's evidence should be preferred and that Wang had lied to the court in saying that Ku had entered into and signed the 2nd SCA.

49. Mr Charles Hollander[29] on behalf of Mayer repeated his submission before the judge that as B&A had adopted the evidence of the other defendants[30] throughout the trial and all these defendants shared a "common foe" and B&A could not succeed without relying on and adopting the case of the other defendants, this is sufficient, at least for the purpose of resisting a striking out application, for Mayer to succeed in showing that the fraud was not that of a mere witness. Mayer was not required to plead a case that B&A had "knowingly adopted" the fraudulent case of the other defendants, "with knowledge" that the case presented by them was dishonest and untrue.

50. Mr Hollander relied strongly on *Cinpres Gas*. He criticised the judge as confusing the issue of attribution (which was the subject of the majority holding of Nourse LJ and Brooke LJ in the *Odyssey* case) with the issue of adoption and contended that she had misunderstood *Cinpres Gas*. He submitted that the present case is on all fours with *Cinpres Gas* and

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28 With Mr Chow Ho Kiu

29 With Mr Justin Ho

30 Strictly speaking, it was adopting the evidence of Ku, who was not a party. Ku was called by AFIL, which was a party.

unless the court is satisfied that *Cinpres Gas* was wrongly decided, this action should not be struck out.

51. In *Cinpres Gas*, Jacob LJ (giving the judgment of the English Court of Appeal) rejected the argument based on the *Odyssey* case that the evidence of the fraudster (Hendry) was to be treated as the evidence of Ladney (in whose favour the impugned judgment was entered but was not shown to have been complicit in Hendry's perjury) by the principles of attribution that Hendry should be regarded as a vital part of the litigation team such that his evidence should be attributed to Ladney ("the team litigation point", see §15(4), considered at §§61 to 65). Nevertheless, the court set aside the judgment on these two bases. The first was formulated in this question: does the fact that Hendry was actually a party to the first proceedings mean that his co-party Ladney should be treated likewise? ("Hendry a party point", see §15(7), considered at §§105 to 107). The second question was: should the false evidence of Hendry be treated as the evidence of Melea (Ladney's assignee) because it is also a general representation to the world on Melea's behalf, namely, that it is only via Hendry that Melea have title to the patent concerned? ("the title point" see §15(8), considered at §§108 to 119)[31]. Both questions were answered in the affirmative. The second basis is not relevant for present purpose.

52. In holding that Hendry was more than a "mere witness" and his perjury should be regarded as that also of Ladney, Jacob LJ said as follows:

> "**106** Quite apart from the "litigation team" point (which we have rejected) we have come to the conclusion that Hendry's evidence the first time round should be regarded as that also of Ladney and that Hendry's fraud should be treated as also that of Ladney. Both Hendry and Ladney were actually parties to the

[31] It is pertinent to note that the "litigation team point" merges with the "Hendry a party point", and also to some extent with the "title point", see §65.

> first proceedings. Hendry was seeking to justify his claim to be the inventor, to be named on the patent as such and to have had the right to have assigned the property in the invention to Ladney. Ladney was claiming to be the owner of the right to apply for the patent by virtue of assignment from Hendry. They had a common foe, Cinpres, and made common, and completely intermixed cause against it. One could not succeed without the other. True it is that Ladney's claim was much the more valuable commercially, but we do not see that value has anything to do with it. Besides even Hendry had a commercial interest in the patent belonging to Ladney for he would be entitled to royalties if that were so. Not so if the patent belonged to Cinpres.
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> **107** Putting it another way it would be wrong to say that Hendry was a "mere witness" in the first proceedings. He was more than merely a witness for Ladney – he was Ladney's "comrade in arms". His fraud by way of perjury was being adopted by Ladney and should be regarded as Ladney's. Hendry himself clearly could not resist the earlier judgment being set aside on the grounds of his fraud. Given that, the whole judgment is unravelled and should be set aside."

53. *Cinpres Gas* is the only case cited to us in which it was held that the fraud of a party may be treated as adopted by another party notwithstanding that other party did not do so knowingly[32]. Mr Litton said it is an outlier. The other cases cited (the *Odyssey* case; the *Highland* case) are cases of attribution, in which the perjured evidence given by an individual was treated as the evidence of a party that was a company. It was held by a majority in the *Odyssey* case that for cases of attribution, there are circumstances in which it is possible for the perjured evidence to be treated as that of a company, "even where it is neither procured or knowingly adopted by the company nor given by someone who is part of the company's directing mind and will or a person to whom the conduct of the litigation has been delegated" (per Nourse LJ, at p 138), as demonstrated by the "unusual" circumstances in the *Odyssey* case itself (p 139).

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[32] *Cinpres Gas* was cited without question in *Phipson on Evidence* (19th ed) at §43-08.

54. I have some difficulty in reconciling the holding in *Cinpres Gas* on the adoption of the fraud of one party by another party without any knowledge of the fraud with the "fraud of a party" rule.

55. In *Boswell v Coaks*, the losing party in a previous action sought to have the verdict against him set aside because of the fraud on the part of one of the opposite party, the defendant Coaks. The judgment of the Court of Appeal (Lindley, Bowen and A L Smith LJJ)[33] stated as follows:

> "As regards the point taken … for the other Defendants viz that the judgment can only be set aside if at all against those who procured it by fraud and it is not suggested that the other Defendants had anything to do with the fraud alleged this point appears to us to be fatal as regards all the Defendants except Coaks and we think it would be fatal to any further action to set aside the sale of the whole."

56. Buxton JL remarked in the *Odyssey* case (p 283 to 284) it seems clear that the Court of Appeal regarded the failure to allege fraud or procurement of fraud against the defendants other than Coaks as fatal to the case against them, whatever was proved against Coaks himself.

57. In the *Odyssey* case, Langley J held that for the perjured evidence to be attributed to the company, the law required at least one of those responsible for the company or the conduct of the litigation on its behalf should have procured the witness to commit perjury, or at the least relied on his evidence to deceive the court in the knowledge that it was perjured. On appeal, the court was unanimous that nothing less than the fraud (or perjury) of a party itself is sufficient to displace the general rule that final judgments should be accorded finality (i.e. upholding the "fraud of a party" rule). The members of the court differed on the question if the

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[33] A transcript of the judgment was taken from the House of Lords papers and the relevant part was quoted by Buxton LJ in the *Odyssey* case at p 283.

evidence of the witness (Mr Sage) should be treated as that of company (Orion), applying the rules of attribution in company law. As mentioned earlier, the majority answered the question in the affirmative. Nourse LJ (with whose analysis Brooke LJ agreed) adopted the approach of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and stated that a special rule of attribution should be fashioned for the substantive rule of judge made law in this situation. The outcome was that Mr Sage's knowledge of the fraud was attributed to Orion.

58. Here, the judge sought to reconcile *Cinpres Gas* with the "fraud of a party" rule on the premise that "it is a question of fact and degree, depending on the facts and circumstances of the case, whether the perjured evidence of a witness can be said to have been adopted by the party in the proceedings, to be treated as the evidence of the party itself"[34], apparently drawing on the statement of Nourse LJ in the *Odyssey* case (said in the context of the attribution issue) that "the question is one of fact and degree which must be determined on a realistic assessment of the particular circumstances" (at p 139).

59. I have reservations if the cases could be reconciled in that way, as it has not been satisfactorily explained why a party should be treated as having adopted the fraud or perjury of another party notwithstanding the lack of knowledge of fraud, unlike the situation of attributing the knowledge of fraud of an individual to a company.

60. I note further in the recent case of *Century Financial Holdings Limited & Anr v Jamtoff Trading Limited & Anr* [2018] EWHC 3135

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[34] Decision, §18

(Comm), 30 October 2018[35], also a case of an application to strike out a new claim brought to set aside a judgment allegedly obtained by fraud, Andrew Burrows QC, sitting as a Judge of the High Court, having considered *Cinpres Gas* and other cases, declined to deal with the "potentially difficult question of law as to whether the setting aside of a judgment for fraud applies only where the successful party was fraudulent, … or whether the power to set aside extends to where any of the parties to the action was fraudulent". Assuming, without in any way deciding, it is sufficient there was fraud by any of the parties such as to undermine the previous judgment and findings, he struck out the new claim on the basis that the new claim was misconceived essentially because even if the evidence alleged was new, and even if it was true, it would not undermine the previous judgment.

61. On the first broad issue, I would disagree with the judge and hold that it is not plain and obvious the legal position taken by Mayer is untenable. Even if this question is to be looked at as a matter of fact and degree, I do not think the facts and circumstances are so compelling that Mayer's contention is plainly not sustainable. I do not think it appropriate to strike out the statement of claim on the basis there was no adoption by B&A of the fraud of the other defendants as disclosing no reasonable cause of action or as an abuse of process.

The reasonable diligence requirement issue

62. There are two lines of authorities as to whether it is necessary for the claimant in the new independent action to show that fresh evidence could not have been produced with reasonable diligence before the trial of

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35 Not cited by the parties

the previous action. The judge had discussed these authorities at some length and concluded that the reasonable diligence requirement remains a test to be satisfied, where a party seeks to set aside an earlier judgment on the ground of fraud[36]. After she gave judgment on 7 February 2017, there have been further developments in the law.

63. On 21 March 2018, the High Court of Australia held unanimously in *Clone v Players* at §§63 to 68 that in setting aside a judgment on the basis of fraud, it is not a precondition that the unsuccessful party has exercised due diligence to discover fraud in earlier proceedings. It was said that the effect of a reasonable diligence requirement would be that a judgment might be set aside for a less serious, but well concealed, fraud but could never be set aside for an extremely serious but brazen fraud that could reasonably have been detected. The court emphasised the historical distinction between a bill of review (reflected in the powers of the appeal court to set aside the orders of the court below and grant a new trial) and an original bill (to set aside a judgment based on fraud by an original action). The reasonable diligence requirement was only ever a condition for leave to appeal for the category of appeal where new evidence had been discovered by the unsuccessful party.

64. On 21 March 2017, the English Court of Appeal allowed the appeal from the judgment of Newey J in *Takhar v Gracefield*, holding that it is always necessary to satisfy the reasonable diligence requirement and

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[36] Decision, §§41 to 52.
The authorities in favour of the reasonable diligence issue mentioned in the Decision are: *Boswell v Coaks (No 2)* (1894) 86 LT 365n; *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 545B; *Owens Bank Ltd v Bracco* [1992] 2 AC 443 at 483F to H; *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44; *Chodiev v Stein* [2015] EWHC 1428; Dicey, Morris & Collins on *Conflict of Laws* (15th ed) at §14-138.
The authorities to the contrary mentioned in the Decision are: *Toubia v Schwenke* [2002] NSWCA 34 at §41; *Takhar v Gracefield* [2015] EWHC 1276; Spencer Bower & Handley on *Res Judicata* (4th ed) at §17.05.

there is no exception where the new evidence is evidence of fraud ([2018] Ch 1). An appeal was brought to the Supreme Court and was heard by a seven-member panel. On 20 March 2019, the Supreme Court unanimously allowed the appeal from the Court of Appeal ([2019] UKSC 13).

65. On the facts of *Takhar v Gracefield*, where no allegation of fraud was raised at the original trial and there was no deliberate decision not to investigate the possibility of fraud in advance of the original trial, all seven judges were unanimous in deciding that the party who applied to set aside the earlier judgment on the basis of fraud does not have to demonstrate that the evidence of this fraud could not have been obtained with reasonable diligence in advance of the earlier trial. Lord Kerr held at §54 that the earlier Privy Council and House of Lords decisions (*Owens Bank Ltd v Bracco* and *Owens Bank Ltd v Etoile Commerciale SA*) were not authority for the proposition that, in cases where it is alleged that a judgment was obtained by fraud, the reasonable diligence requirement must be established for the judgment to be set aside and if those cases did have that effect, they should not be followed. Lord Sumption emphasised at §60 that equity has always exercised a special jurisdiction to reverse transactions procured by fraud, in that a party to earlier litigation was entitled to bring an original bill in equity to set aside a judgment obtained by fraud. And if the fact and materiality of the fraud were established, the party bringing the bill was absolutely entitled to have the earlier judgment set aside.

66. Mr Litton pointed out there is an important distinction between the present case and *Takhar v Gracefield*. In that case, the existence or non-existence of fraud had not been decided in the earlier

judgment, so fraud was a new issue and the action to set aside the earlier judgment for fraud did not involve the re-litigation of an identical claim. In the present case, Mayer produced and relied on the 2nd SCA in support of its own case and its authenticity was clearly in issue before trial. That issue was decided by Reyes J in the B&A Actions in favour of the defendants in that he accepted Ku's evidence that Ku's signature in the 2nd SCA was a forgery and concluded on the balance of probability that the document was a fake. Mr Hollander submitted that the present case is not "a clear-cut case where fraud was fairly and squarely raised well in advance of trial". I would agree with Mr Litton that fraud was raised and determined in the earlier action.

67. Lord Kerr said *obiter* at §55 where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, "it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application". But since the question did not arise in that appeal, he did not express any final view on it.

68. Lord Sumption would appear to have taken a more robust approach at §66 in a situation where the fraud was raised in the earlier proceedings but unsuccessfully. His "provisional view" was that "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".

69. Mr Litton contended that the present case would fall within the qualification as involving a deliberate decision not to investigate the

possibility of fraud in advance of the original trial, but I do not think it is made out on the facts that Mayer had made a deliberate decision not to rely on handwriting expert evidence to counter the allegation that Ku's signature was a forgery.

70. In light of the latest decisions of the High Court of Australia and the UK Supreme Court, it is clearly inappropriate in this striking out application to determine that the reasonable diligence requirement must be met by Mayer to set aside a judgment where new evidence is deployed to establish the fraud that had been raised in the earlier proceedings unsuccessfully.

71. For present purpose, it is not necessary to consider the alternative contention of Mayer that the reasonable diligence requirement is satisfied in any event, at least in respect of the expert evidence in the 2016 reports, had the judge applied the test "flexibly". Lord Briggs in *Takhar v Gracefield* (at §§68 and 86) advocated a more flexible and fact-sensitive evaluative approach (seeking in particular to weigh the gravity of the alleged fraud against the seriousness of the lack of due diligence) to the question whether the lack of diligence in pursuing a case in fraud during the first proceedings should render a claim to set aside the judgment in those proceedings for fraud an abuse of process, but he is in the minority[37]. Whether this approach should be preferred or whether the *obiter* views of Lord Kerr and Lord Sumption should be followed must be left for consideration in the trial of the present action.

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[37] See the judgment of Lord Sumption at §§63 and 64, with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agree.

The new evidence issue and the materiality issue

72. The two remaining issues are largely factual. There is no dispute as to the legal principles as set out by Aikens LJ in the *Highland* case at §106, which have been approved by the Supreme Court in *Takhar v Gracefield* at §§57 and 67 and are as follows:

(1) there must be "conscious and deliberate dishonesty" in relation to the relevant evidence given;

(2) the fresh evidence must be "material", in 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, or that it would have entirely changed the way in which the first court approached and came to its decision; and thus the conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was; and

(3) 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.

73. In respect of the "new evidence issue", it was contended by Mayer the only question is whether the evidence in question was discovered since the original trial, and there is no requirement that such evidence must have been more than simply "additional evidence" elaborating on the existing expert evidence before the Court of Appeal.

74. I do not quite agree with this contention. The requirement that the further evidence is "new", and not simply additional evidence to improve and elaborate on the existing evidence, goes hand in hand with the "materiality" requirement. If the further evidence is just "more of the same", it might not have satisfied the "materiality" requirement applying the criterion in the *Highland* case.

75. In respect of the evidence of the seven Taiwan investors, the judge had explained fully why the affirmations obtained from these investors cannot be regarded as "new", or evidence hitherto unknown to Mayer[38]. As she had rightly stated, the evidence is just "further details" of the evidence which had been presented to and considered by Reyes J and the attempt to introduce such evidence is only "to improve and elaborate on the evidence formerly adduced by Wang and Mayer, to re-argue the probabilities of Mayer's case on the 2nd SCA, the 1st Oral Agreement and the 2nd Oral Agreement". I agree with her this cannot be permitted as an exceptional course to justify a departure from the finality principle.

76. The evidence of the handwriting experts is a different matter. No handwriting expert report was placed before Reyes J. Mayer sought to adduce two "preliminary" expert reports on appeal from Reyes J's judgment but leave was refused by the Court of Appeal applying the *Ladd v Marshall* principles. So expert evidence on handwriting was again not placed before the Court of Appeal and the Court of Final Appeal. The expert evidence Mayer now seeks to rely on contained the firm conclusions of the experts upon consideration of handwriting samples of Ku obtained by Mayer after hard-fought discovery applications in 2015. The fact that

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[38] Decision, §§36 and 37

the reports in 2016 are a confirmation of the experts' earlier tentative opinion in 2012 is irrelevant as the *Ladd v Marshall* principles have no application here. They are not additional evidence to elaborate and improve on earlier evidence as the preliminary reports were not admitted as evidence applying different principles. The judge is wrong not to treat the latest handwriting reports as new evidence for present purpose.

77. On the question of materiality of the 2016 expert reports, Mr Hollander contended that such further evidence would have had an "overwhelming effect" on the trial before Reyes J and his judgment. The further expert reports would establish that Ku had perjured himself, as did Charles Chan and Lam, and if the 2nd SCA was in fact genuine, there is no room for the existence of the 1st and 2nd Oral Agreements. Mr Hollander prayed in aid the judgment of Barma JA in the B&A Actions that if the 2nd SCA were genuine, and Wang had indeed deposited the 99 million shares for the purpose of having them sold on behalf of his clients the Taiwan investors, "this would go a long way" in negativing the existence of the 1st Oral Agreement and would also militate against the existence of the 2nd Oral Agreement[39].

78. I would add that Anthony Chan J in his decision in HCA 686/2012 on 31 July 2015 was also inclined to the view that the handwriting evidence will be a piece of material evidence, having borne in mind that there appeared to be little documentary evidence to assist the court to determine the factual disputes, and noting that where the court is asked to resolve disputed signature without the assistance of other documentary evidence or independent evidence from disinterested

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[39] [2013] 3 HKLRD 276 at §32. This has been set out in full in the earlier part of this judgment.

third party, it cannot be said that handwriting evidence will not play a significant role in that adjudication process (at §§64 and 66).

79. To justify the exceptional course of setting aside a judgment as obtained by fraud, the fresh evidence relied on must satisfy a suitably stringent standard and meet the threshold requirements in the *Highland* case. The handwriting expert evidence if accepted would go to establish "conscious and deliberate dishonesty" in relation to the evidence given by Ku, Charles Chan and Lam. The question that remains is whether such conscious and deliberate dishonesty was causative of the impugned judgment of Reyes J and formed an operative cause of his decision.

80. The judge noted that in finding for the existence of the 1st and 2nd Oral Agreements and dismissing the existence of the 2nd SCA, Reyes J had taken into account many factors in the balancing of the probabilities and improbabilities of the case. He had thoroughly considered the oral testimonies of the witnesses, including Lai, Ku and Wang, and all the documentary evidence. He referred to the documents which supported the case of AFIL, Charles Chan and Lam; the lack of documents to support the case of Mayer; the testimony of Wang and Tommy Chan of Mayer which he found unreliable[40]. He also considered the evidence of the other witnesses of Mayer, Tommy Chan and Flora Kao, and rejected their evidence as unreliable. He preferred the evidence of Maria Kwok, the former secretary employed by Capital Wealth, whom he regarded as an independent witness[41].

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[40] Decision, §57
[41] Decision, §64

81. I would agree with the judge that even if the evidence from the Taiwan investors were put before the court (which in any event should not be regarded as new evidence), it is unlikely to have any practical or material effect on the overall impact of the evidence and the decision made by Reyes J, as irrespective of whether the seven Taiwan investors had subscribed and paid for the 99 million shares, Reyes J took the view it is possible that (rightly or wrongly) Lam was informed and came to believe that Lai was the true owner of those shares[42]. The requirement of materiality is not satisfied in respect of the evidence from the Taiwan investors.

82. In respect of the finding on issue 3 (if Wang did enter into the 2nd SCA for the 99 million shares and agreed with Charles Chan to sell them on behalf of the Taiwan investors), although Reyes J had identified seven other factors why Wang's evidence should not be accepted, he went on to accept Ku's evidence that the signatures on the 2nd SCA purporting to be his were forgeries. Reyes J mentioned that "in light of his assessment of Wang's evidence", he could not regard that agreement as authentic[43]. In my view, the absence of expert evidence to establish that Ku's signatures were genuine and hence Ku's allegation of forgery was untrue must be an operative cause of Reyes J's decision that the 2nd SCA was a fake.

83. Even though Reyes J had made the finding that "in all likelihood, no Custodian Agreement was executed by Wang and Ku and there was no agreement that Charles Chan should sell 99 million shares on behalf of Wang"[44] on his review of the whole of the evidence, the evidence

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42 Decision, §60; judgment of Reyes J, §130
43 Judgment of Reyes J, §§167 and 169
44 Judgment of Reyes J, §180

of Ku as to the disputed signatures on the 2nd CSA must be considered a material part of that finding. I disagree with the judge that the handwriting evidence would not meet the materiality requirement.

84. The judge is wrong to hold that the further evidence of the handwriting experts cannot properly be regarded as new, or that this evidence does not satisfy the requirement of materiality in that it would not undermine Reyes J's judgment.

85. I am mindful that the defendants have been subjected to a full trial in 2012, which went all the way to the Court of Final Appeal, and if this action is not struck out, they will have to participate in a trial to determine if the judgment of Reyes J should be set aside for fraud, and if that judgment is set aside, to participate in yet another trial. For the reasons I have given, potentially difficult questions of law are involved and no short cut may be found as Mayer has the potential of meeting the threshold requirements in the *Highland* case for bringing this action. It would not be appropriate to strike out Mayer's action to set aside the judgment of Reyes J.

Conclusion and orders

86. For the above reasons, I would allow Mayer's appeal and set aside the judge's order in striking out Mayer's claim against the 4th and 5th defendants. I would give leave to Mayer to amend the statement of claim as per the draft annexed to its summons issued on 21 November 2016.

87. I would make these costs orders *nisi*: the 4th and 5th defendants are to pay Mayer's costs of this appeal and of the striking out application before the judge, with a certificate for two counsel; and Mayer is to pay the

costs of and occasioned by the amendment of the statement of claim to the 4th and 5th defendants in any event.

Hon Cheung JA:

88. I agree with the judgment of Kwan VP.

Hon L Chan J:

89. I agree with the judgment of Kwan VP.

(Susan Kwan)	(Peter Cheung)	(Louis Chan)
Vice President	Justice of Appeal	Judge of the Court of First Instance

Mr Charles Hollander and Mr Justin Ho, instructed by Johnnie Yam, Jacky Lee & Co, for the Plaintiff (Appellant)

Mr John Litton and Mr Chow Ho Kiu, instructed by C L Chow & Macksion Chan, for the 4th and 5th Defendants (Respondents)